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**CULTURAL JURISPRUDENCE-AN ACCOUNT OF GOOD  
GOVERNANCE AND RULE OF LAW IN NIGERIA**

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**BIRKBECK COLLEGE, UNIVERSITY OF LONDON**

**DOCTORAL DEGREE IN LAW (PhD)**

‘I, Babajide Olumuyiwa Martins confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.’

## **ABSTRACT**

The search for good governance in Nigeria is premised on the need to ensure that the resources of the state are well managed and used for the welfare of all Nigerian citizens. This thesis draws on the paradigms of good governance and articulates their applicability to the Nigerian political and cultural context. Having set out the theoretical background of this work in cultural jurisprudence, we contextualise our notion of social justice as an important mechanism for the actualization of good governance. The notion of good governance has an international context from the perspective of the World Bank and other international bodies. We undertake a critique of the international benchmark and make a case for good governance, founded on social justice. We also examine how to realise its ideal in the dispensation of governmental powers by the elected political elites, and in fulfilment of the hopes and aspirations of the citizens.

We attempt to justify the adoption of cultural jurisprudence for the analysis of good governance in the context of the cultural ideals of Nigerian communities. In this regard, we acknowledge the patriarchal nature of Nigerian society and the problems it engenders. This affords us the opportunity to articulate the importance of socio-cultural values, a sense of belonging and national allegiance to the state regardless of ethnic inclinations or kinship loyalty. This is important because of the need to provide a paradigm shift that will align with international benchmark in the criteria for evaluation of good governance that reflects the cultural and political history of Nigeria in particular and that of Africa in general.

International donors and bodies measure good governance by certain indicators that overlook the particular historical and colonial history of African countries and the challenges they face in dealing with the issues of governance. We engage a critic of good governance indicators which fails to take cognizance of the social economic peculiarities of Nigeria.

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## **PREFACE**

The search for good governance in Nigeria is premised on the need to ensure that the resources of the state are well managed and used for the welfare of all Nigerian citizens. This thesis draws on the paradigms of good governance and articulates their applicability to the Nigerian political and cultural context. Having set out the theoretical background of this work in cultural jurisprudence, we contextualise our notion of social justice as an important mechanism for the actualization of good governance. The notion of good governance has an international context from the perspective of the World Bank and other international bodies. We undertake a critique of the international benchmark and make a case for good governance, founded on social justice. We also examine how to realise its ideal in the dispensation of governmental powers by the elected political elites, and in fulfilment of the hopes and aspirations of the citizens.

We attempt to justify the adoption of cultural jurisprudence for the analysis of good governance in the context of the cultural ideals of Nigerian communities. In this regard, we acknowledge the patriarchal nature of Nigerian society and the problems it engenders. This affords us the opportunity to articulate the importance of socio-cultural values, a sense of belonging and national allegiance to the state regardless of ethnic inclinations or kinship loyalty. This is important because of the need to provide a paradigm shift that will align with international benchmark in the criteria for evaluation of good governance that reflects the cultural and political history of Nigeria in particular and that of Africa in general.

International donors and bodies measure good governance by certain indicators that overlook the particular historical and colonial history of African countries and the challenges they face in dealing with the issues of governance. The good governance paradigm in international discourse is often linked with democratic governance and the tendency is to set criteria for universal application regardless of the historical cultural background of countries in the developing world.

In the introductory chapter, we describe the importance of understanding the dynamic of good governance that ensures the welfare of Nigerians by articulating a theory of justice based on cultural jurisprudence, which emphasises the importance of communal relationship and its attendant benefits. We also contend that this theory can be expounded to articulate state centric obligations which the citizens can use as leverage against the state in achieving good governance.

Chapter One considers the importance of social justice, not only as an attribute of liberal ideology but as an indigenous notion that can assist in understanding the challenges and culturally imposed duties on individuals and the implications that follow for the welfare of the citizens, not only as individuals but as part of a larger community where the need to contribute to the common good is imperative. We consider the themes of good governance and how social justice can be used as a tool to achieve an egalitarian society.

A theory of justice as formulated by Rawls is not feasible for the theoretical formulation of social justice in the context of this work. However, it provides us with the background against which one can explore the ideals of justice which are relevant to this thesis. We also engage with Nussbaum to explore her model of social justice

and see what inspirations it enthuses. Our engagement in this regard is part of the notion of ‘interzone’, which is predicated on the need to collaborate with liberal ideals where we think it is intellectually beneficial for our discourse.

The discussion on social justice in chapter one explores the possibility of the social justice model based on the Nigerian notion of cultural jurisprudence. This theme lays the foundation for latter discussion of an enforceable constitutional framework for socio-economic rights in Nigeria. At the moment, there are no enforceable socio-economic rights such as the right to education, housing, health and sustainable environment. Presently, socio-economic justice attributes are not expressly enforceable because they are embedded in Fundamental Objectives and Directives Principles of State Policy.<sup>1</sup> No citizen can sue the government for its failure to protect social and economic rights. A consideration of the South African model seems appropriate in this regard and would be explored to reverse this trend to make socio-economic rights actionable. The enforceability of these social, economic and cultural rights will go a long way towards the realisation of Nigeria’s obligations under the International Treaty on socio-economic and cultural rights.

The discussion of social justice is linked with the issue of the form of government that can sustain its realisation. Is democratic governance the most feasible system of achieving good governance? We will consider the feasibility of democratic governance in Nigeria as a country that had endured over two decades of

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<sup>1</sup> Chapter two of the 1999 Constitution of Federal Republic of Nigeria, it provides for the fundamental obligations of the Government, without the rights of the citizens to enforce it as justiciable remedies. Section 13- Fundamental Obligations of the government; section 14- government and the people; section 15- Political objectives; section 16- Economic Objectives; section 17- Social Objectives; section 18- Educational Objectives; section 19- Foreign Policy objectives; section 20- Environmental Objectives, section 21- Directives on Nigerian Cultures; section 22- Obligations of the mass media; section 23- National Ethics; and section 24- Duties of the Citizens.

uninterrupted military dictatorship. The embryonic and nascent democratic government in Nigeria is of particular concern in this regard. It draws our attention to the problem of an ineffective electoral system and the kleptomaniac tendencies of the political elites. There is a need for the structure of governance and form of the state to be reconfigured in order to rectify all these anomalies.

The importance of democratic governance as an alternative to dictatorship need not to be over emphasized in view of its attributes and in which aspect it is to be contextualized.

Democratic government abhors arbitrariness. It provides for accountability and respect for human rights. The essential consideration is how to make democratic governance more suitable for Nigerian citizens who are largely illiterates and may find the dynamics of electoral system overwhelming. In this regard, we advocate a consensus political arrangement that will embrace indigenous governance structure and imbibe democratic institutions for the realisation of good governance.

In our discussion about social justice, the issue of poverty and deprivation is addressed in the context of measures that would assist in the realization of social justice. We look at the work of Peter Townsend to provide a paradigm from which the issues of poverty and deprivation can be assessed. We consider the issue of political justice, as the legal framework upon which social justice theory and practice can be predicated. Our engagement with Townsend is part of the 'interzone' enunciated in this work.

Chapter Two gives an overview of the relevant literature in relation to the definition of good governance from the perspective of International bodies and explores the feasibility of the themes of good governance in international discourse. This chapter

also sets the tone for the discussion in the following chapter in considering the flaw in the International Institutions' criteria of ascertaining good governance and the need to make the issue of social justice a pivotal theme of the assessment criteria.

In chapter Three, we articulate the notion of social justice embedded in the three major tribes in Nigeria - Yoruba, Igbo and Hausa. We contend that there are similar concepts on ideas of social justice among the ethnic groups which can be enhanced in providing a philosophical framework for the idea of social justice.

In Chapter Four, the discussion on legitimate governance is linked to the need to have a welfare state that will target the reduction of poverty and articulate system that will meet international benchmark in the strategies for poverty eradication. We also conceptualise the notion of good governance and examine how this is being achieved in Nigeria, using the international World Governance Indicators of good governance in this regard. We consider the application of good governance imperatives to Nigeria- Rule of law; citizens' participation in decision making; transparency; measures against corruption and protection of Human Rights.

Chapter Five considers the obligations of the Nigerian government towards the protection of fundamental human rights of its citizens. This chapter considers the relationship between fundamental human rights and social justice to a limited extent. The African Charter on Human and Peoples' Rights has a working framework that can assist the citizens of its member states in the realisation of their Fundamental Human Rights and the consideration of case law emanating from the African Human Rights Court. We evaluate the Nigerian government's compliance with her Treaty obligations of ensuring the protection of the Nigerian citizens' human rights. The long years of



military dictatorship in Nigeria have resulted in great deal of human right abuse. The judicial activist role which we advocate for the judiciary is aimed at enhancing the protection of the human rights of the citizens. In Nigeria, where there are no formidable democratic institutions that protect citizens against state abuse, the last hope must be an activist judiciary. The chapter makes use of the distinction between constituent power, constitutional form and constituted power to show how, given the norms that structure the form of the 1999 Constitution, constituted power should be guided by values such as federalism, human rights and sound public policy. This analysis is pivotal as it provides for a better understanding of the imperatives of constitutionalism from the perspective of liberal ideology.

Chapter Six focuses on social justice and how federalism can be used to achieve cohesion and management of ethnic relations in heterogeneous society like Nigeria. What are the values which the Nigerian Constitution must reflect and the policies that must be followed if there is to be a renewal of fundamental values in Nigerian politics?

The features of federalism as practised in Nigeria and how to reconcile federalism with the need to attain social justice are relevant issues to be analysed in this chapter. The heterogeneous nature of the Nigerian population is one of the reasons for the adoption of federalism. In this regard, federalism aims to ensure that diversity among Nigerian people will be managed and reconciled with the need for national cohesion.

Chapter Seven deal with the need to articulate the framework through which social justice can be attained in Nigeria. This is pertinent in view of the fact that there is lack of enforceable rights to social justice under the Constitution. This is necessary because

the 1999 Nigerian Constitution did not guarantee the enjoyment of the social justice ideals to Nigerian citizens. We will draw attention to why this is bad for constitutionalism and why it is part of the problems that undermine the quest for legitimate governance in Nigeria

It considers the possibility of adapting the South African model of enforcement of socio-economic rights in Nigeria. This is premised on the flawed distinction under the Nigerian 1999 constitution which prioritizes civil and political rights over social-economic and cultural rights. The argument is premised on the need to jettison this distinction and make socio-economic and cultural rights enforceable as human rights. Political justice in the context of this work is how to use government processes and institutions to ensure effective governance. The issue of accountability is pertinent to this assessment because it requires public officials and elected representatives to ensure that they use their political mandate in delivering the benefits of governance to the citizens. The relationship among the executive, legislature and judiciary needs to be examined critically to see how the goal of political justice can be attained.

In Chapter Eight we consider the reasons or factors responsible for incursion of military dictatorship in Nigeria, and put the achievement of military dictatorship in context, in order to examine if the many years of military dictatorship had contributed to the economic development of Nigeria. A cursory look at the dilemma of corruption and abuse of human rights during military dictatorship in Nigeria will undermine any argument for justification of military dictatorship.<sup>2</sup>

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<sup>2</sup> See Olusegun Obasanjo, *My Command*, Ibadan/London/Nairobi, 1980 and A Great Hero, Lieutenant- Colonel Francis, 1926-1966. Lichfield, Nigeria, 1992.

In Chapter Eight, we also discuss the scourge of military coup as an aberration to good and legitimate governance. We identified the misapprehension of the relevance of Kelsen's theory in justifying military coups by courts in Nigeria. The misapprehension and confusion emanated from developing jurisprudence expositing on Kelsen's theory in commonwealth countries particularly Pakistan and Uganda. Our contention is that Kelsen's theory is irrelevant in understanding the nature of military coups and their constitutional implication for the continued systems of laws. Kelsen's analysis relates to total revolution which exterminates existing legal order. Military coups and administration are not a radical revolution that exterminates the existing legal order. Military administrations often suspend the supremacy clause of the constitution, which prohibits the amendment and abrogation of the constitution other than terms recognised by the provisions of the constitution. Military Administration is run by a junta, headed by a military head of state, adopts existing court system and the executive cadre and Civil service. The legislature is disbanded because, the military regimes churns out military decrees and edicts, with ouster clauses against the court's jurisdiction. The advent of military coup culminating in a military administration is a political event, which is illegal and must be discouraged. We also examine the impact and implications of ouster clauses in Military Decrees.

Chapter Nine considers the application of rule of law in Nigeria, not only as a procedural phenomenon, but as a governance mechanism. This is a reworking of the substantive conceptualisation of rule of law. The pivotal role ascribed to rule of law is vital in achieving electoral reforms and governance reforms necessary to consolidate the nascent democratic government in Nigeria. The thesis also ascribes a new

approach to the notion of rule of law within the context of this work. The need to ensure that rule of law is dynamic and uses its virtues to ensure good governance links with our notion of enforceability of social-economic rights in Nigeria. This is a new impetus for the rule of law, which we argue should transcend the traditional roles of ensuring equality before the law, predictability of laws, due process of law and judicial processes.

We also attempt a re-working of the doctrine of rule of law to suit our purpose in this discourse. In doing this, we identify the normative notions of rule of law but give it a new-fangled rights' analysis by conceptualising it as amalgam of human rights and pursuit of social justice through which institutional capacities, processes and procedures must strive to achieve. The re-reading given to rule of law within the cultural jurisprudence expounded in this work is bound to provoke further thought. It is a combination of political and socio-economic rights which coordinate with African ideas and human rights.

The concluding chapter has an overview of all the issues discussed and proffers a remedy of constitutionalism as guarantee against abuse of power, accountability and attainment of social justice in the overall context of achieving good governance.

In the concluding chapter, we raise the issue of rule of law from three perspectives and we contextualize it within the political situation of democratic governance in Nigeria. The rule of law is one of the indicators for good governance and the need to adhere to its tenets will achieve the protection of human rights of the citizens and lead to equality of opportunities for the citizens. We can consider the rule of law as an attribute of good governance and look into regulation of governmental powers

between the different arms of the government and that of the relationship with the citizens. In relation to our discussion, on the importance of the judiciary as an arm of government that will protect rights of the citizens against arbitrariness of governmental power, it is imperative to discuss the role of the judiciary in this context. It is also trite to acknowledge that the rule of law has applications in International development policy and Transitional Justice jurisprudence.<sup>3</sup> We will consider the executive, legislature and the judiciary arms of government as part of the governance structures and processes aimed at ensuring the rule of law and assess the factors that undermine the rule of law in this context.

Apart from the conclusion, we have a final section after the conclusion, where we raise a number issues-local government autonomy, judiciary, and reform of the civil service and issue of corruption, which we believe must be tackled in order to assist in the quest to get good governance in Nigeria.

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<sup>3</sup> See Matthew Stephenson, *The Rule of law as a Goal of Development Policy* (World Bank, Washington D.C, 2001) and Thomas Nagel, *The Problem of Global Justice*, 33(2) *Philosophy and Public Affairs* 113(2001).

## INTRODUCTION

### THEORETICAL FRAMEWORK OF THE THESIS

In understanding how to achieve good governance and welfare of Nigeria and its citizens it is imperative to articulate a theory of justice that will ensure that the Nigerian State uses her resources in providing for the welfare and strive towards an egalitarian society. The thesis of this work is the articulation of cultural jurisprudence based on indigenous concepts of justice in achieving good governance in Nigeria. In this chapter, western theories of social justice will be examined and juxtapose those within the parallel African concept of social justice drawing from its philosophy, idioms and values system. We need some general orientating points for a theory of social justice that are relevant to the Nigerian political and social situation. We can take some guidance from debates that have occurred largely within the context of western liberal political thinking over the last few decades, and we want to show how Nigerian and African thinking has certain parallels with western liberal thinking, but comes out of a different context. It is not necessary to become bogged down with arguments about cultural relativism, and the ‘imposition’ of supposedly western ways of thinking on African ways of thinking. It would be much more useful to see African and western ways of thinking as taking part in a kind of dialogue, and this work as an ‘interzone’ where this dialogue takes place.

There is history of atrocities intertwined with imperialism if one goes back to colonial times, one can trace a legacy of oppression and dominance; where western thinking was either seen as superior to African thinking, or, African ideas were somehow accommodated to the dominant paradigm. It would be naive to ignore the past.

<sup>4</sup>However, it would also be wrong to be fixated by it: we prefer a more pragmatic response—given that we are working within a western liberal paradigm, committed to the rule of law and human rights—we need to see how this contemporary line of thinking can be made more nuanced, re-worked, and made relevant to a different cultural and political environment.

So, the difference between African and western thinking is not absolute: any idea needs to be translated into a new cultural context- and the ‘interzone’, then, is where the translation takes place. In other words, the ‘interzone’ shows how the idea of social justice can be made relevant to a different culture and a different politics.<sup>5</sup>

John Rawls seminal work – A Theory of Justice, provides the theoretical foundation on any discourse on social justice.

The liberal debate on social justice has primarily taken its lead from John Rawls. As this work has been so extensively discussed and analysed, we do not propose to say a great deal about it.<sup>6</sup> The points of relevance to our thesis are as follows. Rawls prefers a ‘thin theory of the good’- and his ‘model’ of deliberation behind the veil of ignorance is meant to honour this idea and produce a broadly procedural model of justice. We will return to the notion of “primary goods” in a moment when we also consider the difference principle. Our main point for the moment is that this ‘thin’

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<sup>4</sup> See Lucious Outlaw, “African Philosophy: Deconstructive and Reconstructive Challenges”, in Sage Philosophy : Indigenous Thinker and the Modern Debate on African Philosophy,(Leiden: EJ Brill,1990)

<sup>5</sup>Pal Ahluwalia, Politics and Post-colonial Theory; African inflections. 2001 Routledge (Taylor & Francis Group).

5. John Rawls- A Theory of Justice, Harvard University Press, 1971.

model of the good is not useful in a Nigerian context. We prefer what might be called a more ‘thick’ model of the good. For the moment, we can only assert this point, as a later chapter will show how ideas from the main ethnic groupings in Nigeria can be seen to centre on some basic principles that are relevant to a shared notion of justice. This is not that ‘thick’- nor should it be. We do not want to become hung up on defending some ultimate theory of ‘the good’. A theory of justice can only sketch out some basic principles. Whilst these principles are of basic value- in allowing discussion and discourse on political values to take place- their content and detail must await concretisation in democratic political discourse.

Given the political situation in Nigeria, this might be some way ahead, but it is however pertinent that we have at least a basic conversation on value and principle to become part of the public discussion of the basic polity in the Nigerian state. To this extent, we agree with Rawls’ endeavour to find a point at which all agree. Our difference, of course, is that this agreement is not amongst western liberals- but amongst the different ethnic groupings that make up the Nigerian state.

This brings us to our next point- and another distinction between the western debate on justice, and the need to adapt it and make it relevant for Africa. The great opponents of Rawls are the communitarians. Again, our desire is not to say a great deal about the terms of this on-going debate.<sup>7</sup> We can focus on one main concern which is the idea of justice that emphasizes the need to ensure fairness among the people. One of the basic communitarian criticisms of Rawls is that his theory is way

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<sup>7</sup>John Rawls- *Political liberalism*, Cambridge: 1993, and for a reaction and critique of the work, see Jürgen Habermas, *Reconciliation through the Public Use of Reason: Remarks on John Rawls’ Political liberalism*, *The Journal of Philosophy*, Vol. XCII, No.3 March 1995, pp.109-131.



too formal. The very fact that Rawls' imaginary 'citizens to be' have to debate behind a veil of ignorance suggests that they are not 'proper' people with social identities. The veil of ignorance is a thought device- a modern vision of a state of nature, and to give Rawls his credit- it is a necessary foundation for his formal model of justice where people have to make choices without a social identity. Our point is that- if we do not want a formal vision of justice, or rather, that a model of justice must be more than formal for it to be relevant to Nigerian politics, then we do not see the Rawlsian thought experiment as a relevant starting point.

This, in terms of the liberal debate, may make us closer to the communitarians than the Rawlsians but, as will become clearer as we go along, the notion of community that we have is peculiar to Nigerian culture and to African philosophy. Hence, whilst it has certain parallels with western ideas of being rooted in a culture that figures in communitarian thinking- this is but one reference point, and one that does not capture its African dimensions.

One final point of clarification is the particular way this discourse intends to propound a theory of social justice to be founded on cultural jurisprudence. A theory of social justice, in the way that we are using it is, first of all, a theory of distribution of social wealth. Within the debate on social justice, there is a great deal of writing on this particular theme. We do not want to downplay the importance of this debate, but feel that there is a rather pragmatic approach to the issue that means that some of the more abstract philosophical discussions may not be relevant. As an account of distribution, what needs to be distributed in Nigeria is social wealth. We can usefully allow

economists to debate over how this is defined. At present, the reality is that about 5% of the Nigerian people own a large amount of wealth.<sup>8</sup>

This is both unjust and unfair for a number of reasons: One reason is that it prevents the overall development of Nigeria. We feel that social scientist like Amartya Sen has established that some distribution of wealth is desirable as it leads to overall economic and social development.<sup>9</sup> In other words, some distribution is necessary for the common good and economic development. This does not mean we are talking in term of 'strict equality'- or making everyone equal in their holdings of wealth. Again, we can take a reasonably robust approach to this theme. Distribution of wealth does not mean giving people money. It means building those elements of common infrastructure that suit most people and develop their well-being. Such as provision of health care, education, employment protection and general social and economic infrastructure.

We do not want to specify the details, and this is not necessary- as this should take place in political and democratic discourse. The details of how these common goods are to be achieved is left for political commentators. Our understanding of social justice is that free markets need a degree of management- but- it is not the work of this thesis to come up either with a theory of regulation or a detailed argument for some idea of a Nigerian welfare state or economic policy prescriptions. Our main point is that we need to open a new way of talking about politics in Nigeria driven by some broad consensus on the sharing of the country's wealth. We do not think that this can

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<sup>8</sup> The Nigerian Legislators are highest paid in the whole world. 35% of Nigerian Current expenditure is used to pay the legislators' salaries and allowances. Each earns \$189,000 basic salary per annum. See Nigerians legislators are the highest paid in world. *The Economist*, July 23, 2013.

<sup>9</sup> Amartya Sen, *Development as Freedom*. New York: Knopf.

be described by anything like a ‘difference principle’ drawn from Rawls- indeed- the detail and functioning of social justice is a matter of controversial debate and compromise. Nor do we think that some of the communitarian arguments about the impossibility of a general theory of justice are useful. One can think in general terms about the kind of goods or resources that most probably benefit most people. This, of course, involves compromise. The point is to define the terms over which compromises might be made. To stress and return to our point above. We work from ‘the bottom up’ by thinking about how this sense of social justice might emerge from Nigerian culture. From this perspective it would also be wrong to try and impose some over-arching principle- and- for the moment, we are leaving a great deal unsaid about how the Nigerian state could be made more democratic to include those voices that must be allowed to debate the precise terms of social justice.

Social justice requires more than distribution of social wealth and this thesis explores these other aspects of the idea. Social justice requires human rights- or- in a Nigerian context- African human rights. This is not meant to be an argument about the cultural exclusion. African human rights correspond with international human rights and indeed are the ‘translation’ of these universal ideas into specific cultural contexts. It is also important to note that those aspects of traditional African cultures that are inconsistent with human rights are not to be defended. We can think about the norms of traditional African cultures as dynamic and open to change, not committed to preserving some sort of immemorial truth. This is entirely consistent with arguing that there is a possible consensus over the fundamental terms of justice shared between different cultures, but this argument will be elaborated in a later chapter.

Social justice also requires the rule of law. A great deal could be said about the rule of law, and so it is necessary to stress that we think about the concept in exactly the same way we think about social justice and human rights. The concept has to be adapted to Nigeria. We will say much more about this in later chapters- and will stress the particular role of an activist judiciary in becoming a catalyst for sustainable democratic change. It may even be that the longevity and ‘depth’ of this change can be achieved by developing legal principles that allow the norms of social justice, and the norms of Nigerian ethnic groups to cohere as the principles that guide the Nigerian state. Our discussion of social justice intends to articulate a pivotal role for the state in providing for the welfare of the citizens. In this regard, we will look at the work of Peter Townsend in considering the notion of poverty and deprivation as sources of social injustice.<sup>10</sup> The role to be played by the Nigerian state and emerging global international justice paradigm to reverse the unintended consequences of globalization of movement of capital, trades and vulnerability of the developing world in this rat race for prosperity at all cost. Townsend had discussed the possibility of transaction tax on multinational companies and the need for World Bank to be reformed towards achieving social justice and eradication of poverty emerging from structural adjustment programmes of International Monetary Fund (IMF). The inequalities of trading relationship between the developing countries and the developed world is part of the problematic relationship causing dwindling revenue to the developing world, however the impact of corruption cannot be overlooked in dealing with problem of good governance in Nigeria.

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<sup>10</sup> Peter Townsend (1993) *The International Analysis of Poverty*, Hemel Hempstead: Harvester Wheatsheaf, cited and reviewed in *The Peter Townsend Reader*, chapter 18, Alan Walkers, et al, Bristol: The Policy Press, 2010.

## **Towards an Indigenous Cultural Social Justice - a Cross Cultural dialogue**

The need for sustainable development, social justice and an egalitarian society informs the need to adopt an indigenous cultural social justice discourse that can combine the best of western liberal ideology –human rights and rule of law and that of Nigeria notions of social justice towards the attainment of a humane and people-centric society, where want, squalor, idleness, poverty diminishes and empowerment, opportunity and prosperity become available for all the citizens.

The notion of social justice envisaged here is a response to the shortcoming of liberalism, which apporportion great value to the idea of consent, individualism, autonomy and liberty as the hallmark attributes of liberalism ideology. This is not an outright attack on liberalism, but an engagement to secure concessions. The concession that other civilization and indigenous way of life, in which rights are attributed to individuals and enjoyed in the context of maintaining social order, harmony and welfare. These other civilization differs from liberal idea without necessarily founding such rights on this elusive imaginary well -ordered society with atomic individuals who are supposedly to act under ‘veil of ignorance’ in which their ‘overlapping consensus’ will occur in the pursuit of common good.

The major flaw in this Rawlsian proposition is the abstract nature of the conception of ‘well -ordered society’ in which the citizens are meant to rationally navigate the special constraint that can guarantee impartial judgement of practical questions. No such rational citizens exist anywhere, and this procedural formulation is too idealized. Rawls split this “concept of political autonomy” into two elements: the morally neutral characteristic of parties who seek their rational advantage, on one hand, and

the morally substantive situational constraints under which those parties choose principles for a system of fair cooperation, on the other”.<sup>11</sup> The idea that citizens are rational and act in this order seems preposterous and is not sufficient to deal with its shortcomings in relation to the desired aspiration for social justice in this thesis.

We do not need to consider the response of liberalism in dealing with these criticisms, which communitarian has dealt with extensively.<sup>12</sup> Duncan Ivison has conceded the shortcoming in this regard and argued for a new approach in engaging with these issues, which he described as postcolonial liberalism. He rightly opines “that the challenge for postcolonial liberalism is thus to be oriented according to the local, and yet also provide an account of the conditions and institutions that distinguish this from merely deferring to existing relations of power”. Ivison is concerned about the inordinate ambition of liberalism in its inclination to set the agenda for the periphery in the discourse of determining the scope and context of the discussion about the well-being of the people. He noted further, that postcolonial liberalism aims for a state of affairs in which legitimacy of norms, practices and institutions upon which peoples’ well-being depend on interest in a form of social and political conversation or embodied argument about what is legitimate and illegitimate. The issue of well-being and its pursuit must be well stated, its parameters and how to achieve it must be based

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<sup>11</sup> Quoted from Jürgen Habermas, *Reconciliation through the Public Reason: Remarks on John Rawls’s Political Liberalism*, at p.111.

<sup>12</sup> Drawing primarily upon the insights of Aristotle and Hegel, political philosophers such as Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer disputed Rawls’ assumption that the principal task of government is to secure and distribute fairly the liberties and economic resources individuals need to lead freely chosen lives. These critics of liberal theory never did identify themselves with the communitarian movement (the communitarian label was pinned on them by others, usually critics); much less offer a grand communitarian theory as a systematic alternative to liberalism. Nonetheless, certain core arguments meant to contrast with liberalism’s devaluation of community recur in the works of the four theorists named above (Avineri & de-Shalit 1992, Bell 1993, Borten *et al.* 1997, Mulhall & Swift 1996, and Rasmussen 1990), and for purposes of clarity one can distinguish between claims of three sorts: methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self, and normative claims about the value of community. (Cited in Daniel Bell, *Communitarianism*, <http://Plato.stanford.edu/entries/communitarianism>, accessed on 28 January 2014).

on certain terms and not on argument that is ultimately without any guarantor and without any end. Ivison argues that to ensure that conditions contributing to the legitimacy is for the post-colonial state to reorient itself around a model that ensure coexistence, rather than the usual choice between ‘toleration’ and autonomy.<sup>13</sup>

Ivison acknowledges the shortcoming of liberalism in not encapsulating a plural values system that accommodates the post -colonial states’ local peculiarities of the conditions and institutions that determine the well- being of the people. He however, fails to recognise the need to ensure that the agenda for the discussion of the social and political discourse must be set by local power. To contextualise this, in the discussion about governance, the agenda from western liberal perspective, seems to be ‘One size fit for all’, the narrative being about Human Rights, Democracy and the Rule of Law.<sup>14</sup> The narrative should be reconfigured in order to accommodate divergence and peculiarities of the recipient countries. This is imperative in order to ascribe legitimacy to the agenda, both in terms of its scope and context. The universal benchmark is laudable but the need to accommodate divergence within the parameters of the ‘Universal Parameters’ is imperative. Without undue pressure from the dictates of liberalism, local people should not be marginalized in the process of driving up the reforms to engender these trilogies of Human Rights, Democracy and Rule of Law. It is the local people who know the challenges facing them because of failure of the ruling elites to achieve good governance and understand the dynamics of achieving it. The universal minimum standard would provide the benchmark, to articulate

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<sup>13</sup> Duncan Ivison, *Postcolonial Liberalism*, p.22, Cambridge University Press, 2002.

<sup>14</sup> See Tanja Borzel & Thomas Rise, *One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and Rule of Law*, workshop Paper, Centre for Development, Democracy and the Rule of Law, Stanford University.

programmes and policy to meet it. This must be the exclusive obligations of the local people and the ruling elites. However the international benchmark and the activists must be in the shadow to ensure compliance with the minimum benchmark.

Autonomy for liberalism is about the most important attribute which an individual must enjoy. It espouses the need and prerogative of individuals to decide how to live their lives and how to be bound by the rules of the state, which must not unnecessarily restrain them. If individuals must actualize their potential, the state must provide an enabling environment, which at times might be constraining. Where citizens fail to comply with the state rules, how do we deal ultimately with the inevitable consequences? We are only keen on 'thin theory' as the basis of dialogue between liberalism which found justice on freedom and autonomy. This will not suffice for the proposition of this thesis; the pursuit of social justice in the context of this work transcends the right to exercise individual freedom and right to autonomy. To understand this theme better, we explore the possibility of Cultural Jurisprudence as the basis and foundation for a theory of justice, with the goal of social justice in this context.

The fundamental tenet of social justice in indigenous customary law in Nigeria is predicated on the need to reconcile communal needs with the vagaries of the individualism. There is no absolute autonomy for individuals in a Nigerian cultural setting. It is an indictment on liberal universalism for failing to engage with the achievement of well-being for the citizens.

The Nigerian social justice theory is close to that of some liberal theory which emphasises the need to draw a balance between the 'good of the individual' and the



‘good of the community’. Each individual is entitled to a share of the common good which is proportionate to his own qualifications of sharing the common good.

In expounding a theory of social justice, we are not getting fixated with the Universalism and Particularism controversy. This initiative which is very instructive for this work in elucidating the issue of governance in Nigeria and the need for social justice, we explore how unique attributes of humaneness, kindness, altruism, respect, responsibility, reciprocity, retribution and rehabilitation as part of ‘common good’ which individuals in Nigeria can explore in attaining some level of self-realization. However, one must quickly assert that, there is an argument for the state to provide for enforcement of social and economic rights to education, health care, housing, good environment etc. as part of the enabling environment that can develop capabilities for the citizens.

The underlying principle of the notion of social justice in the context of Nigerian communal life is a fundamental issue of enhancing the common good of the community and those who make up that community.

The 21<sup>st</sup> century discourse on social justice has moved beyond the perennial controversy on universalism and particularism. The present focus, at least from the perspective of this thesis is how cultural jurisprudence can engage with the communitarian values inherent and embedded in Nigeria cultural values system in reiterating the rights to citizens towards ensuring their human rights and well –being within sustainable democratic government.

The use of the term ‘communitarianism’ is problematic, but, its deployment in this thesis as one possible ‘interzone’ of African and Western discourse is to allow us to

explore some of its attributes that have similarities to our notion of social justice based on cultural jurisprudence as being propounded in this thesis.

The usage of language rights often attracts controversy and disagreement by the West and East, including the developing countries in Africa. To overcome this dilemma, this work is relying on this idea of 'Interzone' to develop the narrative for good governance and social justice which does not get fixated with the West/East controversy on respect for human rights and democracy as the model for development. It is important that this controversy is circumvented at least in the context of this work, to deal with more pressing need for good governance and pursuit of social justice in Nigeria. Nussbaum succinctly captures this dilemma:

Nonetheless, the language of capabilities enables us to bypass this troublesome debate. When we speak simply of what people are actually able to do and to be, we do not even give the appearance of privileging a Western idea. Ideas of activity and ability are everywhere, and there is no culture in which people do not ask themselves what they are able to do and what opportunities they have for functioning.<sup>15</sup>

The next pertinent issue to consider is whether there are alternatives to freedom and autonomy within Nigerian Cultural jurisprudence in pursuit of social justice for citizens in Nigeria. Any application of this doctrine of cultural jurisprudence typifies all writing on legal philosophy, adages, customs and oral cultural narratives passing from one generation to the other. African society's lack of good governance is common trend among most of the countries in the continent. The continent shares and

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<sup>15</sup>Martha Nussbaum, *Capabilities As A Fundamental Entitlements: Sen and Social Justice*, *Feminist Economic* 9(2-3) 2003, 33-59, at p.39.

faces similar challenges of ethnicities, marginalization, poverty, religious violence and political instability. Cultural jurisprudence is the new paradigm aimed at unravelling these challenges and providing solutions to same.<sup>16</sup>

In a Nigerian context, cultural jurisprudence is concerned with the way in which Nigerian law might be informed by a ‘spirit of the people’. Elias, one of the earliest proponents of this idea of ‘spirit of the people’, borrowed from Von Savigny – and was very much a latter flowering of the European concern with legal nationalism.

Elias’s work is extremely relevant to any constitutional discourse in the 21st century when looking at the challenges facing Nigeria in its quest for legitimate governance, social justice and sustainable development. The major issue is that of autochthony, which seeks to require legitimacy to governance by rooting it within the consent of the governed. It is imperative that law should reflect the aspirations, desires and spirit of the people it aims to govern. Although, Elias is not on record to have used the term, the sum of his discourse is that laws must reflect the aspirations and the will of the people. To ensure easy administration, legal certainty and autochthony, the source of law must command respect and obedience from the citizens. Elias reiterated the values of the historical school as being:

(a) The assertion that no matter how far back you go into the past, you will always find some sort of law governing the people.

(b) The realization that the form in which law is presented to the people is not abstract, but that it is a living perception in the consciousness of legal institutions in their organic form; and

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<sup>16</sup> Ubuntu is a well-known part of this cultural jurisprudence, See Lovemore, Nyaurmwe & Mkabela, “Revisiting the traditional African Cultural Framework of Ubuntuism: A Theoretical perspective”, 2007 Indlinga-African Journal of Indigenous Knowledge Systems, 152.

(c) The distinction between what is law and what is custom: that the common consciousness of the people must be distinguished from their customs, which are merely one of its manifestation, since custom is merely the index of the law of a people.<sup>17</sup> The idea emanating from Elias in this context is that laws must emanate from the people in order to give it legitimacy and make its enforcement more effective. This attribute is very important in viewing the legitimacy of law and its origin from the people as the constituted power. So, Justice Teslim Elias, one of the foremost Nigerian jurists<sup>18</sup> saw Nigerian common law as a way of creating a coherent legal system that could accommodate the peculiar diverse and multicultural setting in Nigeria.

This stance reiterates the need to search for a Nigerian common law that reflects the indigenous cultural values and customary laws of the people. This work is not about conceiving the common law but exploring and articulating congruent values in the different ethnic groups as the basis of making claims against the state for the citizens' welfare. We believe that the Nigerian post -colonial state has not emerged robustly with the cultural values of the people, which ought to have been part of the emerged nation-state in Nigeria. This dislocation or gap in articulating and transforming the communal values of the people has led to the claim, that the Nigerian state is an artificial nation -state construct, that can never meet the expectations of the citizens and is rather a state conceived to exploit the citizens.<sup>19</sup>

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<sup>17</sup> Elias,2003:17

<sup>18</sup>Former President of the International Court of Justice, he was the first and only African to hold the post to date.

<sup>19</sup> See E.C. Ejiogu, The Roots of Political Instability in Artificial 'Nation State': The Case of Nigeria, International Journal of Comparative Sociology, Volume 42, Issue 3, pp.323-342.

Some of the reasons for the belief that the post- colonial Nigeria state is not thriving is the failure to acknowledge the dislocation caused by failure of the emerged state to carry the citizens along, embrace and trust their cultural values and reflect it in the articulation of governance processes, institutions and structures. This dislocation started during the colonial era through the use of repugnancy clauses to sift cultural practices and values deemed to be barbaric.

This will revive the perceived notion that the application of the repugnancy clause test to cultural practices and customary laws during the colonial administration stultified the development of customary laws in Nigeria. Justices Elias and Eso share common views on this issue.<sup>20</sup>

How do these views transfer to the African context? Cukwurah<sup>21</sup> argues that Volksgeist, perceived as custom, suffers from inherent and imposed limitations in the Nigerian legal order. He argued that because of the heterogeneous and pluralistic nature of the country, it is not possible to speak of a national Volksgeist for Nigeria.

Rather:

*...the volksgeist of the various socio-cultural groups making up the country's population lays the genesis of the inherent limitation.*

His other contention borders on the repugnancy clause, which makes all customary laws that, are deemed to be repugnant to natural justice, equity and good conscience

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<sup>20</sup>Elias drew inspiration from the German jurist Von Savigny's notion of historical jurisprudence. Von Savigny looked at the impact of Roman law on the German legal system and contended that it must be wrong for the indigenous German legal system to be expected to thrive if the Roman law inheritance was not mediated by the history of the indigenous people. Ultimately, German law had to reflect the aspirations and desires of the German people. Elias argued eloquently that the indigenous customary law of Southern Nigerian communities and the Sharia law of Northern states must be reflected and integrated with English received common law in order to have a common law of Nigeria. Elias, *Law in Developing Society*, (Lagos: University of Lagos, inaugural Lectures series, 17<sup>th</sup> January 1969) and ,T.A Aguda, 'Towards a Nigerian Common Law' in M.A. Ajomo, *Fundamentals of Nigerian Law*(Lagos: Nigerian Institute of Advanced Legal studies, 1989)pp249-266.

<sup>21</sup>Cukwurah, '*The Nigerian Jurisprudence Crises*' at pp77-98 in T. Elias and M.I. Jegede, eds. '*Nigerian Essays in Jurisprudence*' (Lagos: MIJ Publishers).

inapplicable. Cukwurah argued that because of that, a vast amount of customary laws must have been excluded based on its repugnancy; customary law's development was therefore compromised. We do not think this argument is tenable: customary law is dynamic and evolutionary. It cannot be restricted by a time-specific criterion. The people cannot be prevented from proclaiming their cultural values and laws. Customs are organic and will grow regardless of exogenous restraint imposed upon them. The Nigerian Supreme Court in the case of *Okonkwo v. Okagbue* asserted the dynamic nature of customary law:

A conduct that might be acceptable a hundred years ago may be heresy these days and *vice versa*. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgement by the court.

However, this must be objectively related to contemporary values, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised of overview of international community, which we share. We must not forget that we are part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current conditions, experiences and perceptions of the people. After all, custom is not static".<sup>22</sup>

These nineteenth century 'mystical' ideas of a spirit of the Nigerian people are not relevant to a contemporary cultural jurisprudence. Cultural jurisprudence, in the sense that we are using it, is closer to Benedict Anderson's notion that a people must be

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<sup>22</sup>[1994] 9 Nigerian Weekly Law Report (Part 368) 301.

‘invented’.<sup>23</sup> In other words, the process of nation building is linked to the creation of an ideology of belonging to a ‘fictional’ entity. However, rather than invoking some mystic unity, we see the invention of a Nigerian culture in pragmatic terms. The predominant discourse of nationalism has proved hard to adapt to post independence politics; and, worst case, may even be collapsing into ethnic and religious appropriations that cut against any general idea of a nation. It may simply be necessary to ‘invent’ a new way of talking about ‘belonging’ to Nigeria to prevent this collapse of any general sense of being a Nigerian citizen, or the viability of a Nigerian state.

This is a huge theme, and we do not propose to explore it in great detail because the main point can be outlined in more immediate terms. Cultural jurisprudence in the Nigerian context- is an attempt to create a ‘democratic’ ideology for a nation emerging slowly from dictatorship. This returns to our point above. For law and democratic institutions to be supported and sustained in Nigeria, it is necessary that they are linked to a set of ideas and beliefs that are shared by most people in the country. Unless there is cultural support for law, democracy will not be sustained. Our basic idea is that all Nigerian citizens must find in the law and state institutions basic values with which they can identify. Admittedly, democracy is nascent and fragile in Nigeria. There is a risk of return to dictatorship. In such difficult times, and in the absence of democracy finding its roots, the process of ‘inventing the nation’ can find its form in the way of thinking about law and justice that cultural jurisprudence allows.

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<sup>23</sup> Imagined communities: Reflections on the origin and spread of nationalism : Benedict Anderson (2006) revised edition

The ‘invention of the nation’, as suggested above, is focused on finding some form of value consensus on social justice in Nigeria. This does not claim that these values are somehow a mystic property of the different ethnicities that were brought together in the creation of the Nigerian state and somehow transferred to a ‘Nigerian’ people. It would be more realistic to see whatever values cohere within different ethnic groups as inchoate- perhaps in some ways lacking clear articulation , but nevertheless ‘present’ within social life. Our argument is that any consensus must itself be created (and created through democratic means) as an on-going discussion about how different values might be brought together to sustain a national sense of social justice. This is a long term project, and, as we will argue, one that may fail.

In this regard the proposition on cultural jurisprudence by William Idowu is instructive.<sup>24</sup>

Before we revert to this proposition, let us identify the inspiration from the interaction with liberal ideas in articulating our idea of social justice. This interaction is what we have called ‘Inter Zone’

**(i) Inter zone**

Liberal tradition prioritizes the idea of autonomy, choice and individualism of citizens in securing and promoting their potential towards the pursuit of their happiness. Communitarians are now responding to this lofty idea, by asserting the need for liberal rights theorist to recognise the need to achieve more for the community in pursuit of common good rather than focusing on autonomy and choice for individuals to realize

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<sup>24</sup>Idowu William, ‘*Between the EBI and IWA Concepts: The Theoretical Foundation of Yoruba Jurisprudence*’, defines “cultural or cross cultural jurisprudence or cultural justice system that recognises, honours and protect the right of cultural contribution in the creation, development, growth and maintenance of an equitable, workable and systematic justice system in order to fulfil the mutual self-supporting destinies of such cultural groups”, cited in African Journal of Legal Theory, Vol.1, 2007 at p.23.



their potential.<sup>25</sup> A leading authority on the idea of rights based on autonomy and choice is Rawls in *Theory of Rights*. Post Colonialism writers like Ivison is keen for an engagement that explores the potential of the periphery in discourse about rights, equality and socio-economic rights.

Ivison fails to recognise the need to ensure that the agenda for the discussion of the social and political discourse must be set by local people, and in local terms. Liberal universalism orientation of law disengages from the relevant cultural values in African society. In so far as law and justice are normative concerns, the point is that we need to observe the specificity of cultural ways of examining these matters. Thus, in thinking about jurisprudence in Nigeria, we cannot follow the contours of dominant jurisprudential discourses current in western academies. Positivism – with its narrow focus on legal mechanisms, and its avoidance of questions of morality and substance, cannot allow an understanding of the cultural location of law. Thus, positivism can give us no sense of the cultural support that law and the rule of law requires for it to be sustainable. Indeed, positivism also side-lines questions of social justice and sees them as part of a politics of law rather than the fundamental structure of law. Any connection between law and justice must ,therefore, move away from positivism.

It is also the case that cultural jurisprudence departs from natural law thinking. Whilst natural lawyers have been more willing than positivists to see morality and the question of the good as central to legal thinking, the cultural jurisprudence outlined in this thesis does not identify itself with this tradition. This is because we do not see cultural jurisprudence as necessarily Aristotelean or Aquinian. Finally, we do not feel that a Dworkinian line in jurisprudence is relevant. Dworkin may have a sense of the

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<sup>25</sup> See A. Etzioni, *The Essential Communitarian Reader*. Oxford: Rowman & Littlefield.

importance of a political morality to law, but, we feel that his approach is too much part of a minimal liberalism (although distinct from Rawls) – and has little relevance to our concern with the values of Nigerian culture.

Social justice requires more than distribution of social wealth and this thesis explores these other aspects of the idea. Social justice requires human rights or in a Nigerian context, African human rights.<sup>26</sup> This is not meant to be an argument about cultural exclusion. African human rights correspond with international human rights and indeed are the ‘translation’ of these universal ideas into specific cultural contexts. It is also important to note that those aspects of traditional Nigerian cultures that are inconsistent with human rights are not to be defended. We can think about the norms of traditional Nigerian cultures as dynamic and open to change – not committed to preserving some sort of immemorial truths. This is entirely consistent with arguing that there is a possible broad consensus over the fundamental terms of justice shared between different cultures, but this argument will be elaborated in a later chapter.

Social justice also requires the rule of law. A great deal could be said about the rule of law, and so it is necessary to stress that we think about the concept in exactly the same way we think about social justice and human rights. The concept has to be adapted to Nigeria. One of the key terms is governance and its relationship to democracy— ‘democratic conversation’-The importance of good governance is how to ensure that the management of resources, governmental institutions and powers are geared towards achieving social justice and will stress the particular role of an activist judiciary in becoming a catalyst for sustainable democratic change. It may even be

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<sup>26</sup> See Akeem Bello, A Comparative Analysis of African and European Systems for the Protection of Human Right, (1997) 2 Ogun State University Law Journal, pp.21-31.

that the longevity and ‘depth’ of this change can be achieved by developing legal principles that allow the norms of social justice, and the norms of Nigerian ethnic groups to cohere as the principles that guide the Nigerian state.

**(ii) Towards an Indigenous Cultural Social Justice- a Cross Cultural dialogue**

Perhaps, it might be ideal to put in context, the meaning we intend to deploy in the use the term ‘Cultural jurisprudence’. This term is used synonymously with the term ‘Cultural Social Justice’. Its usage in this thesis is to signify the themes that will explore the idea that, the Nigerian ethnic groups, which made up the Nigerian state, have a sense of values that underpin their aspiration for social justice as a common goal in the various communities in Nigeria. William Idowu has defined the term as follows:

cultural or cross cultural jurisprudence or cultural justice system that recognises, honours and protect the right of cultural contribution in the creation, development, growth and maintenance of an equitable, workable and systematic justice system in order to fulfil the mutual self-supporting destinies of such cultural groups.<sup>27</sup>

The thrust of this definition is the need to sustain the cultural values of a given people, with the aim of ensuring systematic justice system that ensures a credible social justice agenda.

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<sup>27</sup> William Idowu, *Between the EBI and IWA Concepts: The Theoretical Foundation of Yoruba Jurisprudence*, defines “cultural or cross cultural jurisprudence or cultural justice system that recognises, honours and protect the right of cultural contribution in the creation, development, growth and maintenance of an equitable, workable and systematic justice system in order to fulfil the mutual self-supporting destinies of such cultural groups”, cited in *African Journal of Legal Theory*, Vol.1, 2007 at p.23

William Idowu has argued that an African Jurisprudence is possible.<sup>28</sup> There is a large crowd of Eurocentric criticism of the possibility of African jurisprudence.<sup>29</sup> Idowu understands jurisprudence in a broad sense as an engagement with culture. We want to define this in detail, but, for the moment, it can be seen in outline as a way of thinking about the inter-relationships between legal issues, social and economic concerns.

Idowu's notion of culture is central because he roots his thinking in the political realities of contemporary African nations. Idowu uses the term cultural justice synonymously with cultural jurisprudence- and this shows how his work is engaged with a question of the ends or purpose of law. We are working within Idowu's paradigm, but, to keep our argument focused, we use the terms social justice rather than cultural justice. The point of this thesis is to take Idowu's general ideas, and show how they are relevant to Nigeria. There are some preliminary issues with which we must deal with. Idowu does not present himself as a post colonialist but he is to the extent that he is addressing himself to a period of African history after the colonial period. It is in this sense that we feel Idowu is useful to our thinking about Nigeria in the post- independence period.

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<sup>28</sup>William Idowu-Against the Sceptical Argument and the Absence Thesis: African Jurisprudence and the Challenge of Positivist Historiography, *African Jurisprudence and Politics of Social History: An Inquiry into the Dilemma of Canonisation*, Lesotho Law Journal, Vol.14.NO.1 2001-2004, PP.1-27. Idowu identified a number of theses on misconceived notion that African lacks jurisprudence: Ignorance thesis, the Difference/non-difference argument and the Existence/reality thesis. Sceptical argument is founded is on the assumption, that there is no African philosophy or body of thoughts, because of the fact that Africa is not part of the Enlightenment, hence there cannot be any jurisprudential discourse worthy of investigation. The Ignorance argument is founded on the fact that because there is lack of written texts evidence of jurisprudential discourse, it cannot be empirically concluded that there is a body of thought within the African oral cultural narratives or Indigenous customary law that is capable of intellectual articulation.

<sup>29</sup>A very crude and unrefined example of the sceptical argument against African jurisprudence is the view of J. G. Driberg. In Africa, "generally speaking," according to Driberg, "symbols of legal authority [i.e. police and prisons] ...are completely absent, and in the circumstances would be otiose" (1934:237-238). One other clear example of a proponent of the sceptical argument is that of J. F. Holleman (1974:12) who wrote in a very provocative work that there is nothing like an African jurisprudence. M'Baye (1975) state that "the rules governing social behaviour in traditional African societies are the very negation of law." In the same vein, M. G. Smith (1965) postulated that "African peoples only know of customs instead of law." (cited in Idowu William)

Idowu's post colonialism is also relevant in a general sense, as he provides a defence of thinking in African terms about Africa. For us, this allows us to think about the mediation of ideas rooted in Western traditions of political thought into a different cultural context. This is not to argue, in the earlier mode of 'negritude' or authenticity which we feel (whilst historically important in the independence struggle) may not be relevant to a constructive engagement with human rights and the rule of law. The contact zone between 'Africa' and 'the west' that operates in this thesis is precisely to do with this jurisprudential endeavour. Writers like Fanon, Césaire, and Senghor effectively and poetically evoked a spirit of the people and of revolution that was necessary and important; but, their ideas were some way from law and legal thinking. Our contact zone also needs to engage with developments, in particular African human rights that postdate independence struggles. What we carry forward is the need to speak for Africans- and the need to adapt and to change 'western' ideas so that they are relevant to a new context. There is a radical spirit to both Idowu and writers in the traditions of negritude that we need to preserve and carry forward.

### **(iii) Shared Values within Nigeria**

The next question for consideration is whether there are common cultural values and ideals among the vast majority of Nigerians. The common norms of the major ethnic groups are communitarian notions of rights that are essential in ensuring fairness and equity between individuals in social relations attracting rights and duties.

We can identify the main principles: *respect, responsibility, restraint, reciprocity* and *rehabilitation*.<sup>30</sup> These congruent values should underpin the universal themes of a Nigerian cultural jurisprudence or democratic conversion for realization of social justice.

We also argue that all the attributes are to be interpreted within the cultural milieu or practices of the major ethnic groups in Nigeria towards the realization of ensuring communal cohesion and welfare of all the members of the communities. We argue that the realizations of these attributes are achievable because of the acculturation of such values in the orientation of the members of the various communities among the Yoruba, Igbo and the Hausa. Social relationships are based on mutual respect, which revolves around the need to give regard to age, social status and accomplishments. The better placed should mutually respect the less privileged. There is always an informal system of reprimand where due respect is not accorded in social relationships.

Responsibility signifies that every individual's status attracts a level of responsibility and the individual must always be conscious of the responsibilities, which attach to their status as individuals. Whatever the status of an individual within a family network or social relations, he or she must assiduously carry out or strive to achieve the responsibilities attached to it.<sup>31</sup>

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<sup>30</sup>For a similar discourse based on the notion of dignity of human being and 'humanness', see Tim Murithi "A local response to the global human rights standards: the *Ubuntu* perspective on human dignity" *Globalisation, Societies and Education*, 2007 Vol.5 PT 3 pp277-286.

<sup>31</sup>For an illustration of this in Igbo society, Ejidike succinctly states that "The sameness of Igbo names for the different categories of relatives, uterine kin and paternal kin alike mirror the closely knit nature of the Igbo family and the dispersed nature of sibling and parental responsibilities, obligations and entitlements. In other words, the manner of address reflects the nature of inter-personal behaviour in this context. Thus, responsibility

Closely related to the enjoyment of respect or dignity attached to it, is the need to exercise restraint in order to enhance social cohesion with the attribute which places importance on the need for mutuality of respect.

The exercise of restraint is important as it ensures that those who are accorded respect do not abuse the dignity involved. Restraint does not inhibit self-interest; rather it enhances it by ensuring that people would mutually respect one another, by the exercise of restraint. Self-interest is subject to the vagaries of selfish interest. Morality does not abhor self-interest, but rather

*Morality imposes on a person... the subjugation of vicious tendencies, and by implication, the development of virtuous ones, in thought, speech and action*<sup>32</sup>

There is nothing morally wrong with aspiring to promote one's interest, provided it is done within the confines and limits of ensuring that communal interest is not fractured in an attempt to actualise one's interest and ambitions.

Oke has rightly asserted that in the course of promoting one's self-interest, it is important to ensure that one guards against vicious tendencies that can be generated when an agent, through ignorance or confusion, mistakes selfish interest for self-interest and consequently seeks only self-gratification rather than self-actualization.<sup>33</sup> Reciprocity signifies that individuals in their dealings and relationships

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for the socialization, education and discipline of children is shared by their immediate parents, extended family and neighbours. The duty of care exercised in childhood is reversed in adulthood when children are expected, indeed obliged, to cater for their aged relatives, not just their parents. Igbo mythology is replete with stories of about the importance of returning favours and assistance received and the penalties of non-performance." Quoted from 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria', *Journal of African Law*, 43:71 at 86 (1999)

<sup>32</sup> Moses Oke, 'Self Interest as the Ground of Moral Obligation', Second Order (New Series): *An African Journal of Philosophy*, Vol.1 No.2 July 1988, 79 at 86.

<sup>33</sup> Moses Oke, 'Self-Interest as the Ground of Moral Obligation' Second Order (New Series): *An African Journal of Philosophy*, Vol.1 No.2 July 1988, 79 at 86.

should be just and fair, because of the possibility that whatever an individual does in their conduct and relationships will be reciprocated.<sup>34</sup> There is a belief that individuals are brought up to be kind and selfless. A selfless man or woman will attract the attention of and recognition by his kin. This selflessness will always be rewarded.

Rehabilitation signifies that individuals will always be given a second chance to be rehabilitated, to ensure their welfare, rather than be ostracized for an infringement of societal norms.<sup>35</sup> Any individual adjudged to have breached a societal norm is given the opportunity to remedy their breach by getting involved in community projects and rebuilding trust from other members of their community. We will discuss the implications of these congruent values of respect, responsibility, restraint, reciprocity and rehabilitation in the cultural milieu of the major ethnic groups in Nigeria in the course of this thesis.<sup>36</sup>

What we have endeavoured to do in the introduction is to set the tone for the possibility of social justice in the cultural context of Nigeria. This is to be explored fully in the next chapter. The idea of providing for the welfare of Nigerians should move beyond the contemporary liberal idea of providing social safety net for the vulnerable and less able of the society. In the next chapter, we will examine at the contemporary notion of social justice and undertake a review of some Nigerian authors; particularly, Kelly Ejumudo and Philip Ujomu, to see how their ideas about social justice are being contextualized in the discourse about securing and ensuring social justice for Nigerians.

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<sup>34</sup>J.C Ekei, *Justice in Communal Justice: A foundation of Ethics in African Philosophy*, chapter two (Lagos: Realm Communications Ltd,2001)

<sup>35</sup> See The discussion of dimensions of responsibility by Ekei, at page 115, *ibid*

<sup>36</sup>Chapter two



## CHAPTER ONE – SOCIAL JUSTICE IN NIGERIA

### 1.0 Introduction

There is need the for renewal of governance processes, institutions and orientation in Nigeria in order to make it more effective in providing for the welfare of its citizens. To achieve good governance and social justice, the resources of the state must be harnessed and deployed for effective benefit of the citizens towards achieving a more just and egalitarian society.

Social Justice in Nigeria is predicated on the need to ensure that the resources belonging to the people are judiciously distributed for the mutual benefits of the people and move away from the present elitist praetorian paradigm which focus on the appropriation of state resources for private gain.<sup>37</sup> The need for effective governance, otherwise known as good governance must be based on the tripod of transparency, openness and accountability.

One of the ways to ensure good governance is the ability of the citizens to hold the political elites accountable for appropriations of state resources and ensuring social justice. Social justice, in this context, is to be examined as the need to ensure provision for socio-economic imperatives needed for sustainability and welfare of the

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<sup>37</sup> The claim that the resources belongs to the people is predicated on the fact, that the citizens elect the ruling class in order to use administrative capacity of the state to enhance their welfare and wellbeing by using the state resources efficiently. The idea is based on trusteeship relationship, which emphasizes that the ruling elites control state resources on behalf of the citizens and good governance entails the need to ensure transparency and accountability in this regard. However, the political elites tend to distribute state resources based on nepotism, ethnicity and patronage, which is described as ‘prebendal’, by Richard Joseph- ‘Democracy and Prebendal Politics in Nigeria: The Rise and Fall of Second Republic’, Cambridge University Press, 1999. Ideally, state resources ought to be used in providing infrastructure for the use and welfare of the citizens. This is what a political scientist refers as Infrastructural power, using state resources to provide ‘social goods’, See Michael Mann, Infrastructural Power Revisited, Studies in Comparative International Development (2008) 43(3-4),pp.355-365. Also, for wider discussion, Van de Walle, Nicholas, “Meet the New Boss, same as the old Boss? The Evolution of Political Clientism in Africa” in Kitschelt, Herbert- Wilkinson (eds.) Patrons, Clients and Policies: Patterns of Democratic Accountability and Political Competition. Cambridge: Cambridge University Press, 2007.

citizens. To put it in context, we shall be looking at the notion of social justice from the perspectives of resources, responsibilities and distribution. The idea of good governance can be said to revolve around who get what, why and how.<sup>38</sup> If these basic questions are sorted out in a just manner, the realization of social justice becomes a tool for achievement of good governance.

We will consider the theoretical underpinning for social justice, in the context of this work, as a paradigm that will provide the need and framework which will inform the state in the formulation of its social policy in the alleviation of poverty and providing for equality of opportunities and a lasting solution to the present ‘politics of impoverishment’.<sup>39</sup>

In discussing the conceptual analysis and the theoretical basis of social justice, we are not overtly concerned with the controversy about the origin of social justice as a liberal theory. Rather, we now explore how articulate a theory of justice within the cultural jurisprudence, which prioritises the need for convergence between the imperatives of individualism and the larger collective goal of the society in ensuring social justice for the citizens as part of their entitlement in the commonwealth of the country. An overview of the distribution and recognition model of social justice is examined. We consider some Nigerian authors’ analysis of social justice in the context of Nigeria’s predicament of non-availability of welfare legislations and policy. This is about how to ensure that the ruling class concedes some level of social justice

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<sup>38</sup> This is our deduction of what we think; social justice is all about, especially as it relates to distributive justice. The inability of the political and ruling elites in Nigeria to meet this objective is what we have termed ‘Politics of Impoverishment’.

<sup>39</sup> ‘Politics of Impoverishment’ is what we refer to as the strategy by the ruling elites to keep the citizens in perpetual poverty by exploitation of the state resources for their own benefits and offering little favours and perks to the citizens based on a system of patronage which uses ethnicity, nepotism and religion as the basis of conferring the perks.

to poor Nigerians. There is what we call ‘Politics of Impoverishment’, which is in dire need of eradication in order for the citizens to thrive and achieve their potential.

### **CONCEPTUAL AND THEORETICAL ANALYSIS OF SOCIAL JUSTICE**

The appreciation and comprehension of what constitutes injustice might suffice in elucidating social justice. A theoretical foundation is essential to signpost the importance of political philosophy in the pursuit of justice and ultimately social justice. It also helps to articulate the importance of making linkages with theory and political realities of citizens; making it relevant in pursuit of resolutions to challenges in relation to the existence of human beings. It allows convergence on the basis of expecting good governance from the ruling elites and the need to articulate it as a political action needed to ensure the welfare of the citizens. MacIntyre put this need for convergence between political and moral action and moral and political theorizing lucidly:

There ought not to be two histories, one of political and moral action and one of political and moral theorizing, because there are not two pasts, one populated only by actions, the other only by theories. Every action is the bearer and expression of more or less theory-laden beliefs and concepts; every piece of theorizing and every expression of beliefs is a political and moral action.<sup>40</sup>

For political philosophy and legal theory to have relevance to humanity, we must find common grounds between the virtues they propound and the need for the political actions to articulate their values in formulation of policies. There is need to serve the warning that, this thesis is open to all valuable inspirations without extreme inhibition;

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<sup>40</sup> Alasdair MacIntyre, *After Virtue*, p.61.1981, Notre Dame: University of Notre Dame Press.

the idea of virtue is not central to the ideas propounded in this work. Our inclination is not to prioritise virtue as the basis of moral action. We are only subscribing to the need to have convergence between political actions and political philosophy theory.

The theory of social justice in African philosophy as expounded is based on this premise; it must be articulated by a convergence and consensus of theory and political actions.

On the other hand, in Nigeria's context, altruism and primordial loyalties of the citizens seems to be the basis of family support system for survival of the citizens.<sup>41</sup>

There is the need to articulate the basis for social justice not founded on primordial and altruism tendency of the citizens and build strong institutions and processes in order to ensure social justice. Recent studies of Nigerian society suggest that there is prevalence of strong individuals, primordial ethnic groups and societies. We need to transcend this to the state in order to build strong state that is capable of providing for the citizens and ensure social justice.<sup>42</sup>

The apparent problem with this reliance on local norms would be the inability to effectively seek remedies where the local norms are inconsistent with the universal notion of justice. As Barry aptly put it:

if the victims are forced to appeal to 'local norms', they will be in the absurd position of having to invoke norms that are characteristically antithetical to the rights of women, children, ethnic and religious minorities and the poor.

The whole point of a universalistic conception of justice is that it provides a

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<sup>41</sup> Primordial loyalties are based on ethnic affiliations between citizens and often reflected in communal values which reinforce the need to be kind to one another and the basis of relationship in the cultural context.

<sup>42</sup> A.A. Adebayo, Sociological Investigation into the nexus of poverty, unemployment and leadership in Nigeria, *Mediterranean Journal of Social Sciences*, 2014, vol.5, no.16, pp.578-588. See also, discussion of the transformation of strong society into Weak state, J.S Migdal, *Strong Societies and weak States: State-Social Relations and State Capabilities in the Third World*, Princeton, NJ, Princeton University Press, 1998.

basis on which both those inside and those outside a country can criticize practices and institutions that reflect local norms, which typically endorse discrimination, exploitation and oppression.<sup>43</sup>

In this engagement with Brian Barry we need to acknowledge the fact that, he is a social justice exponent working and theorising within the western liberal environment. Our engagement with his exposition is part of the 'interzone'. He raises an important point on the need to ensure that local norms and international bench marks in the protection of human rights should be harmonised.

Apart from this issue of standardization raised by Barry, the local norms in Nigeria tend to be patriarchal, and anti- feminine .The contemporary agitation by human rights groups and prevalence of elitist theory of state in governance in Nigeria is not sincere about eliminating injustice and achieving social justice.

Researchers suggest that the behaviour and activities of the ruling elites have been predatory and citizens are not able to demystify the façade because of lack of enlightenment and education. This allows the ruling elites to lobotomize the citizens and deny them the benefits of the state resources.<sup>44</sup> The benefits accruing to the elites far out -weigh their contributions to the development of the commonwealth of the Nigerian state and this is epitomised by their corrupt practices.<sup>45</sup> The use of 'commonwealth' refers to national resources and any revenue emanating from it.<sup>46</sup> To

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<sup>43</sup> Brian Barry, *Why Social Justice Matters*, p.27, Cambridge: Polity Press, 2005.

<sup>44</sup> See A. A. Adebayo, *Sociological Investigation into the Nexus of Poverty, Unemployment and Leadership in Nigeria*, *Mediterranean Journal of Social Sciences*,(2014) Vol.5 No.16,pp.578-588 and also Arthur Davies, *Money Politics in the Nigerian Electoral Process*, University of Lagos Journal of Politics, Rainy Season 2012, at pp.65-83. Lagos: Department of Political Science publication.

<sup>45</sup> See I. S. Oguniye, *Corruption in Nigeria: Theoretical Perspectives and Some Explanations*, *Anthropologist*, 11(4): 281-292(2009).

<sup>46</sup> This is also referred to as Sovereign Wealth or National Wealth.

move away from this anomaly, one must articulate a social justice paradigm that empowers the citizens and deconstructs the façade. The emergence of the predatory state in Nigeria is predicated on the inclination of the ruling elites to appropriate state's resources for their aggrandizement and to a limited extent for their ethno-political constituencies.

The importance of this analysis for this discourse is that contemporary Nigeria is still dealing with the exploitation by the ruling elites which dissipate the state resources, cause hardship and poverty for the citizens. The challenges facing Nigeria is how to meet the basic needs of Nigerians in terms of life essentials like Food, Housing, Education, Health, Clean Environment and how to use the national resources to meet economic development.<sup>47</sup> The causes of ignorance, want, idleness, squalor and disease in contemporary Nigeria are as a result of deliberate predatory attitude and corruption of the elites in exploitation and squandering of state resources.<sup>48</sup>

In understanding social injustice in the Nigerian context, we need an articulation and elucidation of how rights, resources and opportunities are shared among Nigerians in a manner that reinforce and create inequality and injustice. This process can be described as 'politics of impoverishment'. Poverty makes citizens to be vulnerable to social evils of ignorance, want, idleness, squalor and disease. The state needs to remove the vulnerabilities that create the vicious cycle of poverty, in order to assist the citizens to triumph over these so called social evils. There is a vulnerability of the poor to deprivation and poverty. One of the essences of this work would be to

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<sup>47</sup> See M. Taiwo and A. Abayomi, "Government Expenditure and Economic Development: Empirical Evidence from Nigeria". *European Journal of Business and Management* (2011) Vol.3 No.9. [www.iiste.org](http://www.iiste.org).

<sup>48</sup> See I. S. Oguniye, *Corruption in Nigeria: Theoretical Perspectives and some Explanations*, *Anthropologist*, 11(4): 281-292(2009)

empower the citizens with the philosophical armoury of rights to assist in, securing better concession from the state and to avoid the state's 'politics of impoverishment'.

## **THE REDISTRIBUTION AND RECOGNITION MODEL OF SOCIAL JUSTICE**

There are two thematic bases for claiming social justice in the contemporary world. The redistribution model recognises the inequalities in the society and seeks to rectify the injustice caused by the uneven distribution of the resources in the society, by seeking to redress the inequalities by redistributing the resources to ensure social justice. If we refer to our earlier analysis above, about the rights to resources being arbitrarily skewed in favour of the state and its elites, this is possible, and very important to adopt this model because of the highly stratified Nigerian society, along socio-economic hierarchy.

The second model emanates from the commitment to push the boundary of redistribution to universal recognition, that all citizens are entitled to social justice by virtue of the fact, of being citizens and nothing else. It is said to "develop a new paradigm of justice that puts recognition at the centre" of entitlement and difference.<sup>49</sup> Ejumudo posited that this new constellation, the two kinds of justice claims is often dissociated from one another-both theoretical and pragmatically. This task often polarizes the discussion about social justice and causes loss of focus to the fundamental issue of eradicating injustice. Ejumudo aptly captures this controversy:

Some proponents of distribution reject the politics of recognition outright, casting claims for the regulation of difference as 'false consciousness, a

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<sup>49</sup>Kelly Ejumudo, Social Justice, Democracy and Cultural Renewal in Nigeria, *Africana*, June 2010, p.211 at 221.

hindrance to the pursuit of social justice. Conversely some proponents of recognition approve the relative eclipse of the politics of redistribution, construing the latter as an obtruded materialism, simultaneously blind to complicit with many injustices.<sup>50</sup>

To overcome this controversy about these rivalries of paradigm, there is need to devise a pragmatic convergence of the redistribution and the recognition paradigm, as both aims to do same thing-achieving social justice. This would ensure “two –way dimensional conception of justice that can accommodate both defensive claims for the recognition of differences and distribution of opportunities”.<sup>51</sup>

The inadequacy of this analysis centres on the need to assess the basis of redistribution in a country like Nigeria with historical inequality. This historical inequality reinforces prejudice against women, youth, children, elderly and the disabled.<sup>52</sup> Nigeria is a highly stratified society and distribution of resources is lopsided and is characterised by lack of an equitable and just system. This lack of equity in the distribution of the resources is as a result of lack of concerted effort to explore the distributive paradigm in social justice theory.

Failure of this kind of discourse is because of the insensitive nature of the ruling elites to the economic and social plight of the citizens. The Nigeria ruling elite is highly parochial and is only interested in protecting the interest of people from same ethnic background against issues that border on national interest.<sup>53</sup> The ruling elite form

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<sup>50</sup>Ejumudo, *op cit*, at p.222, quoting, C.O Fraser (2000) : Social Justice as A Global Imperative, London: Oxford University Press,

<sup>51</sup> Ibid.

<sup>52</sup> Sope William, Nigerian, its Women and International Law : Beyond Rhetoric, 4 Human Rights Law Review, 229(2004)

<sup>53</sup> William Idowu asserts this dilemma by saying “Over the years, successive governments and regimes are often defined in the sense of a dominant group and subjected, excluded groups. This consistent pattern in the



alliances and political association based on the selfish reason, of parochial aggrandizement. For the political elite, the pursuit of justice and eradication of poverty is not an important policy; they do not have permanent friends or foes but permanent interest, which is to use their office for personal aggrandizement.

Ejumudo set out the differences between the two paradigms as follows:

while the redistribution paradigm focuses on injustices it defines as socio-economic and presumes to be rooted in the political economy such as exploitation, economic marginalization, and deprivation, the recognition paradigm, in contrast, targets injustices understood as cultural, which it presumes to be rooted in social patterns of representation, interpretation, and communication like cultural domination, non- recognition and disrespect. Secondly, the two paradigms propose different sorts of remedies for injustice. In the redistribution paradigm, the remedy for injustice is political-economic restructuring involving redistributing income, recognizing the division of labour or transforming other basic economic structures, but in the light of the recognition paradigm, the remedy for injustice is cultural or symbolic change.<sup>54</sup>

The problem of this approach as enunciated by Ejumudo is the failure to elucidate the reasons often proffer to justify non –redistribution, and non -recognition of entitlement of citizens’ right to social justice in Nigeria. Nigerian state often disregards the redistribution paradigm, on the basis of inadequate resources. The inadequacy of

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nature of governance and rule and the inordinate, unbridled ambition to perpetually dominate others, coupled with the struggle to monopolize the resources allocating elements of the state are the factors that account for the problems of citizenship, statehood and their effects on the incidence of political conflict”- Williams Idowu, *Citizenship Status, Statehood Problems and Political Conflict: The case of Nigeria*. *Nordic Journal of African studies* 8(2): 73-88(1999) 73-87, at page 82.

<sup>54</sup> At p.223

resources argument is not sustainable. Iris Young has also put the inclination to displace the distributive paradigm by what she calls five faces of oppression-exploitation, marginalization, powerlessness, cultural imperialism, and violence.<sup>55</sup> She is of the view that distributive injustices may contribute to or result from these forms of oppression, but none is reducible to distribution and all involve social structures and relations beyond distribution.<sup>56</sup>

The Nigerian state often attempts to displace redistribution as unjustified clamour orchestrated by disgruntled citizens and in any way lack of adequate resources to meet the challenge. In theorizing about justice, in this context, the focus is on material resources and social goods like employment, education, health care and housing. There are some factors responsible for historical discrimination based on ‘Oppressive domination’ caused by decades of military dictatorship and its resultant marginalization, powerlessness and violence against the southern part of the country; especially against the business elite and human rights activists.

Before we discuss distribution, and its mechanism of achieving justice, let us consider Young’s position. Young warns that justice should not be conceived primarily on the model of the distribution of wealth, income and other material goods. We tend to disagree with this argument because the distribution of wealth, income and other material things must be put in context of mechanism of redistributive taxation, which can be used to achieve social justice. In Nigeria, most of the wealthy citizens derive their money from government patronage and endemic corruption.<sup>57</sup> Although one

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<sup>55</sup> Iris Young, *Justice and the Politics of Difference*, New Jersey: Princeton University Press.

<sup>56</sup> P.9

<sup>57</sup> This usage of corruption in this regard is quite fluid, it is used advisedly to include taxation evasion and other fraudulent practice of obtaining government subventions and other waivers without due process. An important

must acknowledge that the scope of justice transcends the distributive model, distributive issues are central to the focus of this discourse because the inequalities in the Nigerian society are primarily caused by inequitable distribution. In the developed world, where basic needs and welfare are relatively provided for by the state, there is a policy that ensures that minimum standard of living is catered for by the provision of welfare state. The issue of *distributive justice* is embedded in the social legislation behind the welfare state. The great concern for such developed countries is the increasing cost of such welfare state. The increasing cost of welfare state necessitates a rethink. The burden of the welfare state is generating contention between neo-liberals and those of the left who believes that state must provide for welfare state. This is applicable in Britain.<sup>58</sup> However, there is an on-going concern about the marketization of the welfare system, with the aim of streamlining or eliminating the citizens' entitlement, as observed by Gearey. He posits that it is 'unlikely that private operators would seek to take over certain welfare services, as it would be difficult run them profitably'.<sup>59</sup> The position in Nigeria is direr than the issue of marketization of welfare, where welfare is non-existent.

The pursuit of justice must be a universal concern for all citizens, and all citizens must be able to strive for the attainment of justice; injustice to one is injustice to another. Adaramola posits that justice arouses the need to re-examine our attitude towards the very existence and basis of the human person and inter personal relationship in

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example is that of many well-known business individuals who collected import subsidy on importation of petroleum, running into billions of dollars. Nobody has been prosecuted for the alleged offence to date.

<sup>58</sup> Howard Gennerster, *Paying for Welfare- Towards 2000 and Understanding the Finance of Welfare: What Welfare Cost and How to pay for it*, (Routledge, 2009).

<sup>59</sup> Adam Gearey, *Justice as Welfare*, p.65,(2012) New York: Bloomsbury

others.<sup>60</sup> He is indirectly alluding to the need to protect the human dignity in others as the common virtue which unifies us as part of human race. The right to dignity and to respect the dignity of others, which we canvass to be a unifying common virtue, is instructive in this regard. To achieve this, there is need for provision of socio-economic rights aimed at social justice. This theme of common humanity and dignity must be the basis of seeking justice for one another. Ujomi proving the link between cause of lack of social justice and conflict argues that the idea of social justice encapsulates every aspect of institutional rules and relations which are subject to potential collective decision. He is of the view that in the light of prevalence of social conflicts, questions about social justice will continue to be relevant, in so far as there is domination and oppression in society. The inevitability of conflicts because of domination and exploitation by the ruling elites, within the context, of what I described as ‘politics of impoverishment’, would always provide the basis for clamour for social justice.

There is need for a theory of social justice that ‘emphasises the well-being and welfare of every individual in society’. To avoid conflicts resulting from domination and exploitation, there is need for “social justice to aim at the achievement of the good of the society at large, as well as the good of every individual in society. Social justice is, therefore, a fundamental framework for the total development of the human person in his or her physical, social and spiritual life”.<sup>61</sup> This is a holistic overview of social justice; it includes the need to cater for the wellbeing of the individual and this is

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<sup>60</sup>Funso Adaramola, ‘On Justice’ in J.O Oguejiofor (ed.) *Philosophy and Public Affairs*, Enugu: Delta Publishers, 1998:p.262 cited in Philip Ujomi, *Social Conflicts, Resources Distribution and Social Justice In Nigeria*.

<sup>61</sup>Philip Ujomi, *Social Conflicts, Resources Distribution and Social Justice in Nigeria*, *Journal of African Studies*, No. 63, 2002.

reflected by creating an enabling environment to profess one's religion. What Ujomi fails to take cognizance of, is the fact that conflicts do not arise just because of lack of resources or inadequacy but more importantly because the ruling elites deliberately waste the resources meant for the citizens and turn away when conflicts occur because of their praetorian attitude.<sup>62</sup> They leave the citizens to their own devices of self-preservation and survival in the midst of pandemonium and violence created because of the ruling elite's greed and insensitivity to the plight of the citizens.

This is part of the dilemma of governance in Nigeria, a lack of respect for the rights of the citizens and failure of the ruling elites to use governance to improve the welfare of the citizens. The ruling elites lobotomize the citizens because of their inability to articulate the issues of governance and the disguise their squandering of the resources as not being a major cause of lack of social justice. The citizens' religion, ethnicities, gender and physical disability are being manipulated and exploited as the major cause of lack of empowerment and welfare.

We consider notion of rights, resources and opportunities as part of criteria of articulating social justice. The central theme to the discussion of these issues is the basis of its distribution. The basis and the criteria of its distribution would determine how just or unjust a society is?

The notion of rights to enjoyment of social and economic rights is dependent on the ability of the state to provide the enabling environment for the enjoyment of the

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<sup>62</sup> See generally, Religion, History, and Politics in Nigeria: Essays in Honour of Ogbu Kalu, eds. Chima Korieh and Ugo Nwokeji, (2005) University of America Press and Mike Kwanashie, Politics and Political Power Relations in Nigeria. Kaduna: Ahmadu Bello University Press, 2003.

rights.<sup>63</sup> This entails the provision for facilities for housing, health, education, recreation, clean environment etc. It is trite that a right can be exercised if the complimentary imperatives are provided by the state. Effective enjoyment of the rights must be guaranteed and all inhibitions for the enjoyment of such a given right must be removed by the state.

For example, right to education, implies that there are schools, competent teachers, equal access to such schools and facilities adequate to carry out an effective well vetted curriculum. Perhaps more importantly the availability of choice and autonomy, in the Rawlsian sense, which we argue is of less importance. The first hurdle for Nigerians is the availability of resources to provide education, let alone the right to exercise autonomy and choice.

Education must be accessible, acceptable, adaptable and most importantly affordable. There must not be artificial barrier against less well- off pupils to gain admission to school of their choice. The rights of the pupils must be protected against potential abuse by the parents and guardians. The right to be properly educated without being exposed to religious bigotry and extremism should also be protected.

A woman will have a right to abortion, if there is well equipped hospital and fee-free access to abortion. There are three relevant issues that flow from it, to make the right realistic. There must not be a law prohibiting abortion; there must be competent doctors who can carry out the operation in safe and secure environment and it must be affordable. Any missing link would make the right an illusion.

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<sup>63</sup> We will discuss in a subsequent chapter, the international legal framework for enjoyment of socio-economic and cultural rights and how South African Jurisprudence can assist the Nigerian government .

The Nigerian citizens' human rights and its protection are skewed arbitrarily in favour of the state and primordial local authorities. The primordial loyalties are well entrenched loyalties from the citizens to the traditional chiefs and kings and ethnic affiliations of the citizens to one another. The average Nigerian's level of education affects his ability to comprehend the idea of rights, its articulation and how to harness actions to protect and enforce it. He is at the mercy of the state, in relation to what rights can be elicited from the state. This depends on how enlightened he is. The socio-economic status of the citizens goes a long way in the determination of what the state would concede. The judicial arm of the government also has a pivotal role to play in either protecting and upholding the rights of the citizens or conniving with the other arms of government in denying the rights through lack of enforcement. A vibrant judiciary can ensure the enforceability of social justice and the pursuit of justice in a state like Nigeria must be the duty of every citizen because the other arms of government are evasive and unwilling.<sup>64</sup>

The gender bias nature of the patriarchal nature of Nigerian society is another cause of injustice. The girl-child and women in Nigeria stand a high risk of suffering injustice because of historical marginalization and contemporary bias in terms of access to education, employment, social-economic rights and participation in politics.<sup>65</sup> The right to social welfare has to be based on well-articulated and uniform human rights systems, that do not allow discrimination based on gender, ethnicities, religions, sexuality, physical disabilities and other biases. Social welfare has to be

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<sup>64</sup> For a detailed analysis of how an effective judiciary can assist in this regard, D. M. Brinks and V. Gauri-Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World, Cambridge: Cambridge University Press.

<sup>65</sup> See Risikat Dauda, Patterns and Socio-Economic Determinants of Women's Participation in Nigeria's Urban Areas: The Case of Lagos Metropolis, UNILAG Journal of Politics, Vol.1, Rainy Season pp.102-123 (June 2012) Lagos: University of Lagos Department of Political Science.

rights-based, and not on philanthropy, altruism or political patronage. The effective system of rights that can ensure social justice is one based on equal opportunities and effective remedial systems, where access is denied or unwittingly restricted.

We now move on to discuss the importance of social resource as an attribute that can assist in the actualization of social justice in Nigeria. Resource in this regard is quite fluid and encompasses all sorts of things that are in short supply and the state have to monitor its supply, distribution and use regulation to achieve justice or fairness. Resource in this regard would include social materials like time, money and opportunity to have access to education, housing, healthcare, employment etc. Brian Barry is quite lucid in his articulation of the nature of rights and its implication for attainment of justice in its distribution:

The idea that justice of a society can be assessed by its distribution of (some) rights is older and less controversial than the claim that the distribution of opportunities and resources within a society also makes for a society's being just or unjust. Social justice-concerned with the distribution of opportunities and resources-should be conceived of as building on the foundation of liberal rights.<sup>66</sup>

Barry quite rightly sets in motion the origin of social justice in the liberal tradition but fails to reconcile the inevitability of conflicts and tensions between liberal rights thinkers' inclination that autonomy and choice cannot be compromised on the altar of wanting to do justice for all.

He acknowledges this conflict by saying, "Unquestionably, there is a conflict between certain rights claimed by traditional liberals (today often distinguished by calling them

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<sup>66</sup> Brian Barry, *Why Social Justice Matters*, p.22.



‘libertarian’) and the demands of social justice”.<sup>67</sup> His answer was rather simplistic, that social justice must subsume liberal justice, and that contempt for social justice does nothing to guarantee liberal justice.

One can sympathize with him for his socialist inclination in resolving the conundrum of how to achieve social justice in predominantly liberal democratic societies, when he argues that social justice can be seen as an extension of liberal justice. But Barry’s position is still contestable! He argues that liberal justice rests on the presupposition that all citizens are equal before the law. His argument is based on the notion that if equality of opportunity or equal treatment is a vital virtue for the liberal, then this virtue should not be confined to liberal rights? It is important to note that his solution lies in the prescription of social democracy, I guess instead of liberal democracy. For Barry, Social democracy challenges the assumption that whatever distribution of opportunities and resources that arise within the confines of liberal democracy, as being ‘necessarily just, and its implication that any departure from the inequalities thus generated must depend on the goodwill of the beneficiaries’.<sup>68</sup> Barry Brian is effectively positing that liberal democracy is yet to solve the problems of inequalities effectively.

In Nigeria, liberal inclination that all individuals are endowed to make decisions based on autonomy and choice is constrained by the inability of the citizens to understand and take decisions that can enhance the idea of autonomy and choice. The state needs to provide structures and processes that will empower the citizens to understand how to articulate their cultural values and make a compelling case for protection of their

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<sup>67</sup> P.22

<sup>68</sup> *Ibid* p.25

rights. The state needs to take decisions that will protect and enhance the interests of the citizens because there is an obligation for the state to provide for the welfare of the citizens. To assist the citizens the state need to intervene in the distribution of resources or regulate the resources in the private sector to get concessions for the citizens, rather than leave it to the vagaries of market economy.

What is important for achieving effective deployment of state resources is the prevention of graft by those employed by the Civil Service for the allocation of resources in the public sector. In relation to this, the role of a regulator is paramount, in view of the fact that, there is an increase in public-private joint venture and private finance initiative in public utilities like electricity, telecommunication, petroleum, gas and water etc. All these emerging utilities multi-national corporation in attempt to ensure favourable relations with host-communities often engage in cosmetic social corporate responsibilities programmes.<sup>69</sup> An effective regulator must ensure that the level of pricing is competitive, not arbitrary and complaints and remedial system are robust. Is the state abandoning its role of regulating the supply of resources or its distribution, by its marketization, through having private companies delivering the resources?

The final issue to be discussed under this theme is the way the Nigerian state distributes its resources among the various sectors of the economy. The rural area, where an estimated sixty percent of the population resides is disadvantaged in the

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<sup>69</sup>Jedrzej George Frynas, The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies, *International Affairs (Royal Institute of International Affairs 1944-)*, Vol. 81, No. 3, Critical Perspectives on Corporate Social Responsibility (May, 2005), pp. 581-598; Ite, Uwem E., Corporate Social Responsibility in Developing Countries, *Corporate Social - Responsibility and Environmental Management* (Mar 2004): 1-11.

allocation of resources.<sup>70</sup> There is inequality and disparity in the availability of resources in the urban and rural area. Poverty is a profound limitation to so-called autonomy, freewill and choice, which liberals posit as the fundamental attribute of individuals as citizens.

Gearey's articulation of the liberal tradition's link to social justice believes that citizenship should be the only qualification for enjoyment of rights to welfare. He posits that recognition of citizens' right to membership of a political community which entitles the citizens to capability can be rationalized in the Rawls' argument and the difference principle. The rationale is found in the ability to show how 'unjustifiable inequalities' can be attacked. Effectively, the liberal tradition recognizes that autonomy and choice are capable of being hampered by 'unjustifiable inequalities'. His answer from this perspective is that the distribution of resources that have created the gap between the 'rich' and the 'poor' can be analysed within the context of looking for how social freedom can be used to achieve well-being. In achieving well-being, there is need for the state to play a paramount role; in doing this, it is incumbent on the state to enhance the citizens' capability. The enhancement of capability, according to Gearey can lead to citizens becoming more 'autonomous, self-directing individual goes beyond narrow understandings of freedom from coercion'.<sup>71</sup> The cost of governance is overwhelming and analysts are of the view that Nigerian legislators and Executive are the most rewarded in the world, to the

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<sup>70</sup> The citizens in rural areas have to resort to self-help projects, See G. R. Akinola, Coping with Infrastructural Deprivation Through Collective Action Among Rural People in Nigeria, *Nordic Journal of African Studies*, 16(1) 30-46(2007). The estimate is by National Population Commission of Nigeria, [www.population.gov.ng](http://www.population.gov.ng).

<sup>71</sup> Justice As Welfare, p.76

detriment of the citizens.<sup>72</sup> There is a perceived sense of inequality because of the amount of money and benefits given to the legislators and other ruling class. Anybody concerned about social justice must be concerned about such disparity in income. It is often being justified on the myth of merit. The concept of meritocracy and equality of opportunity must be analysed to put it in perspective in relation to the search for social justice. It is part of how social resources are distributed.

### **MERITOCRACY AND EQUALITY OF OPPORTUNITY**

We refer to our discussion in relation to distributive paradigm as a mechanism to achieve social justice. The thrust of our argument here centres on the need for equality of opportunities as *condition precedent* before one can envisage or indeed apply merit in allocation of public position and opportunities. All public policies and decision making processes often tend to ascribe some measures of merit in favour of some individuals to justify why they should be treated better than others who do not enjoy such appellation of ‘merit’. Is this practice, a reality? It is pertinent to note that the idea of ascribing ‘merits’ to the distribution of resources like employment or public position is questionable. This is both from philosophical and policy discussions perspective about social justice. An example is Giddens’ rejection of meritocracy as a way of conceiving equality and social justice, through Third Way and post-Third Way thinking. “Giddens’ understanding of meritocracy sees the term as entirely synonymous with dis-proportionate distributions of resources and downward mobility”.<sup>73</sup> One way to analyse this idea of merit, is to explore the way, it reinforces historical disadvantage, which lack of equal opportunity engenders. In this context, if

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<sup>72</sup> Agu, Osmond Chigizie, Democracy and Cost of Governance in Nigeria, Journal of Culture, Society and Development (Vol. 2) 2013

<sup>73</sup> (Giddens, 1999, pp. 101-102) Cited in Gearey, Welfare as Justice, p. 211.

we assume that education is a resource and its potential impact of its distribution will determine peoples' future, individuals from poor background are very likely to attend not highly rated schools and universities.

On their emergence in the job market, they would face stiff competition from children of middle class parents, which had all the support, their background and leverage of their parents can provide for them. In such circumstances, the applicants from such disadvantaged background will lose out in the pursuit of employment and other public positions. To ameliorate this anomaly, Gearey posits that, the issue of education, if perceived as a resource, can be used to redress past injustice caused as a result of lack of equalized distribution in the past. To ensure egalitarian society, the narrative should transcend beyond the dichotomy of improving the condition of the 'badly off' and the 'less well off'. It should target how the resources available to individuals could be harnessed and well distributed, as this affects their life chances. Gearey believes that "meritocracy is also too individualistic, and obscures the extent to which resources and life chances tend to be distributed over generations".<sup>74</sup>

The so -called idea of merit is flawed and one can argue that it is potentially arbitrarily adopted by decision makers, which favour some individuals which their bias and prejudice artificially adjudged. This assertion is predicated on the assumption that value neutral merit evaluation is difficult or virtually impossible to measure. Iris Young is particularly concerned about the injustice caused by the use of merit in allocation of resources by organizations and social institutions. For her, the need to reverse this trend will go a long way to achieve justice and remove domination and cultural imperialism from our society. To ensure social democracy in work place, she

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<sup>74</sup>Gearey, Welfare as Justice, p.82.

believes that there is need to facilitate how workers would have more input to the assessment of the criteria for their recruitment and promotion. She identifies the disparity between the pay of professional and non-professional and argues that, it is unjustified as one cannot really identify the explicit contribution worthy of exceedingly rewarding the professional cadre.<sup>75</sup>

Young believes that this disparity in income is based on the task defining and task execution dichotomy. Some individuals continued in dead end job because the task defining preserve of the professional and management cadre makes their fortune less favourable and social mobility becomes an illusion for them. The difficulty with Young's analysis is that she is overlooking the energy and expenditure involved in becoming a professional and the need to reward that diligence and industry. Professionalism entails three facets; a course of professionals training and certification by examination; rigorous rules to adhere in the performance of the professional duties and lastly a system of sanctions for failure to adhere to such standards set for the industry and expected from a reasonable and competent professional acting in such capacity. Non- professional do not undergo these rigorous process of accreditation, supervision and sanction for failure to comply with professional regulations.

The idea of merit would become relevant in dealing with such distribution of resources like employment in this regard. For us, the pertinent question should be, to what extent can private arrangement or public utilities be allowed to excessively reward management staff, especially when such reward are not performance related.<sup>76</sup>

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<sup>75</sup> Iris Young, *Justice and the Politics of Difference*, pp.200-214, Princeton: Princeton University Press,1990)

<sup>76</sup> Adam Gearey has also considered this issue of disparity of income and its impact on the opportunities and life chances that can avail people with middle class background, *Welfare as Justice*, pp.211, "It would be hard to assert, that income levels have no influence on life chances open to people. These arguments point at a

The practice of unmerited reward; especially' in public utilities companies perpetuates injustice and inequalities. This practice cannot just be allowed to continue on the simple argument of demand and supply, market forces and non- interference by the state. The argument also overlooks the interest of investors in such companies facing dwindling return of investment due to bad investment and management policies of such executives. The self-serving response is that such people would migrate to other countries where their pay demand can be met. This is an argument that throws meritocracy into chaos! This was part of an inordinate bonus culture that prevailed and caused the 2008 economic crash that emerged from the subprime mortgage crisis. This snowballed into universal economic crises.<sup>77</sup>

Townsend, who considers the issue of poverty in developing world, argues that the issue of poverty is not a matter to be extricated from political ideology; rather, it must be subjected to a wider scientific perspective in order to capture wider social needs of the citizens, rather than a narrow concern for physical and nutritional needs of human beings.<sup>78</sup> The disparity in the level of poverty in the first world and third world is worrisome, and there is need to have 'national poverty eradication plans' to address the structural causes of poverty, encompassing action on the local, national, sub regional, and international levels.

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'redistribution of opportunities' that goes beyond mere 'tax and benefit redistribution' (Millband, 2005, p.47). Connecting these arguments back to our concern with income inequality suggests that it is necessary to work in two fronts; to improve the conditions of the disadvantaged it would be necessary to raise their levels of income as well as the opportunities open to them.

<sup>77</sup> Brian Barry discussed the disparity in the wages structure between workers and Management staff and its impact on social justice, 'Why Social Justice Matters', Chapter 8; John V. Duca, Subprime Mortgage Crisis: How and Why the Crisis Occurred, Federal Reserve Bank of Dallas, <http://www.federalreservehistory.org/Events/DetailView/55>

<sup>78</sup> The Peter Townsend Reader, ed. Alan Walker, p.325, Bristol: Policy Press.

These plans should establish, within each national context, strategies and affordable, time-bound, goals and targets for the substantial reduction of overall poverty and the eradication of absolute poverty'.<sup>79</sup> About 70 per cent of Nigeria's population lives on less one dollar a day. This qualifies them for being in the absolute poverty categorisation. The absolute poverty is defined as "a condition characterised by severe deprivation of basic needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services".<sup>80</sup> The inability of the Nigeria state to meet these least standards is the source of social injustice in Nigeria; hence, the need to articulate a theory of justice that would provide for social justice and good governance. There is need for safety nets to cater for the consequences of poverty and eroding impact of overall poverty in Nigeria.<sup>81</sup>

After discussing the theory for social justice as part of the renewal of the Nigeria state, towards achieving a better and egalitarian society, we will now move on to consider what good governance is. The underlining assumption here is that good governance should strive to achieve social justice.

In the next chapter, we consider the criteria for measuring of good governance and contextualize it with in the governance framework in Nigeria.

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<sup>79</sup>UN, 1995, pp.60-61.

<sup>80</sup> UN, 1995, p.57.

<sup>81</sup> Overall poverty takes various forms, including "lack of income and productive resources to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments and social discrimination and exclusion. It is also characterised by lack of participation in decision-making and in civil, social and cultural life. It occurs in all countries: as mass poverty in many developing countries, pocket of poverty amid wealth in developed countries, loss of livelihoods as a result of economic recession, sudden poverty as a result of disaster or conflict, the poverty of low –wage workers, and the utter destitution of people who fall outside family support systems, social institutions and safety nets" (UN, 1995, page57). Cited in The Peter Townsend Reader, p.327.



## **CHAPTER TWO - GOOD GOVERNANCE**

### **2.0 Introduction**

This chapter deals with the importance of good governance and undertake a critique of the World Bank and other United Nations Bodies criteria of assessing good governance. This critique is based on the notion that the issue of social justice is not central to the criteria of assessing good governance in World Bank perspective. We are focussing on World Bank because of its leading role in articulation and formulation of economic policies, which developing countries are encouraged to adopt in benchmarking their national policies.<sup>82</sup> The other reason is the leading role of World Bank in prescribing conditions and criteria of eligibility for financial assistance to developing countries. We shall also examine the analyses Nigerian scholars on good governance and explore, if there is any discourse on social justice in their analyses about good governance. Finally, in the chapter, we consider the possibility of good governance anchored on our notion of cultural jurisprudence as adumbrated in the introductory part of this thesis.

A critique of the World Bank approach becomes relevant in the discussion about a desirable governance structure for Nigeria that is capable of achieving social justice and providing enabling environment for the attainment of just and equitable society.

### **Good Governance**

There is a myriad of definitions by many United Nations bodies and International Non-governmental organizations on good governance. This may have prompted

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<sup>82</sup> Nudging or Fudging: The World Development Report 2015.

Olowu<sup>83</sup> to posit that there are two popular groups of definitions of governance.<sup>84</sup> The first group which aligns with the views of the World Bank and many other United Nations institutions sees governance in terms of “leadership - the manner in which (state) political leaders manage, use (or misuse) power - whether to promote social and economic development or to pursue agendas that undermine such goals.” The other group of definitions sees governance as more of “sharing of authority for public management between state and non-state organizations ... (and so governance is seen) as forms of multi-organizational action rather than involving only state institutions.”<sup>85</sup> There is no generally acceptable definition of governance. While what constitutes governance remains contestable, there is sufficient literature on what is poor governance and its impact on public sector management in general. Poor governance, according to African Development Bank<sup>86</sup>, manifests itself through the following: failure to make a clear separation between public and private resources; this is depicted by abuse of public offices and positions for private gains; failure to establish a predictable framework of law and government behaviour conducive to development- this is characterised by lack of coherence and certainty in planning and articulation of government policies, leading to unpredictability and impunity by government functionaries; excessive rules and regulations, which impede the functioning of markets and encourage rent-seeking; priorities inconsistent with development,

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<sup>83</sup> Cited in I.S. Oguniye, *Democracy and Good Governance: Nigeria's Dilemma* (African Journal of Political Science and International Relations) 4(6), 201-208.

<sup>84</sup> Cited in Oguniye, *ibid*

<sup>85</sup> Governance for Sustainable Human Development, UNDP (United Nations Development Programme) Governance Policy Paper, 1997, <http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>

<sup>86</sup> Cited in Olubanji Fajonyomi and F. Olu-Owolabi, Good Governance and Local Government for Development: Multiple Perspectives, *Journal of Capital Development in Behavioural Sciences* Vol. 1 (April, 2013) Faculty of Education, Lead City University, Ibadan, Nigeria - ISSN: 21543981, pages 1-16

resulting in a misallocation of resources and narrowly based or non-transparent decision-making- when decision making is shrouded in secrecy, it leads to speculation of bias, nepotism and corruption. To overcome these anomalies, there is need to ensure a sustainable governance structures that will eliminate the anomalies and create an enabling environment for sustainable governance and development.

The United Nations Economic and Social Commission for Africa and the Pacific (UNESCAP) define governance as “the process of decision-making and the process by which decisions are implemented (or not implemented)”. Governance according to the United Nation Development Programme is “...the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interest, exercise their legal rights, meet their obligations and mediate their differences.”<sup>87</sup>

The World Bank (1989)<sup>88</sup> while defining governance as “the exercise of political power to manage a nation’s affairs” identifies three distinct aspects of governance to include: the form of political regime; the process by which authority is exercised for managing a country’s economic and social resources for development; and the capacity of governance to design, formulate and implement policies and discharge functions.

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<sup>87</sup> Governance for Sustainable Human Development, UNDP (United Nations Development Programme) Governance Policy Paper, 1997, <http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>

<sup>88</sup> <http://www.worldbank.org>

In this regard, the World Bank views governance as, “the manner in which power is exercised in the management of a country’s economic and social resources for development.”<sup>89</sup>

The United Nations Development Programme (UNDP 1999) sees government and governance as being synonymous. Accordingly, it defines governance as a complex mechanism, process, relationships and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.

Thus, governance includes institutional and structural arrangements, decision making processes, policy formulation and implementation capacity, development of personnel, information flows and the nature and style of leadership within a political system.<sup>90</sup>

Administrative governance, to the World Bank, is a system of policy implementation carried out through an efficient, independent, accountable and open public sector. These elements constitute the governance system, that is, the formal institutional and organizational structure of authoritative decision-making in the modern state.

By governance, therefore, we mean the manner in which power is exercised by governments in the management and distribution of a country’s social and economic resources. The nature and manner of this distribution makes governance a bad or a good one. Thus, when resources are distributed to promote inequality or to achieve personal or group ambitions, the essence of governance which coincides with the essence of politics and essence of the state is defeated. Therefore, resources must be

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<sup>89</sup> Ibid

<sup>90</sup>World Bank Institute, 2003.

distributed responsibly, equitably and fairly for the realization of the essence of the state.

The African Development Bank<sup>91</sup> views good governance as one that embodies and promotes effective states, mobilized civil societies and productive private sectors. The United Nations Development Programme sees good governance as a commitment and the capability to effectively address the allocation and management of resources to respond to collective problems.<sup>92</sup>

According to Organisation for Economic Co-operation and Development (OECD),<sup>93</sup> good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law.<sup>94</sup> It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making (OECD, 2001). Within this purview, Nigeria's Vision 2010 document defines good governance thus Good governance means accountability in all its ramifications. It also means the rule of law and an unfettered judiciary; that is freedom of expression and choice in political association. Good governance means transparency, equity and honesty in public office. In the Nigerian context, good governance calls for constitutional rule and a true federal system. These are the basic pedestals on which any vision of development rests on.

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<sup>91</sup> Cited in F.U.Okafor "*Game without Rules: confronting the problem of lawless rulers in Africa* in J. Obi Oguejiofor(ed.) *Philosophy, Democracy, and Responsible Governance in Africa*, (Delta Publications, pp.579-585(2003).

<sup>92</sup> UNDP 1998: *Integrating Human Rights with Sustainable Human Development Policy Document*.

<sup>93</sup> UNESCO Report, 2005.

<sup>94</sup> Cited in I. S. Ogunidiya, *Democracy and Good Governance: Nigeria's Dilemma* (African Journal of Political Science and International Relations) 4(6), 201-208.

According to the World Bank (1992), bad governance has many features, among which are:

- Failure to make a clear separation between what is public and what is private, hence a tendency to divert public resources for private gain
- Failure to establish a predictable framework for law and government behaviour in a manner that is conducive to development, or arbitrariness in the application of rules and laws
- Excessive rules, regulations, licensing requirements, etc., which impede the functioning of markets and encourage rent-seeking.
- Priorities that are inconsistent with development, thus, resulting in a misallocation of resources and excessively narrow base for, or non-transparent, decision-making.

According to UNDP (1997)<sup>95</sup>, good governance is “... participatory, transparent and accountable, effective and equitable, and it promotes the rule of law. It ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.”<sup>96</sup>

It is obvious, that in all these definitions so far, none alludes to the need to consider social justice or making the achievement of social justice as a parameter for the assessment of good governance. The definition focuses on accountability, transparency and adherence to the rule of law. The United Nations’ international

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<sup>95</sup>Governance for Sustainable Human Development, UNDP (United Nations Development Programme) Governance Policy Paper, 1997, <http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>

<sup>96</sup>Ibid

bodies charged with the responsibility of measuring and evaluating good governance is not conversant or indifferent with the need for assessment based on the need to ensure social justice. There are various reasons for this stance, ranging from the fact that the issue of social justice cannot be pursued by a United Nations organization, except such UN organization has an express mandate to do so. The other reason is that there is an existing International covenant of Socio-economic rights. It is pertinent to confirm that International Labour Organization made a Social Justice Declaration on 10 June 2008.<sup>97</sup>

Next, we consider what features can be ascribed to governance to serve our purpose as part of this idea of collaboration of ‘interzone’.

## **2.0 GOOD GOVERNANCE: CONCEPTUAL AND THEORETICAL DISCOURSE**

The question dealing with governance, though significantly related to democracy, is culture specific and system bound. It depends to a large extent on the historical experiences of a nation, its cultural mores, aspiration of the people and the stated political and economic objectives of the state, including individual and group preferences, current issues, the expectations of the governed, the nature and type of the political system, the ideological and religious predisposition of the state and a host of others. For instance, the Fundamental Objective Principle entrenched in the Nigerian constitution provides the yardstick for measuring good governance. Section 14(1)<sup>98</sup> states that, “the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice”. This is further strengthened in Section 16

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<sup>97</sup> See ILO Report- World Social Report - Building Economic Recovery, Inclusive Development and Social Justice, 2014/2015.

<sup>98</sup> The Constitution of the Federal Republic of Nigeria 1999

(1) and (2) of the said provision. Section 16 (1) (a), (b), (c) and (d) respectively, provides that, “The state shall, within the context of the ideals and objectives for which provisions are made in this constitution - harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy; Control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy; Without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy”.<sup>99</sup>

Section 16(2) states that, “the state shall direct its policy towards the promotion of a planned and balanced economic development; That the material resources of the nation are harnessed and distributed as best as possible to serve the common good; That the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and 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”.<sup>100</sup> Citizens will undertake to support the government to the extent that the government undertakes to take care of certain needs and rights of the citizens and

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<sup>99</sup>Section 16(1) A- D, of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>100</sup> Section 16(2) Federal Republic of Nigeria Constitution.



failure to provide these needs will lead to the system to be termed a failure of governance.<sup>101</sup> These are laudable ideals, which if executed would go a long way to achieve good governance for Nigeria. The major hurdle is that the citizens do not have enforceable rights to these ideals, as propounded by the drafter of Nigeria 1999 constitution. To overcome this anomaly, we must be able to commit the Nigerian government to a system of norms which would make the realisation of these aspirations achievable.

Fundamentally therefore, to describe governance as a good one and to determine whether it is a bad one requires the understanding of the essence of the state. This is not only embedded in the constitution but also a function of the ethical and political ideals and the nature of current socio-economic and political problems confronting the state. The constitution reiterates the importance of social justice but fails to provide enforceable rights to social justice.

The question about the essence of the state formed the major preoccupation of the pursuit of common good for the benefit of the larger society. The essence of the state within the context of this discourse is to promote the common good as acknowledged in section 16(2) (b) of the Nigerian constitution. Thus, public authorities should ensure that the pursuit of common good of the state as their prime responsibilities. The common good stands in opposition to the good of rulers or of a ruling group. It implies that every individual, no matter how high or low placed in the society, has a duty to share in promoting the welfare of the community as well as a right to benefit

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<sup>101</sup>Theophilus Okere: Crisis of Governance in Africa, in J. Obi Ogbuefor “Philosophy, Democracy and Responsible Governance in Africa”

from that welfare.<sup>102</sup> Common implies that the “good” is all inclusive. In essence, the common good cannot exclude or exempt any section of the population. If any section of the population is in fact excluded from participating in the life of the community, even at a minimal level, then that is a contradiction to the concept of the common good.

Hirst and Thompson (1996) define governance as “the control of an activity by some means such that a range of desired outcomes is attained”.<sup>103</sup> Thus, governance in a political sense is a more complex activity. Secondly, political governance is service oriented. Governance is better conceived from Harold Lasswell, political scientist’s traditional definition of politics as who gets what, when and how and perhaps how much.<sup>104</sup> Thus, governance has a lot to do with the articulation of values and allocation of resources in the society, which to a large extent is political in nature.

Although governance is related to politics, it is conceptually different. However, as a human phenomenon, governance is exercised within a given socio-cultural context and belongs to a broader department of politics. While politics is the authoritative allocation of values or who gets what, when and how, governance is the process and mechanisms of allocating the values without jeopardizing the principle of equity, justice and fairness. Therefore, it is through the practical application of the authority and the processes of governance that the powers of the state acquire meaning and substance.

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<sup>102</sup> Jacob Mabe, *The Problem of Governance in Africa*- in Philosophy, Democracy and Responsible Governance in Africa, J. Obi Oguejifor (ed.) Munster: LIT VERLAG, 2003.

<sup>103</sup> Cited in Olubanji S. Fajonyomi, *Good Governance and Local Government Administration for Development*

<sup>104</sup> Harold D. Lasswell, ‘Politics: Who Gets What, When, How’, 1936.

The state does not exercise authority over the citizens in vacuum. The exercising of state authority is a reciprocal relationship between the citizens and the state. The citizens surrender their liberties and accord obedience to law and dictate of the state on the mutual belief and understanding that the state in exercise of its authority will afford the citizens their dues and protect their fundamental human rights. The idea of protection of human rights now transcends its basic tenets and it involves rights to socio-economic rights. The politics of deciding the allocation of state resources among the citizens is a contemporary determinant of good governance. This politics entails the obligation to be fair and ensure equitable distribution.

According to Obadan, when some of these features of bad governance that we have referred to above, occur together they create an environment that is hostile to development.<sup>105</sup> In such circumstances, he further argues that the authority of governments over their peoples tends to be progressively eroded. In essence, bad governance is the absence of good governance and may not necessarily mean the absence of democracy. It is evident in the inability of a state to achieve or realize the essence of the state at a particular time.

In sum, good governance is about the performance capacity of a government or as it relates to leadership capability. Failure of governance, therefore, could expressly mean failure of leadership. Indeed, the best governors are those who met their society in a condition of social and political nadir and are able to save the society or lift it up from doldrums to the position of fame and prosperity.

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<sup>105</sup>Obadan, *Journal of Capital Development in Behavioural Sciences* Vol. 1 (April,2013) Faculty of Education, Lead City University, Ibadan, Nigeria - ISSN: 21543981

Governance is good provided it is able to achieve the desired end of the state defined in terms of justice, equity, protection of life and property, enhanced participation, preservation of the rule of law and improved living standard of the populace.<sup>106</sup>

## **2.1 THE CORE CHARACTERISTICS OF GOOD GOVERNANCE**

In this section, we consider the core characteristics of good governance and ascertain the impediment making its realisation difficult. The need for the citizens to participate in governance either through elected representatives or through direct action like referendum and involvement in articulation of government policies is an essential element of good governance. A feature of democratic governance is participatory involvement of the citizens in the government. Citizens should have a voice in decision making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.

A paramount feature of good governance is the adherence to the rule of law. The existence of robust Legal Frameworks makes the governance sustainable, because citizens will be able to plan and conduct themselves within the remits of the law. The rule of governance must be enforced fairly and impartially, particularly the laws on human rights.

It is also paramount to have transparency, which is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.

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<sup>106</sup>Moyosore Saka, A Critique of World Bank Assessment of Good Governance, (Unpublished Paper, February, 2015, copy on file)

Another feature of good governance is Responsiveness - Institutions and processes must be geared towards responding to all the concerns and legitimate expectations of the citizens and endeavour to meet the citizens aspirations and accountable to the citizens.

Good governance must engender consensus orientation among the different individuals and interest groups in the country. This is more pertinent in developing democratic country like Nigeria, where there is diversities because of the heterogeneous nature of the population. Good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.

Good governance must also strive to achieve equitable distribution of the state resources to the citizens. This role is essential in achieving the empowerment of the citizens by providing for their welfare. All men and women have opportunities to improve or maintain their wellbeing.

Effectiveness and efficiency must drive the governance processes and public institutions must produce results that meet needs while making the best use of resources.

Decision-makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organization and whether the decision is internal or external to an organization.

Strategic vision - Leaders and the public have a broad and long- term perspective on good governance and human development, along with a sense of what is needed for

such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.

Good governance, therefore, promotes gender equality, sustains the environment, enables citizens to exercise personal freedom, and provides tools to reduce poverty, deprivation, fear, and violence.

The rate of unemployment, diversion of resources by public officials, escalating rate of corruption, abuse of power by public officials, looting of public finances, kidnapping, increased rate of cybercrimes and other types of crime, show that good governance is still a mirage as far as the conditions needed for its attainment in Nigeria.

According to scholars of the social justice school of thought<sup>107</sup>, (as opposed to the World Bank's Policy on good governance) a holistic perspective of the problem of social conflicts in Nigeria resolves that the situation which depicts a lack of social justice and poor resource management in the Nigerian State, has been the effects of long years of corrupt civilian rule and military dictatorship. The ineffectiveness of state institutions or agencies of government in the fulfilment of their constitutional role within the social system also contribute to it.

According to Nwagbara (2003), (whose perspective of good governance is slightly different from the World Bank's policy on good governance) good governance

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<sup>107</sup> Philip Ujomu, *Social Conflicts, Resource Distribution and Social Justice in Nigeria*, (Journal of Asian and African Studies, No. 63, 2002).

encompasses general values and basic freedoms that include the absence of human right abuse.<sup>108</sup>

Godfrey O. Ozumba<sup>109</sup>, a scholar in the humanist school of thought, posits that the major factors that hinder good governance include;

- Lack of National Consciousness; here he states that all successful nations possess a patriotic national consciousness that gave them identity to work with one mind towards the achievement of their greatness, Nigeria is hopelessly divided and lacking in National consciousness and identity.
- Tribalism; he opines that citizens and succeeding leaders have never displayed a hundred per cent nationalistic and patriotic spirit from Ahmadu Bello, Nnamdi Azikwe, Obafemi Awolowo, down to Goodluck Jonathan. There is deficit of selfless leaders in Nigeria.
- Rulership as birth right; as long as one section of the country sees ruler-ship as her birth right, there will never be peace and good governance.
- Precept rather than example; here, he states that Nigerians are docile, and in need of exemplary leaders and not leaders who will live by empty sloganeering.

A.O Echekwube<sup>110</sup> states that “he who plans does not really fail but he who refuses to plan has already accepted failure”. The thrust of his analysis on good governance is

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<sup>108</sup> Cited in Philip Ujomo, ‘*Social Conflicts, Resource Distribution and social Justice in Nigeria*’, (Journal of Asian and African Studies, No. 63, 2002)

<sup>109</sup> G.O. Ozumba, National Consciousness, Value Orientation and Identity: An Integrative Humanism Approach,(2014) Journal of Integrative Humanism,pp.147-155(Ghana)

focussed on the need for planning and a coordinated approach by a dedicated leadership. He states that governance has to do with directing and controlling one's citizens in a way as to achieve the common goals of a state. It is perceived that the challenge of governance and development does not lie in the magnitude of the growth of income and material wealth; rather the critical issue is the equitable distribution of resources in such a manner as to reduce both social and spatial inequalities and promote the general welfare of the population.

Godfrey Ozumba's analysis basically emphasizes the fact that good governance in Nigeria and Africa as a whole does not depend solely on the political leaders. He states that there is need to be a value re-orientation and a sense of oneness by every citizen to the national identity, as this will aid good governance.

We have done a literature review of scholars on good governance to ascertain their position of the issue. What seems to be missing in all their analyses is the oversight on the need for social justice to be part of the criteria for assessment of good governance. This gap is a major flaw in the International bodies' perception and Nigerian scholars theorizing on good governance and how to achieve it in Nigeria.

The next section explores the possibility of good governance based on social justice in a democratic governance setting.

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<sup>110</sup>Cited in J. Obi Oguejiofor- A Philosophy for Effective Governance in Africa: *Philosophy, Democracy, and Responsible Governance in Africa*- in *Philosophy, Democracy and Responsible Governance in Africa*. Ed. J. Obi Oguejiofor, Munster: LIT VERLAG.



## 2.2 GOOD GOVERNANCE AND THE FEASIBILITY OF DEMOCRATIC GOVERNMENT IN NIGERIA

There is abundant literature on the feasibility of democracy in western developed nations and the need for Africa to democratize.<sup>111</sup> However, there is dearth of literature on how to transform governance structures in Africa in attaining the ideals of democratic governance.<sup>112</sup> This major gap is exacerbated by lack of a discourse focussing on the failure of democracy in Africa and in Nigeria in particular because of insensitivity to the need to consider the peculiar socio-economic conditions in Africa. In this regard, three questions are paramount: Is liberal democracy a condition precedent for good governance in Nigeria? Is the cultural diversity and management of ethnicities in Nigeria a challenge to survival of Democracy in Nigeria? And finally, are there indigenous cultural values and narrative that are common to the many ethnic groups in Nigeria that can be harmonised as the basis of common law for good governance? This third question will be discussed in chapter three.

In dealing with the first question, one needs to consider the attributes of democracy.

The first major attribute of democracy is the prevalence of majority rule tyranny, the elected representatives rules based on the party manifesto of the ruling party. It is referred to as the tyranny of the majority because the views of the minorities that did not elect the ruling party become less important in the formulation and execution of the ruling party policies and programmes. This allows a 'winners takes all and losers with nothing' attitude. The issue of majority rule is founded on the notion, that the

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<sup>111</sup> Claude Ake- Feasibility of Democracy in Africa and Ben Nwabueze (Constitutional Democracy in Africa, Volume1 - 4, Ibadan- Spectrum Books 2004) are leading authorities in this regard.

<sup>112</sup> The vast of the literature examines the role and link between democracy and development. E.g. Claude Ake- Democracy and Development in Africa, Brookings Institution Press 1996.

party and candidates with overall majority are elected into office of governance and assume the power of the state. This is a doctrine that is incompatible with communalism of Nigerian society, where all the citizens rely on social networks and civil associations, in which they live communal lives.<sup>113</sup>

The minority whose votes did not translate to political mandate are left on the periphery of the political landscape. This is a major hurdle for democracy. Competition for electoral votes should be transformed to governance for all including those citizens that did not vote for the emerged winners. The need for consent is to give legitimacy to the government; it is not to ostracise opponents who did not support the emerged winners. The political elites and office holders are not matured enough to see beyond dichotomy of consent and competition. The need to clinch to power and punish opponents is still an anomaly of contemporary democratic practice in Nigeria. The problems associated with this anomaly are that of the political elites' authoritarian attitude and impunity. The elites do not see themselves as custodian of the political mandate from the citizens, for which they must be accountable to the citizens. Democratic governance is the only governance that can provide mechanism for checking the authoritarian attitudes of the political elites and make them accountable to the citizens through periodic free and credible elections. In order to influence the outcome of elections, the elites perpetrate electoral fraud and violence during elections to intimidate opponents who are likely to vote against them for their failure to exercise the political mandate given to them judiciously for the benefits of the citizens.<sup>114</sup>

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<sup>113</sup> See John Ayodele, *Community Empowerment: The Missing Link in Developing Sustainable Democracy in Nigeria*, (2012) Rainy season, pages 84-101.

<sup>114</sup> Arthur Davies, *Money Politics in the Nigerian Electoral Process*, UNILAG Journal of Politics, 2012 Rainy season, pages 65-83.

The notion of universal suffrage which is a vital element of democracy becomes compromised as a result of disenfranchisement orchestrated by the elites. Majority of Nigerians live in the rural areas and are illiterates, the significance of universal suffrage becomes elusive as they are unable to comprehend and articulate the need for exercising their civic responsibility of electing credible leaders.<sup>115</sup> Poverty is so endemic to the citizens that they are unable to rise above inducement that will compel them to vote for undeserving candidates during elections. To articulate and get public input into party policy and programmes, there is need for enlightened citizens that can be sensitised and mobilised to participate in the policy formulation and execution for the ultimate benefit of the citizens.

Four decades of military dictatorship had left a catalogue of human rights abuses against the citizens. A democratic dispensation is the only regime that can guarantee the protection of the citizens' human rights. This is a positive attribute of democratic governance. Some commentators are particularly concerned about the unsuitability of democratic governance because of its inability to reconcile the interest of minorities with that of the overwhelming majority. In the context of cultural jurisprudence, the ability to treat all and sundry under the local hegemonies of the traditional authorities is a commendable attribute which seek maximum allegiance from the citizens. This welfare centric governance system did not accommodate the need for robust human rights protection regime. There is need to accommodate the concern about human rights in relation to indigenous governance because of bias and discrimination against women and other minorities in the society. Some of the criticisms levelled against pre-colonial indigenous governance are the peculiar abuse of human rights. However, one

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<sup>115</sup> *ibid*

can canvass the view that abuses of human rights were unfortunate incidents which are a result of assertion of traditional authority, which ultimately benefits the society at large. This is not justifying human right abuses. This view is reiterated by Skar (1995:27) when he said African Polities have dual (Constitutional and traditional) dimension of authority; importantly he added; in the main, existing incorporation of traditional authority's amount to oligarchic encroachment on democracy: they do tend to enhance the stability and legitimacy of policies that rest on insecure democratic foundations.<sup>116</sup>

To understand, why liberal democracy is being clamoured for Nigeria as a panacea for good governance, it is imperative to articulate the factors responsible for this trend in the context of 21st century realities. The discredited erstwhile military dictators in Nigeria now seek legitimacy by seeking political offices and supporting democratization drive. Democracy is more of a strategy rather than a commitment to seek empowerment from the citizens. It is desperate attempt to seek patronage and continuing relevance in the political landscape of Nigeria.

Decades of military dictatorship have led to human rights abuses and marginalization; hence communal and ethnic militant groups have emerged and now seek democratization to actualise the dreams of their members and empowerment.<sup>117</sup> This is about the most important reason, why democracy should be sought and made a grass root project, in order to disempower the activists from hijacking it as propaganda for selfish and parochial interest of the elites.

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<sup>116</sup> Cited in James Wunsch- Refounding the African State and Local Self- Governance: The Neglected Foundation, *Journal of Modern African studies*, Vol.38.No.3 (September 2000) pp.487-509.

<sup>117</sup> See I.S. Ogundiya,(2010) *Democracy and Good Governance : Nigeria's Dilemma*. *African Journal of Political Science and International Relations*, Vol.4 (6), pp.201-208, June 2010.

The brunt of poverty, high unemployment and lack of infrastructures in Nigeria has led to disenchantment and apathy on the part of the citizens and seeking democratization becomes an urgent remedy that might elevate their political rights to economic empowerment. This yearning can only be transformed, when a governance structure that is people-centric and relies on their involvement for legitimacy is adopted.

International Human Rights Non- Governmental Organisations and International Financial Institutions especially the International Monetary Fund and World Bank are at the forefront of campaign for democratization in Nigeria. Their yearning is founded on the imperatives of democracy as governance structure that is ideally suited to protect human rights and foster economic development in Nigeria. Closely related to this, is the support by western developed countries for democratization in Nigeria. However, this is tainted as it purports to advance the western model as the universalizing model that should be accepted. This is not a realistic strategy, as the Nigerian peculiar local circumstances cannot make this feasible.

The overbearing attitudes of the political elites, dysfunctional electoral system and level of illiteracy among Nigerians are some of the undermining factors for effective democratisation in Nigeria. These issues are discussed further in subsequent sections.

The next question is whether Nigeria's cultural diversities and ethnicities pose a challenge to the survival of democracy in Nigeria. The issue of ethnicities is a recurring theme on democratization in Africa and its relevance needs to be contextualised in the course of this thesis. Nigerians are ethnically and culturally diverse peoples. There is a dichotomy in this regard between the north and south parts

of the country. The diversity of religion and socio-economic realities are contending factors. The prevalence of ethnic rivalry and internecine wars are precarious factors that undermine the effectiveness of democracy in Nigeria. To overcome this challenge, it is necessary to understand how to transform primordial loyalties of the people and articulate their nuances for national allegiance and good governance.

This is where the imperatives of federalism as a mechanism that can manage ethnicities become paramount. The other mechanism for management of ethnicities within its context are proportionality in the distribution of resources and power, protection of minority rights for cultural integrity, protection against discrimination (gender, age, tribal, sexual orientation, disabilities, religion etc.) and the sharing of political power/offices on rotational basis at the federal level through an equitable arrangement. We consider these issues under the relevant section of this thesis.

It is trite to conclude that cultural diversities and religious differences are contending impediments with the survival of democracy in Nigeria.

## CHAPTER THREE- INDIGENOUS GOVERNANCE IDEALS AS SOCIAL JUSTICE

### 3.1 FEASIBILITY OF GOOD GOVERNANCE ANCHORED ON CULTURAL JURISPRUDENCE

The next question for consideration is whether there are common cultural values and ideals among the vast majority of Nigerians to be harmonized as a common basis of ensuring good governance. In this context, the aim of good governance is synonymous with cultural jurisprudence analysis of social justice, that governance must achieve social justice for the governed. The notion of social justice can be achieved by the creation of an enabling environment among the major ethnic groups. The common norms of the major ethnic groups are communitarian notions of rights that are essential in ensuring fairness and equity between individuals in social relations attracting rights and duties. We can identify the main principles: *respect, responsibility, restraint, reciprocity and rehabilitation*.<sup>118</sup> We also argue that all the attributes are to be interpreted within the cultural milieu or practices of the major tribes in Nigeria towards the realisation of ensuring communal cohesion and welfare of all the members of the communities. The realisations of these attributes are achievable because of the acculturation of such values in the orientation of the members of the various communities among the Yoruba, Igbo and Hausa. What is very important is the need to make such congruent values compliant with human right

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<sup>118</sup>For a similar discourse based on the notion of dignity of human being and ‘humanness’, see Tim Murithi “A local response to the global human rights standards: the *ubuntu* perspective on human dignity” *Globalisation, Societies and Education*, 2007 Vol.5 PT 3 pp277-286.

norms, and the protection of minorities who might find themselves outside the auspices of such cultural values.

Social relationships are based on mutual respect, which revolves around the need to give regard to age, social status and accomplishments. The better placed should mutually respect the less privileged. There is always an informal system of reprimand where due respect is not accorded in social relationships. Responsibility signifies that every individual's status attracts a level of responsibility and the individual must always be conscious of the responsibilities, attached to their status as individuals. Whatever the status of an individual within a family network or social relations, he or she must assiduously carry out or strive to achieve the responsibilities that attach to it.<sup>119</sup>

Closely related to the enjoyment of respect or dignity attached to it, is the need to exercise restraint in order not to strain social cohesion which respect portends. The exercise of restraint is important as it ensures that those who are accorded respect do not abuse the dignity involved. Restraint does not inhibit self-interest; rather it enhances it by ensuring that people would mutually respect one another, by the exercise of restraint. Self-interest is subject to the vagaries of selfish interest.

Morality does not abhor self-interest, but rather

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<sup>119</sup>For an illustration of this in Igbo society, Ejidike succinctly states that "The sameness of Igbo names for the different categories of relatives, uterine kin and paternal kin alike mirrors the closely knit nature of the Igbo family and the dispersed nature of sibling and parental responsibilities, obligations and entitlements. In other words, the manner of address reflects the nature of inter-personal behaviour in this context. Thus, responsibility for the socialization, education and discipline of children is shared by their immediate parents, extended family and neighbours. The duty of care exercised in childhood is reversed in adulthood when children are expected, indeed obliged, to cater for their aged relatives, not just their parents. Igbo mythology is replete with stories of the importance of returning favours and assistance received and the penalties of non-performance." Quoted from 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria', *Journal of African Law*, 43:71 at 86 (1999)



*Morality imposes on a person... the subjugation of vicious tendencies, and by implication, the development of virtuous ones, in thought, speech and action*<sup>120</sup>

There is nothing morally wrong with aspiring to promote one's interest, provided it is done within the confines of ensuring that communal interest is not fractured in an attempt to actualise one's interest and ambitions. Oke has rightly asserted that in the course of promoting one's self-interest it is important to ensure that one guards against vicious tendencies that can be generated when an agent, through ignorance or confusion, mistakes selfish interest for self-interest and consequently seeks only self-gratification rather than self-actualization.<sup>121</sup>

Reciprocity signifies that individuals in their dealings and relationships should be just and fair, because of the possibility that whatever an individual does in their conduct and relationships will be reciprocated.<sup>122</sup> There is a belief that individuals are brought up to be kind and selfless. A selfless man or woman will attract the attention of and recognition by his kin. This selflessness will always be rewarded.

Rehabilitation signifies that individuals will always be given a second chance to be rehabilitated, to ensure their welfare, rather than be ostracized for an infringement of societal norms.<sup>123</sup> Any individual adjudged to have breached a societal norm is given the opportunity to remedy their breach by getting involved in community projects and rebuilding trust from other members of their community. We discuss the implications

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<sup>120</sup> Moses Oke, 'Self Interest as the Ground of Moral Obligation', Second Order (New Series): *An African Journal of Philosophy*, Vol.1 No.2 July 1988, 79 at 86.

<sup>121</sup> Moses Oke, 'Self-Interest as the Ground of Moral Obligation' Second Order (New Series): *An African Journal of Philosophy*, Vol.1 No.2 July 1988, 79 at 86.

<sup>122</sup> J.C Ekei, *Justice in Communal Justice: A foundation of Ethics in African Philosophy*, chapter two (Lagos: Realm Communications Ltd, 2001)

<sup>123</sup> See The discussion of dimensions of responsibility by Ekei, at page 115, *ibid*

of these congruent values of respect, responsibility, restraint, reciprocity and rehabilitation in the cultural milieu of the major ethnic groups in Nigeria in the next section.

### **3.2. THE NOTION OF SOCIAL JUSTICE AMONG THE YORUBA<sup>124</sup>**

In the context of our earlier analysis of cultural jurisprudence, we are inclined to explore, the operation of the monarchy system, among the Yoruba of South West Nigeria, to ascertain, if there are rudiments of social justice in the monarchical practice which can be adapted for good governance. The Ancient Oyo Empire operated a collegiate system of monarchical governance structure. This system was based on ruler-ship, with committee of chiefs that represented the various communities and people. The citizens in the ancient Oyo Empire gave absolute allegiance and loyalty to the king. The king in return ruled with a great deal of consultation through the Council of Chiefs, the *OYO Mesi*.<sup>125</sup> This takes care of the notion of accountability; no king can afford to be arbitrary and abuse his position. The paramount ruler was endowed with the power to appoint various ministers, charged with various responsibilities in accordance with their skills, experience and hereditary entitlements. The members of the Council of Chiefs were appointed on the basis of their popularity and the tacit approval from their community. The members of their community have the power of recall, where they perceived, (and there was a communal consensus) that a chief was autocratic in dealing with his community.

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<sup>124</sup> There is the possibility that, some might consider, it anachronistic. There are two responses to this, the Colonial Administrators found the system sustainable and formed the basis of Indirect Rule in Nigeria, which was pioneered by Lord Lugard. The second response is that, the collegiate monarchical system is still in practice and there is clamour to integrate the monarchical traditional institutions into democratic governance and give the traditional rulers a constitutional role in governance structure in Nigeria.

<sup>125</sup> There are seven high titled chiefs who constitute the *Oyo Mesi* Advisory Council: Bashorun, Agbakin, Samu, Alapini, Laguna, Akiniki and Ashipa.

Emissaries could be sent to the King, with the primary goal of persuading the King to assuage their grievances by either calling their representative chief to order or relieving him of his post, where the atrocities were overwhelming.

The paramount King was seen as the divine representative of the gods. The adherence to the supernatural status accorded to the King, the adulation and allegiance given to him were thought to emanate from his divine status. He is revered and deemed to be next to the gods, thus the saying: “*Alase Igbakeji Orisa*”: *The authoritative commander next to the gods*. The reverence is both dignifying and a reminder to the King that he is the representative of the gods, and must not incur their wrath by being arbitrary and oppressive to the people. This is effective, because before chiefs and King are appointed, the diviners often consult the gods, to have a divine prediction about the likelihood nature of the reign of such post holders.<sup>126</sup> At the inauguration of such chiefs and the paramount King, they participate in a ritual coronation ceremony, in which they are made to swear to oath of office, which has repercussions for them, if they misrule and become autocratic.<sup>127</sup>

The *Ogboni* Cult also serves as an effective check on the powers of the monarch as they can call the King to order where there is significant concern about his rule and ultimately sanction the King for recalcitrant attitude. In fact, the

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<sup>126</sup> See M. Akin Makinde, ‘Ifa as a Repository of Knowledge’ in Proceedings of the XVIIth World Congress of Philosophy, Montreal, 1983, and also in ODU, No 23, 1983, pp. 116-121 (Cited in African Culture and Moral Systems: A philosophical Study Second Order, Vol. 1 Number 2 July 1988); and on the issue of Good character, see Wande Abimbola, “*Iwapele: The Concept of Good Character in Ifa Literary Corpus*” in Wande Abimbola (ed.) *Yoruba Oral Literature* (Ibadan: University Press Ltd., 1975).

<sup>127</sup> See A. Emmanuel, “Chieftaincy Institution and Traditional Taboo in South-Western Nigeria: Review Article” *Current. Res. J. Soc. Sci.* (1) 6-9, available on <http://maxwellsci.com/print/crjss/69/pdf>. It was accessed on 3 October 2011.

*Ogboni* can banish a King or undermine the King so effectively that the King could open the “Ritual Calabash”, which will ultimately lead to the end of his reign by committing suicide.<sup>128</sup>

Another power the citizens have is the power of refusal to pay their dues and taxes, as a protest for any perceived misrule and arbitrariness of autocratic rulers. It is very effective and drastic, in that it attracts wrath from the chiefs and the paramount King. The chiefs and the paramount King can see it as a source of rebellion and seek to quench such moves from the communities. Most chiefs will invite representatives of the communities to dialogue to find solutions for such grievances. This signifies the importance of dialogue even in the so -called rudimentary governance system in pre-colonial era.

However, where the chiefs and King perceive such steps as being unfounded, the culpable people behind such of protest can be arrested and tried for acts of rebellion and treason. Often, such drastic steps can be averted, where the chiefs and the paramount King, perceived that the grievances are genuine and can lead to sympathies and adventurers warriors taking advantage of such inevitable political instability.

So far, we have identified the mechanisms that help guide against misrule and arbitrary regimes in ancient Oyo Empire. All these mechanisms are still in place, and its effectiveness can still be reinvigorated in the new framework that will involve the traditional rulers as part of present democratic dispensation. The *Yoruba* way of communal living is socialistic, and attains social justice goals. We have fully

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<sup>128</sup> See Idowu William, “Law, Morality and the African Cultural Heritage: The Jurisprudential Significance of the *Ogboni* Institution”, *Nordic Journal of African Studies*, Vol.14, No.2, 2005, p.61. The role of removal of Kings is now being undertaken by the Executive Governors of the state, in consultation with the State Council of Chiefs and Kings. This role was recently performed by the Executive Governor of Ondo State in South West Nigeria, who removed the paramount King of Akure, for publicly beating his wife who sustained severe injuries. The appointment and removal of chiefs and Kings are subject to judicial scrutiny to ensure due process of law.

identified this theme in our claim that socialism owes much unacknowledged inspiration to the communalism of the *Yoruba*. These inspirations are part of the nationalistic-ideological philosophy.<sup>129</sup>

We are considering four phenomena among the *Yoruba*, which determine and found the basis of the relationship between individuality and community in traditional African thought systems. These phenomena have both religious and mythic foundations, as the source of authority among the *Yoruba*, in conducting themselves in their community.

These are *Iwa*- character, *Esan*-Nemesis, *Alajobi*-common heritage, *Atunbotan*- life after death repercussion. Gbadegesin has put some of these concepts into philosophical perspective, by asserting that it is the basis of ascertaining the relationship between individuality and community in traditional African thought systems. He identifies two crucial issues, which are: values placed on individuality in relation to the community, the expectations of the community and humanist foundations of communalism, and the philosophical basis of traditional moral values.<sup>130</sup>

*Iwa* according to the *Yoruba* has both genealogical interface and individualistic inputs. The community and family shape and orientate the attitudes of the individuals, and imbibe from childhood some of the attributes that would help them grow into responsible and committed citizens.

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<sup>129</sup> See Odera Oruka's analysis of this, *Sage Philosophy* (Nairobi: African Centre for Technology Studies, 1991), and Lucius Outlaw, "African Philosophy: Deconstructive and Reconstructive Challenges," in *Sage Philosophy: Indigenous Thinker and the Modern Debate on African Philosophy*, (Leiden: E.J. Brill, 1990)

<sup>130</sup> Segun Gbadegesin, *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities* (New York: Peter Lang Publishing Inc., 1992).

These roles are both that of the children's immediate family, and that of the extended family. The orientations of the community and communalism are paramount in getting the individuals well engrained into the socialisation process. The circumstances of one's birth and heritage have a significant role in the constitutional makeup of an individual's character. However, the individuals are capable of reconstituting their character and the Yoruba do not believe that some individuals are irredeemably "evil and bad". Individuals are capable of moving away from their family background if they perceive that it has a negative impact on the formation of their character. The recipient family and the community, with whom the individuals have re-identified and realigned, would be obliged to fortify their character building and formation with the communal goals that are often aimed at communalism.

The communal nature of the traditional setting of the Yoruba has endowed the individuals with the goal of taking care of one another. The Yoruba believe that the individuals as representatives of the community must ensure that the communal objectives are reflected in the endeavours of all the individuals who are nationals or members of such communities. This belief is based on the notion that individuals' prosperity is possible because the community provided the enabling environment, by being obedient to the gods in carrying out their individual endeavours. Prosperous individuals must reciprocate by embarking on altruistic projects and benevolent attitudes.

*Esan* literally means nemesis: the Yoruba believe that whatever an individual does whilst on earth, there is an inevitable nemesis; thus all individuals must ensure their

acts and conducts are morally upright, as they will have to account for it in life after death. The Yoruba have a deep-seated belief in 'life after death' and all individuals will account for their sojourn on earth, after their exit through inevitable death. Individuals are obliged to be worthy ambassadors of *Eledumare*: the God of creation. This mythology emanates from the belief that at creation individuals are endowed with destiny, which is responsible for their activities and endeavours whilst on earth. Individuals can fulfil this destiny, provided the evil detractors have not used occultist powers to get an insight into it and affect it adversely.

Thus, an individual's conduct on earth, if positive and worthwhile, causes glory to be given to the gods. If, on the other hand, their existence seems to be unfulfilled, it is necessary to ascertain the source of their misfortune. If the gods are consulted through the diviners and such divinations reveal interference by evil detractors, the gods are lobbied to reverse the adverse effect of such interference. If, however, it is through the individual's ill-acquired self-destiny, the gods can still be appeased to rectify such destiny, so that such individuals can lead a fulfilled and worthwhile life on earth. It is in view of this that individuals, as members of the community must strive to conduct themselves in appropriate manner and ensure that nemesis is avoided; this is the philosophical genealogy of ethics governing individuals' conduct towards ensuring communalism.

The notion of *Alajobi* among the Yoruba denotes common and family lineages and heritages. If people share the same biological lineage, it is incumbent, because of the biological bond that unifies them, to expect them to be loyal to one another. This act

of loyalty must be reflected in their conduct to one another, and must not be betrayed by one another. A breach of trust and any acts of dishonesty are perceived as a betrayal of the bond and the notion of *Alajobi*. It is often said that “*Alajobi jaju ogun lo*” - common heritage fights more than charms. It signifies that if you betray your brethren, you are inviting the wrath of your ancestors and the gods. People often swear on the gods to invoke the spirits of their ancestors to remedy any perceived wrongs perpetrated by people that share a common heritage. This notion often guides the Yoruba to be passionate about ensuring that their “*Iwa*” (*character*) must be upright to ensure a humanitarian and compassionate well-being and existence. The sequence to a bad *Iwa* would attract *Esan*, based on the common heritage notion - *Alajobi*.

The next notion is that of *Atunbotan*, which signifies that people will be penalised for their atrocities whilst on earth. The punishment can be meted out whilst on earth and after death. This is the natural sequel to the notion of *Iwa*, *Esan* and *Alajobi*. In order to avoid these unpleasant punishments, which are natural consequences of the acts of individuals in a communal setting, a sense of direction and moral values of the individuals and communities that made up the Yoruba, was geared towards inculcating good behaviour. Individuals would conduct themselves towards attaining a humane and compassionate living. Social justice was attained by the mutual compliance with all these doctrines among the Yoruba. This work attempts to itemise these issues and advocate an indigenous social justice paradigm, which can proffer solutions to the problems of legitimate governance in Nigeria.



### 3.3. THE NOTION OF SOCIAL JUSTICE AMONG THE IGBO

The Igbo are the people of South Eastern Nigeria and are depicted in Chinua Achebe's *Things Fall Apart*. They are located in the present states of Abia, Anambra, Delta, Ebonyi, Enugu, Imo, and Rivers. They are predominantly Catholic Christians and traditional religionists. We are to identify the notions of good person/kinsmen-*umunna*, lineage obligations, revenge and life after death. The notion of the order of existence in Igbo cosmology is central to their way of life and their conduct on earth. The Igbo, just like the Yoruba, believe that living in the world is a special privilege and a man's existence must fulfil righteousness by ensuring that one's ancestors and generations to come are not jeopardised by the way in which the individual conducts himself. The notion of *omenala* or *omenani* is central to the Igbo cultural milieu, as the embodiment of how things are done in accordance with societal norms. Chris Uroh captures the essence of this phenomenon succinctly:

*A direct translation of Omenala will read as 'that which obtains in the land or community'. Or simply, what is in accord with 'the customs and traditions of the People'<sup>131</sup>*

*Omenala*, in other words, is a society's accepted way of doing things. It is not only the norm; it *defines* the norm. In everything one does, the Igbo expect their behaviour to conform to the *Omenala*.

And so, *Omenala* is the standard for measuring the conformity or otherwise of the individual's activities in the society. As the basis of the social rule whose

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<sup>131</sup>T.U. Nwala, *Igbo Philosophy* (Ikeja: Lantern Books, 1985), P.26. cited in Chris Uroh *Indigenous Igbo Political Philosophy and the Quest for Political Legitimacy* in O.Vaughan, *Indigenous Political Structures and Governance in Nigeria* (Ibadan: Book craft Ltd.2004) at p277

maintenance keeps the society alive, sanctions are usually brought against people when they violate the *Omenala*. The worship of the ancestors, marriage ceremonies, circumcision, and so on all come under *Omenala*”<sup>132</sup>

This explanation outlines the importance of lineage obligations among the Igbo as part of cultural norms that maintain social equilibrium and ensure that individuals act in a conscientious manner that will have social attributes. Igbo society has an amorphous political leadership with ‘limited government’; hence, the saying the *Eze* (King) reigns rather than rules. The Council and Counsel binary are very important in the articulation of opinions and policies in a typical Igbo society: the Council, as represented by the chiefs and elders (*Ndichie*), gives advice to the *Eze*. The articulation of the advice is based on the consensus from the *Umunna* (patrilineal groups), *Otu-Ebiriuke/alia* (age group) and *Oha-ne- Eze* (general assembly of the clan or parliament of the people). Membership of the different age groups cuts across all the citizens and their participation in the consensus building in the articulation of policies does not leave any individual isolated or marginalized. Matters of public concern are discussed at the assembly and attendance is compulsory. Inclusiveness as part of engaging with the pluralistic nature of society is taken care of and everybody’s sensibilities and desires are embedded in public policies. The King in Council cannot be dictatorial and authoritarian.

Disgruntled individuals have a medium to express their grievances, because it is important to have communal solidarity in the attainment of goals that will bring about social justice. The social groups and age groups have pivotal roles to play in providing

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<sup>132</sup>Chris Uroh, ‘Igbo Political Philosophy and The Quest for Political Legitimacy’ in Olufemi Vaughan (ed.) *Indigenous political Structures and Governance in Nigeria* (Ibadan: Bookcraft Ltd,2004)P.277

public amenities, and ensuring enabling environment for the articulation of the public good, which they are obliged to carry out as part of lineage obligations to the ancestors. In consensus building, disgruntled individuals are afforded an opportunity to present their dissenting views, and majority views are usually reconciled with it. Voting is not an instrument to gauge the majority views or break deadlocks: when there is a disagreement on an issue, rather than resort to hostilities, further deliberations are undertaken. Haggling and trade-offs are embarked upon until a consensus is reached. Consensus does not signify unanimity; rather, it emphasises the possibility of unanimity of opinion as a ‘by-product’ of dialogue and concessions after an informed decision making process. There are no recriminations and sanctions for having diverse views and ‘no winner, no vanquished’ in the decision-making process for the communal good. The idea of consensus, according to Wiredu, “usually presupposes an original position of diversity. Because issues do not always polarize opinion on lines of strict contradictoriness, dialogue can function, by means, for example, of smoothing the edges and produce compromises that are agreeable to all or, at least, not obnoxious to any” .<sup>133</sup>

Families have an obligation to bring up their members in the ways of the community and ensure that communal goals and attributes for their attainment are taught to the children. The *Igbo*, like the *Yoruba*, believe that there are causes for phenomena and events occurring in an individual’s life. Gods *Chukwu* and *Eledumare*, as they are respectively known in the two cultures, ordain both good and eventful occurrences. When uneventful and bad things occur in peoples’ lives, there must be a cause and

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<sup>133</sup> K. Wiredu, ‘Democracy and Consensus in Africa Traditional Politics: A Plea for a Non- Party Polity’, p.303 at p. 304, in E. Eze ed. *Post-Colonial African Philosophy: A Critical Reader* (Oxford: Blackwell Publishers, 1997).

therefore divination must be undertaken and, where necessary, sacrifices must be made to appease the gods. The role of diviners- ‘Ndibia’ and ‘*baba alawo*’, are paramount in both cultures, which to serve as diviners or metaphysical medium between the people and ancestral departed souls of relatives.

The *Ofo* is the symbol of fairness and conscientiousness among the Igbo people, in eliciting the truth between parties in the case of contentious matters. It is a sacrilege to swear untruthfully before the *Ofo*, knowing the severe and dire consequences of such an endeavour. The *Ofo* ensures justice, by being adopted in the informal reconciliation and conflict resolution among the Igbo.

The *Aladinma* juridical model is the epitome of this phenomenon among the Igbo in ensuring social cohesion and social justice.<sup>134</sup> Its virility and sanctity can be compared to that of *Ogun*, the ‘god of iron’ among the Yoruba. The sanction against those who lie after having sworn to oath before the “god of Iron” is sacred: there is a taboo of the wrath of the god for those accused of lying. This is reflected by the inevitable havoc that will occur to such persons: the taboo is that, if such persons have any contact with moveable and immoveable metal objects, some considerable harm will befall them.

There has been call for that politicians and public office holders should be obliged to swear on these gods to avert misappropriation of public properties. The effectiveness of the *Ofo* is a universal norm among the Igbo; thus there is no need to take revenge against individuals who have wronged others and committed atrocities. The notion of social justice as epitomised among the Igbo, in terms of fairness, righteousness and equitable distribution of resources, can be replicated in contemporary political

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<sup>134</sup>See Obinna Ihunna, ‘Cultural Forms, Social Cohesion and Igbo Political Communities: The Aladinma Juridical model in Focus’ in Olufemi Vaughan ed. *Indigenous Political Structures and Governance in Nigeria*, (Ibadan: Bookcraft Ltd.2004)

discourse. However, the impacts of Christianity, civilization and western education have affected the growth of this trend. The Igbo are very nationalistic and therefore these cultural values can be harnessed for national integration.

The issue to be discussed next is the notion of 'life after death'. The Igbo believe in the continuity of human existence, that individuals must live a righteous life whilst on earth, because everybody must fulfil their destiny in accordance with God's intention for every human being. There is a nexus between the Igbo's belief in reincarnation and accountability for one's conduct as a living creature. The Igbo believe that enemies and detractors, who are capable of having an insight to the destiny of individuals and tampered with it through occult powers, can deter progress and the fulfilment of an individual's destiny. There is a need to appease the ancestors by good conduct of those living in order to enhance the prospects for posterity. This belief serves as an impetus for individuals to act in an upright manner.

### **3.4 THE NOTION OF SOCIAL JUSTICE AMONG THE HAUSA**

The Hausa-Fulani have the highest population in Nigeria; they are located in the northeast and north-western parts of Nigeria, with an estimated population of over 50 million. They can be found in the states of Adamawa, Bauchi, Borno, Gombe, Gongola, Jigawa, Kano, Kaduna, Katina, Kebbi, Sokoto, Taraba, Yobe, and Zamfara; The Hausa-Fulani people have dominated the political scene in Nigeria, especially during the military dictatorship. The impact of Islam because of a Jihadist incursion by Othman Dan Fodio in the early part of the 19th century into the northern part of Nigeria left an enduring legacy of Sharia law. Unlike the Igbo and Yoruba, who kept their culture with minimal impact from colonialism, the Hausa lost their culture and

Islamic injunctions and jurisprudence became the dominant culture and way of life. The application of Sharia law in Nigeria has been the most controversial constitutional conundrum. This claim is premised on the effect of Section 10 of the 1999 Constitution, which recognises the secular nature of the Nigerian state.

It is sometimes assumed erroneously that Islamic law is a form of customary law.<sup>135</sup>

This assumption is premised on the fact that northern Nigerian states practise and adopt Islamic law as their personal law in family disputes, inheritance matters and marital affairs<sup>136</sup> and more recently, controversially in criminal law.<sup>137</sup> The applicability of Sharia law in some parts of Northern Nigeria has created some constitutional dilemma of how to reconcile it with the guarantee of fundamental human rights for the citizens. Adherents of Sharia law often argue that it guarantees social justice and that its application is inevitable. Adherents of Islamic faith believe that the secular state cannot protect the religious inclinations of Moslems and therefore, there is a need for Sharia law to fill the gap. The sources of Islamic jurisprudence are the Quran and *Hadith*. The *Hadith* is the traditions and injunctions of Prophet Mohammed, in which he exhorts Muslims to uphold justice in their way of life and seek paradise after their earthly existence. The Quran is said to be a revelation

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<sup>135</sup>For a contrary view, see A.A Oba, 'Islamic Law as Customary Law: the Changing Perspective in Nigeria', [2001]51 ICLQ 817.

<sup>136</sup>For a critical analysis of Hausa-Fulani Culture, see A.H.M. Kirk-Greene, '*Mutumun Kirki: The Concept of the Good Man in Hausa*', (Bloomington: Indiana University Press, 1974), also 'Maudu Laawol Pulaaku: Survival and Symbiosis' in M. Adamu and A.H.M Kirk-Greene (eds.) *Pastoralists of West African Savannah* (Manchester: Manchester University Press, 1986).

<sup>137</sup>There is no uniform codification of customary law in Nigeria yet. Islamic law is unwritten, based on the Holy Quran and its interpretation by Islamic scholars. Emiola identified the divergence of views on the interpretation of Holy Quran. Of these schools, the Maliki School is the most prominent. The principle of the Maliki school of thought applies to the greater part of Northern Nigeria.

from God through angels, of what *Allah* conceived as his injunctions and rules for human beings to comply with if they want to enter paradise after death.<sup>138</sup>

Sharia law as part of the indigenous laws of the northern Nigeria attract controversy because of the claim that it tends to undermine the attributes of human rights.<sup>139</sup> To overcome this dilemma, it is important to make its application subject to the test of its constitutionality by ascertaining whether it complies with human rights norms. Practices that discriminate against women's rights and human rights in general must be condemned in a sensitive and engaging way without ridiculing followers of the faith.

We adopt the same pattern of assessing the notion of a 'good-natured person', lineage obligations, revenge and 'life after death' in assessing the notion of social justice among the Hausa. The Islamic injunctions are very strict on the attributes needed by human beings to be perceived as 'good-natured'. The goals of all people should be the attainment of a just life and eventual transition to paradise after death. Individuals must be of good character and live a just life. The Hausa believe that a person's character (*Hali*) follows him: '*Hali mutual shiyakebinsa.*' A person's character follows him or her everywhere he or she goes.

Those in authority must always strive to be just in their rule as they exercise the power to rule on behalf of Allah. Ibrahim Muhammad identifies the following qualities as being paramount for those in authority when governing: the one with power or authority has to have patience (*sabr*), love (*wudd*), mercy (*rahmah*), compassion

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<sup>138</sup> *Perspectives in Islamic Law and Jurisprudence: Essays in Honour of Justice (Dr) M.A. Aremu (JCA)*. Ed. M. Abdul-Rahman (Ibadan: University of Ibadan National Association of Muslim Law Students, 2001).

<sup>139</sup> Ikenga K.E Oraegbunam- Sharia, Criminal Law, Islam and Democracy in Nigeria, paper presented to the Department of Religion and Cultural Studies of the university of Nigeria, Nsukka on 1<sup>st</sup> December 2010.

(*rahmaniyyah*), circumspection (*haymanah*) and forgiveness (*maghfirah*).<sup>140</sup> Such comprehensive qualities rest with Allah alone, who is Creator, Fashioner and Possessor of all things. When a human being is referred to as *Adl* (just), it is only a metaphor. In the language of jurisprudence, “when a human being is described as just it means: a just person is he who at all times avoids the enormities of sin and always guards against the abominations”.<sup>141</sup>

Such a person is regarded as acting always in accordance with what is morally right and proper. He or she is a reasonable and fair-minded person. Thus, following from the above, the concept of justice (*Adalah*) in Islam is the equitable and unprejudiced giving of what is right to whom it is legally due, or the deprivation of right from a person who otherwise is not legally entitled to that right. It is not always a requirement that attainment of justice can only come about through the courts of law.<sup>142</sup>

Lineage obligations are very strong in Islamic injunctions, which the Hausa adhered to. These obligations are a consequence of individuals’ obligations of living a just life. The Hausa believe that you are supposed to be your brother’s keeper, as the well-being of fellow citizens can only bring prosperity and a fulfilled life to individuals. The Hausa believe in *tusheniyali*; the family name must be protected and must not be brought to ridicule. The Hausa do not believe in individuals taking revenge for wrongs done against them. It is for God to take action against individuals for their inequities and atrocities whilst on earth. The ultimate sanction is the fire of hell for those

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<sup>140</sup> See ‘The Application of the Islamic Concept of Justice in Democratic Government’, in M .O. Abdul-Rahmon, ‘*Perspectives in Islamic Law and Jurisprudence*’, (Ibadan: MLSA, 2001) at p.230.

<sup>141</sup> At p.230, *ibid*.

<sup>142</sup> See ‘The Application of the Islamic Concept of Justice in Democratic Government’, in M .O. Abdul-Rahmon, ‘*Perspectives in Islamic Law and Jurisprudence*’, (Ibadan: MLSA, 2001) at p.230.



individuals who failed to live in accordance with Sharia law. Revenge (*ramuwa*) is not for individuals to take, because it causes more damage to individuals; this principle is expressed by the Hausa saying “*Ramuwan Gaya tafi Na gayazafi*”: a person taking revenge does more damage to the other person.

Life after death is a paramount desire and goal that the Hausa strived to attain, by being just and righteous. This desire is prompted with the notion of paradise, where all those who lived a just life on earth will go after their death. The issues we have discussed so far are replicated among the minor ethnic tribes in Nigeria; thus, we can harness all these attributes towards a common notion of social justice in Nigeria.

### **3.5 Conclusion**

The Nigerian cultural justice/jurisprudence is to be the bedrock of Nigerian notion of social justice towards the attainment of good governance. We have identified congruent values that are common to the major tribes in Nigeria, which oblige the majorities to be sensitive to the needs and welfare of the minority tribes as well. It is also important that the norms of human rights be protected within these cultural settings and in national, state policies in governance structures. Bringing together common congruent customary law and human rights will assist in the integration of indigenous governance structures within modern democratic government.

We have stressed the importance of the values of *respect, responsibility, restraint, reciprocity* and *rehabilitation* of individuals within the community of the each of the major ethnic tribes in Nigeria. The conceptualisation of these phenomena and their contextualisation among the various tribes discussed show that the cultural milieu of

Nigerians can support the canvassed notion of African constitutionalism founded on the discussed cultural jurisprudence.

## CHAPTER FOUR- GOOD GOVERNANCE INDICATORS

This chapter examines what we consider as good governance and how the international bench mark in its assessment can be contextualized in Nigeria. The starting point as stated in the last chapter is how the United Nation Agencies like World Bank define good governance and undertook a critique in order to ascertain, if those parameters are realistic in the context of Nigeria's socio-economic realities. It is also imperative to find out, what Nigerian commentators' views are on the notion of good governance. We cited and discussed few of them in the last chapter. The underlining issue is lack of assessment of social justice in the context of good governance.

There is a tendency to use the term good governance synonymously with legitimate governance. Although, legitimate governance in literature at times relates to how the government emerges. The different types of government in Nigeria are predominantly military regimes that emerged as a result of military coups. At Nigeria's Independence, which ushered in parliamentary democratic governance from 1 October 1960 to January 1966, when the first military coup occurred. The return to democratic governance with American presidential system from 1 October 1979 to December 31 1983 was truncated by another military coup. The problems of good governance in Nigeria are attributable to electoral malpractices, impunity on the part of politicians and the ruling elites. The long years of military dictatorship have caused so much harm to good governance in Nigeria.<sup>143</sup>

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<sup>143</sup> See A. A. Nwankwo, *Nigerians as Outsiders: Military Dictatorship and Nigeria's Destiny*, Enugu: Fourth Dimension Publishers, 1996, and also G. Ajayi, *The Military and the Nigerian State 1966-1993: A Study of the Strategies of Political control*.

Governance cannot be effective and beneficial unless, it deals with issues of social justice. Good governance is imbued with the need to use the resources of the state for the welfare of the citizens in the state. The use of state resources for the attainment of common good must be paramount role of the state. The prevalence of poverty and need to minimize it is an imperative to ensure good governance. Poverty elimination is a laudable development goal. A poverty reduction strategy becomes paramount. Its sustenance must be articulated within the yearning for economic empowerment for the citizens and need for sustainable development in view of Nigeria's socio-economic resources.

#### **4.1 THE CONCEPTUALIZATION OF GOOD GOVERNANCE IN NIGERIA**

The need for good governance has become a crucial issue in Nigeria, in view of the political development culminating in the transition to civil democratic rule in May 1999 following about three decades of military rule. Good governance has become a relevant paradigm to ascertain how the government uses the resources of the state in meeting the welfare needs and economic development of a country. Good governance in the context of this work focuses on the criteria that can be considered before a government can be deemed to be a 'good government'. In this regard, we are concerned about the criteria set by the World Bank and other International Financial Institutions and their insensitiveness to the yearning for social justice in Nigeria (to a limited extent) in ascertaining good governance. It is pertinent to acknowledge that Good Governance as a concept emanated from the World Bank in 1989 as the basis of considering eligibility for grant of bilateral aid. The remit of World Bank and other

International Financial Institutions does not engender political assessment of recipients' countries' government for good governance. The consideration of good governance is indirectly assessed as part of economic criteria of assessing eligibility for assistance.<sup>144</sup>

Some of the criticisms about World Bank and other International Financial Institutions are the concern that they interfere with the political affairs of developing countries and also orchestrated economic and political instability as a result of their unpalatable economic policies in the developing countries orchestrated by conditions attached to financial assistance. More relevant for our purpose is the fact that, they are insensitive to cultural values and socio-political realities of the developing countries. This issue of sensitivity is of paramount concern to this discourse because of the contention, that governance need to reflect the cultural values and must be representative of the needs of the entire citizens, including the minorities, who are meant to be governed. The belief that the citizens are entitled to some sort of assistance from the state to actualize their potential and enjoy socio- economic rights from the state is central to this claim. Governance has a multifaceted application and meaning in different areas of discourse in social sciences and in the administration of companies. The underlining thread that cuts across its different application is the need to be transparent, prudent and accountable in the exercise of power in relation to resources in order to achieve the most effective result. Good governance has application in running of private organizations, aid and financial institutions Good government assists in the development of the country and enables the citizens to actualise their potentials. Good

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<sup>144</sup>Ved Nanda, The "Good Governance" Concept Revisited, The ANNALS of the American Academy of Political and Social Science, 2006, 603: 269.

governance is vital in order to hold the elected government accountable for the exercise of political power on behalf of the citizens.

There is no consensus as to the accurate definition or accurate measure of Good Governance because of the dichotomy of political and philosophical orientations among practitioners and countries of the South and North hemisphere. This had led to considerable literature positing the different views and justifying the basis of each claim. This inevitably leads to donor countries' inclination on particular set of criteria and recipient countries inclination and aspirations to seek sensitivity to cultural value and socio-economic political antecedents of the recipient countries. Justin Lin has captured this dilemma thus:

*Empirical research has attempted to circumvent the philosophical and theoretical problems of governance by trying to measure it and quantify perceptions of progress toward its goals. Perhaps the most authoritative and rigorous approach is that of the Worldwide Governance Indicators (WGI) project, which is based on perception surveys.*

There are six indicators of governance that are paramount in this regard: voice and accountability; political stability and absence of violence; government effectiveness; regulatory quality; rule of law; and control of corruption. It defines governance as consisting of “the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement

sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.”<sup>145</sup>

The theme of these WGI indicators which resonate with our concern for lack of consideration of social justice is the inability to have consistent measures of governance across the countries in a consistent manner across “countries, institutional settings, political contexts, cultures of power, and administrative structures. Neither does it provide a blueprint for the operationalization of good governance”.<sup>146</sup>

Lin is quite right about the need to consider global good governance from a pluralist perspective rather than from the western liberal orientation, which tends to dominate the literature in different disciplines. There is divergence of the opinions about the notion and it is outside the remit of this discourse to explore all the different strands that are reflected in theory, policy and practice.

In view of this controversy, what we intend to do is to adopt some functional criteria that will encompass some of these definitions and themes and consider their application in Nigeria in relation to the crisis of governance in Nigeria. The crisis of governance which Nigeria faces is the basis of making enquiry to ascertain if the government is able to meet the challenges of good governance. The crisis of governance in Nigeria is as a result of abuse of political power by the political and ruling elites, mismanagement of public resources, inefficient public service, and lack of infrastructures, lack of economic empowerment for the citizens, insurgency and terrorism, ineffective judicial administration, abuse of human rights of the citizens.

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<sup>145</sup> See <http://info.worldbank.org/governance/wgi/index.asp>.

<sup>146</sup> Justin Yifu Lin and Celestin Monga, *Solving the Mystery of African Governance*, New Political Economy Volume 17(5) (2012).

The pursuit of social justice agenda necessitates the need to seek good governance as a panacea for the crisis of governance. We consider the contents of Good Governance otherwise known as indicators of Good Governance, its application to Nigeria and the consideration of African Union and NEPAD Initiative on Good Governance.

Some commentators have described good governance as “the means for achieving directions, control and coordination of wholly or partially autonomous individuals or organizations on behalf of interests to which they jointly contribute”.<sup>147</sup> Good Governance in the words of Healey and Robinson (1994), implies “a high level of organizational effectiveness in relation to policy formulation and the policies actually pursued, especially in the conduct of economic policy and its contribution to growth, stability and public welfare”. More explicitly, it is “the means by which power is exercised in the management of a country’s economic and social resources for Development” (World Bank 1992),<sup>148</sup> which Potter calls “Sound Development Management”. (2000:379)

Good Governance is essential and measures to achieve it in Nigeria must be contextualised in view of the peculiar nature of Nigeria as a federal nation with multiplicities of ethnicities and religious diversities and decades of military dictatorship that had affected the development of its institutions and concomitant corruption of ruling elites.

Huther and Shah have identified some indexes towards assessing the effectiveness of Good Governance in countries seeking fiscal measure towards realisation of good governance. These are Citizen Participation Index-political freedom, political stability,

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<sup>147</sup>Lynn et al. 2000.

<sup>148</sup> Cited in Ademola Azeez, Contesting Good Governance in Nigeria: from the Perspective of Legitimacy and Accountability, (2009) Journal of Social Science 21(3), P.217-224.



participation in Decision making process; Government orientation Index- Judicial Efficiency, bureaucratic Efficiency and lack of corruption; Social Development Index- Human Development, Egalitarian income distribution and Economic Management Index-onward orientation, central bank Independence and inverted debt to GDP ratio.<sup>149</sup>

Before we consider these indexes any further, it is pertinent to identify that the International Monetary Fund also applies similar criteria in assessing the eligibility of countries for support based on the Countries Good Governance record or propensity to achieve good governance. The four criteria are (i) transparency and accountability (ii) citizens' participation in Decision making (ii) pluralism and (iv) Representation.

What is central to all these criteria is the need to comply with Rule of Law, Citizens' Participation in Decision Making, Electoral and Public Service Reform, Transparency and Accountability, Measures against Corruption, and Protection of Human Rights .The United Nations Agencies also alluded to these imperatives.<sup>150</sup>

#### **4.2 APPLICATION OF GOOD GOVERNANCE IMPERATIVES TO NIGERIA'S POLITY**

(i) **Rule of Law-** There is an urgent need to have effective legal system that can support the ideals of rule of Law, as part of measures to achieve good governance in Nigeria. The contemporary conception of rule of law envisages the need for certainty

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<sup>149</sup> Jeff Huther and Anwar Shah, "Applying a Simple Measure of Good Governance to the Debate on Fiscal Decentralization". 1998, World Bank Publications.

<sup>150</sup> UNDP Report, 2007 acknowledges that Good Governance is imperative for sustainable Human development and stated its core characteristics as (1) participation(2) Rule of Law(3) Transparency(4) Responsiveness (5) Consensus Orientation(6) Equity (7) Effectiveness and Efficiency (8) Accountability and (9) Strategic Vision. The African Union through the NEPAD initiative also gave credence to the importance of Good Governance through the Peer Review Mechanism, which one must say that it is ineffective because of lack of political will of the African presidents to criticise one other and lack of political sanctions to ensure compliance. See J. Akokpari, The AU, NEPAD and the Promotion of Good Governance in Africa, Nordic Journal of African studies, (2004) 13(3), pp243-263.

and regularity of law, predictability of the legal system and courts system, absence of arbitrary powers, obedience to the law and equality before the law.<sup>151</sup> Since the inception of the Fourth Republic democratic governance on 21 May 1999, the Nigerian state has witnessed abuse of government power to a large extent, by the elected and appointed political elite which undermines the notion of the rule of law. In particular, is the failure to abide by the ideals of federalism as required to be practised by operation of the Federal system amounts to the breach of rule of law? The President arrogates and exercises arbitrary power. An example to illustrate this is the power to appoint the Inspector General of Police in the President of the Country and the State Police Commissioners in The Police Service Commission in accordance with section 215 of 1999 Constitution. The lack of state Police and inability of the State Executive Governor to give instructions to State Police Commissioner had led to great deal of abuse of power by recalcitrant State Police Commissioners.<sup>152</sup> It is inconceivable for the Executive Governor of the constituent State to effectively be the Chief Security accounting officer of the state without the ability to enjoy cooperation and collaboration from the state Police Commissioner.

The practice of federalism requires that the federal government and state government should respect the sanctity of the constitution and the constitutional rights of the constituents' parts of the federal state. Each arm of the government in a federation is

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<sup>151</sup> All these features are the formal conceptualisation of rule of law, See generally for discussion of formal and substantive model and the possibility of middle ground in Paul Craig-Formal and Substantive conceptions of the rule of law: An analytical framework, 1997 Public Law, No 3 autumn, pp.467-487.

<sup>152</sup> A former Commissioner of Police in River state, AIG Joseph Mbu, is a notorious officer who harassed and intimidated the Governor of River State, where he was meant to be working together with the Governor, as the Chief Security Officer of the State. He was not reprimanded by the Inspector General of Police; he was promoted to the rank of Assistant Inspector General Police (AIG) for apparently doing the bidding of President Goodluck Jonathan and People Democratic Party (PDP). Governor Ameachi left the PDP to join the opposition party- All progressives' Congress.

expected to act in accordance with its constitutional remit and limitations. There is so much interference with State Government and its administration by the Federal government and this inevitably leads to abuse of power and breakdown of the rule of law. One of the areas in which the Federal Government had interfered is the impeachment of state governors and manipulation of the judiciary to influence courts decisions in disputes about impeachment of state governors, who are not necessarily in breach of the constitutional law but have become estranged from the presidency.<sup>153</sup> Under the constitution, the impeachment of state governors is a matter for the State Legislative Assembly but the Federal Government often hijacks this process to manipulate and deal with recalcitrant State Governors who have fallen out of favour from the President. All these anomalies have impact on the survival of the democratic governance and good governance.

Military rule legacy in Nigeria has lumbered the country with a large array of retrospective legislations which are still applicable under the present democratic dispensation. Some of the laws are anachronistic laws and must be reformed. More importantly, there is Constitution Review Committee which is charged with the responsibility of amendment of the constitution as some of the provisions are inconsistent with the imperative of federalism as practised in Nigeria now. There are a number of reasons for this anomaly. The military administrations were truly unitary form, because of the fusion of executive power and legislative powers in Military Supreme Council, which deliberates and made Decrees. The Decrees and Policy Directives from Military are binding on the constituents states without any reservation

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<sup>153</sup>See chapter 4, Ben Nwabueze, *Current Issues and Problems in the Working of Constitutional Democracy in Nigeria*, Ibadan: Gold Press Ltd, 2011.

to accommodate variation in local circumstances of the state.<sup>154</sup> This often sacrifices the plural nature of the heterogeneous communities that make up Nigeria. Laws emanating from military regimes need to be reformed in line with the present objective of achieving good governance.

**(ii) Citizens' Participation in Decision Making** - A crucial way of ensuring citizens' participation is having credible elections for the representatives of the citizens to be elected to the legislative houses. An electoral system that is free, fair and credible will produce satisfying results to the aspirations of the electorates in making sure that their true representatives are elected to represent them. The inability to conduct free and fair election and violence during elections often leads to political apathy and disenfranchisement. There is need to overhaul the Independent Electoral Commission to be able to stand to the challenge of conducting credible elections in Nigeria.<sup>155</sup>

**(iii) Electoral and Public Service Reform**-Public Service in Nigeria is endemic with maladministration, inefficiency and corruption which affect the performance of civic and statutory responsibilities. This inevitably affects the good governance index in the area of government orientation, which is reflected in the form of bureaucratic inefficiency. This problem is exacerbated because of over centralisation of the Government agencies and their impact on mal administration.<sup>156</sup>

The vast majorities of Nigerians live in rural areas and the impact of government is far from them. There is need for decentralisation and providing more functions and funding for Local government to assist in the pursuit of social justice to make impact

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<sup>154</sup> For A critique of Military Administration and impact on legislative function, Abiola Ojo Constitutional Law and Military Rule in Nigeria, Ibadan: Evans Publisher. 1989.

<sup>155</sup> The Independent Electoral Commission (INEC) has admitted the challenges inherent in conducting elections and had on many occasions had to cancel some election result and conduct new elections.

<sup>156</sup> Juwayriya Badamasiuy, Muhammed Bello: An Appraisal of Administrative Justice and Good Governance in Nigeria ; Journal of Politics and Law vol.6, No2 (2013) Canada.

on the good governance index.<sup>157</sup> This will entail constitutional amendment because of the inclusion of the remits and roles of the different strands of government in the Exclusive, concurrent and residuary list under the 1999 constitution.

Capacity building in the public service will engender transparency and accountability and in this regard the importance of Information and Computer Technology need not be over emphasized. Decentralisation of functions and powers of government makes transparency and accountability in Public service and government more feasible and efficient. Devolution and ‘deconcentration’ forms of decentralisation are most efficacious.<sup>158</sup>

**(iv) Transparency and Accountability-** Transparency as a governance indicator is aimed at ensuring that government agencies, their employees and representatives’ actions and initiatives are undertaken with a view of removing opportunities for graft and corruption. Freedom of Information governance and legislation has been used to achieve this goal in different countries. Both in the developed countries and in the developing countries; the use of freedom of information is very isolated. The Government in Nigeria has passed the Freedom of Information Act 2011; there is still deep seated culture of hoarding public information in all facets of government in Nigeria.

The Ministry of Finance has recently been publishing accounts of funds distributed to State and Local Government on its website. There is a well- entrenched culture of

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<sup>157</sup> National Population Commission of Nigeria-www.population.gov.ng.

<sup>158</sup> There are other types like Delegation and Divestment: see Decentralisation in Commonwealth Africa, Janet Kathy Ola and Oluwatoyin Job(eds.) London: Commonwealth Secretariat, 2011.For extensive reviews of definitions and typologies of decentralisation see Decentralisation: A Sampling of Definitions,UNDP,1999; Supporting Capacities for Integrated Local Development Practice Note, November 2007;Adamolekun, L(1984).The idea of Local Government as a Third Tier of Government Revisited: Achievements, Problems and Prospect, Quarterly Journal of Administration,18(3-4),pp.92-112.

hoarding information in public Service in Nigeria and this problem is exacerbated by the rudimentary form of manual compilation and storing of information because of lack of Information and Computer Technology in most of the Public Service Agencies. Transparency is also part of the indicators taken into consideration in assessing ease of doing business in a country and level of corruption by International Non -Governmental Bodies.<sup>159</sup>

Accountability is defined in the literature as “the means by which organisations and their leadership are held responsible for their action (and inaction) in the use of public resources and authority. Any accountability system thus has three critical components- clear definition of responsibility, reporting modality and reward system”.<sup>160</sup>

Accountability can be vertical-upwards to central and regional governments and other higher tiers of decision making bodies or downward to citizens. Horizontal accountability may be transferred to organised civil society, community groups, and residents’ association or to private sector (formal or informal enterprises).<sup>161</sup>

Nwabueze believes that accountability is an intrinsic and integral part of democracy, and its origin is from four principles: one political and the other legal. The first is political responsibility which he describes as the subjection of authority to control. In the context of democracy, he refers to it as government being subjected to ‘authority and control of the people as the body, the ultimate repository of sovereign power in

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<sup>159</sup> Transparency International rated Nigeria as one of the most corrupt county.

<sup>160</sup>Decentralisation in Commonwealth Africa, Janet Kathy Ola and Oluwatoyin Job (eds.) London: Commonwealth Secretariat, 2011; see also an exciting chapter by Ben Nwabueze, Constitutional Democracy in Africa, Volume 3, Chapter 14 ‘A Society Permeated by an Ethic of Public Probity and Accountability,’ Ibadan, Spectrum Book, 2004.

<sup>161</sup>Cited in Decentralisation in Commonwealth at p.9, quoting Olowu, D (1999): ‘Accountability and Transparency’ in L .Adamolekun (ed.) Public Administration in Africa, Westview Press, pp.139-158.

the state, from whom governmental power is derived'.<sup>162</sup> The concept flows from popular election of government officials into public office and the mandate given to them by the virtue of such election, and the need to exercise that mandate responsibly by not abusing same or making decisions contrary to the rules of engagement or public administrative law.

He also refers to the other principle which accountability emanates from, as the delegated power, describing the people or the citizens as the delegator and the appointees or elected officials as the delegate, who must exercise the delegated power with utmost good faith and subject to the control of the citizens as the source of the power. Nwabueze also sees accountability as emanating from government and exercise of governmental power as public trust, which must be guarded and controlled by 'obligations and restrictions implied in the concept of trusteeship, in particular, the duty of honesty and fidelity, and the prohibition against using the position for personal benefits'.<sup>163</sup> The last principle as enunciated by him is that accountability is important in understanding the concept of public service. Public service should be synonymous with accountability, the duty to serve with honesty and integrity. These are the attributes of accountability that are lacking in Nigeria polity and public service, Elected officials and public officials that lack all these attributes will inevitably become inefficient and corrupt, which affect the quest for good governance.

The themes of accountability can be contextualised in Nigeria. All elected and appointed representatives are to be accountable for power vested in them and

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<sup>162</sup> Ben Nwabueze, *Constitutional Democracy in Africa*, Volume 3, Chapter 14 'A Society Permeated by an Ethic of Public Probity and Accountability,' Ibadan, Spectrum Book, 2004. At p.329.

<sup>163</sup> *Ibid*, at p.331

exercised on behalf of the citizens. The Federal parliament which consists of Senate and House Representatives is empowered to undertake oversight roles for the Federal Executive and all statutory bodies created under the law.<sup>164</sup> All these statutory bodies are accountable to the parliament in the exercise of their constitutional duties. All the supervising ministers can also be summoned to the parliament to account for the revenue allocation given to any of the bodies under their supervision. This is an illustration for vertical accountability.

The executive ministers are accountable to the parliament by subjecting their budgetary proposal to approval of the relevant committee of the parliament. However, this power is not robustly and effectively exercised by the parliament, as members are often accused of accepting bribes to compromise or influence the level of scrutiny which the budgets and projects undergo by the relevant select committee of the Senate and House of Representatives.

There is need to have a robust system of horizontal accountability exercisable and enforced by civil society. This is vital in view of the fact that civil societies are less likely to be influenced in their scrutiny of public bodies and can be more rigorous in their advocacy and accountability oversight roles. However, the sensitisation and advocacy profile of the civil societies in Nigeria are still very rudimentary, and this epitomises the larger problem of illiteracy and limiting impact of socio-economic demography of the Nigerian population.

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<sup>164</sup> Section 153 of the 1999 Constitution established the Code of Conduct Bureau; Council of State; Federal Character Commission; Federal Civil Service Commission; Independent National Electoral Commission; National Defence Council; National Judicial Council; National Population Commission; National security Council; Nigeria Police Council; Police Service Commission and Revenue Mobilisation Allocation and Fiscal Commission.



(v) **Measures against Corruption** – Maladministration and bureaucracy are some of the factors that affect good governance from the Government orientation perspective. Civil servants and politicians are equally blameworthy for corruption. Keefer and Knack (1997) observed that corruption significantly reduces economic development. Such problems are said to be worse in sub-Saharan Africa where rent seeking are high because of propitious environment where government is the major employer and control virtually all spheres of life.<sup>165</sup>

The government often creates the propitious environment that facilitates corruption by policies and programmes that will make bribing of the officials inevitable because of limited resources and artificial scarcity in supply of import licences, grants for Industrialization, subsidies, tax concessions, award of contracts at inflated amounts and other types of corrupt practices. All these are avenues for rent seeking and inevitable corruption by private sectors operators seeking government patronage and inevitable nepotism.

(vi) **The Protection of Human Rights-** There is paramount concern for protection of human rights of all citizens in all the countries of the world. The Universal Declaration of Human Rights has provided the yardstick by which all the countries are to be judged in their relationship with their citizens and it must be said that, human rights record of all nations is a major determinant in the assessment of governance record of various governments, especially in the developing countries. The Nigerian government witnessed abysmal breach of human rights of the citizens during the

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<sup>165</sup> Cited in Justin Lin, *The Mystery of African Governance, New Political Economy*, 2012 17(5).

military dictatorship era.<sup>166</sup> The nature of military administrations made the abuse of human rights inevitable and condemnable.

The protection of human rights is also of paramount concern for the African Union and the creation of African Charter of Human and Peoples Rights is well deserved mechanism in the realisation of this objective. The major problem about the protection of Human Rights in Nigeria is the demarcation between civil and political rights and socio-economic rights. The socio-economic rights are not enforceable against the state under the 1999 Nigerian constitution. The socio- economic issues are under Chapter Two of the constitution entitled Fundamental Objectives and Directive Principles of State Policy.<sup>167</sup> Individuals will need an array of competent lawyers to be able to benefit from any of the provisions in view of the jurisprudence of the courts in relation to these provisions of the constitution.

The Nigerian Human Rights Commission is charged with the responsibilities of articulating policies and procedures to protect human rights in Nigeria. Its impact has been very minimal because of lack of funding and inability to be very effective in its advocacy and enforcement remits. The major hurdle for the Human Rights Commission is the enforcement of citizens' rights and impunity by government agencies. The other challenge is the recent acts of insurgency and terrorism by the

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<sup>166</sup> Hakeem Yusuf, *Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria*- International Journal of Transition Justice, 2007, Issue 2, pp268-286, for an account of Human Rights abuse by military dictators against the citizens,

<sup>167</sup> Section 13 – Fundamental Obligations of the Government- 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 this chapter of this constitution. Section 14 -The Government and the People (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. Section 15-Political objectives, section 16- Economic objectives, section 17-Social objectives, section 18- Educational Objectives, section 19 Foreign Policy Objectives, section 20 Environmental Objectives, section 21- Directive on Nigerian Cultures, section 22-Obligation of the mass media, section 23-National Ethics, and section 24-Duties of the citizens. All these are aspirations of the state; the citizens cannot enforce any of the provisions against the state. We will consider the issue of justiciability and enforceability of these provisions in a latter chapter.

*Boko Haram* sect. The Human Rights Commission has not issued any enforcement proceedings against the government for victims of the Boko Haram insurgency.

The interference by the executive arm of the government in the affairs and running of the judiciary also affects the perception of good governance. The protection of the judiciary from interference from the executive and legislative arms is the only guarantee that can ensure the independence of the judiciary. The resources available to the judiciary have been dwindling in the past three years.<sup>168</sup> There is a controversy between the Executive and the Judiciary on the modalities to guarantee financial autonomy of the Judiciary as enshrined in the 1999 Constitution as amended.

The next issue to discuss is the desirability of democracy or not in attaining good governance. There is divergence of views about this. Most countries that have attained a measure of good governance are countries that operate democracy. Empirical researches tend to suggest that there is a correlation between democracy and good governance.<sup>169</sup> We are not inclined this moment to explore this further except to acknowledge that we canvass a measure of democratic institutions that can facilitate attainment of good governance objectives. We will return to this aspect in a later chapter.

It is pertinent to acknowledge that because of the fact that majority of Nigerian population are illiterates and reside in the rural areas, it is imperative that we should consider the importance of local indigenous institutions in bringing governance to the rural people and use existing institutions to ensure that traditional rulers are

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<sup>168</sup> Nigeria Revenue Allocation and Mobilisation Commission Report, 2014

<sup>169</sup> See Cyril Obi, *No Choice, But Democracy: Prising the People out of Politics in Africa?*, Claude Ake Memorial Paper, No.2, 2008. Department of Peace and conflict Research, Uppsala University and Nordic Africa Institute, Uppsala.

empowered to be more involved in the administration of the local communities in Nigeria. It is important that all these indexes discussed so far, will go a long way to ensure that governance is made more relevant to the yearnings and aspirations of the citizens; more importantly, towards the realisation of social justice as enumerated in earlier chapters.

## **CHAPTER FIVE – FUNDAMENTAL HUMAN RIGHTS AND SOCIAL JUSTICE**

### **5.0 Introduction**

This chapter is focusing on the Nigerian Constitution and the policies that must be followed if there is to be a renewal of fundamental values in Nigerian politics. The chapter makes use of the distinction between constituent power, constitutional form and constituted power to show how, given the norms that structure the form of the 1999 Constitution, constituted power should be guided by values such as federalism, human rights and sound public policy. The regime of Human Rights Protection in Nigeria has been enhanced by the adoption and enforceability of African Human Rights Charter in Nigeria. We consider the development of this jurisprudence in Nigeria. This analysis is pivotal as it provides for a better understanding of the imperatives of constitutionalism from the perspective of liberal ideology.

The features of federalism as practised in Nigeria and how to reconcile federalism with the need to attain social justice are relevant issues to be analysed in this chapter. The heterogeneous nature of the Nigerian population is one of the reasons for the adoption of federalism. In this regard, federalism aims to ensure that diversity among Nigerian people will be managed and reconciled with the need for national cohesion. One inevitable issue is the management of national resources among different people and the state's need to achieve this within the imperatives of federalism. The pursuit of social justice by the Nigerian state is the solution this research proffers. The need to protect minorities from marginalization, and the use of state institutions to attain an equitable distribution of national resources is paramount in a federal state like Nigeria. The need to make social and economic rights enforceable is part of the social justice

agenda that we identified in Chapter One. We will consider this issue again here in the context of the present, non-justiciable status, of the Fundamental Objectives and Directive Principles of State Policy of the 1999 Constitution.<sup>170</sup>

In Chapter three we identified the need for constitutionalism to permeate the governance structure and consolidation of the nascent democratic governance in Nigeria. The challenge for constitutional law in Nigeria is to ensure that the rule of law, protection of human rights, inclusive citizenship and civil society are engaged to ensure a governance structure that embraces indigenous structures and compliments democratic governance. The foundation for this typology was discussed in the introduction of this thesis under the term ‘cultural jurisprudence’ to some extent. Other elements of constitutionalism that we need to adapt to make them relevant for Africa is the espousal of a regime of communitarian human rights and the protection of the independence of the judiciary.

The policies and programmes of different military regimes in Nigeria have seriously compromised this democratic ethos; the emasculation of constitutionalism by military dictatorship has further problematized the possibility of political discourse for good governance.<sup>171</sup> Sustaining civilian and democratic governance requires a consistent approach to Nigeria’s social, economic and political problems that will ultimately provide a secure foundation for an inclusive and legitimate state.

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<sup>170</sup> In Chapter Seven, we canvass for the adoption of the South African Model of implementation of socio-economic rights in Nigeria. In that context we examine this issue of Fundamental Objectives and Directive Principle of State Policy extensively.

<sup>171</sup> A. Agbaje, L. Diamond & E. Onwudiwe, (Eds.) *Nigeria’s Struggle for Democracy and Good Governance* (Ibadan: University Press, 2004), Chris Ali, *The Federal Republic of Nigerian Army: The Siege of Nation*, (Lagos: Malthouse, 2001), Lai Olurode and Remi Anifowose eds. *Democratization and the Military in Nigeria* (Lagos :Friedrich Ebert Stiftung, 2004)

A central element of a legitimate state is that it secures social justice. This issue will be elucidated later in the context of marginalized regions, distributive justice and the allocation of national resources in a federation such as Nigeria's. We shall argue that, in as much as the region is entitled to a measure of redistributive justice, it must be balanced with the necessity to equally provide for other minorities in Nigeria. Such an enterprise should be balanced against the desires of other parts of the federation to partake and benefit from the national resources of the country, regardless of their geographical location and the availability or otherwise of petroleum resources in a region. We will also show that social justice is a force in the constituent power of Nigerian politics. This is important because Section 14(1) of the 1999 Constitution declares that the primary purpose of the Nigerian government is defined as "the security and welfare of the people"; therefore, good governance must be anchored on principles of democracy and social justice.

Social justice is primarily aimed at the government's resolve to achieve the exercise of political power within constitutional provisions, with an agenda to remove inequalities and provide equal opportunities, observing the protection of fundamental human rights and ensuring restraint on abuse of state power. Political justice presupposes the state's adherence to the principles of constitutionalism. Social justice in the context of this thesis is preoccupied with more than mere adherence to constitutionalism. It goes further to insist that the protection and enjoyment of socio-economic rights should be legally enforceable. That is, it goes beyond minimal compliance with the principles of justice by the state. Social justice in the context of this discourse includes the following themes:

- (1) The pursuit of social cohesion among different ethnic groups and centripetal unity;
- (2) The creation of a humane and compassionate society, based on the need to ensure citizens' empowerment;
- (3) The creation of a welfare state including social security, free primary and secondary school education, affordable health care, social housing schemes, public transportation and sustainable environmental protection;
- (4) The protection of the vulnerable and the marginalized in society;
- (5) The creation of an enabling environment for the attainment of equal opportunities and
- (6) The empowerment and eradication of discrimination based on ethnic affiliation, religion, gender, and sexual orientation.

Perhaps the paramount concerns for social justice are the need to ensure equal treatment for equal citizens, using distributive justice to correct past injustices. These two objectives can also be articulated as ensuring that the state creates and maintains redistributive justice, provides opportunities for equal treatment and redresses past inequality of treatment.<sup>172</sup> The pursuit of social justice in the context of this work aims to provide an enabling environment for the citizens without the economic resources to achieve their potential and ensure their own welfare. This is important because the Nigerian state does not have social security legislation that would provide welfare benefits for citizens as there is in developed economies.

This research advocates the need to achieve the realisation of social justice goals by making the provisions under the Fundamental Objectives and Directives Principles of

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<sup>172</sup>For a discussion of re-distributive justice in relation to gender discrimination see A. Steward (ed.) *Gender, Law and Social Justice*, (Oxford: Blackstone, 2000)



State Policy legally enforceable. This will ensure that the provisions under this section of the Constitution will become justiciable. There is a need to make entitlement to social justice as part of the legal norm in Nigeria. To achieve this, we need a theory of justice that accounts for how to achieve political justice, which will require accountability from the elected and appointed state functionaries who are charged with the responsibilities of how to transform the political mandate entrusted to them by the citizens for the attainment of good governance and social justice. Political justice is about how to achieve essence of government through the overhaul of the processes, procedures and public institutions in Nigeria. Political justice is about achieving strong and sustainable institutions that would be the basis of exercising public power and securing 'common good' or 'public good' for the benefits of the citizens. It is important to signpost our discussion about the need to achieve social justice by the adoption of the South African model of making socio-economic rights legally enforceable. This is discussed in chapter six. The desire for enforceability of the rights to socio-economic rights is predicated on the idea of political justice.

These provisions are synonymous with the Covenants on Economic, Social and Cultural Rights, which at present are not justiciable as enunciated in Chapter Two of the 1999 Constitution.<sup>173</sup> Citizens do not have enforceable rights at the moment. There are two approaches to overcome the problem of non-justiciability of the State Directive Objectives as asserted by section 6(6) (c) of the Constitution. These are restrictive construction of the Directive principle and the liberal approach. Firstly, some scholars have argued for the restrictive interpretation of the Directive principle,

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<sup>173</sup> Fundamental Objectives and Directive Principles of State Policy in J. N. Aduba and S. Oguche, 'Key Issues in Nigerian Constitutional Law,' Lagos – Nigerian Institute of Advanced Legal Studies, 2014.

by saying that, since the Nigerian constitution failed to provide for an enforcement mechanism in the constitution itself, there are no remedies available for aggrieved citizens.<sup>174</sup>

This interpretation is very restrictive and espouses the views that if the constitution wanted social and economic rights to be enforceable, the constitution would have expressly provided for such entitlement. The liberal interpretation of the Directive principle, which this thesis espouses, is founded on the importance of the African Charter on Human and Peoples' Rights and the implication of its ratification by the Nigerian African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The Government has signed the African Charter on Human and Peoples' Rights and it has become part of Nigerian law. Citizens can, therefore, rely on its provisions to enforce their social, economic and cultural rights.

We will conclude by looking briefly at the African Charter on Human and Peoples Rights and its impact on the Nigerian Constitution. The Nigerian government is bound by international human rights norms and, therefore, it becomes pertinent for constituent power (and indeed the Constitution itself) to reflect those norms. This Chapter will argue that whilst rights must inform Nigerian politics generally, democratic, civilian 'power' must take seriously the human rights obligations of the state.

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<sup>174</sup>Professor Ben Nwabueze, a renowned constitutional law expert in Nigeria, believes that there is no need to have socio-economic rights as enforceable rights: in his early work, *Constitutional Law of the Nigerian Republic* (London: Butterworth, 1964) at p.408, as quoted by O.Nnamuchi, "Kleptocracy and Its Many Faces: The Challenges of Justifiability of the Right to Health Care in Nigeria", *JAL*, Vol.52, No 1, p.1-42 at 7. Prof.Akande also supports the stance of Nwabueze.

## 5.1 CONSTITUTIONAL THEORY AND THE 1999 CONSTITUTION

In constitutional theory, there are three issues which are paramount for understanding how political power is acquired and exercised. These are constituent power, constitutional form and constituted power.<sup>175</sup> Constituent power emanates from the people as a source of sovereignty: no government has power to rule over the people, except through their consent. There are safeguards and frameworks to ensure that the government does not act to exceed the mandate that brought it into constituted authority. The basis of legitimacy to rule is of utmost concern to constitutionalism. There are various ways of seeking such consent and reliance on it, as the mandate to rule depends on which constitutional form is operational in a given polity. The notion that power remains with the people implies that the people cannot be divested of their power, even once their democratic representatives have formed a government. Furthermore, even the seizure of government by military dictators through the use of force and coercion cannot divest the people of their constituent powers. In the event of a military coup, constituent power is in ‘abeyance’, because the emergence of a dictator cannot cancel out the constituent power that is expressed in the constitution, even though this may have been suspended. The ability and modality by which people can recall their mandate is outside the remit of this discourse, but we want to affirm the central relevance of this principle of democratic power.<sup>176</sup>

Constituted power also signifies the need for government to ensure that the overarching principles of government must be in accordance with the constitution and

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<sup>175</sup> See D. Galligan, ‘The Paradox of Constitutionalism or the Potential of Constitutional Theory’, *Oxford Journal of Legal Studies*, Volume, No 2( 2008) pp.343-367. This is a review article on the book by M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Reform* (OUP, Oxford 2006); (hereafter Loughlin and Walker.)

<sup>176</sup> See generally Margaret Canovan, *The People*, (Cambridge: Polity Press, 2005).

must be guided by the broader cultural values reflected in the constitution. This thesis argues that in Nigerian constitutional law theory, governance and political values must be founded on African human rights and Nigerian political culture. Political and cultural values which have largely survived the colonial period can be updated to meet modern problems. This chapter outlines these values. In this chapter, we focus on the broad themes structuring Nigerian politics. They are the nature of civil and political rights, as well as the socio-economic and cultural rights of the citizens.

Constitutional form is how the government apparatus is used to galvanize the mandate from the constituent power and then get it exercised by the constituted power. The normative core values of each society must be reflected in the type of constitutional form adopted by that society. International standards have been set which such core values must accommodate. Respect for fundamental human rights, civil and political rights are some of the norms of international standards that must be entrenched, regardless of the type of government in any given nation. Constituted powers must ensure that the core values must be incorporated in the constitution.

The people as the source of sovereignty in the political governance structure must ensure that those who exercise the sovereignty as the constituted power comply with the rules of constitutionalism that aim to safeguard the rule of law, protection of human rights, civil and political rights. The inability to comply with the conditions synonymous with the exercise of power often leads to the abuse of power and bad governance.

Government all over the world is now accountable to international bodies such as the United Nations for the exercise of political power in their domain, at least to a limited

extent. Political sovereignty is no more an absolute bar to scrutiny from the international community and from international organisations. Governments all over the world can now be held accountable when these norms are not complied with.<sup>177</sup> No nation can avoid the scrutiny of international law by pleading that such scrutiny amounts to interference with its political sovereignty. Political accountability is now the norm, requiring that all governments must respect the human rights of their citizens and must adhere to international norms on the protection of human rights. In this regard, Nigeria must consolidate its nascent practice of liberal democracy by observing the rule of law and by conducting free, open and multi-party elections. Election monitoring and good governance are now synonymous with ensuring free, fair and credible elections, as a pre-condition for good government.<sup>178</sup> Independent observers during elections are now a common phenomenon, and their impact is to engender an imperative for political participation as a human right entitlement. Civil and political rights articulate the power of citizens to choose who governs them, in democratic, fair and free elections. The regimes of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and other covenants such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women and the Conventions of the Rights of Children, are all international treaties obliging Nigeria to provide minimum standards in its constitution and policies that protect the human

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<sup>177</sup> Although the exercise of veto by United States of America, Russia, United Kingdom, France and China constitute a major impediment to effectiveness of international governance and unilateral action without UN authorisation is a major onslaught to UN governance system.

<sup>178</sup> See further, A.D. Asante, "Election Monitoring Impact on the Law: Can it be Reconciled with Sovereignty and Non-Intervention?" (1994) 26 *New York University Journal of International Law and Politics*, at 235; , arguing that United Nations election Monitoring activities are consistent with Article 2(7) of the UN Charter which precludes "interference in the internal affairs" of the states.

rights enunciated in these treaties. The Nigerian state must consolidate democratic notions of popular sovereignty, with compliance with the rule of law and the pursuit of social justice; these must be supplemented by adherence to human rights principles and the provision of remedies for the breach of human rights.

The political theory subscribed to by this thesis is based on the need to combine cultural values with the protection of human rights of the citizens as the constituent power. This theory presupposes the need to reflect all the international norms on protection of human rights and good governance in order to realise a constitutional government based on constitutional form which includes the protection of human rights. What is needed is a constitutional form, which reflects the ideals of social justice drawn from African culture as well as from international law norms generally. This is not just a procedural version of democracy. Constitutional form needs to be supplemented by a notion of constitutional substance. International norms protect the right to life<sup>179</sup>, dignity of the human person<sup>180</sup>, the right to personal liberty<sup>181</sup>, the right to a fair hearing<sup>182</sup>, the right to private and family life<sup>183</sup>, freedom of thought, conscience and religion<sup>184</sup>, freedom of expression and press<sup>185</sup>, freedom of movement, the right to peaceful assembly and association<sup>186</sup>, the right to freedom of movement<sup>187</sup>, and freedom to participate in political governance<sup>188</sup>. An emerging norm of the right to democratic governance, protection of minorities and protection of women's rights

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<sup>179</sup> International Covenant on Civil and Political Rights, Article 6 (henceforth ICCPR)

<sup>180</sup> Article 7 ICCPR

<sup>181</sup> Article 9 ICCPR

<sup>182</sup> Article 14 ICCPR

<sup>183</sup> Article 23 ICCPR

<sup>184</sup> Article 18 ICCPR

<sup>185</sup> Article 19 ICCPR

<sup>186</sup> Articles 21 & 22 ICCPR

<sup>187</sup> Article 12 ICCPR

<sup>188</sup> See Article 13 of the African Charter on Human & Peoples' Rights.

as well as other social, economic and cultural rights.<sup>189</sup> We will outline these rights and reflect on how the Nigerian constitution strives to achieve these rights within its heterogeneous society, which also includes a significant number of minorities.

These ideals will be explored with reference to the 1999 Constitution. Constituent power derives its authority from the Constitution and must act within its parameters and limitations. Constituent power as represented by the Federal Executive Council and the National Assembly - Senate and House of Representatives, must strive to exercise its powers not only to protect citizens' human rights but also the diversity of citizens. It should also consider the interests of minorities and ensure social justice by executing programmes to achieve the aims and obligations emerging under the covenants on social, economic and cultural rights. There is an anomaly in relation to the form of the 1999 Constitution as the source of the form of constitutional government. This anomaly is the curtailment of the enjoyment of social, economic and cultural rights by not making it justiciable. However, we will argue that this restriction can be overcome by a purposive interpretation of the obligations of the Nigerian state under the African Charter on Human and Peoples' Rights. This was also the view of the Supreme Court of Nigeria in the case of *State v Nemi*.<sup>190</sup> The Constitutional provisions that aimed to guarantee and confer protection of the rights given under the international Covenants on Civil and Political and the African Charter on Human Rights and Peoples' Rights are examined in outline here.

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<sup>189</sup> See Thomas Franck, The Emerging Right to Democratic Governance, (American Journal of International Law, Vol.86.1992,p.46) For a critique of this paper, see Susan Marks, What has become of the Emerging Right to Democratic Governance ?(European Journal of International Law, Vol.22.Issue 2.Pp507-524)

<sup>190</sup> (1994) LRC 376, Decision by the Supreme Court of Nigeria.

The African charter is a regional initiative by the African Union that aimed to consolidate and diversify the international human rights discourse to protect the fundamental human rights of Africans in the continent against abuses perpetrated by governments<sup>191</sup>. It is referred to as

*...the mix of tradition and modernity, which is more than a matter of public international law or international customary law; it is a synthesis of universal and African elements. Its organising principle is the balance between tradition and modernity, not only between African tradition and the modernity of law, but also between African modernity and the tradition of international law*<sup>192</sup>

The tradition of international law includes respect for the rule of law, respect for fundamental human rights and mechanisms for their protection. The African Charter on Rights must respect these imperatives. There are three categories of rights guaranteed under the Charter: libertarian rights, egalitarian and solidarity rights. The first two sets of rights are synonymous with the provisions of the International Covenant on Civil and Political Rights, the Covenants on Economic, Social and

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<sup>191</sup> The African Charter was the first African regional human rights treaty to establish an institutional mechanism for the promotion and protection of rights in the continent: the African Commission on Human and Peoples' Rights (hereafter, the "African Commission"). Although the erstwhile OAU, now reconstituted as the African Union (hereafter, "AU"), had earlier adopted treaties and resolutions having some bearing on human rights, the African Charter was the first human rights treaty for the entire continent. For details of OAU human rights initiatives see, Claude Welch Jr. *The OAU and Human Rights: Towards a New Definition*, 19 J.MOD.AFR.STUD.401, (1981) cited in Udombana, *Between Promises and Performances: Revisiting States' Obligations under the African Human Rights Charter*, (Stanford Journal of International Law 40(2004) 105. For further literature, see U.O. Umozurike, *The African Charter on Human Rights and Peoples' Rights* (Netherlands: Martinus Nijhoff, 1997), N.S. Rembe, *The System of Protection of Human Rights Under the African Charter On Human and Peoples' Rights: Problems and Prospect* (1991), Carlson Anyangwe, 'Obligations of State Parties to African Charter on Human and Peoples' Rights', 10 AFR.J.INT'L & COMP.L.625 (1998), and N. Udombana, 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights', 17 AM.U.INT'L. L.REV.1177 (2002)

<sup>192</sup> U. Udombana, 'Between Promises and Performances: Revisiting States Obligations under the African Human Rights Charter', *Stanford Journal of International Law*, 2004, 40 (1) 105, at p.110.



Cultural rights and other regional charters in Europe and South America.<sup>193</sup>

Libertarian rights emphasize the sanctity of life, right to liberty, freedom of movement and the right to seek asylum in a member state. We will embark on an overview of only some of these provisions for pragmatic reasons.<sup>194</sup>

The African Court of Human and Peoples Rights was launched on 2 July 2006 and was charged with the duty of interpreting the African Charter and dealing with state orchestrated abuses and infringement of fundamental human rights.<sup>195</sup> The Court is at the forefront of ensuring that member states adhere to their obligations to respect, protect and realise human rights.

The sanctity of life is recognised in article 4 of the Charter, which guarantees that the right to life is inviolable. The state must protect life and desist from acts that can lead to arbitrary deprivation of life. This signifies that life can only be taken after due process of law, as in the case of capital punishment imposed by a properly constituted court of law. This also respects the dignity of life, the need to avoid cruel, inhuman, or degrading treatment or punishment. It specifically prohibits all forms of exploitation and degradation of man, particularly slavery. This is paramount to prevent children and women trafficking, especially since child labour and prostitution have become very prevalent in Africa. There is forced migration of children from rural areas to

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<sup>193</sup> See European Convention on Human Rights and its five protocols-[www.hrcr.org/doc/Eur.convention/eurconv.html](http://www.hrcr.org/doc/Eur.convention/eurconv.html), 14/11/1950, and the Inter-American Convention on Human Rights, signed on 22/11/1969.

<sup>194</sup> For a detailed analysis, see C. Anyangwe, 'Obligations of State Parties to the African Charter on Human and Peoples' Rights', 10 *African Journal of International and Comparative Law*, (1998) 625, U. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Rights Charter*, (2004) *Stanford Journal of International Law*, Vol.40, 105:

<sup>195</sup> The original Protocol establishing the Court was adopted on 27 June 1981, but the protocol did not come into effect until 25 January 2004, due to procrastination among members. See the Protocol on [www.achpr.org](http://www.achpr.org). There is a further protocol for establishing the Court of Justice of the African Union: [www.africa-union.org](http://www.africa-union.org)

urban areas to work as child labour and the perpetration of other atrocious activities.<sup>196</sup>

The Charter also guarantees that deprivation of life without compliance with the due process of law is in breach of member states' treaty obligations.<sup>197</sup>

The charter obligation of compliance with due process is widely used by the Commission. In *Media Rights Agenda v. Nigeria*,<sup>198</sup> the Nigerian military government tried a civilian citizen in a military Tribunal and concluded that

...the appearance, sentencing and conviction of Malaolu, a civilian by a special military Court, presided over by military officers in active duty is nothing short of a violation of the fundamental tenets of the trial as stipulated under article 7 of the charter

Also in *Constitutional Rights Project of Nigeria v. Nigeria*<sup>199</sup>, the Commission held that it is reasonable to assume that local remedies will not only be available but must produce effective results. It was also held that a general restriction on rights diminishes public confidence in the rule of law and is counter-productive.

The principle of proportionality is vital within the jurisprudence of the Court as recognised by Article 10. Proportionality in relation to punishment meted out for crimes committed and proportionality in relation to actions meant to achieve the state objectives. In *Interights, Institute for Human Rights and Development in Africa and Association Mauritanenne des Droits del' Hommeu Islamic v. Republic of*

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<sup>196</sup>For a detailed analysis, see *Child Trafficking in West Africa: Policy Responses* (Florence: Innocenti Research Centre – UNICEF,2003)

<sup>197</sup>*Amnesty International v. Sudan*, Communication Nos. 48/90, 50/91, 52/91, 89/93, 1999-2000 African Annual Activity Report.

<sup>198</sup>  
<sup>199</sup> Communication 102/93, para.58 cited in Udombana, *Between Promise and Performance: Revisiting States' Obligations under the African Charter* see footnote 182.

*Mauritania*<sup>200</sup>, the Commission held that in respect of allegations made against the state,

...the dissolution of UFDI Erenouvelle political party by the respondent state was not proportionate to the nature of the breaches and offences committed by the political party and are therefore in violation of the provisions of article 10(1) of the African Charter

In addition, the Article 7(2) of the Charter prohibits retroactive laws which criminalise and punish offences which were hitherto not deemed as crimes. In addition, it prohibits punitive laws and other types of laws that have retroactive effect. The importance of this provision cannot be over emphasized in a continent where most of the countries are under either military dictatorship or a repressive one party state. Many examples abound, including Niger<sup>201</sup>, Libya<sup>202</sup>, Tunisia, Algeria, Morocco, Zimbabwe<sup>203</sup>, Egypt<sup>204</sup>, Cote D'Ivoire<sup>205</sup> and Nigeria until 1999, when the present democratic dispensation commenced.

The right not to be discriminated against is another major provision under Article 2 of ACHPR, which provides that

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<sup>200</sup>Communication 242/2001.

<sup>201</sup> There was a bloody military coup on 18 February 2010, which ousted elected President Mamadou Tandja. The coup attracted widespread condemnation and the African Union Peace and Security Council imposed sanctions on the administration of the military junta. There is a specific ACHPR resolution concerning military coups: ACHPR/Res.14 (xvi), adopted at its 16<sup>th</sup> ordinary session held from 25 October - 3 November 1994 at Banjul, The Gambia, condemned the planning and execution of coup d'états and any other attempt to seize power by undemocratic means: [www.achpr.org/english/resolutions/resolution/62\\_en.htm](http://www.achpr.org/english/resolutions/resolution/62_en.htm) (accessed on 18 January 2010)

<sup>202</sup>President Mamman Gadhafi was in power for about 4 decades, using repression and violence to perpetuate his regime against the citizens of Libya and maintained absolute coercion. His regime was overthrown with the assistance of NATO.

<sup>203</sup>Where President Robert Mugabe has been in power since independence in 1981, and operates a highly repressive state.

<sup>204</sup> President Hosni Mubarak was in power for over four decades.

<sup>205</sup>The refusal of defeated president Laurent Gbagbo after 10 years in government, despite losing the election on 28 November 2010, to concede victory to the winner, Alassane Qattara, has created human rights abuses and stalemate in the country.

...every individual shall be entitled to the enjoyment of the rights and freedom recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour sex, language, religion, political or any other opinion, national or social origin fortune, place of birth or other status.

This is an important provision, which obliges member states not to discriminate against their citizens on grounds of gender, ethnic origin or indeed nationality. The Commission held in the case of *Ivorian Human Rights Movement v. Cote d'Ivoire*<sup>206</sup> that Ivorian Law, which discriminates on the type of Ivorian citizens who can stand for election for the presidency, is discriminatory and against the Charter. In addition, the Ivorian law 98-750, which prohibited acquisition of land in the rural areas by non-Ivorian citizens, is discriminatory and in breach of article 14(2) of the Charter; it was unlawful and should be amended.

The right to participate in government, either directly or through the election of representatives by the citizens of the member states, is well entrenched in Article 13 of the Charter. This is the crux of the dilemma facing virtually all African countries. The inability to ensure political participation of all the citizens and concerted efforts to prevent all-inclusive citizens' participation in the political process of the different countries in Africa is the bane to democratic governance in Africa. The political elites do not create a credible Electoral system which will be effective in ensuring political accountability.<sup>207</sup> At the root of this is the repression perpetrated against minorities and dissidents in the political process of many African countries. The female gender

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<sup>206</sup>In Communication 262/2000, cited in the report of 45<sup>th</sup> Extra-ordinary session, EX CL/529(XV) at page 4.

<sup>207</sup> See generally Claude Ake, *The feasibility of Democracy in Africa*(Darussalam: CODESRIA,2000)

suffers a great deal of discrimination in the political process, and in this regard, the African Union adopted a protocol on ACHPR on Women Rights.<sup>208</sup>

The independence of the judiciary and the need for provision of remedies for breach of rights under the Charter is well entrenched in Article 26 of the Charter:

State parties to the present charter shall have the duty to guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with promotion and protection of the rights and freedom guarantee by the present charter

The independence of the judiciary is pivotal for the protection of human rights and the survival of democratic governance. The Commission in the case of *Constitutional Rights Projects of Nigeria v. Nigeria*<sup>209</sup>, interpreting the phrase ‘within the law’ in Article 9(2), has said that the national authorities should not override constitutional provisions and fundamental human rights guaranteed by the Constitution and by international human rights treaties. The respondent state recognised that national law could not set aside the right to express and disseminate information recognised under international law.

The focus on solidarity rights emphasizes the conviction that African values system place high premium on the need to take care of one another, relying on family ties and on kinship for survival and the use of common resources for sustenance and well-being. The obligation is to “assist the family which is the custodian of morals and traditional values recognised by the community” (Article 18). The uniqueness of solidarity rights lies in the fact that they embrace and uplift the cultural values and

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<sup>208</sup>We will consider the provisions of this protocol and its implications for Nigerian women participation politics in the next chapter.

<sup>209</sup>Communication 102/199.

ethics of African people. Family values of reliance on kinship, family ties, promoting cohesion and cultural rights in relation to the environment and how to ensure that communalism, which is paramount to the African way of life are promoted and respected under the Charter.

Article 29 stresses the duty of the individual to

...preserve the harmonious development of family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.

To be able to do this, the state must assist by providing an enabling environment for the realisation of economic potential of the individuals living in the member states. This emphasizes the importance of the interrelatedness and interdependency of the economic, social and cultural rights with communal/group rights in the human rights discourse. To achieve this goal, the state must ensure that the resources at the disposal of the state are well managed and equitably distributed for the benefits of all the citizens. This can only be achieved if graft and inefficiencies in the government's management of resources can be eliminated or reduced to a bare minimum. The different tribes making up the many ethnic nationalities of the Nigerian state have legitimate expectations that the state will protect their human rights, that equity and fairness will be adopted when dealing with them, both by their fellow citizens, by civil society and by the Nigerian state. No part of the Nigerian state should accord or arrogate a superior status to its entity as part of federal state.

In federalism, as indicated earlier in this chapter, all the constituent states are deemed equal, regardless of their population, economic resources and competitive advantages

that might be inherent in some states. Any competitive advantage a member state of a federation may have must be used for the benefit of all states. For example, the states making up the Niger- Delta, cannot lay a better and superior claim to the resources emanating from that area because of the availability of petroleum. This is the importance of Article 21 of the African Charter on Human and Peoples' Rights. It provides that the disposal of wealth and natural resources in member states should be done in such a way as to enhance the interest of all citizens and its distribution must be such as to achieve equitable results among all citizens.<sup>210</sup> The allocation of state Revenue must also be in accordance with constitutional provisions. The exploitation of oil revenue is possible because other, non-oil producing areas, provided an enabling environment for oil companies to continue to operate. The resulting resources must accrue into the federal account, to be shared for all the nations within the Nigerian state.

Ownership of minerals and petroleum is vested in the federal government of Nigeria. We are aware of the need to rectify past injustice as part of redistribution of wealth, as noted by some social justice theorists.<sup>211</sup> This need must be balanced against other compelling needs for the state to provide national security and cohesion. This argument runs in contrast to some expectations: minority rights' experts have argued in favour of the allocation of more resources for the Niger-Delta states, because of their peculiar circumstances in terms of environmental pollution and resultant destruction of livelihood of the inhabitants of the Niger-Delta.

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<sup>210</sup>Emphasis added.

<sup>211</sup>See Bronwen Manby, *The Price of Oil-Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999- Human Rights Watch).

There is always an argument that the government must provide an enabling environment to create opportunities for inhabitants in the area. Some might argue that there is need for oil exploring companies in the area to provide more educational establishments that would empower the citizens. This is a misconception; the state cannot abandon its responsibility in providing education as fundamental human right, hoping that multinational oil companies will assume this role as part of their corporate social responsibility. The state should provide quality and universal primary, secondary and higher education. If the citizens do not avail themselves of the benefits of these institutions, their agitations and grievances about lack of empowerment will become questionable.

The Niger-Delta Development Commission and the Petroleum Development Trust Fund are some of the statutory creations of the federal government to foster development, provide education, and infrastructures. It is arguable that, in view of the scale of corruption by state governors and these statutory bodies in the Niger Delta area, Section 162 of the 1999 Constitution should be amended to encompass another revenue sharing formula, which would be fairer to other parts of the federation. On the one hand, there is an argument, that parts of the Northern states are facing abject poverty, because of a lack of arable land and economic empowerment. The prevalence of infectious diseases like HIV/AIDs, polio, malaria, tuberculosis is a source of high mortality rate and destruction of the working population.<sup>212</sup>

On the other hand, it is possible to argue that the Federal government is not doing enough to rehabilitate the Igbo speaking part of the country following the devastation

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<sup>212</sup>See Lori Bollinger, *et al*, *The Economic Impact of AIDS in Nigeria*, Research Triangle Institute (RTI) and The Centre for Development and Population Activities (CEDPA), 1999-  
[www.policyproject.com/pubs/Nigeria.pdf](http://www.policyproject.com/pubs/Nigeria.pdf) accessed on 18 September 2011.



and destruction caused by the Biafra civil war.<sup>213</sup> This seems to be the justification, albeit, that it might be anarchist in propaganda because the civil war was a failed secession attempt, why bodies like Movement for the Actualisation of the Sovereign State of Biafra (MASSOB) attract sympathy among the grassroots. The leader of MASSOB, Ralph Uwazuruike, was recently released on a treason charge. Some commentators have argued that the Federal government does not have a moral justification for his prosecution.<sup>214</sup> This incident has revived the call for a sovereign national conference. The reasons for such demands are informed by the need to discuss the issues of marginalization, revenue allocation, constitutional amendments, the constitutional court and the enforceability of the Fundamental Objectives and Directive Principle.

To overcome concerns with marginalization and ethnic tensions, it is important to ensure that allocation of resources is made in an equitable manner; this is an imperative of pluralism in the case of federalism that must be rigorously adhered to. The states without natural resources should not be disadvantaged in fiscal allocation policies and programmes. A coherent system of fiscal federalism would help ensure social justice and pluralistic cohesive regional development, taking cognizance of the centripetal national goals. This will be a federalism in which regional autonomy is allowed in raising of revenue and spending the revenue in providing infrastructures. The revenue that is generated into the federal account should be more evenly and

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<sup>213</sup> President Goodluck Jonathan should be commended for the appointment of Lieutenant General Ijerika as the Chief of Army Staff, and Senator Pius Anyim as the Secretary to the federal government of Nigeria. This was the first time that Igbo citizens were appointed to such strategic positions in Government.

<sup>214</sup> Political activists and human rights activists that advocates for the welfare of their people within the limits of the law should not be persecuted and prosecuted on frivolous and thumped charges.

equitably distributed among the states in Nigeria. This must be well articulated and implemented in the National Economic Development Plans.<sup>215</sup>

We will now consider to what extent the 1999 Nigerian Constitution espouses the human rights and ideals of democracy. The position of the African Union in the clamour for realisation of these rights for the citizens in the African continent is anchored on the need for democratic government: hence, the declaration and adoption of the African Charter on Democracy, Election and Governance by the Heads of States of the members states on 30 January 2007. The Charter reiterates the importance of democratic governance as the form of governance that can sustain the ideals of the rule of law and good governance.<sup>216</sup> At the inception of the present dispensation of democratic governance in May 1999, the military administration commissioned the 1999 Constitution. There is lack of popular legitimacy in terms of having peoples' consent in the drafting of the Constitution; it emanated from the military administration, with no involvement from the citizens, either in the deliberation of the draft or in the election of the drafting committee, or in the conveying of referendum for its subsequent adoption.

The origin of 1999 Constitution, being a creation of the military administration, casts some doubts on it as an effective mechanism for ensuring the rule of law and constitutionalism. The democratic deficit in the Constitution, not being a creation of an elected legislative assembly of constituents, can be overcome by the necessary

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<sup>215</sup> '1999 Constitution and Fiscal Federalism in Nigeria', in *Position of Citizens' Forum for Constitutional Reform of the 1999 Constitution* (Lagos: CFCR, 2004)

<sup>216</sup> For a detailed discussion see Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights-A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Netherlands: Nijhoff Publishers, 2003).

amendments of the Constitution in areas that are inconsistent with these principles.<sup>217</sup>

Also, recently a Constitutional conference held deliberations on some amendments that are desirable to reflect the wider scope of the members of the Nigerian society to reflect the divergences of the communities. It is aimed at removing some of the deficits in the 1999 constitution.

The Constitution retains the basic framework for the protection of fundamental human rights in its Chapter Four. The supremacy of the Constitution as the source of power and authority to govern the citizens is well stated in Section 1. The nature and extent of federal government powers,<sup>218</sup> the relationship between the executive, legislative and the judiciary<sup>219</sup>, the qualifications and elections of members of the National Assembly and the procedures for summoning and dissolving the National Assembly<sup>220</sup>, power and control over public funds<sup>221</sup>, composition of and staff of State House of Assembly and the procedure for summoning and dissolving the State House Assembly<sup>222</sup>, the establishment and powers of the different courts, and the establishment of National Agencies<sup>223</sup> and Election Tribunals<sup>224</sup> are some of the key provisions under the Constitution that aim to ensure good government. The mechanics of complying with the provisions, the formulation and implementation of policies and programmes and the interpretation of the Constitution are some of the challenges facing the Nigerian state in its efforts to ensure good governance and the protection of fundamental human rights of Nigerian citizens. The government must ensure that the

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<sup>217</sup> President Goodluck Jonathan recently signed an amendment to the 1999 Constitution.

<sup>218</sup> Part II of the Constitution

<sup>219</sup> Section 4,5 and 6

<sup>220</sup> Section 47 to 79.

<sup>221</sup> Section 80 to 89

<sup>222</sup> Section 90 to 93

<sup>223</sup> Third Schedule, Part I.

<sup>224</sup> Part III, Section 285.

legitimacy of the government is ensured by compliance and adherence to the limits imposed on it in protecting the rights of the citizens.

In common with many constitutions, the 1999 Constitution provides for an array of fundamental human rights and the obligation of the state to protect the citizens against infringement of these rights. The 1999 Constitution's provisions in relation to social, economic and cultural rights are ones of aspirational goals rather than legally binding and enforceable rights. These are set out in Chapter II under the title- Directive Principles of State Policy. The obstacles to the enjoyment of social justice are reflected in the non-justiciable nature of these rights and the lack of judicial purposive interpretation. Section 6(6) (c) of the Constitution provides an ouster clause, excluding the courts' jurisdiction in relation to matters therein. However, we argue that the limited access for adjudicating on these issues can be overcome by pursuing social justice rights through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. In effect, this Act made the benefits of rights under the African Charter enjoyable, without the need to go through the African Commission or the African Court of Justice. In addition, the fact that Nigeria is a signatory to the International Covenants on Civil and Political Rights means the citizens can rely on the Nigerian courts to derive and enforce the rights emanating from such treaty.

There are disagreements concerning the need or otherwise to entrench or incorporate socio-economic rights in a constitution and make them justiciable. Professor Nwabueze strongly believes that its non-inclusion in the Constitution makes them not enforceable. Judicial pronouncements concerning the issue of justiciability of the

African Charter under Nigerian law is unambiguous. In *Nemi v. The State*<sup>225</sup>, the Supreme Court of Nigeria held that the absence of an enforcement procedure in the African Charter does not constitute an impediment to the enforcement of the rights contained in it. According to Bello, CJ:

*Since the charter has become part of our domestic law, the enforcement of its provisions like all our laws falls within the judicial powers of the court as provided by the constitution and all other laws relating thereto*<sup>226</sup>

The *Nemi* decision by the Supreme Court confirmed that, despite the fact that there is no enforcement mechanism for the rights conferred by the African Charter in the 1979 Constitution, the fact that its adoption by the Nigerian state through ratification, made its provisions part of Nigerian domestic law. The citizens, as the source of the sovereignty of constituted power, must be protected in order to ensure that the legitimacy of the government is procured and preserved. The legitimacy of government is ensured if the power to act is derived from the people and the power is used to ensure that the human rights of the people are protected against abuse by the state.

In relation to the International Covenant on Economic, Social and Cultural rights<sup>227</sup>, the jurisprudence of its interpretation is that, because of its similarity to rights under African Charter on Human and Peoples' Rights, it can be enjoyed through a purposive interpretation by the Nigerian courts. In addition, with the domestication of the ACHPR in Nigeria, there is no need to seek remedies from the African Human Rights

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<sup>225</sup>(1994)1 LRC 376.

<sup>226</sup> P.385

<sup>227</sup>See Rhoda Howard, "The Full –Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub- Sahara Africa", *Human Rights Quarterly*, vol.5 (November 1983), pp.467- 90.

Commission. Nnamuchi, argues that by virtue of article 60 of the African Charter, the African Commission can apply not only human rights principles adopted by the UN, such as those contained in article 12(1) of the ICESR, but also the “provisions of various instruments adopted within the Specialised Agencies of the United Nations”, such as General Comment No 14. Furthermore, he said, since the domestication of the African Charter as part of Nigeria’s municipal law, the Courts became vested with the judicial powers and obligations of the African Commission; it follows that these courts can conform to or observes the Commission’s procedural rules (including Article 60) unless there is a statutory provision to the contrary. There is none.<sup>228</sup>

The Universal Declaration of Fundamental Human Rights, the International Covenant for Political Rights and the International Covenant for Economic and Social Rights are all recognised by the Nigerian Constitution<sup>229</sup>. In Nigeria, there is recognition of the rights to life<sup>230</sup>, dignity of the human person<sup>231</sup>, personal liberty,<sup>232</sup> right to a fair hearing<sup>233</sup>, the right to privacy and family life<sup>234</sup>, freedom of thought, conscience and religion<sup>235</sup>, rights to freedom of expression and the press<sup>236</sup>, peaceful assembly and association<sup>237</sup>, freedom of movement<sup>238</sup>, freedom from discrimination<sup>239</sup> and the right to acquire and own immovable property anywhere in Nigeria.<sup>240</sup> The extent to which these rights are enjoyed and exercisable is subject to controversy and judicial

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<sup>228</sup>O. Nnamuchi, ‘Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Rights to Health Care in Nigeria’, *Journal of African Law*, 52,1 (2008)1- 42, at p.28.

<sup>229</sup> However, the rights are embedded in the State Directives and Policy that is not enforceable against the state.

<sup>230</sup>Section 33, 1999 Constitution.

<sup>231</sup>Section 34.

<sup>232</sup>Section 35.

<sup>233</sup>Section 36.

<sup>234</sup>Section 37.

<sup>235</sup>Section 38.

<sup>236</sup>Section 39.

<sup>237</sup>Section 40.

<sup>238</sup>Section 41.

<sup>239</sup>Section 42.

<sup>240</sup>Section 43.

interpretation. The necessity for the state to ensure public policy, safety and security has become overwhelming in any claim by citizens to enjoy and assert their rights.<sup>241</sup>

Having discussed the theme of constitutional form, we now turn our attention to the issue of constituted power. Like constitutional form, power must operate within broader procedures and values. These are informed by values drawn both from Nigerian politics and from other international norms. These values relate to social justice, the distribution of state resources and the welfare of citizens. In the Nigerian context, social justice can be understood with reference to the attainment of social goals by the government relying on federalism and social and economic rights.

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<sup>241</sup> Section 45 provides that nothing in Sections 37, 38, 39, 40 and 41 shall invalidate any law made for the reasonable justification of a democratic society, if such laws are in the interest of defence, public safety, public order, public morality, public health, or for protecting the rights and freedom of other persons.

## CHAPTER SIX - SOCIAL JUSTICE AND FEDERALISM

### 6.0 Introduction

It is important to articulate the framework through which social justice can be attained in view of lack of enforceable rights to social justice under the Constitution. This is necessary because the 1999 Nigerian Constitution did not guarantee the enjoyment of social justice ideals to the citizens. We will draw attention to why this is bad for constitutionalism and why it is part of the problem that undermines the quest for legitimate governance in Nigeria. Nigeria is a heterogeneous society with over thirty six ethnic groups and it is pertinent that the existing federalism is well managed to ensure cohesion and harmony.

Social justice in the context of this work would articulate the facets of justice, which are aimed to achieve a just and humane society. Social justice is complimentary to political justice, as we have sign posted it in chapter one. However, the attainment of political justice under an enabling environment will ultimately lead to the realization of social justice.<sup>242</sup> Programmes aimed at social justice are often anchored on obligations under the International Covenants on Economic, Social and Cultural Rights (ICESCR) and similar provisions under the African Human and Peoples' Rights Charter. The incorporation of the duties emanating from these charters is often hampered by the fact that such rights are non-justiciable under the national constitutions of signatory members, including Nigeria.<sup>243</sup>

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<sup>242</sup>See Brian Barry, *Why Social Justice Matters* (Cambridge, MA: Polity, 2005).

<sup>243</sup> C.A. Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in M. Evans and R. Murray (eds.) *The African Charter on Human and Peoples' Rights-The System in Practice, 1986-2000* (Cambridge: University of Cambridge Press, 2008) S. Ibe, "Beyond Justiciability : Realising the Promise of Socio-Economic Rights in Nigeria,"(2007),7 African Human Rights Law Journal,229.The judiciary has a responsibility for the enforcement of fundamental human rights, thus it is imperative for the judiciary to take a proactive stance in elucidating the socio-economic rights of the citizens,



Nwabueze (1993:5) has lucidly asserted that

*...social justice is predicated on the notion that organized society, as an association of people, creates in the member certain reasonable expectations or claims which it would be unfair to disappoint. It gives rise to certain claims which each member, either by virtue of purely being such a member and irrespective of his conduct or choice, or in virtue of his desert, merit or need as such member, can fairly make on the society as a whole, and which it would be unfair for society to deny or fail to meet*<sup>244</sup>

This notion of social justice is based on the idea of social goals, which society must achieve as part of the contract between the state and the citizen. This argument is reminiscent of Hobbes's social contract theory. The state relies on constituted authority to use its 'organisational capacity', "by which is meant the capacity of the institutions, organisations and processes of government to achieve collective" goals.<sup>245</sup> The government has the overwhelming capacity to harness state resources and ensure their distribution by taking into consideration competing needs for limited resources. The government's distribution strategy depends on its particular political ideology and its commitment to the tenets of that ideology. It is incompatible with citizens' legitimate expectation, which anchored citizens' entitlements to such benefits on the ability of the citizens to contribute to the well-being and development of that polity. It should suffice that citizens' entitlement to social justice is based on their membership of that society and obedience to its law. However, some commentators like Frankena

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regardless, of Section 6(6)(c) of the 1999 Constitution, which provided ouster clauses on the judicial interpretation of the fundamental objectives and directive principles of state policy. The author cites a number of Indian Supreme Court decisions, in support of this proactive jurisprudence.

<sup>244</sup>B.O. Nwabueze, *Military Rule and Social Justice in Nigeria* (Ibadan: Spectrum Books Ltd, 1993), p.5.

<sup>245</sup> Ibid at p.5

and Ross, have argued that it is unreasonable to expect to treat citizens equally regardless of their contribution, need and merit; this position emphasises the distinct principles of desert, merit and need in the pursuit of society's desire to give equal treatment to its citizens.<sup>246</sup> In a county like Nigeria, where over 40% of the population are un-employed, the state needs to be more proactive in pursuing policies that can achieve social justice.

## **6.1 RESTORING FEDERALISM INFORMED BY SOCIAL JUSTICE AND HUMAN RIGHTS**

The Federal character policy,<sup>247</sup> which aims to reflect Nigerian diversity in the administration of government, obliges the Federal government to appoint at least one minister from each of the 36 states that make up the federation. Diversity must also be reflected in the appointment of personnel from all states of the federation into federal civil service and other public bodies, in a manner that reflects the population's ethnic diversity and that promotes pluralism. Federal policy on the appointment of personnel should be strengthened to achieve pluralism and must be implemented within the parameters of the appointment criteria of the federal civil service. It is not sufficient to appoint a person into a federal post without them meeting the basic qualification and relevant experience. The federal character of Nigeria would negate the goal of national cohesion if it is not properly implemented. This is because federal character can lead to a situation where particular ethnic groups are over-represented in the civil

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<sup>246</sup> William Frankena, *et al*, *Introductory Reading in Ethics*, Prentice Hall, 1974 cited in Nwabueze, *op. cit*

<sup>247</sup> Section 13(3) of the 1999 Constitution provides that "the composition of the government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or of a few ethnic or other sectional groups in that Government or in any of its agencies".

service because of deliberate affirmative action being taken to project and promote that tribe into the particular specialism or cadre.

The federal character is also applicable to issue of the location of federal infrastructures and institutions. This is where the federal government can use its advantage to foster economic development by the provision of infrastructures in the Niger Delta. This will rehabilitate the youths that emerged following the amnesty granted in relation to past violent criminal conducts.<sup>248</sup> As part of the federal character principle, we need to redress the injustice perpetrated against the Niger Delta and other minorities in Nigeria. The creation of a federal ministry for the Niger Delta and Niger Delta Development Commission is commendable, subject of course to the issue of minimising corruption and directing the resources of the establishments for the development of the region. Policies need to be informed by human rights, as they relate to education, health, housing, transport and investment.

The right to education is part of every citizen's right in ensuring enlightenment and empowerment.<sup>249</sup> The universal primary education programme needs to be revamped with adequate funding and measures to reduce graft in order to ensure that funding is well managed and expended on the programme. The mass of the Nigerian populace are located in rural areas; it is important to ensure that the rural communities are well

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<sup>248</sup> On 9 August 2009, President Yardua set up the Presidential Task Force on the Amnesty in the Niger Delta. The programme has three themes: disarmament, reintegration and rehabilitation of the militant youths. Dr Timiebi Agary, media coordinator of the Amnesty Programme said the programme for the reintegration is done with non-governmental organisation and the Petroleum Trust Development Fund. The Joint Military Task force in the Niger Delta is still operational in the area, until the area is secured. Major –General Godwin Abbe, the head of the Amnesty Task Force, has said on African Independent Television (AIT) News interview on 20 September 2009, that after the ultimatum for the amnesty, militants who are yet to embrace the programme will bear the full wrath of the law. Air vice Marshal Lucky Ararile, the coordinator of the interagency platform for the Amnesty Programme, said some of the political elites are not genuinely committed to the amnesty programme.

<sup>249</sup> See R. Ahiede 'Universal Basic Education in Nigeria: Matters Arising' (2006) 20(2) *Journal of Human Ecology*, 97-101.

targeted in the provision of universal primary education as well as secondary school education. The government needs to involve the private sector in the provision of educational programmes and infrastructures. This is paramount because of the increasing role of the private sector and the government commitment towards the 3Ds of contemporary globalization: deregulation, denationalization and disinvestment. We must bear in mind that this trend in western democracies is also becoming open to question because of recent crises in financial institutions which led to national governments taking concerted measures to stabilize the banking system.

The provision of public health facilities and programmes is a paramount duty of the state in the quest for social justice. Over 50% of the Nigerian population are inhabitants of the rural areas and are employed in the informal sector of the economy such as farming, fishing, artisan, and trading.<sup>250</sup> Public health facilities and programmes must target the rural areas. Private health care is beyond the reach of the rural inhabitants because of their lack of economic power and even where they seek to access private health through non-governmental organizations, the private health sector does not invest in the rural areas. It is necessary to embark on credible primary health care programmes, which will involve the local government authorities in the rural areas as strategic partners, to ensure that the benefits of primary health care programmes reach the rural populace rather than being overwhelmed by the bureaucracy at the federal government and state government levels. The need to embark on the eradication of malaria in Nigeria is paramount because of its status as one of the major killers of the people. In addition, the HIV/AIDS pandemic needs to

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250 UNICEF Country Information: Nigeria at aGlance, <http://www.unicef.org/infobycountry/Nigeria-statistics.htm/>, visited on 19 July 2010.

be dealt with by concerted efforts and with continued collaboration with the Non-Governmental Organizations. In relation to the river-locked areas, there is a need to control water-borne diseases and environmental pollution prevalent in those areas of the country. In the northern part of Nigeria, there is a need to eradicate polio and vagina fistula among rural women.

Nigeria, with a teeming population of 140 million, needs a coherent and sustainable housing policy. There should be housing programmes that would provide affordable houses to the working class. The present policy of clearing slum areas and thereby rendering the people homeless cannot be said to be just and equitable. Most of these slum areas are then rehabilitated and distributed to the rich to build affluent houses.<sup>251</sup>

The issue of housing is closely related to land acquisition and ownership. The regime of the Land Use Act 1978 should be reformed to ensure that where the government acquires land from slum areas, such acquisition should be in public interest, and for public projects. There should be adequate compensation, and resettlement for the displaced inhabitants of such slum areas.

The transport sector also needs to be revamped as part of the government industrialisation objective in its 4-points agenda. The rail, road and air transport systems need overhauling. The private sector can be brought in to invest in this area because of its capital-intensive nature. It is paramount to ensure that the economies of rural and urban areas are integrated for the sake of optimum development of both

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<sup>251</sup> The Plight of the Maroko evictees in Lagos is still on-going. The military government of Navy Captain Gbolahan Mudashiru in 1991, compulsorily acquired the land, reallocated the land to new occupiers without due process of law. The land is now part of the most affluent area of Lagos called Lekki. Some of the Maroko evictees were relocated to the Ilasan housing estate. In December 2005, an NGO, SERAC obtained a high court decision in the case of *Aiyeyemi and Others v The Government of Lagos State and Others* (unreported, suit No M/474/2003) against the planned forced eviction of the former Maroko evictees from their present location at Ilasan estate without an order of a competent court: cited by Stanley Ibe in *“Beyond Justiciability : Realising the Promise of Socio-Economic Rights in Nigeria) op cit.*

areas. An integrated transport policy and programme are paramount for the realisation of this objective. Private franchises could be created for private investors to run parts of the railway. An efficient and integrated transportation system will foster industrialization and prevent the rural-urban migration that often leads to over-burdening of inadequate infrastructures in the urban areas.

The government should ensure policies that encourage companies to invest in corporate social responsibility and assist in the attainment of social justice in areas where such companies' operations are embarked upon. There should be collaboration between the Bureau of Privatization and Commercialization, the National Pension Commission and the National Agency for the Eradication of Poverty for initiating programmes that encourage corporate social responsibility. Kelechi Kalu has argued that politicised ethnicity should be well managed as a resource that can contribute to economic development.<sup>252</sup> This is possible because of Nigerian citizens' consciousness of their ethnic identity. This consciousness can be harnessed to foster economic development by ensuring that their ethnic identity and the patriotic zeal invested in such identities are re-energized towards contributing to the national agenda of promoting social justice and political stability. What is paramount is that the government should use funds from the Excess Crude Revenue Account to ensure that the rural areas are given priority in the provisions of infrastructures to make life less difficult for the inhabitants of those areas.

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<sup>252</sup> Kelechi Kalu, 'Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics' *West African Review*, Issue 6, 2001, page 1

## **6.2 SOCIAL JUSTICE AND THE ACTIVE MANAGEMENT OF ETHNIC RELATIONS**

Government should take a leadership role in managing ethnic relations between the different ethnic groups in Nigeria, as it is inevitable that conflicts will arise because of political and religious affiliations and the parochial views of the different ethnic groups. This role has to be performed in order to ensure the preservation of the sovereignty of the Nigerian states and that all different groups live in harmony within the same sovereign political entity. In managing these ethnic conflicts and relations, the Nigerian government is obliged by virtue of Section 10 and Section 38 of the 1999 Constitution to ensure secularism. However, some of the northern states of the federation have sought to relinquish their obligations to this part of the Constitution by the adoption of Sharia law and practice in their states.<sup>253</sup> To achieve social justice, the government must assiduously ensure that procedural governance issues are judiciously and equitably formulated and implemented. Issues like revenue allocation, creation of new states, federal government appointments, access to national institutions and other resources, which the federal government is constitutionally obliged to distribute among the states and citizens, should be done in an equitable manner. This raises concerns about the operation of policies like federal character and other initiatives that tend to promote nepotism and discrimination.

Perhaps the most controversial issue is that of resource allocation. There should be an equitable distribution of resources to all the states and local government areas in Nigeria. This will ensure that such resources are available for policies and

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<sup>253</sup> A. Iwobi, 'Tiptoeing Through a Constitutional Minefield: The Great Sharia Controversy in Nigeria', 48, No.2 (2004): 111-164 *Journal of African Law*

programmes that will empower all the citizens in the realization of their talents and be able to contribute to the development of the economy. Presently, citizens are using their politicized ethnicity as a tool to bargain and seek government services and patronage. This is because meritocracy has been compromised and citizens are only able to access government services through nepotism and discrimination, to the detriment of citizens who are not well connected. Resources in this context relate to the criteria used for the allocation of revenue; the question is how to ensure fairness and equity while upholding the principle of fiscal federalism policy in a federation like Nigeria. We will now examine some of the ways for addressing inequality and ensuring social justice.

**(I) Re-distribution of wealth through progressive taxation<sup>254</sup>:**

One of the normative problems, which any social justice discourse often faces, is how to deal with the wealthy people in a given society. Is the government obliged to ensure redistribution of wealth through progressive taxation? We will consider this issue from two perspectives:

- (i) Social harmony and enabling environment.
- (ii) Personal responsibility and equal opportunity.

To ensure social harmony and cohesion, the government is obliged to provide equal opportunity to all members of society in order to achieve their well-being and enable them to actualize their potential. To provide an enabling environment for the creation of equal opportunities, the government can impose a progressive taxation system, which will ensure that those who have more wealth pay more tax.

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<sup>254</sup>For further discussion on the impact of taxes on taxable income see Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).



This redistribution of wealth takes wealth away through taxation and puts it at the disposal of the government to ensure an enabling environment for those who are less wealthy and need more support from the government. The government needs to provide social equilibrium by ensuring that the less privileged and the poor are provided for by the state. If the state needs to raise money for such goals by taxing the wealthy, then such redistribution is justifiable. This is because the wealth-creation abilities of the rich are dependent on having an enabling environment, which the government is obliged to provide. For the government to provide such an enabling environment there is a need to provide for the citizens and the unemployed to ensure social harmony and cohesion.

The other perspective about redistribution of wealth through taxation is that it encourages indolence and personal irresponsibility of the people who do not have money, and have to rely on state support.<sup>255</sup> This argument revolves around the notion that all the government needs to do, is ensure equal opportunities for everyone to be able to create wealth and make money. This perspective suggests that it is not the business of the government to take wealth away through taxation in order to provide an egalitarian society. The argument is further canvassed that people should take personal responsibility for their fate in society. Wealth creation through hard work and inheritance should not be penalised by punitive taxation aimed at redistribution of wealth. The argument of the right wing capitalists is that wealth creation is achievable by people who are committed and focused on private enterprise. The government is only meant to provide a plain- field and mechanisms for ensuring fair play in private

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<sup>255</sup>This is the capitalist's autonomy argument that the state should not be involved in creating artificial barriers, which obstruct wealth creation, thus preventing hard work, and rewarding indolence of citizens who made bad choices .

enterprises. This discourse takes issue with such argument and analyses because the role of the state is to ensure the well-being of all citizens, regardless of their economic status and ensure social cohesion.

We would take the issue of equality of opportunity further in an attempt to show that wealth creation could be sustainable ideal, provided the need to ensure social justice is to be reconciled with equality of opportunity for wealth creation.

## **(II) Provision for equality of opportunity<sup>256</sup>:**

In order to eliminate further stratification of Nigerian society along socio-economic class, it is important to provide equality of opportunity and a level plain- field where all citizens can attain and realise their potential. No special concession or resources should be provided, in terms of education, training and other resources that can lead to further empowerment or creation of a special class that will dominate the people and use state resources for their own personal aggrandizement. The emergence of military elites is an example where state resources were used to create opportunities for military officers, predominantly from the northern part of Nigeria.<sup>257</sup> The creation of the Nigerian Military Defence Academy, whose graduates hold various posts and perpetrate violence against the populace, had led to the abuse of state resources to provide training opportunities, which are later used to perpetrate illegal violence against the Constitution and the Nigerian population.<sup>258</sup>

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<sup>256</sup>Brian Barry, *Why Social Justice Matters: Applied Political Philosophy* (Cambridge: MA: Polity, 2005). For a critique of Barry, see Richard Anerson, *Does Social Justice Matter? Brian Barry's Applied Political Philosophy, Ethics* 117 (April, 2007)1.

<sup>257</sup>See Shehu Othman, *"Power for Profit: Class, Corporatism, and Factionalism in the Nigerian Military"*, (Lagos: Mimeo, 1987).

<sup>258</sup>See further analysis in Kayode Oguntuashe, 'The Prestige of the Military Profession in Relation to Some Others in Nigeria', in *Democratization and the Military in Nigeria*, L. Olurode and R. Anifowoshe eds. op cit

The creation of opportunity also needs to be viewed in the context of the recruitment of public officials and the training afforded to such officers. This relates to present circumstances and frameworks for recruiting public officials and seeking employment in the private sector. The criteria and standard of the prospective candidates should be equal and well known to all citizens, regardless of their ethnicity and social backgrounds. The standards in public education should be able to equip citizens who could not benefit from private education with such skills that would enable them to vie for such public positions and private employment. Equal, according to Brian Barry, does not necessarily mean identical; rather it means equivalent ability for the attainment of the desired goal. Social justice requires equal distribution, unless inequality arises by voluntary choice from an initial situation in which everyone has equal opportunity.

According to Barry, the rights, opportunities, and resources in which social justice arises are disparate, and it is a mistake to suppose that these disparate types of goods can somehow be reduced to a common measure:

*Perhaps the notion that resources can be reduced to a common denominator arises from the idea that there is some generic stuff (called utility advantage or whatever) whose distribution is subject to social justice.*<sup>259</sup>

This assertion by Barry epitomizes libertarian argument against social justice theory as an impediment on free choice and autonomy. The idea of free choice and autonomy allows people to make personal choices for which they must take responsibility. If the personal choices they made turn out to be disastrous, they are to face the

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<sup>259</sup> Richard Arneson, *Does Social Justice Matter?* at p.193

consequences. Barry contends that people should be given more chances in order to correct past erroneous voluntary decisions they made, and to create equal opportunities in spite of earlier wrong choices that caused them losses. The capability approach to social justice, as articulated by Martha Nussbaum,<sup>260</sup> might be more appropriate to the Nigerian context in order to overcome the problem of distribution of disparate goods or resources, which Barry identified. Nussbaum's position is that society

*...should be arranged so that everyone has that capability to function at an adequate level in each of the several dimensions of life that together constitute good human living. This position does not require that one be able to integrate the different dimensions of human capability to arrive at one overall measure of an individual capability<sup>261</sup>*

This position envisages the limited nature of the organizational capacity of the state to provide disparate resources for the actualization of an individual's potential.

In order to ensure equality of opportunity, historical or initial inequalities must be eradicated. Inequality can be the result of previous privileged position or status that passes from one generation to the other. Such historical inequality often leads to cumulative advantages and disadvantages depending on the extent of the historical inequalities. In these circumstances, social justice must ensure that equality of opportunity is achieved by using distributive justice to correct past injustice. Redressing past injustice is a paramount objective towards the attainment of social justice.

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<sup>260</sup>See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge MA; Cambridge University Press, 2006); cited in Richard Arneson, *Does Social Justice Matter?*

<sup>261</sup> At p.395

### **(III) Empowerment of rural communities and minorities.**

Overwhelming parts of the Nigerian population are habitants of the rural community, and highly marginalized.<sup>262</sup> As part of the goal of creating convergences between the urban and rural areas, the existing network of cooperation and collaboration among the indigenous rural community can be used to channel modern infrastructures and amenities to the people. The agrarian economy of the rural community can be complimented by the government initiative to provide liberalized land reforms that will provide easy access to land and provisions of financial assistance for mechanised farming. Cooperative societies and micro finance companies should be encouraged and well-regulated to assist the rural populace and empower them. All these initiatives, if implemented by the government, will effectively lead to the realization of the government's obligation to provide work and food under Articles 6 and 11 of the Covenant on Economic, Social and Cultural rights respectively.

### **(IV) Diversity and Tolerance**

The Nigerian state aimed to build a cohesive state, which respects the diversity of the different ethnic groups that made up the country and at the same time encourages tolerance of minority views. This objective is achieved with provisions on citizenship and fundamental human rights. It is translated in the 1999 Nigerian Constitution under the Directive Principle and State Policy. Two objectives to be achieved are to promote the national political objective of building a united and free society for all Nigerians, and to advance reciprocal obligations between the state and its citizens. It is necessary

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<sup>262</sup> The Obasanjo Administration in 1999 acknowledged this fact, hence the initiative on Nigerian National Policy on Poverty Eradication and the creation of the National Poverty Eradication Council, which is charged with the implementation of the National Poverty Eradication Programmes (NAPEP). The NAPEP's activities are built around four schemes: the Youth Empowerment Scheme (YES); Rural Infrastructure and Development Scheme (RIDS); Social Infrastructure Services Scheme (SOWESSS) and the Natural Resources Development and Conservation Scheme (NRDCS).

to re-orientate citizens' values towards cherishing a Nigerian state based on inclusive citizenship.<sup>263</sup> This inclusive citizenship, while respecting the diversity of the people in terms of their cultural, political and religious inclinations, expects reciprocal respect from these citizens towards other people's views and their right to be different. The state should set the target of what national values are to be aspired for and encourage its citizens to strive for their attainment.

The state should not profess a particular religion or embark on policies that may have such an inclination. The Nigerian state is a secular state by virtue of Section 10 of the 1999 Nigerian Constitution. The state should desist from funding citizens to visit Saudi Arabia for religious pilgrimages or to Israel in order to perform religious rites. There is no economic advantage for this practice; it serves as source of graft to siphon resources away. In addition, it acknowledges that Islam and Christianity are the only recognized religions. The issue of faith and its practice is not the business of the state, except the need for the government to provide a level plain- field for all citizens to propagate their religion.

Some commentators believe that the creation of new states from existing states will foster diversity and tolerance by creating a geographical entity for people of similar and identical ethnic origin.<sup>264</sup> We do not agree with such an analysis because it is imperative for citizens to be able to live together in a cohesive and peaceful manner. In addition, history has shown that past exercises in state creation, such as in 1967, 1976, 1987, 1991 and 1996 have not succeeded in curbing ethnic rivalry and violence.

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<sup>263</sup> 'Towards an Inclusive Citizenship in Nigeria', in *Position of Citizen Forum for Constitutional Reform on the 1999 Constitution*, (Lagos : CFCR, 2000)

<sup>264</sup> Rotimi Suberu, "States Creation and the Political Economy for Nigerian Federalism" in Kunle Amuwo et al (eds.) *Federalism and Political Restructuring in Nigeria*, (Ibadan: Spectrum Books) pp. at 276.

Furthermore, there is no economic or political justification for the creation of more states in Nigeria. The proliferation of states will only lead to the creation of further bureaucracy, which does not lead to economic development or to the creation of infrastructures at the local level. The creation of states has always been an exercise in political expediency rather than in the interest of economic development or for fostering grassroots involvement and participation in governance.

There is no genuine census to ascertain the population of Nigeria for the purpose of fiscal and economic development analysis. All the state creation exercises by General Gowon, Murtala Mohammed/Obasanjo, Buhari, Babaginda and Abacha regimes were all motivated by the need to compensate the sectional and cabal interests of the political elites rather than fostering developments at grassroots level.<sup>265</sup> On all occasions that the federal government created states for the southern part of Nigeria, it was a political strategy in response to the clamour of political actors. Such a request to create more states inadvertently exacerbates the problems of representation and of equity in the dichotomy between the north and south. The northern parts of Nigeria often get more states without any conclusive population census to support the assertion that the northern population is higher. The military dictators were always mainly from the northern part of Nigeria, and maintaining the status quo was paramount to continue the hegemonic traits of the Hausa/Fulani oligarchy.<sup>266</sup>

However, the creation of states at times was also meant to stem rivalries and acrimony between different communities lumped together in the same geographical location for

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<sup>265</sup>For the politics of state creation, see, H. Alapiki, State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy, *African Studies Review*, Vol.48, No.3 (December 2005), pp.49-65

<sup>266</sup>For an analysis of the bourgeoisie in this context, see Adebayo Olukoshi, Bourgeois Social Movements and the Struggle for Democracy in Nigeria: An Inquiry into the 'Kaduna Mafia',

political expediency. This often leads to clan and ethnic orchestrated violence, and to religious riots. Roberts<sup>267</sup>, however inaccurately, asserted that traditional rulers were complicit, unable or showed little positive disposition in the religious riots that engulfed parts of the country in the wake of the adoption of Sharia law. In our view, it is not the role or function of traditional rulers to perform the key function of the state: that is, of maintaining law and order. The state is the only entity in the polity endowed with the capacity and resources for the maintenance of law, order and security.

The nation state has four essential characteristics or features, namely, population, territory, sovereignty, and government. The government must not adopt illegal policies that will lead to a state of emergency. Government is the institution through which the state maintains social order, provides public services, and enforces law and order and the maintenance of national security and territorial integrity. It is high time that the Nigerian state gave cognizance to the roles and functions of the traditional rulers towards the attainment of the role and function of government. The traditional rulers have been performing these roles from time immemorial without due recognition and recompense. In the colonial era, these functions were identified by constitutional provisions, albeit, without much dignity and their role was accorded only a peripheral status. Nevertheless, they were the pinnacle of the indirect rule and the colonial administration. The post-colonial state cannot afford to indulge in such a cavalier stance, because of the increasing importance of the roles of the traditional rulers and the State's own inability to perform all its functions. This crisis, or inability to maintain law and order, is compounded by a further legitimacy crisis. According to

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<sup>267</sup> F. O. Roberts, "Traditional Rulers, Governance and the Postcolonial State", in O. Vaughan (ed.) *Indigenous Political Structures and Governance in Nigeria*, (Ibadan: Bookcraft LTD, 2004) p. 13.



Agbaje (2000) this is linked to the State's inability to manage power and resources and the weakness of its political institutions, including the significant fact of a flawed federal structure.<sup>268</sup> Roberts concluded that the

*...state has therefore been unable to transform itself into a state that has the heuristic quality of being treated as if it is issued from society. As presently constituted, the postcolonial Nigerian state under develops both itself (state) and society. Its routine efforts to engineer political change are often invalidated by inherent efforts contradictions in the state itself or presiding regimes.*<sup>269</sup>

### **6.3 CONCLUSION**

This chapter has identified the importance of international norms for the protection of human rights and how the Nigerian state strives to achieve good governance within the ideal of democracy and social justice. It laid the foundation for the discussion on how the judiciary in Nigeria is endeavouring to ensure the protection of human rights while ensuring a purposive interpretation of the provisions of Directive Principle and State Policy under Chapter II of the 1999 Nigerian Constitution. Social justice can only be achieved if the state assiduously adheres to its obligations emanating from the International Covenant on Social Economic and Cultural Rights and the African Charter on Human and Peoples' Rights, which guarantee citizens' social and economic rights.

The importance of the Nigerian state in terms of the need to provide for the welfare of the citizens cannot be over emphasised. The state is in a unique position, because of

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<sup>268</sup> A. Agbaje, *The State in Nigerian Political Development*(Ibadan: NISER,2000) cited in Roberts

<sup>269</sup> F. Roberts, *Traditional Rulers, Governance and the Postcolonial State*, p.23,op cit

its access to state resources and has the ability to distribute the same in accordance with a declared political ideology. Nigeria does not have a well-entrenched political ideology. The position of this thesis is that the pursuit of a social justice agenda can render the government more relevant to citizens who conceded their constituent power to the government in the exercise of their political power as the source of sovereignty. Having discussed this idea of constitutional theory, we will discuss the importance of socio-economic rights and its enforceability using the South Africa model as well as the role of military dictatorship in political governance and its impact in relation to good governance in Chapter Six and Seven respectively.

## CHAPTER SEVEN- SOCIAL AND ECONOMIC RIGHTS

### 7.0 Introduction

As part of the ‘interzone’ idea, it is pertinent to consider how the international convention for the realization of socio-economic rights can be adapted for the Nigeria state to assist in the desire to achieve good governance for the citizens. We have alluded to the fact that cultural jurisprudence will be enhanced by the adoption of liberal ideas and initiatives that are worthy of adaption. It is only logical to adopt and adapt same towards the realization of the ‘interzone’ idea. This chapter considers the obligations of Nigerian Government following the accession of Nigeria to International Treaty on Covenant on Economic, Social and Cultural Rights and African Charter for Human and Peoples’ Rights.<sup>270</sup>

Has Nigerian Government made enough efforts in terms of legislative steps and other measures towards progressive realisation of the obligations under the treaty? We will consider the provisions of Chapter Two of the Nigerian 1999 constitution on Fundamental Objectives and Directives Principles of State Policy to determine to what extent, does it fulfil the obligations of Nigeria. The core values of the rights as enunciated in the four doctrine of *availability, accessibility, acceptability and*

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<sup>270</sup>Nigeria acceded to the treaty on International covenant of Social, Economic and Cultural Rights on 29 July 1993, she is yet to enact it into law in accordance with section 12 (1) of the Constitution, 1999- “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”. Nigeria, with other several countries in Africa and indeed in the world, who are parties to ICESCR, which are yet to take legislative and other measures for the progressive realization of the core obligations. This group of countries enunciates the non- justiciability of the provisions as defence to exonerate the breach of the core obligations. This matter will be discussed in this section. The Banjul Charter was acceded to on 27 June 1981. The Charter was named as Banjul Charter, after the name of the capital of Gambia, where it was signed. Nigeria enacted it as African Charter on Human and Peoples’ Rights (Ratification) and Enforcement Act), Cap.A9, Laws of the Federation of Nigeria, 2004.

*adaptability*.<sup>271</sup> The focus is on rights to education, health care, housing, and environment. The effectiveness of defence of lack of resources to meet these obligations will be considered. It will also explore the South African Model of constitutionalization of the economic, social, and cultural rights. The ability to realise this objective must be founded on the principle of interrelatedness, interdependency and indivisibility of civil and political rights as well as economic, social, and cultural rights.

The realisation of the benefits of this treaty to the Nigerian citizens will go a long way to actualise the attainment of social justice as part of the concerted efforts to provide benefit that will empower the Nigerian citizens and fulfil the constitutional provision in section 14 (1) that Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice.

The Nigerian Government is a party to the African Charter of Human and Peoples' Rights and had enacted its provisions into the Nigerian law in accordance with section 12(1) of the Constitution.<sup>272</sup>

Economic, Socio, and Cultural rights are unenforceable under the Nigerian 1999 constitution, because of the provisions of section 6 (6) ( c), which excludes the exercise of judicial power of interpretation in relation to enforcement of the provisions of the Fundamental Objectives and Directives Principles of State Policy set out in

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<sup>271</sup> We can use the four attributes for the rights to be examined, right to education, health care, housing and environment. There is permeability of core obligations in all the rights, including civil and political rights, see Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 *Osgoode Hall Law* ,(1989) (Articulating this important relations as one of "permeability" which refers to the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection norms of another treaty dealing with different category of Human Rights) Cited in Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, *Yale International Law Journal*(January 2008) 113 at

<sup>272</sup> The domestication of the Banjul Charter under the African Charter on Human and Peoples' Rights(Ratification and Enforcement) Act 1983, Chap 10, Laws of the Federation of Nigeria,1990 has transformed it into an enforceable statute in Nigeria.

Chapter II of the constitution. We will start by considering the nature of the obligations under the ICSECR.

## **7.1 CORE OBLIGATIONS AND DUTIES TO ACTUALIZE ITS IMPLICATIONS**

The Universal Declaration of Human Rights in 1948 ushered in a new dawn on the protection of human rights after the Second World War, and the United Nations Assembly adopted two treaties for the realization of the objectives of protecting the civil and political rights and also the economic, social and cultural rights of the citizens of the world.<sup>273</sup> The genesis of the controversy of non-justiciability of the ICESCR rights emanated from these two different instruments that actualised the intention of the General Assembly. The notion of interrelatedness, interdependency, and indivisibility of the Human Rights’ will attract controversy between Human Rights academic and practitioners, who seek to discountenance any argument about distinctions as being esoteric and of no juristic value.

We do not intend to embark on exegetical voyage into this distinction, save to say that historical distinction and hierarchy between civil and political rights on one hand and economic, social, and cultural rights are misconception that undermine the efficacy of human rights discourse for the protection and empowerment of the human

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<sup>273</sup> Adopted by General Assembly res 217A (III), 10 December 1948, UN doc A/810(1948) and ICSECR was adopted by the General Assembly res 2200A (XXI) 16 December 1966, UN GAOR, 21st sup no 16, at 49, UN doc A/316(1966). Nigeria acceded to this instrument on 29 July 1993, but has yet to enact it into its local national law and yet to sign the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights.

race.<sup>274</sup> This is rather a bold statement, and its basis is supported by the fact that, the hitherto distinction between positive rights, that need resources by the state to make it realisable and negative rights that do not need resources cannot be maintained, in view of the jurisprudence of the courts and the potential within the optional protocol to ICESCR in provision of complaint and remedial mechanism to citizens of the state parties. To have a robust civil and political rights and the need to guarantee liberties of the citizens, the state must undertake measures to achieve this goal. The right to fair hearing, right to legal representation and trial within reasonable time, state parties need infrastructure of significant resources to execute. The notion that civil and political rights do not attract resources is a myth. Also, the fact that the state also has obligation to ensure that non -state-parties or agents do not breach the civil and political rights of the state parties' citizens also attracts a significant amount of resources. The primary philosophical basis of civil and political rights is the need to protect the dignity and liberty of individuals, and if the normative enquiries of the basis of economic, social and cultural rights are explored, it also stems from right to dignity and survival. Both rights are interdependent.

The Economic and Socio-cultural Committee issues General statement, relying on experts' opinions in the determination of what are the core obligations that state parties must adhere to and cannot derogate from the minimum core obligations.<sup>275</sup> The

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<sup>274</sup> For a selection of arguments for and against justiciability of economic, social and cultural rights, see Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Texts and Materials*, pp275-350(2<sup>nd</sup> ed.,2000).

<sup>275</sup> See, e.g., *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Annex, U.N. Doc. E/CN.4/1987/17 (June 2-6, 1986) reprinted in 9 HUMAN RIGHTS QUARTERLY 122, 126 (1987) ("States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13, reprinted in 20 HUMAN RIGHTS QUARTERLY 691, 695 (1998) ("Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and

notion of “core obligation” emanated from the provision of article 2 (1) ICESCR “ each state party to present covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present covenant by all appropriate means, including particularly adoption of legislative measures”.

Elucidating this provision, Philip Alston has argued that the contents of rights must be of such quality that will enhance the qualitative effect of the rights derivable by the citizens, as the rights holders and which their government must ensure its realization. He said that if the normative content is so indeterminate it will lead to the possibility that right holders possess no particular entitlement to anything.<sup>276</sup>

To overcome this risk, the Committee on Economic, Social, and Cultural rights has adopted and adapted Henry Shue’s typology of duties in interpreting the ICESCR duties to (1) Avoid depriving (2) protect from deprivation and (3) aid the deprived. The core obligations are aimed at respecting, protecting and fulfilling the rights of the state parties’ citizens.<sup>277</sup>

According to Katharine Young, there are three discernible approaches in the determination of the minimum core of the obligations on Economic and Social rights.<sup>278</sup> These are the Essentialist, Consensus and Minimalist approach. Each of this approach has its advantages and limitations. An overview will suffice for our analysis.

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difficulties.”). Cited in Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, Yale International Law Journal, (January 2008) p.113 @p121.

<sup>276</sup>Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 353 (1996).

<sup>277</sup>Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, (2<sup>nd</sup>.Ed.1996).

<sup>278</sup>Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, Yale International Law Journal, (January 2008) pp.113-175.

The essential approach is founded on the normative ideas of rights and why its preservation is essential in order to ensure the dignity and freedom of individuals being protected. It locates the minimum core in the essential minimum and is commonly used by those seeking absolute foundation for economic and social rights. Young reiterates that this approach reaches for a moral standard for prescribing of such rights. She prescribes the most promising content of the minimum core, such as, how liberal values of human dignity, equality and freedom or how the more technical measures of basic needs, are minimally sustained within core formulation of right. The obvious criticism about this approach is its abstract interpretation that fails to resonate with rights claimants' desperate need to ensure effective interpretation and enforcement by their government. The citizens will be better off, if the benefits from the rights guaranteed under ICESCR, is assiduously monitored by the International mechanism with effective sanctions for non-compliance.<sup>279</sup>

The second approach, the consensus situates the minimum core in the minimum consensus surrounding economic and social rights. Young asserts that under this theory, fledging concept of minimum core gains universal credibility by tying its fortunes to the basic and not hypothetical-consensus reached within the communities constituting each field. She found the unique advantage of such approach as the ability to unite the themes of legitimacy and self-determination common to both international and constitutional law. This approach is commonly relied upon by the committee and it deciphers its parameter from the contents of the reports submitted by state parties to

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<sup>279</sup> There is a reporting system by countries, to provide information to the committee against the bench mark and indicators set by the committee in ascertaining if members meet the minimum core obligations and measures proposed to meet it and time frame. For a discussion on measuring state compliance- Robert Robertson, "Measuring State compliance with the obligations to Devote "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights", 16 Human Rights Quarterly 693(1994).



the committee. What Young fails to appreciate as a limitation to this approach is that developing countries tend to exaggerate the extent of their compliance in their reports to the committee.<sup>280</sup> Also, because of dearth of accurate statistics, such report does not necessarily reflect the state of compliance in the respective countries.<sup>281</sup>

Although, it fulfils self-determination, by allowing the countries to determine what measures are most suited to their economic and social circumstances in attaining compliance, it also indirectly allows for an open-ended system that creates no coherent contents of core obligations.

The advantage of this approach, as rightly observed by Young is that “it propels international and constitutional formulations along different and uncertain paths, setting limits on the capacity for guidance of each in establishing appropriate and appropriable content for the minimum core. The end result is amalgamation of universal and country-specific cores, whose adjustability belies the pretensions of each “core” to represent an absolute (and non-derogable) minimum”.<sup>282</sup>

The minimum core approach locates the minimum core in the content of the obligation rather than the right itself. What are the minimal cores which each state party must comply with? There is a distinct minimum core that must be readily attained as distinct from non-core that can be progressively achieved. This is the most effective way of getting compliance, because the international organisation and domestic courts would be able to pronounce on non-compliance, once the non-attainment of core obligations can be proved by the citizens, then the state will now

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<sup>280</sup> Audrey R. Chapman ‘A violations approach to monitoring’ the international covenant on Economic, social and cultural Rights . human rights dialogue 1.10(fall 1997) ‘Efforts, East and West, to improve human rights assessments

<sup>281</sup> Ibid

<sup>282</sup> Katharine Young, *supra* at p.117.

have the burden to prove that it took all the maximum resources available, legislative and other measures to achieve the minimal core of economic and social rights.

Retrogressive measures would have to be castigated and declare to be in breach of minimal core obligations. The mechanism for review will be akin to that of reasonable review. Declaring what are the minimum core and not necessarily affording personal remedies to individuals. The South African constitutional court is leading in this trend of reasonable review.<sup>283</sup>

The status of reservations afforded to some state parties at the ratification of the treaty in relation to realization of the minimal core obligations is of significant concern and it will come to fore, now that there is the potential for international mechanism for complaints and adjudication, following the first protocol to the .ICESCR treaty.<sup>284</sup>

In furtherance of ensuring good compliance, the committee has moved away from not only identifying the minimum core obligations, but has adapted templates which set out the indicators and benchmarks to be used in measuring compliance by state parties. This is said to be an attempt by the committee to circumvent the difficult questions of forms and content of legal entitlement.<sup>285</sup>

The idea of indicators seems to be pragmatic because it will provide guideline to countries on what is expected of them in meeting the minimum core obligations. Such indicators are issued in the form of General Comments. An example is General Comment Number 12 in relation to food, identifying the core contents as

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<sup>283</sup> Sandra Liebenberg, *Enforcing Positive Social and Economic Rights Claims: The South African Model of Reasonable Review*, in Squires, Langford and Thiele eds. *Road to Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights*, Sydney: Australian Human Rights Centre & University of NSW Press, June 2005.

<sup>284</sup> See David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 *Stanford Journal of International Law* 53(2006).

<sup>285</sup> Katherine Young, at p.152.

encompassing “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and accessible within a given culture, and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights”.<sup>286</sup>

We should perhaps make two general observations about the applicability of the core obligations to extraterritoriality and International Aid and Development. This obligation is applicable to states that have access to citizens other than their own citizens. A state party cannot exonerate itself from the obligations on the excuse that the applicable beneficiaries are citizens of other countries.<sup>287</sup>

We would now move on to discuss Nigeria specific context.

### **Progressive Realization with Available Resources**

The General Assembly is conscious that immediate actualisation of the obligations under the treaty is not feasible because of the limited resources available to different parties’ signatories under the treaty and in that regard allows for progressive realization and to take into consideration the maximum available resources available to each state member. The treaty does not allow non-implementation as a result of lack of resources. Nigeria as a signatory since 1993, (which is over two decades) is yet to ensure full progressive realisation of the treaty obligations. Although some of these rights are enunciated in chapter two of 1999 Constitution of Federal republic of Nigeria but they are not enforceable against the state. The failure to make enforceable legislations to actualise these economic, social, and cultural rights is not in the spirit of the obligations under the treaty.

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<sup>286</sup> General Comment 12 of 1999 in relation to Right to Food.

<sup>287</sup> See Katharine Young, pp165-167 for a discussion of extraterritoriality and obligations applicable in relation to economic and social rights.

## **Immediately Realised Obligations- Non Discrimination and Equal treatment**

The drafters of the treaty are conscious of the fact that there are some obligations that will only incur minimal cost and can be made realisable within a relatively quick time frame. In such a situation, state party members are obliged to take all appropriate measures for the immediate realization of such benefits. In doing that, discrimination on the basis of gender, age, ethnicity, disability, religion, socio-economic status, and sexual orientation must be eliminated.<sup>288</sup> There must be equality for access to health care, education, housing, social security and other social goods. This also extends to workers' rights, trade unionism and equality of workers in terms of equal pay and provision of enabling environment for female workers to be able to enjoy workers' rights and duties of parenthood.<sup>289</sup> After an overview of the core obligations, we will now move on to discuss the feasibility of right to education, health care, housing and environment respectively.

### **7.2 RIGHT TO EDUCATION IN NIGERIA**

Perhaps, it is pertinent to state from the beginning, that there is no justiciable right to education as education comes under the Fundamental Objectives and Directive Principles of State Policy. Under the Educational Objectives, in the 1999 Nigerian constitution, Section 18 (1) provides that the state shall direct its policy towards ensuring that there are equal and adequate opportunities at all levels. Section 18(3) provides that government shall strive to eradicate illiteracy; and to this end

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<sup>288</sup> Nigeria is in breach of this, by promulgation of Same Sex Marriage Prohibition Act 2013, which stipulates 14 years imprisonment for same sex marriage.

<sup>289</sup> See for a sustained argument about feasibility of right to work and social security. N. Udombana, *Social Rights as Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 *Cornell Int'l L.J.* 185(2006).

government shall as and when practicable provide-(a) free, compulsory and universal primary education;(b) free secondary education;(c) free university education; and (d) free adult literacy programme. All these provisions seem to be geared towards realising the obligations to make education available, accessible, acceptable and adaptable.<sup>290</sup> This is a ruse, as the consideration of a number of cases will illustrate the actual situation in Nigeria. The first indictment is the failure of Nigeria to sign the Optional Protocol to the Treaty on Economic, Social, and cultural Rights in providing a mechanism for providing remedy for individuals' complaint of state party's breach , and provision of remedies for any infringement as a result of breach of the covenants.<sup>291</sup> The Nigerian government is yet to sign the optional Protocol. A lot of African Countries with less resource have signed the protocol.<sup>292</sup>

The four criteria for the assessment of the essential framework applicable to provision of education as adopted by the committee are Availability, Accessibility, Acceptability and Adaptability. Availability signifies that government should ensure that educational institutions and programmes are in sufficient, quantity and quality and function effectively to fulfil the right to education. Accessibility signifies that all citizens should have unrestricted access to education. The purport of this doctrine is to ensure that no female should be prevented from going to school or discriminated against in access to school because of cultural or religious reasons. Acceptability

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<sup>290</sup> The Right to Education Preliminary Report of the Special Rapporteur submitted in accordance with Commission Human Rights Resolution,1998/33, Katarina Tomasevski, UN Document/CN.4/199949,"51-56(1999).Henceforth to be referred to Tomasevski Report.

<sup>291</sup> The Optional Protocol was adopted on 10 December 2008, for the status of ratifications, see [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-3-a&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en) (accessed on 18 April 2014)

<sup>292</sup> Out of the 45 state parties that have signed, 10 African countries with less resources are included: Benin, Burkina-Faso, Democratic Republic of Congo, Cape Verde, Gabon, Ghana, Guinea-Bissau, Mali, Senegal, and Togo.

signifies that education should be flexible as to accommodate cultural diversities of the students and ensure that its quality and appropriateness are safeguarded in providing a transparent system of monitoring compliance. Adaptability also compliments other attributes by the need to make education flexible to reflect the particular needs of students and cultural diversities. Thus it must for example be mobile, where you have nomadic population like in Northern Nigeria. The Nigerian Government seeks to achieve all these by making education objectives a matter of Fundamental Objectives and Directive Principle of State Policy. This is not enough to meet the obligations as enunciated above. There are impediments that make the realisation of right to education illusory. The Universal Primary School Programme made the provision for free primary school for all Nigerian children, but the payment of nominal fees made this goal unrealisable. This is more prevalent in the rural areas, where the largest population of the children resides.

Art. 2(2) ICESCR states that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This is further complimented by provision against sex discrimination in Art. 3, which specifies that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

There is no guarantee for free secondary school education under ICESCR; however, there is provision for progressive introduction of secondary school and in accordance

to this provision, the Nigerian constitution in section 18(3) (c) of the 1999 Constitution provides that the government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide free secondary education. The Nigerian Court of Appeal recognized the right of Nigerian parents to educate their children and wards in the best possible institutions, including faith –based and church owned schools. It was held in the case of *Archbishop Anthony Okogie and others v The Attorney General of Lagos state*,<sup>293</sup> that although educational objectives is under Fundamental Objectives and Directive Principles, under the then 1979 constitution was not justiciable, the state must pay compensation to churches, whose schools were compulsorily acquired by the state.

The Court of Appeal was very alive to its responsibility, in another case, where the issue of non- discrimination on the basis of religion was brought before the Court. *In Rev. Joshua Adamu and Six Others v. Attorney General of Borno State and 3 others*, the Court held that it was unconstitutional for Local Authority School Administration to discriminate against Christian children, by requiring that their parents should pay teachers that will teach them Christian religion studies and the state was paying Arabic teachers who were teaching Muslim pupils. Although, it was held by the Court that religion was not a justiciable matter, the sanctity of the then section 39 (1) of 1979 constitution, which prohibited discrimination against any Nigerian citizen was protected, and any payment of tuition fees by Christian pupils amount to discrimination. The respondents sought to deflect the effect of the section by arguing that, the issue of non-justiciability of religion should be the paramount

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<sup>293</sup> (1981) 2 Nigerian Constitutional Law Report, 357

concern and any alleged breach of non -discrimination provision should be disregarded. The Court of Appeal was quite unequivocal in its ruling:

One of the canons of the interpretation of a Constitution is that the true meaning of the words used and the intention of the legislature in any statute and particularly in a written Constitution can best be properly understood if the statute is considered as a whole. It is a single document and every part of it must be considered as far as relevant in order to get the true meaning and intent of any particular portion of the enactment. A constitution must always be construed in such a way that it protects or guides what it set out to guide. By its very nature and by necessity, a constitution must be interpreted broadly in order not to defeat the clear intention of its drafters. In the instant case, having regard to the canons of interpretation, the learned trial judge could not consider the objective policy on education in isolation of the fundamental rights of the appellants which form the substratum of their action.<sup>294</sup>

We have quoted the judgement of the Court of Appeal extensively in order to put in perspective its jurisprudence, which is very vital in enforcement of economic, social, and cultural rights in view of the discussion that will follow on the need to use its constitutional power to achieve substantive justice.

The African Charter on Human and Peoples' Rights in Article 17 (1) also provides that "every individual shall have the right to education". This is directly enforceable right in Nigeria, since the African Charter has direct application in Nigeria.

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<sup>294</sup>(1996) 8 Nigerian Weekly Law Report, p.203 at 208.



<sup>295</sup>Adeniran has suggested that based on the combined reading of Article 17 (1) of the African Charter, section 15 of the Child Rights Act 2003, and chapter II of 1999 constitution, and in consonance with giving full effect to the spirit and provision of the Charter, the government should guarantee the right of a child to free, compulsory and universal education up and until the end of junior secondary school.<sup>296</sup> The effect of section 4 of the Child Rights Act 2003 which vests the right of survival and development on every child implies the need for secondary school for all children of secondary age. The government can achieve this by taking progressive steps towards ensuring that secondary school education is accessible to all Nigerian children. It is regrettable that there are still children of secondary school age who are not in school because of poverty and lack of resources by their parents.

In relation to university Education, there are federal universities, state owned universities and privately owned universities in Nigeria and the National University Commission is the Regulatory Agency charged with the regulation of all universities. There is always shortage of places for universities applicants because of over subscription to such federal and state universities, because of their low fees in comparison to privately owned universities. The Nigerian constitution provides a non-justiciable access to free university; in reality, this is not the actual situation, as fees are payable. The major challenge for the universities is how to reconcile the “Federal Character Policy”, which requires positive affirmation action in relation to applicants

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<sup>295</sup>The Nigerian version of the Banjul Charter is the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act of 1983, Cap 10, Laws of the Federation of Nigeria, 1990.

<sup>296</sup>Akingbolahan Adeniran, Non-Profit Privatization of the Management of Nigerian Public Schools: A Legal and Policy Analysis, *Journal of African Law*,53,2 (2009) 249 at 268

from so called 'educationally disadvantaged states' and applicants who are not from such states, performed better at the entrance examination, but are not offered places.<sup>297</sup> In the case of **Badejo v. Federal Minister of Education**,<sup>298</sup> it was held that it was discriminatory for candidates who performed better at the entrance examination conducted for admission to Federal Government College, not to be offered admission because of quota allotted to applicants from designated educationally disadvantaged states.<sup>299</sup> However, when the matter got to the Nigerian Supreme Court, it was held that the court could not act in vain, by giving a relief that will not be activated. The appellant wanted the court to set aside the already conducted interview for entrance to the Federal Government Colleges, which was held on 8 October, 1988 should be set aside. The appellant sat for examination for the entrance to Federal College; she performed very well, having scored 293 but was not invited for an interview. She was aggrieved because other students from educationally disadvantaged states with scores as low as 152 were invited for interview. The Supreme Court held that in affirming her fundamental human rights not to be discriminated against, there is need to balance that with the interest of all those who attended the interview and were offered places. To order a cancellation and another interview round will jeopardise the smooth running of the admission policy into the federal government colleges. It was rather an unfortunate decision, although Nigeria had not yet acceded to ICESCR when this case

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<sup>297</sup> This operates by setting lower pass scores for the entrance examination and qualification requirement for citizens from designated educationally disadvantaged states and this often jeopardize the interest of applicants from non- designated educational disadvantage states mainly in the South West and South Eastern Nigeria. For a discussion of Federal Character, See Kehinde Mowoe, *Constitutional Law in Nigeria*, at pp.87-91,(2008,Lagos: Malthouse Press Ltd.)

<sup>298</sup>(1990)4 NWLR (Part 142)254

<sup>299</sup>(1990) 4 NWLR, (Part 142),254.

was decided, so the issue of right to education was not considered. The Supreme Court held:

“A fundamental right is certainly a right which stands above the ordinary laws of the land, but I venture to say that no fundamental right should stand above the country, state or the people”.

It was a missed opportunity for the Supreme Court to have elucidated on a purposive interpretation of the Fundamental Human Rights provision.

Let us now consider a case which is directly related to the issue of right to education and justiciability of the right under the Nigerian law. The intriguing issue for this case to be considered is the venue for the adjudication of the case, which is the Economic Community of West of Africa (ECOWAS) Court.

The Economic Community of West Africa (ECOWAS) Court held in the case of **Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)**, that the right to education was justiciable under the African Charter of Human and Peoples’ Rights.<sup>300</sup> We need to analyse this case extensively to appreciate the jurisprudence of the ECOWAS Court. The case emanated as a result of a report by Independent Corrupt Practices and Other Related Offences Commission into the activities of the second defendant. It was revealed that 488 Million Naira looted funds from the states and headquarters of Universal Basic Education Commission. The contention of the applicant was that the right to primary school education was being jeopardized as a result of the funds meant for it being looted, thus denying over five million Nigerian children access to primary education. SERAP

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<sup>300</sup> Judgement of ECW/CCJ/APP/08/08, delivered on 27 October 2009.

alleges that this was a violation of the human right to education, the right to dignity, the right of peoples to their natural resources, and the right of the people to economic and social development, guaranteed by Articles 1, 2, 17, 21 and 22 respectively under African Charter for Human and Peoples' Right. SERAP also sought a number of reliefs, one of which is declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 15 of the Child Rights Act 2003.

The Federal Government of Nigeria and UBEC raised a preliminary objection to the competence of the suit and the jurisdiction of the ECOWAS Court to hear the matter. A numbers of issues were formulated for determination by the defendant and the relevant ones to be considered are (1) Whether the ECOWAS court has jurisdiction on this issue because of the fact that Compulsory and Basic Education Act 2004 and the Child's Right Act 2004 are municipal laws of Nigeria and are not a treaty, convention or protocol of ECOWAS,(2) Whether the educational objective of the Federal Republic of Nigeria as provided for under section 18(1),(2),(3) of chapter II of the 1999 Constitution is justiciable or enforceable and can be litigated before the ECOWAS Court and (3) Whether the Plaintiff has *locus standi*, the plaintiff having not suffered any damage, loss or personal injury.

The court rejected all the objections by the defendants, held that right to education is justiciable under the ACHPR and the fact that ECOWAS has jurisdiction to hear the matter because dissipation of educational funds for primary school through corrupt looting will inevitably affect resources available to the programme. The Court held that whilst steps are being taken to recover the funds or prosecute the suspects, the first defendant should provide money to meet the shortfall and failure to do so, will

lead to denial of right to education for the children that would be denied school because of lack of funds.

This is a particularly sound judgement because of the fact that we need an articulate court which can always decipher the issue of non-justiciability in order to assiduously give effect to the provision of ICSECR and ACHPR. This is the implication of new article 9(4) of the protocol on the court.

The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: "*The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State*".

The decision is commendable and its importance cannot be overemphasized as a shift in paradigm of the jurisprudence of the right to education and other rights under the ICSECR and ACHPR.

### **7.3 RIGHT TO HEALTH CARE**

The ICESCR provides for right to health for the citizens of state parties by virtue of article 12(1) referring to the "highest attainable standard of physical and mental health". The Committee of the ICESCR adopted the categorization by Paul Hunt report in the determination of the core obligations accruable based on the right to enjoy the highest attainable standard of physical and mental health.<sup>301</sup> It is trite to reiterate that our analyses above in relation to the framework on right to education are also applicable to health because of the permeability argument. There is a declaration that Primary Health Care is the platform through which health for all can be achieved,

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<sup>301</sup> Paul Hunt Report (2003) to the Secretary General- The right of everyone to enjoy the highest attainable standard of Physical and Mental Health, delivered to the General Assembly, UN. Doc.A/58/427(10 October 2003) International Human Rights Instrument adopted Paul Hunt's categorizations for Indicators and applied it for purposes of measuring the fulfilment of all the Human Rights. see U.N 2006 Report on Indicators for Monitoring Compliance with International Rights Instrument No 4 and 7, U.N Doc. HR// MC 2006/7(11 May 2006).

following the impetus from the Alma Ata Declaration.<sup>302</sup> The major hurdle for the realization of health for all is the fact, that the constitutional provision for it is non-justiciable. The aim of this discourse in this regard is to overhaul the rhetoric of rights in this regard and adopt the South African model for the right to respect, protect and fulfil right to health.

Article 12 (2) of ICSECR, provides for the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- b. The improvement of all aspects of environmental and industrial hygiene;
- c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- d. The creation of conditions which would assure medical services and medical attention to all in the event of sickness.

Nigeria is said to be among 12 countries that could not reduce infant mortality by two-third by 2015 as part of Millennium Development Goals. There are 124 deaths out of every 1000 children born under the age of five, and there is need for concerted efforts to stem this trend.<sup>303</sup>

Section 17 (3) (d) of the 1999 Constitution provides that the state shall direct its policy towards ensuring that- “there are adequate medical and health facilities for all

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<sup>302</sup> See “Declaration of Alma Ata” [http://www.who.int/publications/almaata\\_declaration\\_en.pdf](http://www.who.int/publications/almaata_declaration_en.pdf) (Accessed on 27 April 2014).

<sup>303</sup> See Obiajulu Nnamuchi, The Right to Health in Nigeria, See World Health Organisation- <http://www.who.int/countries/nga/en/>, accessed on 27 April 2014

persons.” The National Health Policy of Nigeria which focusses on primary health care and other themes, are they sufficient as other measures for the realization of the right to attain “highest attainable standard of physical and mental health?”<sup>304</sup>

Nigeria also has obligation to ensure the highest attainable physical and mental health, as a member of the African Union that has also localised the African Charter in her law. The regime of emanating obligations is the duty to respect, protect, promote and fulfil. The African Commission in the case of *Social and Economic Rights Action Centre V. Nigeria* has painstakingly elucidated the nature of these duties:

“At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs”.

At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.

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<sup>304</sup> See Obiajulu Nnamuchi, The Right to Health in Nigeria. <http://ssm.com.so13/papers.cfm?abstract-1d=1622874> (Accessed 22/4/2014).

This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food

(Direct food aid or social security)”.<sup>305</sup>

The reason we have quoted the African Commission extensively is to put in perspective its jurisprudence, in interpreting the nature of rights which citizens of state parties can enjoy and also to indicate that its philosophy does not recognise any distinction focused on Negative and Positive right, Undefined and vague versus defined, aspirational versus immediate, and resources dependent versus independent of resources availability that often obstructs effectiveness of social and economic, cultural rights to the advantage of prioritising civil and political rights.

Article 16 of the African Charter reads:

*“(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.*

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<sup>305</sup>Social and Economic Rights Action Centre v. Nigeria, Communication 155/95, paras 46-48. Available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>, accessed on 24 April 2014.



*(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*

The implication of this provision are two fold- the need to ensure that state undertakes actions that will remove what might impedes the enjoyment of good health by her citizens and also the need for provision of medical facilities for the citizens when they are sick.

The African Commission held that the Nigerian government was in breach of this obligation, when it allowed Shell Petroleum Development Company, its consortium to pollute the Ogoni area through oil spillage and Gas flaring. The damage to the health of the inhabitants as a result of drinking polluted water and inhaling fumes amount to denial of the right to the best attainable state of physical and mental health. The health impact on the pollution was held to include skin infection, gastrointestinal, and respiratory ailments, increased risk of cancer and neurological and reproductive problems for the inhabitants.

Closely linked to the issue is the right to environment, which was also analysed in the SERAC Case. We will move on to discuss right to clean and safe environment.

#### **7.4 RIGHT TO CLEAN AND SAFE ENVIRONMENT**

The Nigerian 1999 Constitution provides in Section 20, under the Environmental Objectives that the State shall protect and improve the environment and safeguard the water, air, and land, forest and wild life of Nigeria. There is impediment to the enforceability of this provision is that it is non- justiciable. For citizens of Nigeria to

enjoy and enforce right to clean environment, mechanism other than this provision must be explored.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. This obligation must be interpreted within the praxis of article 2(1) ICESCR, which requires that state party to present covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present covenant by all appropriate means, including particularly adoption of legislative measures.

As part of the permeability argument earlier discussed, the right to clean environment will contribute to right to good health, in attaining highest level of physical and mental health, it is imperative to have a clean and sustainable environment, if one wants to enjoy right to health. This was one of the central issues that were discussed in *SERAC V Nigeria* case, Article 24 of the African charter- "***All peoples shall have the right to a general satisfactory environment favourable to their development.***"

*These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibrium is harmful to physical and moral health.*

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore, imposes clear obligations upon a government. It requires the State to take reasonable steps and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3) already noted oblige governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual”.<sup>306</sup>

The Commission went further to highlight the duty imposed on Nigeria to ensure safety of the environment and the mechanism to achieve its protection:

*Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing*

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<sup>306</sup> SERAC v. Nigeria, Paras 51-52

*information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.*<sup>307</sup>

The importance of Environmental Impact Assessment and continuing monitoring, right to fair hearing, effective consultation for the inhabitants of Ogoni land are essential features which the African Commission was reiterating in this opinion. These are issues to be considered when discussing the “reasonableness review” in the South African Jurisprudence on ICESCR in achieving social justice.

Also recently, a Federal High Court in Nigeria heard a case that centred on environmental health. In that case, *Jonah Gbemre & Ors v Shell Petroleum Development Company of Nigeria LTD & Ors*, the applicants sought and were granted a declaration that gas flaring by oil companies operating in the plaintiffs’ community is illegal, harmful to their health and environment and therefore constitutes a violation of their rights to life and human dignity as guaranteed by the Constitution.<sup>308</sup>

## **7.5 RIGHT TO CLEAN AND SAFE HOUSING**

The Nigerian constitution under section 16 (2) (d) provides that the state shall direct its policy towards ensuring that suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care, and pensions, unemployment and sick benefits and welfare of the disabled are provided for all citizens. The

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<sup>307</sup> Para 53- SERAC v. Nigeria (supra)

<sup>308</sup> Suit FHC/CS/B/153/2005, Federal High Court, Benin City, Judgment of 14 November 2005 (unreported); copy of judgment available at <http://www.climatelaw.org/>, cited in Obiajulu Nnamuchi- The Right to Health in Nigeria (Supra) p.23

obligation to provide housing is twofold; the government should make laws for security of tenure, protection from unlawful eviction both by individuals and government agencies and government should embark on provision of Housing for the citizens. The **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".<sup>309</sup>

The seven components of the right to adequate housing articulated in General Comment No. 4 are legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. The habitability and accessibility components touch most closely on the issue of health. The former requires that housing provides shelter from threats to health as well as disease vectors. The latter mandates that adequate housing be made accessible to persons with disabilities, including the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, and the mentally ill.<sup>310</sup>

The provision of suitable and adequate shelter is of paramount importance because of recent surge in evictions of occupants from land and makeshift accommodation. The evictions cannot be challenged effectively because all the residents are people of lower socio-economic status who can barely afford to eat let alone to hire legal representation. Forced eviction is a traumatising event for the citizens. The anomaly

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<sup>309</sup> (E/1992/23, annex III. Paragraph 8(a)).

<sup>310</sup> Cited in Bret Thiele, The Human Right to Adequate Housing: A tool for Promoting and Protecting Individual and Community Health, *American Journal of Public Health* (2002), May 92(5), 712-715.

around these evictions is lack of provision of alternative accommodation or assistance towards getting alternative accommodation and lack of compensation.

The African Commission upholding the rights of the evictees and inhabitants who were brutalised when they sought to rebuild their homes in SERAC v. Nigeria case held that forced eviction was unlawful and in breach of right to housing and a violation of article 14, 16 and 18(1) of the African Charter. The Commission held that:

*"forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection". Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths... Evictions break up families and increase existing levels of homelessness.*<sup>311</sup>

There was a very unpopular and unconstitutional mass eviction of Maroko residents in Lagos in 1990 during the Military administration of Colonel Raji Rasaki of Lagos State. It was estimated that over 300,000 people were forcibly evicted. The matter is still pending before the African Commission by a Communication brought by SERAC.<sup>312</sup> The evicted citizens brought an action for enforcement of Fundamental

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<sup>311</sup>SERAC v. Nigeria, *supra*, Para 63.

<sup>312</sup> SERAC V. Nigeria, Communication 379/09, see for background information on the admissibility of evidence before the African Communication. <http://www.scribd.com/doc/141426326/SERAC-v-Nigeria-ACHPR-Comm-370-09-Brief-on-Admissibility>, accessed on 26 April 2014.

Human Rights; the action was riddled with myriad of preliminary objections and other technicalities by the state to frustrate the outcome of the litigation.<sup>313</sup>

The African Commission in the case of *SERAP v Federal Republic of Nigeria*,<sup>314</sup> which was another case in relation to the environmental degradation of the Ogoni land as a result of exploration of oil activities of Shell Oil Company and other oil companies. The Commission held that the Nigerian Government fails to ensure right to dignity of the people by failing to ensure that the oil companies did not cause oil pollution to the environment and thereby causing damage to the houses of the inhabitants of the oil producing areas. The federal Government abortively challenged the competency of the suit, of the ECOWAS Court, and the *locus standi* of the plaintiff, as having no interest in the suit, having not personally suffered any personal injury, loss or damages. All the heads of the challenges were rejected by the Court and the court found the federal government liable for all the claims. The Court held the indivisibility of the right to dignity and right to safe environment under article 1 and 24 the African Charter signifies right to safe living and housing as held as follows:

*From what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.*<sup>315</sup>

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<sup>313</sup>Kokoro- Owo and others v Lagos State Government, Suit No M/394/90. In 1999 at the return of the civilian government, the plights of the Maroko evictees were presented to the Justice Oputa Human Rights Violations and Investigation Commission. The Commission recommended compensation for the evictees, the government has not complied with the recommendation.

<sup>314</sup>JUDGMENT N° ECW/CCJ/JUD/18/12, delivered on 14 December 2012.

<sup>315</sup>Para.108 of the judgement.

On the attempt by the Federal government to shift the blame on the oil companies, and arguing that it had enacted a catalogue of legislations:

*Contrary to the assumption of the Federal Republic of Nigeria in its attempt to shift the responsibility on the holders of a licence of oil exploitation (see paragraph 82), the damage caused by the oil industry to a vital resource of such importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.*<sup>316</sup>

The right to safe environment and housing includes the obligations on Nigerian government to penalise third parties who are causing environmental degradation:

*It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.*

*And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples' Rights.*

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<sup>316</sup>Para.109 of the judgement.



*Consequently, the Court concludes and adjudges that the Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples' Rights, and has violated Articles 1 and 24 of the said instrument.*<sup>317</sup>

The ECOWAS Court concluded by ordering the government to urgently take measures that will restore the environment, prevent reoccurrence and apprehend perpetrators and punish them.

Before considering the attitude of Nigerian Courts on the interpretation of the Fundamental Objectives and Directives Principles of State Policy and the justiciability of social, economic and cultural rights, let us first consider the possibility of adopting the South African Model of jurisprudence of the socio, economic and cultural rights.

## **7.6. EXPLORING SOUTH AFRICAN SOCIAL JUSTICE ADJUDICATION MODEL**

The Post- apartheid South Africa made concerted efforts to rectify past injustice against the black communities and citizens, and in this regard there were constitutional provisions which guarantee right to health, housing, food, water, education and social security welfare payment. The regime of enumerated rights to social welfare will be considered in the context of the importance accorded to it and the adjudication by the constitutional court.<sup>318</sup> This is a concerted effort to create an

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<sup>317</sup>Para 110-112 of the SERAP Vv.Federal Republic of Nigeria case.

<sup>318</sup> See Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL.695, 695 (1996)

enabling environment for economic equality and bring an end to economic disparity of the apartheid era.

This regime of constitutional rights to economic and social welfare rights has to be understood from the perspective of this unique background and circumstance of South Africa. However, there are lessons to be learnt and the possibility of exporting this social justice adjudication to a country like Nigeria with history of social injustice and lack of socio-economic rights for the citizens. Can the Nigerian state use constitutional adjudication to remedy socio-economic injustice? The first hurdle is the fact that the Nigerian constitution has made the socio-economic rights non-justiciable and this discourse will look at ways of overcoming this hurdle by the adoption of South African jurisprudence. We will consider how the South African constitutional court has dealt with constitutional claims under the socio-economic rights in a number of cases including *Soobramoney*,<sup>319</sup> *Grootboom*,<sup>320</sup> *Occupiers of 51 Olivia Road, Bevia and 197 Main Street, Berea Township, Johannesburg v. City of Johannesburg and others*<sup>321</sup> *Treatment Action Campaign*<sup>322</sup> and *Njong*<sup>323</sup> decisions on right to health, housing and social security respectively.

Eric Christiansen is a strong advocate of exporting the South African jurisprudence on socio-economic rights abroad to other jurisdiction.<sup>324</sup> He is of the firm view that despite all the classic arguments against non-justiciability of the socio-economic

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<sup>319</sup> *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC)

<sup>320</sup> *South Africa v. Grootboom* (2001)(1) SA 46(CC) at 66(S.Afr.)

<sup>321</sup> (2008) 3 SA 208 (S.Afr.) Available on <http://www.constitutionalcourt.org/ZA/Archimages/1581.02.08.pdf>.

<sup>322</sup> *Minister of Health v. Treatment Action Campaign*(2002)(5) SA 721(CC)(S.Afr.)(henceforth to be referred to TAC)

<sup>323</sup> *Njongi v Member of the Executive Council, Dep't of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) para.78 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2008/4.pdf>.

<sup>324</sup> Eric Christiansen, Using Constitutional Adjudication to Remedy Socio- economic Injustice, 13 *UCLAJ.Int'L L & For.AFF.*369 (2008); Adjudicating Non- Justiciable Rights: Socio- economic Rights and the South African Constitutional Court, 38 *Columbia Hum.RTS.L.Rev.*321 (2007) and Exporting South African Social Rights Jurisprudence, 5 *LOY. U. CHI. INT'L L. REV.* 29 (2007).

rights, the jurisprudence of the South African Constitutional court can still be exported to other jurisdiction. He contends that enforceable constitutional rights provides at least four classes of assistance: remedying of evident rights violations; influencing government actions through the threat of judicial enforcement, supporting non-adjudicatory processes and reinforcing constitutional values for social transformation. When the rights to socio-economic rights are violated by state agencies, the fact that the citizens know that there is a constitutional court which is constitutionally empowered to adjudicate on the violation in view of the constitution provision; the citizens are able to find succour in the jurisdiction of court. This is absent in the Nigerian constitution and the way forward is to seek the Nigerian courts' jurisdiction based on the effect of Nigerian obligations under the African charter. The government agencies are compelled to act in furtherance of the constitutional obligations because of the threat of judicial enforcement under the South African Constitution. The Constitutional court can also prompt the government to embark on non- adjudicatory process in resolving the claimed socio-economic right. The role of the court is also vital towards reinforcing the constitutional values for social transformation as entrenched in all these socio-economic rights. There is need for constitutional right to enforce these rights and this is geared towards achieving social justice through transformative substantive justice.

Let us first adumbrate on the classic argument about non-justiciability.<sup>325</sup> The democratic legitimacy argument revolves around the fact that the judiciary are not by training, vocation and orientation capable of dealing with issues and policies on

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<sup>325</sup> For a collection of arguments for and against justiciability of Economic, Social and Cultural Rights, see Henry Steiner & Philip Alstons, *International human rights in Context: Law, Politics, Morals: Texts and Materials*, 275-350 (2nd.ed, 2000).

allocation of resources. Adjudication on socio-economic rights will expose them and give the power to usurp the traditional role of the elected legislative and executive decision makers. Judicial enforcement of social rights is fraught with difficulties relating to competency concerns which focus on the inadequacy of the judiciary and other adjudicative processes to appropriately resolve social rights complaints. Christiansen opines that these failings include (i) Procedure limitations, especially concerns about general suitability of any particular plaintiff, (ii) informational problems including absence of specialised unbiased fact finding and (iii) remedy-related difficulties, particularly where judicial remedies would be inadequate or politically inappropriate. The problems seem to be genuine and the legitimacy question is becoming academic as the Constitutional court is crafting sustainable social rights jurisprudence.<sup>326</sup> All these critical harms are said to be less harmful by not ensuring social justice and removal of injustice.

This is also linked to the discussion about the inability of the judiciary to deal with polycentric issues. Polycentric issues can occur, when judges are dealing with the adjudication of socio-economic rights. This will be beyond the contemplation of the court, when dealing with particular cases. This often emanate when dealing with the process of adjudication involving social and economic rights. Potential Litigants often wait to see the outcome of extant proceedings to explore how they can benefit from it. This has implications for the sustainability of the decision making processes and has the capacity to create satellite litigation. However the South African Constitutional court is conscious of this possibility and the regimes of rights and remedies offered seem to be context specific, rather creating an open ended precedent.

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<sup>326</sup>Exporting South Africa Social Rights Jurisprudence at p.34.

The court is aware of the limited resources and the discretion vested in the decision maker in distributing the limited resources in relation to all the competing needs.

The issue of non-justiciability of socio-economic rights and its implications as an aberration of separation of power was discussed in the Re- Certification case.<sup>327</sup> This is what Christiansen has called the adjudication threshold Question. He is of firm view that the Court's *In re Certification* judgment addressed multiple challenges to the inclusion of social rights in the Constitution. The challenges were based on arguments that socio-economic rights were not "universally recognized fundamental rights" and that they violated the constitutional principle of separation of powers.

The Court rejected both challenges. It asserted that the "universally recognized Fundamental rights requirement merely established a minimum threshold that placed no limit on the inclusion of additional rights. The Court also stated that the adjudication of socio-economic rights did not inevitably violate the separation of powers requirement. The threshold importance of the *Certification* judgment is that it permitted inclusion of socio-economic rights in the final text of the South African Constitution."<sup>328</sup>

We will now consider some cases in order to see the reasoning of the South African Constitutional court. The Court is very keen on constructive engagement with applicants, whose right to socio-economic entitlement is engaged. In doing this, it has come to what is termed as 'reasonable review' to see to what extent the state has

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<sup>327</sup> For a general discussion of the required constitutional certification process, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras. 1–19, 76–78 (S. Afr.); for a discussion focused on the controversy regarding inclusion of social rights, see *Adjudicating Non-Justiciable Rights* for arguments and response to it in Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007) at 324-42.

<sup>328</sup> Extract from Eric Christiansen, *Exporting South Africa Social Rights Jurisprudence*, Volume 5, Issue 1 Loyola University Chicago International Law Review 29, at p.32

undertaken its constitutional obligation towards meeting the right being claimed by the citizens.

In **Soobramoney**, the applicant was a person, who is terminally ill and in need of dialysis in relation to his kidney failure illness. The section 27 right to health of the applicant was engaged. The Hospital has a standing policy of prioritising access to dialysis for patients that are not terminally ill. The applicant insisted that he should be entitled to dialysis; the court held that in so far as there is right to health and emergency medical treatment, the decision to allocate resources to life sustaining treatments to a category of patients must not be overturned in order to assert the right to health of the applicant. The court will not easily overturn reasonable decision of doctors and administrators who are faced with limited resources. This is the “reasonableness review”, which is aimed at ensuring that limited resources are optimally expended by administrators who understand the dynamics of taking operational and policy decisions that will have most meaningful impact.

There are three important frameworks that have been identified by the Constitutional court, and become paramount in enforcing the enumerated social-economic rights. They are the need for “*Comprehensive and coordinated Programme*” in meeting socio-economic rights claims, “*meaningful engagement*” with citizens, whose rights are likely to be engaged. The third is the “expansive remedial power against unconscionable conduct” by state actors. The notion of “comprehensive and coordinated” programme came into play in the case of *Grootboom*, Ms Irene Grootboom, is a lady with other 510 children and 389 adults, who reside as squatters in an informal settlement outside Cape Town. They made a section 26 right of access

to adequate housing and section 28 seeking provision for adequate housing for adult and children pending accommodation. The court concluded that government housing programme violated the constitutional right to housing because of the failure to have a “comprehensive and coordinated programme” to advance a constitutional right, particularly programme that failed to address the housing needs of people with no access to land, no roof over heads, who were living in intolerable conditions or crisis situations”.

The right to housing is constitutionally guaranteed, which the state cannot derogate from its minimum core; hence, the court ordered the government to remedy the programme’s failure and assigned the Human Rights Commission to monitor and report back on progress. This is recognition of the attainment of minimum core within available maximum resources and the progressive realization obligation within the ICSECR jurisprudence.

The Court added the need for “meaningful engagement” in the Olivia Road case. If the state wants to evict squatters, there is need to engage them and discuss the implications of the eviction and work out modalities for alleviating their plight, which is inevitable, if eviction occurs. Christiansen is of the view that the decision in *Berea Township Case*, gives the citizens and affected communities in relation to eviction matters, the opportunity to have meaningful engagement, and the potential for judicial enforcement of the outcome of the meaningful engagement. This supports the furtherance of social justice objective in the constitution without the direct involvement by the courts. “This supports the further realization of social justice without direct involvement by the courts and, very beneficially, coordinates cause

lawyering and broader popular involvement”.<sup>329</sup> This is rather a benevolent assumption because citizens who are not parties to the particular litigation will only benefit from its effects, if the government chooses to change policy and takes on board the recommendations or the prompting by the court.

In the *Treatment Action Campaign* case, the court held that in order to prevent mother to-child HIV infection, Nevirapine should be widely distributed and easily accessible to pregnant women. The court directed the government to devise and implement within its resources a “comprehensive and coordinated programme” to address mother to-child HIV infection. The programme must include reasonable measures for counselling and testing pregnant women for HIV, must immediately remove the restriction that prevented HIV prevention medication from being distributed widely, and must “permit and facilitate” the use of such medication for reducing HIV transmission.

There is need for state and her agencies to act in a conscionable manner when dealing with statutory entitlement to social security welfare payment. This was the issue that was analysed by the court in the case of Njongi. Ms Njongi was a disabled, pensioner, poor and very vulnerable. She was in receipt of social security welfare payment. Without explanation to her the grant was stopped. She made enquiries as to why the payment was stopped to no avail. The court held that the government department had acted unconscionably when it tried to use prescription to deny her of suing for the non- payment of her entitlement.

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<sup>329</sup> Eric Christiansen, Using Constitutional Adjudication to remedy Socio-economic Injustice: Comparative Lessons from South Africa, 13 UCLA J. INT'L L. & FOR. AFF.369 (2008) at 399.



The court did not discuss the validity of using Limitation Act to debar proceedings for being out of time; the court was particular about the plight of the applicant and the deplorable attitude of the official. However, the court did not order punitive measure against the responsible minister, although it alluded to that possibility. The court understandably did not order punitive measures here, as that will dissipate the limited resources that could have been available for meeting other citizens' social-economic rights claims.

### **7.7 NIGERIA COURTS' ATTITUDE TO FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY**

There are challenges to overcome in transplanting the provisions of the South Africa constitution and jurisprudence to a jurisdiction like Nigeria. The unique historical context of apartheid in South Africa and concerted efforts to transform the society is not applicable to Nigeria. However, there is still need and justification for a regime of socio-economic rights in Nigeria to deal with social injustice. The first hurdle is how to ensure that the judiciary appreciates the potential in the South African jurisprudence and adapt same to achieve social justice for the Nigerian citizens in spite of the restriction in section 6(6) C of the 1999 constitution. It is imperative to recite the provision-“The Judicial power vested with the foregoing provisions of this section-

(a)....

(b)....

(c) shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and

Directive Principles of State Policy set out in Chapter II of this constitution; and...”. This is what some commentators in Nigeria have referred to as ouster clauses which prevent the judiciary to examine or consider the issues of socio-economic provisions as provided in chapter II of the constitution. The orthodox view is that, you cannot enforce the provisions, because the constitution debars it and hence Nigerians are denied access to court to enforce the rights.<sup>330</sup> As we have narrated above, the African Human and Peoples’ Rights Commission and ECOWAS Court had indicated on several occasions that Nigeria cannot use its constitutional provisions to deny the rights and effects of African Charter and ECOWAS charter to the citizens. This discourse align with the position of AHPR Commission and ECOWAS court on the need to interpret the constitutional provisions in a purposive manner in order to achieve social justice for the citizens, by jettisoning the distinction between civil and political rights as enunciated in chapter IV and socio, economic and cultural rights in chapter II respectively.

The Nigerian Constitution under the Exclusive legislative list which gives the federal government exclusive jurisdiction to legislate on the items listed, therein, gave power to establish institutions and regulation of authorities “to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this

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<sup>330</sup> Professor Ben Nwabueze is a leading proponent of this idea. His views are founded on the historical and report of the legislative Sub-committee charged with the drafting of that part of the provisions in 1979 constitution. He served on that committee and opines that the committee made it obvious that the provisions on Fundamental Objectives and Directive Principles of State Policy. The present provisions in 1999 constitution are identical to the 1979 constitution. See The Report of the Constitution Drafting Committee, Vol. II containing a report of the Sub-Committee on National Objectives and Public Accountability, Lagos: Federal Ministry of Information, 1976, p.38. Also See K. Omodire, “History, Objectives and Implications of Entrenchment of Fundamental Objectives and Directive Principles of State Policy in the Nigerian Constitution, and J.N Aduba, “The Constitutionality of the Justiciability Question” in Azinge,E. and Owasanoye,B(eds.) Justiciability and Constitutionalism: An Economic Analysis of Law, Lagos: Nigerian Institute of Advances Legal Studies,2010,p.17-33 and 115-125 respectively. For views on justiciablity, See Professor E. Azinge, “Econometrics of the Justiciabilty Proposition” in E. Azinge and B. Owansanoye (eds.) Justiciability and Constitutionalism: An Economic Analysis of Law.

constitution”.<sup>331</sup> The implication of this provision is quite remarkable and far reaching. It implies that, the government can set up agencies and adopt other mechanism that can create an enabling environment and regime that will facilitate the realization of the provisions in chapter II of the constitution. All the arguments on non- justiciability will become academic once the provisions of that provision is activated and used to create the desired agencies and legislative framework needed for realization of the social, economic, and cultural rights. The Nigerian Supreme Court in a number of cases has held that the implications of the provision and that of section 4(2) on power of federal government to legislate and section 15(5) power of the state to abolish all corrupt practices and abuse of power are efficacious in the state ability to meet a political objective in relation to eradication of corruption in Nigeria.

We need to be upfront, that the Supreme Court is yet to adapt this principle to the enforcement of other social, economic and cultural rights as provided in Chapter II of the constitution. Our contention is that this potential is there and the Supreme Court, if called upon can adapt its jurisprudence in this remit.

We will now consider a number of cases to distil this trend of giving effect to political objective, which we argue if further legislated can lead to transformative justice, which can be extended to other socio-economic rights to education, health, housing and safe environment to mention a few.

In *Attorney General of Ondo State v Attorney General of the Federation and 36 others*<sup>332</sup>.The Federal government established the Corrupt Practices and Related

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<sup>331</sup> Item 60(a) of the 1999 Constitution of Federal Republic of Nigeria.

<sup>332</sup> Attorney General of Ondo State v. Attorney General of the Federation and 35 Others (there are 36 states in Nigeria, all the 35 states, were joined in this suit except the claimant state)(2002) 6 Supreme Court Report(Part 1) 1,(2000) 9 NWLR (part 772)1.

Offences Commission on 13 June 2000, relying on the legislative initiative under the constitution in item 60 A of the Exclusive Legislative list, on the Second schedule, which is meant to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the 1999 Nigerian Constitution. This was part of the effort to promote the political objective in section 15(5) that the state shall abolish all corrupt practices and abuse of power. The Ondo state government, a regional government in the south west of Nigeria brought an application, relying on the Supreme Court original jurisdiction for determination of the legality of the creation of the Commission and other related issues.<sup>333</sup> The argument is that Federal Government cannot rely on the power vested in the National Assembly on its legislative power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in part I of the second schedule of the constitution. The federal government argument is

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<sup>333</sup>Extract of the issues for determination from the reported case in Law Pavilion Electronic Report (2002) **LPELR-623(SC)** “(1). A determination of the question whether or not the Corrupt Practices and Other Related Offences Act, 2000, is valid and as a law enacted by the National Assembly and in force in every State of the Federal Republic of Nigeria (including Ondo State)(2) A determination of the question whether or not the Attorney-General of the Federation (1st defendant) or any person authorised by him can lawfully initiate legal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000, (3) A declaration that the Corrupt Practices and Other Related Offences Act, 2000, is not in force as law in Ondo State,(4) A declaration that it is not lawful for the Attorney-General of the Federation (1st defendant) or any person authorised by him to initiate legal proceedings in any court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000,(5) An order of perpetual injunction restraining the Federal Government, its functionaries or agencies whomsoever (including the Independent Corrupt Practices and Other Related Offences Commission) or howsoever from executing or applying or enforcing the provisions of the Corrupt Practices and Other Related Offences Act, 2000 in Ondo State whether by interfering with the activities of any person in Ondo State (including any public officer or functionary or officer or servant of the Government of Ondo State) in exercise of powers purported to be conferred by or under the provisions of the said Act or otherwise howsoever, and(6). An order of perpetual injunction restraining the Attorney-General of the Federation including his officers, servants and agents whomsoever or howsoever from exercising any of the powers vested in him by the Constitution of the Federal Republic of Nigeria, 1999 or by any other law in respect of any of the criminal offences created by any of the provisions contained in the Corrupt Practices and Other Related Offences Act, 2000”.

that since fighting corruption is a political objective under the Fundamental Objectives and Directives Principles of the state, it is legally correct to make the law establishing a Government Agency to eliminate corruption. The importance of the case for our analysis is that the Supreme Court recognised that the Federal government can under the constitution take legislative actions to fulfil the objectives of the socio-economic, and cultural rights embedded in part II of the constitution.

The implication of this from the perspective of the jurisprudence of ICESCR is the fact that the Supreme Court appreciates the importance of validating any legislative initiative that aims to create an enabling environment for the enjoyment of socio-economic and cultural rights in Nigeria. The Supreme Court rightly dismissed the suit, holding that the Federal Government was constitutionally empowered to make the law creating the Commission and refused all the reliefs sought by Ondo State.

We will recite some extract from the judgement of the Supreme Court, as read by Justice Uwais, (Then Chief Justice of Nigeria):

*It is submitted that "corruption" is not a subject under either the Exclusive or the Concurrent Legislative Lists and therefore being a residual matter, the National Assembly has' no power to legislate upon it. This submission overlooks the provisions of section 4 subsection (4) (b) of the Constitution which provide that the National Assembly has the power to legislate on any matter with respect to which it is empowered to make law in accordance with the provisions of the Constitution. Section 15 subsection (5) directs the National Assembly to abolish all corrupt practices and abuse of power. The*

*question is how can the National Assembly exercise such powers? It can only do so effectively by legislation. Item 67 under the Exclusive Legislative List read together with the provisions of section 4, subsection (2) provide that the National Assembly is empowered to make law for the peace, order and good government of the Federation and any part thereof. It follows, therefore, that the National Assembly has the power to legislate against corruption and abuse of office even as it applies to persons not in authority under public or government office. For the aim of making law is to achieve the common good. The power of the National Assembly is not therefore residual under the Constitution but might be concurrent with the powers of State House of Assembly and Local Government Council, depending on the interpretation given to the word "State" in section 15 subsection (5) of the Constitution, which I will deal with anon.*

*The Supreme Court went further on the importance of taking legislative initiative to create institution that will make the objectives of socio-economic rights realizable:*

*“The ICPC is, by the provisions of item 60 (a), to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy as contained under Chapter II of the Constitution. The question is: how can the ICPC enforce the observance? Is it to use force? Is it to legislate or what? The ICPC cannot do either of these because the use of force or coercion in enforcing the observance will require legislation. The ICPC has no power to legislate. Only the National Assembly can legislate. The*

*Constitution of India has similar provisions to ours on Directive Principles of State Policy in Part IV thereof. In the Indian case of Mangru v. Commissioners of Budge Budee Municipality (1951) 87 CLJ 369, it was held that the Directive Principles require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.*

The importance of this part of the decision is the fact that the Nigerian Supreme Court recognised the significance of India Jurisprudence on the effect of the Fundamental Objectives and Directive Principles. The purposive interpretation on these issues as enunciated by the Indian constitutional Court will be of persuasive authority, if cited by advocates on socio-economic rights. The prevailing jurisprudence in India is advocated and it reiterates the interdependence of civil and political rights on one hand and that of socio- economic rights on the other hand.

The realization of the right to life is only meaningful when citizens enjoy the concomitant socio-economic rights. The jurisprudence of the right to life in other commonwealth jurisdictions such as Canada and India has developed to impute the obligation to provide the appropriate socio economic conditions that would enhance the prolongation of life.<sup>334</sup> Chandrachud, CJ's dictum is instructive in this context:

*The sweep of the right to life conferred by Article 21 is wide and far reaching.*

*It does not mean merely that life cannot be extinguished or taken away as, for*

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<sup>334</sup>The Canadian Supreme Court confirmed this obligation in the case of *Operation Dismantle Incorporation. V. The Queen*. (1985) 18 DLR (4th) (sec), and the Indian Supreme Court in *Tellis v Bombay Municipal Council*, (1987) LRC (const.) 351

*example, by imposition and execution of death sentence, except according to procedure by law. There is one aspect of the right to livelihood because no person can live without the means of living that is the means of livelihood.....Life.... means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed*<sup>335</sup>

This statement reiterates the importance of the obligation of the state to provide enabling environment for the realization of citizens' right to life. This obligation is important if the citizens' expectations to live an endurable life are to be realistic. The court interpretation envisages provisions of habitable housing, health services and pollution-free environment, which will make life sustainable.

In concluding this chapter, it is important to identify that the Nigerian Court will embrace a purposive interpretation of the provisions of the social and economic rights as embedded in the Fundamental Objectives and Directive Principle of State Policy regardless of the non-justiciability argument being canvassed now based on section 6(6) (c ) of the 1999 Nigerian constitution. Also, it is vital to reiterate that the effectiveness of the ECOWAS Court and African Commission will go a long way to inform and develop Nigerian Courts' jurisprudence in this regard, as the cases of *SERAC v Federal Republic of Nigeria*, *SERAP v Universal Basic Education Commission and SERAP v Federal Republic of Nigeria* to the effect, that Nigeria cannot challenge the jurisdiction of the ECOWAS Community Court in adjudicating on ICESCR, socio-economic rights are enforceable and Nigeria cannot use its own

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<sup>335</sup> *Ibid*, at 368.



constitution to deflect from her obligations under international treaty. The Court concluded that “though ECOWAS may not have adopted a specific instrument recognizing human rights, the court has the mandate to exercise jurisdiction with regard to all international instruments, including the ACHPR, ICCPR, ICESCR, etc. to which member states of ECOWAS are parties. Furthermore, the court said the members’ state parties to the revised Treaty of ECOWAS have renewed their allegiance to the said texts, within the framework of ECOWAS.”<sup>336</sup>

The immediate action that is paramount for Nigeria is to sign the Optional Protocol, to ICESCR which will eventually provide individual remedies to members’ state citizens for failure of their countries to take legislative and other measures towards the progressive realization of the rights in the social, economic, and cultural rights treaty.<sup>337</sup>

The socio-economic rights are sources of actualization of social justice and empowerment of the citizens. The quest for Social justice is achievable if the government is sincere about the need for the enforcement of socio-economic rights and the judiciary must be able to achieve a purposeful interpretation of Fundamental Objective and Directive Principles of State Policy. There is urgent need for Nigeria to sign the protocol to the ICESCR toward achieving this goal of creating an enabling environment for social justice. We contextualize the operation of the international social- economic covenant as practised in South Africa and canvass for its adoption in

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<sup>336</sup> Cited in Zechariah and L. Dauda, *Institutional and Constitutional Constraints to the Realization of Economic, Social and Cultural Rights in Nigeria: Lessons to Learn From International Law*, NIALS Journal of Constitutional Law, Maiden edition, 236 at p.305. (Lagos: Nigerian Institute of Advanced Legal studies, 2013)

<sup>337</sup> See generally, B. Simmonds, *Should State Ratify the Process and Consequences of Optional Protocol of the ICESCR?*, Norwegian Journal of Human Rights, Vol.27(1)(Spring 2009) 64-81.

Nigeria. This is a way forward in achieving social justice in Nigeria in the area of provision of right to education, health care, safe environment and safe housing.

In the next chapter, we will discuss the issue of military dictatorship in Nigeria, as it affects legitimate governance. The survival of democratic governance is dependent on the ability to compel military authorities to adhere to their constitutional role of protection of the country from internal, external aggression and maintaining the territorial integrity of the country.

## **CHAPTER 8: DICTATORSHIP IN NIGERIA: LEGITIMATE GOVERNANCE AND LEGAL THEORY**

### **Introduction**

Having identified Military coups and dictatorships as a major threat to the survival of democratic government in Nigeria, this chapter will focus on the causes of military dictatorship in Africa, particularly Nigeria.

The focus of this chapter will be military dictatorship, rather than one party and multi-party system democracies that degenerate to dictatorship. However, allusions would be made to these other types of governments, in view of the fact that, its degeneration among other things, often leads to emergence of Military Dictatorship. To avert military coups, elected government must respect the imperatives of constitutionalism.

A brief synopsis of military coups and administrations in Nigeria might be relevant here. The first military coup occurred on 15 January 1966, led by Major Nzeogwu, which led to the assassination of the Prime Minister Tafawa Balewa, who was the first Prime Minister following the political independence on 1 October 1960. There was a counter coup which was led by Major-General Ironsi on 29 July, 1966. This was later followed by another coup, on 29 July 1967, which ushered in the military government led by Yakubu Gowon. The Gowon regime held power until it was overthrown by Murtala Mohammed. The Murtala Mohammed/Obasanjo held on to power till 1 October, 1979. The Shagari's democratic government was inaugurated on 1 October 1979. The government was overthrown by the coup of Muhamadu Buhari, on 31 December, 1983, which led to a series of further coups by Babaginda and Abacha's regimes. The sudden death of Abacha on 8 June, 1998 ushered in Abdul Salami as the

head of the military junta, who eventually conducted the election leading to the transition on 29 May 1999, which ushered in the present democratic government.

No matter how inchoate a democratic government might be, there can never be justification for the military to overthrow the government in a military coup. Whenever there was a military coup in Nigeria, the constitutionality of the military administration in relation to the overthrown constitutional order was always a crucial issue for the judiciary and legal theorists in Nigeria to grapple. There is a misconception in this regard to assume that Kelsen theory in relation to the issue of revolution, being an event which can eradicate the previous constitutional order, as a justification for military coups.

This chapter will address the false premises of this misconception; how to reduce military coups and how to consolidate democratic government, to make it less vulnerable to military coups.

## **8.0. LEGAL THEORY AND MILITARY TAKEOVER**

The influence of Kelsen, who is a continental legal theorist in judicial analysis of coup d'état in the Commonwealth countries of West Africa has been overwhelming.<sup>338</sup> This section intends to explore why Kelsen enjoyed such a unique role, in spite of not coming from the common law tradition. Is it a case of judicial expediency or superior persuasive legal analysis to the detriment of Common law tradition jurists-like Bentham, Austin and Hart? One of the earlier critiques of analytical jurisprudence theorists is that they lack relevance to contemporary governance issues and related matters. All these claims and their validity will be explored in the context of military

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<sup>338</sup> See his major work, Hans Kelsen, *The Pure Theory of Law*, (1967) University of California Press, Berkeley. For a recent analysis of his work, Stanley Paulson, *Kelsen Legal Interpretation*, (1990) *Legal Studies*, Vol.10, issue 2, pp.136-152.

takeover and its effect on the constitution of Nigeria. All these three jurists shared the legacy of being English theorists and positivist. However, these positivist credentials are subject to different propensity and inclinations. Hart enjoys the unique position of being a contemporary theorist as compared to Bentham and Austin, who had a pedigree, which gave him the accolade of being referred to as Bentham's apostle. He fervently defended Bentham, by trying to re-conceptualize his thoughts, albeit with the difficulty of encompassing all his thoughts. One area that readily comes to mind is the recognition of constitutional law by Bentham and its significance in regulating the polity.

The tenet of Bentham exposition of law like other positivists revolves around the nature of law and its coercive elements. He believes that law is an emanation from the sovereign, its nomenclature and modus of emanation is irrelevant in ascertaining the nature and validity of law. This provided the foundation for Kelsen's theory, as a positivist enunciation of law and supremacy of law.

Constitutional law regulates the relationship between the three arms of government, legislature, executive and the judiciary. It regulates the election and appointment of different office holder to these three arms of government. It confers powers exercisable by the different office holders, and also provides a mechanism for removal of any office holders who acts in an extra constitutional manner. A democratically elected government derives its power from the constitution, having been elected by the citizens exercising their political sovereignty. The political mandate can be withdrawn by the electioneering mechanism. Where there are disputes as to the conduct and results of such electioneering mechanism, there is a mechanism in the

constitution for such matter to be resolved through the courts system. It is the failure to adhere to this constitutional arrangement that often leads to break down of law and order. The situation is exacerbated, by the actions of the incumbent government in wanting to maintain the status quo, regardless of the election results and the pursuit of extra constitutional remedies.

The Army in conjunction with the Navy and Air-force has a constitutional role to defend a democratic government by ensuring that the country is protected from external aggression and her territorial integrity is protected. Constitutional law covers this obligation and such responsibility is entrenched in the constitution of all democracies. This role cannot be interpreted to justify the intervention of the military in terminating existing democracies no matter how inchoate it might be. The “Doctrine of Necessity” as expounded under the guise of Kelsen’s Theory is an exercise in ‘Jurisprudential fraud’.

The role of Judges, when faced with judicial adjudication emanating from an unlawful and unconstitutional usurpation of power is to; pronounce such coup as illegal, as it amounts to aberration of the constitution.

The first case, in which the Kelsen’s theory was flaunted, was STATE v DOSSO, which emanated from Pakistan. The African Courts that dealt with military usurpations cases might have been intimidated that if a legal theory was ‘successfully applied in Pakistan, then it might be incumbent on them to accept such case as a judicial precedent. If one assumes that this was the contention, then it must be a judicial enslavement which was not able to take advantage of other ramifications of

judicial precedent in distinguishing from the notion of persuasive and binding judicial precedents.

The other explanation which can be offered is that the judiciary as part of the elites wants to preserve its position and ensure survival under the military regime. The judiciary would rather not pronounce that military coup is illegal and attract the wrath of the dictator, leading to termination of their appointments. They would find it more politically expedient to accommodate such usurpation within the existing legal jurisprudence, by adopting what Ogowewo termed 'Dodgy Jurisprudence'.

A court faced with adjudication relating to constitutionality of Coup d'état, has four options. Mahmud succinctly summarised these as (i) validate the usurpation of power,(ii) declare the usurpation unconstitutional and hence invalid; (iii) resign and thereby refuse to adjudicate the legality of the demise of the very constitution under which the court was established or (iv) declare the issue a non-justiciable political matter. He argued fervently, that the last option is the most appropriate option.<sup>339</sup>

I strongly disagree with Mahmud's contention; judges are not sworn to office to pick and choose cases which are suitable for their political inclinations, in neglect of their constitutional responsibilities. The integrity and independence of the judiciary can only be enhanced where judges are able to carry out their roles as designated under the provisions of the constitution. Judges are appointed by the provisions of the constitution to hold their office and perform their duties without impartiality. Where judges are in a situation where they cannot carry out their allegiance to the constitution, they should seriously consider their appointment. I strongly think if they

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<sup>339</sup> Tayyah Mahmud, Jurisprudence of Successful Treason: Coup d'état and common law, *Cornel International Law Journal*, Vol.27, Issue 1 winter 1994, p51 at 59.

cannot go with option II as enunciated by Mahmud, their position under the constitution becomes precarious. Their option does not even include option III, allowing them to resign and not adjudicate on such illegal usurpation.

Military coups have become such a disturbing phenomenon in the developing world because of its political implications and consequences. Political commentators and international relations academics are the forerunners of the discourses, which tend to analyse it not only as a political anomaly, but also as an illegal aberration of a constitutional government. The prevalent occurrences of military coups in the developing world enabled western legal scholars to overlook it; thus denying a consistent and thorough legal research into this problem. However, it is not a critique of western legal scholars that it is of paramount importance to this discourse; rather, the erroneous misconception of the developing countries' judiciary and academics to adopt Kelsian theory in a vacuity manner.

Military coup is the illegal use of unconstitutional means in overthrowing a democratically elected government from power. Such coup may involve the use of force, leading to assassination of key officials of the government. At times, it may not involve the use of force and no bloodshed is involved. This latter version is colloquially referred to as '*palace coup*'.

Military coups are illegal because it undermines the supremacy of any given constitution. No matter how inchoate a democratic government may be, it must not be unconstitutionally subdued. The constitutional framework provides for the supremacy and sanctity of the constitution. This supremacy clause often provides that the constitution either in part or as a whole cannot be amended, abolished, abrogated or



obliterate without the often-laid out rigid provisions in such constitutions. When a military coup occurs, it is a change of government, which was not in the contemplation of the constitution, but more importantly it is an aberration of the constitution.

There is a misconception that coup is a political event, which must be resolved by political machinations. The Political solution often preferred in this regard, is to perceive it as a political event, which is non-justiciable political question. To concede to such a proposition is to lay the foundation for what *Ogowewo* has called ‘twin failure’ -failure of democracy and failure of government, which he argued provide “the ideal opportunity for the subversion of the existing democratic order through an unconstitutional usurpation”<sup>340</sup>.

*Odinkalu* has rightly noted that a military coup is a legal event with political consequences and not the other way round. This crucial distinction, which has eluded many commentators, would facilitate a coherent elucidation of this discourse.

A similar misconception that needs identifying is the perception of coup as a revolution. A revolution for all intents and purposes is different from a coup. For the purpose of this discourse coup d’état is different from a revolution.

“A Revolution...involves the rapid tearing down of existing political institutions and building them anew on different foundations. This definition clearly implies that existing institutions are rapidly and forcibly substituted one for another; thus, upheaval in the social order of that particular state is quick and violent, much like a

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<sup>340</sup> Tunde Ogowewo, ‘Self Inflicted Constraints on Judicial Government in Nigeria’ *Journal of African Law*, 49(1) (2005) 39-53.

civil war. The bloodshed and violence envisaged in such a metamorphosis and transformation is broad and affects the entire state”<sup>341</sup>

In an attempt to elude the decision to categorically ascertain if a military coup is synonymous with revolution, some academics and the judiciary have termed it as revolutionary situations. Perhaps, Mahmud is unique in his exposition, when he said that:

*Revolution “envisages a complete metamorphosis that affects both civil society and the entire state; the transformation is so pervasive that legitimacy of the new order is completely autonomous of the processes and institutions of the old order. The content of the legal order and the structure of judicial institutions are typically changed” This is the most accurate exposition, which accommodates the sort of radical revolution, which Kelsen was contemplating. Such revolutions like the French and American war of independence wiped out monarchical regimes and established republican constitutional governments.*<sup>342</sup>

A cursory look at military coups in Africa, Asia or indeed South America, does not reveal what can be accurately called revolution that would fall within the parameters of this definition. It is very tempting in a discourse like this to get swayed by the causes of military coups and the *modus operandi* of military regimes. This discourse does not intend to pursue that line of thought, save to acknowledge that, it is the disintegration of political order, break down in law and order and abuse of legal power

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<sup>341</sup> *ibid*

<sup>342</sup> Mahmud, *Op cit*

in democratically elected government, culminating in the so called “twin failure of democracy and government”.

This twin failure “provides the ideal opportunity for the subversion of the existing democratic order through an unconstitutional usurpation. The presence of these failures in a system makes a coup propitious, and a propitious coup executed by those at the top echelon of the military is almost certain to be successful and welcome. The absence of a counter –force in the military will ensure that it is successful”<sup>343</sup>

### **8.1. Kelsen's Pure Theory of Law: Grundnorm and its Misconception in Constitutional Judicial Decisions**

Kelsen exposition of the pure theory of law was inspired by the aftermath of the Second World War and was conceived in the context of procuring a jurisprudential analysis for the emerging vanquisher’s authority. A hermeneutic exposition of his text would reveal this:

*“If they (revolutionaries) succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour in the new order regulates actually behave, by and large, in conformity with the new order, then the actual behaviour of individuals is interpreted as legal or illegal”.*

*Kelsen went on, to explore the notion of grundnorm, as the basis of positing where the authority rests, the revolutionaries in commanding obedience*

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<sup>343</sup> Ogowewo, Self Inflicted Constraints on Judicial Government in Nigeria, Journal of African Law, 49(1) (2005)39-55, p.46.

*from the hitherto adherent subjects of the old order, which the new order is meant to have 'overthrown'.*

*It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempts to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government, if they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour, the new order regulates actually behave, by and large, in conformity with the new order, then this new order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, and then on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution that as an illegal act the crime of treason, and this to the old monarchic constitution and its specific norm<sup>344</sup>*

This is the genesis of the legal dogmatism and judicial vacuity that became prevalent in common law jurisdiction. Here, the courts faces the challenge of interpreting the

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<sup>344</sup> Han Kelsen, *The Pure Theory of Law*, translated by Marx Knight, 1967,p.48

constitutions vis a vis military regimes' unconstitutional usurpation of power and unlawful violence against the constitution.

The decisions of the courts in *State v Dosso* and *Uganda v. Matovu* decided relying on this Kelsen's principle.<sup>345</sup> These are the forerunners of these misconceptions.

The Ugandan court held, in upholding the validity of military coup and its decree:

Applying the Kelsenian principles, which incidentally form the basis of the

Judgment of the Supreme Court of Pakistan in the above [*Dosso*] case, our

deliberate and considered view is that the 1966 Constitution is a legally valid

constitution and the supreme law of Uganda; and that the 1962 Constitution

having been abolished as a result of a victorious revolution in law does

no longer exist nor does it now form part of the Laws of Uganda, it having

been deprived of its de facto and de jure validity. The 1966 Constitution,

We hold, is a new legal order and has been effective since April 14, 1966,

when it first came into force.<sup>346</sup>

The Supreme Court in the Nigerian case of *Lakanmi v Attorney General*, held that the

Court can look into legitimacy of Decree (Forfeiture of Assets (Public Officers and

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<sup>345</sup> *State v. Dosso* 1958 PLD.Supreme Court 533(Pakistan) and *Uganda v Matovu* (1966) East African Law Report 514 (Uganda). On August 11, 1966, Michael Matovu, a Buganda county chief, was served with a detention order under provisions of Article 31(I) of the 1966 Constitution. Matovu filed a habeas corpus application, arguing that the detention order violated the fundamental rights provisions of section 28 of the 1962 Constitution, which remained the supreme law of the land. This furnished the High Court of Uganda with the opportunity to examine the validity of the new regime in *Uganda v. Matovu* In a unanimous decision, the Court first rejected the regime's plea that the new oath of allegiance administered under the new Constitution precluded the Court from inquiring into the validity of that Constitution. The Court also rejected the plea that "the court had no jurisdiction to enquire into the validity of the Constitution because the making of a constitution is a political act and outside the scope of the functions of the court." The Court relied expressly upon and quoted extensively from both Kelsen and *Dosso*, which it found "irresistible and unassailable." The Court designated the events from February 22 to April 1966 as "law creating facts appropriately described in law as a revolution," because "there was an abrupt political change, not contemplated by the existing Constitution that destroyed the entire legal order and was superseded by a new Constitution ....and by effective government." Resting its holding expressly on Kelsen and *Dosso*. (Quoted from Mahmud *Jurisprudence of Successful Treasons: Coup d'état and Common law*, at p.54.

<sup>346</sup> Cited in Tayyah Mahmud, *Jurisprudence of Successful Treason: Coup d'état and common law*, *Cornel International Law Journal*, Vol.27, Issue 1 winter 1994, p51 at 59.

other Persons) Validation Decree Number 45 of 1968) promulgated by the Military Junta and ruled that the Decree was inconsistent with the unsuspended 1963 Nigerian constitution provisions in relation to Human Rights protection and jurisdiction of the superior courts.<sup>347</sup>

The bravery of the Supreme Court was immediately rebuffed by the military junta by the promulgation of Federal Military Government (Supremacy and Enforcement of Power) Decree Number 28 of 1970. This Decree introduced ouster clause in Decree which prevents the court in adjudication on the validity of the Decree in any manner whatsoever. The Pre- Lakanmi case and post- Lakanmi cases decided by Nigerian Judges were unfortunately pro -military junta and upholding the validity of military Decrees.<sup>348</sup>

This is the crux of this matter. The judges should have availed themselves of the opportunity to embark on using the law as an instrument of constitutionalism. This issue of military coup was a peculiar problem destroying the corpus of the constitutional order of the newly independent commonwealth countries.

It is paramount to conclude that, there can be no justification for military coups; democracies will evolve and grow in accordance with the peculiar traits and hazards that will affect its growth in the developing third world. The military advent has been an aberration and stultified the constitutionalism principles which democracy is meant to develop. The UN and other regional bodies should develop their charter to condemn and take actions against dictatorship and military coup.

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<sup>347</sup> Lakanmi v Attorney General, University of Ife Law Report 214., Abiola OJo, criticized the Supreme Court for challenging the supremacy of the Decree and the power of military junta in making Decree- The Search for a Grundnorm in Nigeria- The Lakanmi Case, International and Comparative Law Quarterly, Volume20, Issue 01,pp.117-136.

<sup>348</sup> See Council of the University of Ibadan v. Adamolekun (1967) 1 ALL. NN.L.R. 213, decided on 7 August 1967 and Boro v. Republic. (1967) Nigerian Monthly Law Report 163( Decided on 5 December 1963).

It is imperative that legal theory should be adopted to provide practical and meaningful solutions. Post-colonial theory as a discourse was not well known or has firm themes, during the time these decisions were made. Could the judges deciding on the legality of military coups have looked inwards to African jurisprudence to provide legal basis for their judgement? Their training and orientation did not afford them this opportunity. This is where the dislocation gap, (which we referred to in Chapter One) becomes important in raising awareness and building consensus among the judges that, military dictatorship cannot be tolerated or explained away within the system of law in Nigeria. This re-orientation and new consensus to be articulated is founded in our cultural jurisprudence theory enunciated in this work.

It is pertinent at this point to adumbrate why there is desperation on the part of commonwealth developing countries' judiciaries to find solace in foreign legal jurist in the adjudication of constitutional disputes and judicial pronouncements. The enlightenment and civilization argument propaganda of colonialism is a major factor in this regard. Most countries, which are ex-colonies of Britain, inherited a legal system, which accorded an overwhelming importance to English legal system. This legacy formed the basis of legal education curriculum, which the newly independent countries had in place. Thus, old empire law for new independent legal order was a recipe for distorted legal system. It is a paradox, which postcolonial thought must strive to rectify.

The legal training of judges on these distorted legal curriculum, ultimately denied them the opportunity to look inward to indigenous laws and its dynamics. This anomaly becomes the cipher for on-going stultification of customary law and thus

missing out on its contribution to legal scholarship and development in Africa. One of the well-developed areas is indigenous African governance, among the Yoruba and Igbo ethnic groups in Western and Eastern parts of Nigeria. The inherent participatory consensus democracy is well documented.<sup>349</sup> This legendary political structure is now the contemporary basis of clamouring for emancipative democratic politics after the failure of western democracy all over Africa. It is pertinent to say that this paradigm is central to the issue of so called third wave of democracy and consolidation of democracy in Africa. This paradigm would be returned to later in the context of exposing an alternative indigenous jurisprudence in averting military dictatorship.

One can sympathise with the early judges called upon to rule on military coups in the 1960s and 1970s. There was dearth of legal resources in their different judicial jurisdictions. The disheartening scenario is that of judges making decisions in the 1980s, 1990s and at the 21<sup>st</sup> century. There has been tremendous jurisprudential writing and other legal resources, which should have influenced the line of thoughts of present contemporary judges operating under military regimes.

The reception of Empire's common law and its legacy in the ex-colonies provides another dilemma for the development of indigenous legal philosophy. This problem is exacerbated by the inability of indigenous law to contend with the ruptures and tension, which the withdrawal of the empire produced. These difficulties are exacerbated by problems of ethnicities and inter-tribal aggression. This has been the bane and source of crisis in nation states in Africa.

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<sup>349</sup> See Dele Olowu and John Erero, *Governance of Nigeria's Villages and Cities through Indigenous Institutions*, Workshop Working Paper, W95-25, Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana.



The overwhelming importance of common law and the English legal system continues to influence and dominate the ex-colonies jurisdictions. One of the reasons for this continuing influence was the ill-conceived perception of it as finest system of dispensing justice. The admiration of the English legal system and its tendency in its positivistic manifestation or its softer humanistic guises, have the tendency to reduce the 'outsider to the insider'.

Closely related to this, are the relics of common law left behind in the ex-colonies, known as statutes of general application, these are laws applicable in England as at 1<sup>st</sup> January, 1900. After decades of independence from England; it is diabolical that some laws that have been abolished in England are still applicable in the ex-colonies. Apart from the fact that such laws are devoid of socio –cultural values of the ex-colonies because of its imperial jurisprudence, the applicable customary laws that could ameliorate the harshness and injustice in such statutes of general application were subject to doctrine of repugnance clause. The cornerstone of this test is that no customary law is applicable if it is repugnant to "Equity, Natural Justice and Good Conscience".

The Jurisprudence of this doctrine in relation to legal development is well examined elsewhere. The theme of this repugnance doctrine as a bulwark against development of customary law and as an epitome of positivistic imposition is well captured in these terms:

The first issue to be resolved is to determine the object of the legal address. Rules of law generally prescribe norms of conduct. That is, they are generally normative rule that is, customary law.

In Hartian terminology, it will appear to be playing the role of a power conferring secondary rule of recognition to the duty –imposing primary customary rule. Further, it is also necessary to determine what in fact should be repugnant. Is it the rule of customary law itself as such or the result of its application that is likely to produce in a particular situation that is, the consequence of the application of the rule?

After having identified some of the reasons judges obliged themselves to take a positivistic stance when interpreting constitutional provisions following a military coup, it is pertinent to identify and explore the possibility of a postcolonial jurisprudence in resolving the constitutionality or otherwise of military *coup de tat* and their relationship with constitutionalism.

The major critique of military regime is in relation to abuse of Fundamental Human Rights. Also, the infiltration of the civil society by state agents undermines the articulation of consensus and democratisation processes. All these measures by the military dictators provided the platform for the collaboration of the political elites and cronies with the military dictators to the detriment of the citizens. The need for preservation of status quo, by this class, has necessitated the need to ‘de-politicise’ and demobilise the citizens. This argument has its origin in the orientation of the middle class through their educational and sociological development.

The need to mobilise consensus among the citizens and articulate it for the formulation of policy and structure of governance is of paramount importance. The ruling class and the middle class never undertook this role. This prebendal nature of the contemporary elites in Africa has a genesis in the contrived nature of nation state inherited from the colonial masters. It endows the elites with parochial views, which

allow them to seize state powers to subjugate the citizens for their personal aggrandizement.

Ogowewo also alluded to this assertion but not in postcolonial perspective. He argued that as part of implicit bargain theory, that judicial arm of the government survives military coups because the judges are keen to keep and continue to enjoy the emolument and fringe benefits of their judicial offices. To ensure this, they adopt the ruse of judicial imposed limitations, which forbids them to pronounce military Decrees and other legislations from being *ultra vires* of the constitution. This argument is reminiscent of Mahmood's contention that if judges resign because they could not possibly be expected to declare the constitutions under which they are appointed to be null and void, to the extent of its inconsistencies to a usurper's Military Decrees. Both scenarios would allow the usurpers to pack the courts with their sympathisers, who would be 'rubber stamps'.

A postcolonial articulation would assist the judges to reach a formidable decision without losing their credibility and integrity. This would arguably assist the judges in articulating that the sovereignty belongs to the people from time immemorial and that sovereignty is epitomised in the constitutional mandate, to elect their representatives to govern the country for the *good of the people*. The will of the people cannot be destroyed, although if subdued through *coup d'états*, it has an inbuilt mechanism, which resuscitates it, and allows its survival during and after the departure of the usurpers.

Mamdani in a provocative analysis of the obstacles to democratisation in post-independence Africa argued that the bifurcated power, which is reflected in racial and

tribal domination, has left the state a divided nation consisting of citizens and subjects. The citizens as the elites are placed in a privilege position to exploit state resources, and power, to oppress the subjects-the masses with little or no remedies to redress these predatory tendencies. His analysis is based on the exploitation of the authoritarian tendencies in the pre-colonial state and consolidating it by the emerging decentralized despotism.<sup>350</sup>

This emerged decentralised despotism is the political elites in form of military dictators, their cronies, sycophants and others in the democratic dispensation. To avert the excessive impact of this decentralised despotism, critical scrutiny and accountability must be the foremost criteria to control how an elected government will not become authoritarian, thus creating room for military coups. The role of civil society and courts must be emphasised to assist in the consolidation of the democratic ethos and governance, under the present political dispensation. A vibrant and critical press would assist as part of the civil society to deepen democratic governance.

Bureaucratic authoritarianism will emerge, if the government as elected adopts a great deal of extra constitutional powers to ensure that state powers are exercised for personal gains, rather than comply with the due process of the law in exercising governmental powers and affording remedies to the people, (where there has been abuse of powers). There are some inevitable consequences of abuse of power. The people as the electorates are denied the benefits and rights accorded to them in the constitution. The Courts as the custodian of the constitution of the country must be rigorous in protection of fundamental human rights and rule of law. The absence of

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<sup>350</sup> See Mahmud Mamdani, *Contemporary Africa and the Legacy of Late Colonialism- Citizens and Subject*, Princeton University Press, 1996.

these features in a democratic government in Nigeria provides enabling and propitious political conditions for military coup. The military regimes often use the presence of authoritarianism and break down of law and order to interrupt democratically elected government and impose military junta. The next section intends to identify the false premises of this claim by indicating that the advent of military regime leads to the erosion of constitutional protection of fundamental human rights and massive corruption.

## **8.2 FEATURES OF MILITARY DICTATORSHIP IN NIGERIA**

The advent of military dictatorship in Nigeria undermined the traditional role of the military as the custodian of national security and territorial integrity of the country. There are six specific features of military government which undermine legitimate governance: suspension of the constitution; excluding the jurisdiction of courts; ouster clauses in military decrees; blurring of separation of powers between the executive, legislature and the judiciary; press censorship and incarceration of journalists; and persecution of political opposition and civil society.

The first military administration in 1966 suspended the 1963 republican constitution by the promulgation of the Constitution (Suspension and Modification) Decree No.1 of 1966. The effect of this Decree and its similar successors is to suspend the supremacy clause in the 1963 constitution. Section 6 confirmed that the Decree had superior effect and nullified the provisions relating to supremacy of the constitution. The purport of this decree was to exonerate the military junta from the need to comply with the fundamental human rights provision of the 1963 constitution. The Supreme

Court in the celebrated case of *Lakanmi and another v. Attorney General (Western State) and others* attempted to resuscitate the supremacy of 1963 constitution. In this case the plaintiff sought to contest the legality of the confiscation of their property by the military government through the Forfeiture of Assets (Release of Certain Forfeited Properties, Etc.) Validation Decree. The Supreme Court held that the Decree was in breach of the fundamental human rights of the plaintiff. Justice Ademola, Chief Justice of Nigeria, held that the Decree violated the principle of separation of power in the 1963 constitution. ‘The Decree is nothing short of legislative judgement, an exercise of legislative judgement; an exercise of judicial power. It is in our view *ultra vires* and invalid’

The Military government reacted to this Supreme Court decision and reasserted its authority by promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.28 of 1970. This Decree reiterated that the Military government’s Decree and actions purported to be done under the authority of the Decree cannot be challenged in the Courts. This generated a great deal of criticisms and laid the foundation of what amount to the *grundnorm* in Nigerian legal theory discourse. We have dealt with this issue in the context of the Kelsen theory above.

As at May 1999, before the military handed over political power to the elected government of Olusegun Obasanjo, the effects of Decrees and its relationship to the hierarchy of laws is as follows:

In *Labiya v Anretiola*, the Supreme Court enunciated the hierarchy of laws in Nigeria under military regimes as follows:

Thus, on the 31st December, 1983, the status of the laws in the order of superiority would seem to be as follows:

1. Constitution (Suspension and Modification) Decree 1984;
2. Decrees of the Federal Military Government;
3. Unsuspended provisions of the Constitution 1979;
4. Laws made by the National Assembly before 31/12/83 or having effect as if so made;
5. Edicts of the Governors of a State;
6. Laws enacted before 31 December, 1983 by the House of Assembly of a State, or having effect as if so enacted.

This decision in *Labiya v Anretiola*<sup>351</sup> regarded decrees as supreme in Nigeria.

What is important for our analysis is the illegality of ouster clauses in military Decrees which debar courts' jurisdictions and denies the court the capacity to scrutinise the Decrees, and provide remedies for the aggrieved citizens. The litigants who were mainly civil rights and human rights activists consistently sought to achieve justice through the remedies in African Charter on Human and Peoples' Rights (ACHPR). The ACHPR was incorporated into the domestic legislation in Nigeria in 1983 during the second republic democratic government of President Shehu Shagari, which was overthrown in a military coup by Buhari on 31 December 1983.

A.A. Oba, a renowned Nigerian scholar's assertion that the nature of Decrees and how they undermine the notion of legitimate governance are very instructive:

*The problem with decrees was that many touched on the rights of citizens.*

*The military government had no qualms or inhibitions to use bills of*

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<sup>351</sup>(1992) 8 NWLR (Part 258) 139.

*attainder. Ad hominem laws were made retrospective in order to deprive persons of their properties without any process of hearing.*

*Although ouster clauses are not exclusive to military regimes in Nigeria, the overwhelming majority were enacted during military regimes. The use of ouster clauses prevented persons aggrieved by the actions of a military government from seeking redress in the courts. By barring access to the courts, the military became a totalitarian government. In a seminal work on ouster clauses, Chief Gani Fawehinmi identifies 'several garbs' in which ouster clauses appear. These include 14 retrospective laws made to protect unconstitutional laws; laws enacted to cover up the failure of leaders to hold consultation or obtain statutory consent, advice or approval required by the legislature; laws to cover up failure to comply with fundamental rights; laws to prevent the use of general process of courts; laws to stop court proceedings and nullify court orders; and laws to prevent the court from committing erring public officers for criminal contempt.<sup>352</sup>*

Professor Nwabueze identifies various formulas used, either singly or in combination, by military governments in Nigeria to comprehensively oust the jurisdiction of the courts. He summarises them as follows: Civil proceedings in respect of any act, matter or thing done or purported to be done under the decree were barred; the words 'purported to be done' being most significant indeed. If such proceedings had been instituted before, or after, the commencement of the decree, they were abated, discharged and made void. Any judgment, decision or order of any court given or made in relation to such proceedings had no effect or, where appropriate, was deemed

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<sup>352</sup> A.A. Oba- Islamic law as customary law: the changing perspective in Nigeria (2001) 51 ICLQ 817



never to have had effect. Specific remedies, *quo warranto*, *certiorari*, *mandamus*, prohibition, injunction or declaration, were barred. Rights guaranteed by the Constitution were excluded, with the additional stipulation that no enquiry was allowed into whether any of those rights had been contravened by anything done or purported to be done under the decree. Persons acting under these decrees were relieved of liability for their acts.

Furthermore, the jurisdiction of the courts was, either by express words or by implication, excluded whenever a special tribunal was established under various decrees for the trial of specified offences. The African Charter was pitted against ouster clauses in a series of cases, ending with *General Sani Abacha and Others v Chief Gani Fawehinmi*.

The potential use of the African Charter in this regard lies in the fact that it contains valuable human rights provisions that could be used to challenge decrees which purportedly ousted the jurisdiction of courts.

Article 7(1) of the Charter provides thus:

Every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and custom in force;
- (b) The right to be presumed innocent until proved guilty by competent court or tribunal;
- (c) The right to defence, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.

Once access to court is secured, other provisions of the Charter, such as those against retrospective legislation and those granting the right to other aspects of fair hearing, can be invoked.

All these assertions in relation to ouster clauses and military Decrees confirm the concerns of this discourse that military regimes are illegitimate governments that undermined the citizens' fundamental human rights; separation of powers principle; under federalism principles, and the need for cohesive nation building. The only way to avert military coup by democratically elected government is to adhere to the safeguards in the constitution and deepen the frameworks for the survival of democratic governance.

### **8.3. DEEPENING THE FRAMEWORKS FOR THE SURVIVAL OF DEMOCRATIC GOVERNANCE**

To prevent the advent of military coup, there is need for the survival of the present contemporary democratic government. There are crucial measures that must be taken to ensure the ethos of democratic governance are deepened. The executive must respect and comply with the decisions of the courts. There is also the need to ensure that the legislative arm of the government intensifies its oversight functions, in monitoring the executive and the agencies assigned with statutory responsibilities for its policies and execution of their programmes .If democratic governance is to have any meaning for the peoples, it must be seen to provide empowerment and capacities to realise individual potential, within a cohesive and peaceful environment. The marginalised groups, like the minorities, women, disabled and other groups must be integrated to the mainstream of the society. In accordance with the theme of this

research, the democratic dividends should be translated to a coherent programme of social justice which we have discussed in Chapter Three. Accountability, transparency and unreserved compliance with judicial decisions in resolving election disputes, revenue allocation and other constitutional disputes must be cardinal principles in the present contemporary democratic dispensation.

Concerted efforts to ensure the survival of democratic government in Nigeria must be anchored on the need for the civil society to be vigilant and ensure accountability from the government, in the exercise of its constitutional powers. The government must ensure absolute regard for the rule of law, supremacy of the constitution, obedience and compliance to judicial pronouncement, resolution of election disputes and above all, a coherent social justice policy. We have argued for a diversified version of the rule of law, to encompass the notion of social justice. The government must ensure that, the purpose of governance is for the welfare of the citizens and for the protection of their fundamental human rights.

The most difficult dilemma facing the African Union and the Economic Community of West Africa (ECOWAS) is how to have an effective sanction system against military dictators that emerged and wanted to participate in international juridical discourse, in order to gain legitimacy. The African Peer Review Mechanism and the New Partnership for Africa's Development must be rigorously pursued in providing solutions to inter states conflicts, abuse of power and issues surrounding protection of human rights. It is the inability of these mechanisms to be fully exploited, that leads to human right abuse and non-realisation of economic, social and cultural rights in Africa. The commitment of the leaders of the continent must be rigorously sought and

enforced in making democratic governance a sustainable paradigm in the continent. The constitution of the Africa Court of Justice, on its commencement will determine the relevance of the Court in the development of the jurisprudence of the ACHPR. There is the so-called holy trinity of liberalism, democracy and human rights. This discourse is at the centre of international clamour for good governance. There are international standards which all countries striving towards good governance are meant to comply with.

In the next chapter, we will discuss the application of rule of law in Nigeria, before discussing electoral reforms and institutional reforms necessary to consolidate good governance. The rule of law has a pivotal role in the survival of democratic governance. The continuing support by international donors and benchmark in ascertaining good governance which we have discussed have adherence to rule of law, as an important indicator. In conjunction with our notion of 'interzone', we subscribe to this as indicator to good governance; however we are giving it a different and more robust interpretation to suit the orientation of this work.

## **CHAPTER NINE – THE APPLICATION OF RULE OF LAW IN NIGERIA.**

### **Introduction**

This chapter will focus on the need to respect the rule of law as a mean to achieve good governance in Nigeria. As part of the ‘interzone’ collaboration enunciated in this work, we shall in this chapter consider the tenets of rule of law, and see how adherence to the tenets of rule of law will assist in having good governance in Nigeria. In chapter seven, we discussed how to empower Nigerian citizens by adopting the South African model of enforcing socio-economic rights as part of legal framework to enforce human rights and the need to jettison the artificial distinction between civil and political rights and socio-economic rights.

This chapter on rule of law will adopt a pragmatic approach in the discussion of rule of law by focussing on formal minimalist understanding of rule of law which will include substantive political outcome, which is reflected by democratic principles promoting human rights and redistributive justice. The rule of law is one of the indicators for good governance and the need to adhere to its tenets will achieve the protection of human rights of the citizens and lead to equality of opportunities for the citizens. We can consider rule of law as an attribute of good governance and look into regulation of governmental powers between the different arms of the government and that of the relationship with the citizens. In relation to our discussion, on the importance of the judiciary as an arm of government that will protect rights of the citizens against the arbitrariness of governmental power, it is imperative to discuss the role of the judiciary in this context. It is also trite to acknowledge that the rule of law

has applications in International development policy and Transitional Justice jurisprudence.<sup>353</sup>

We will consider the executive, legislature and the judiciary arms of government as part of the governance structures and processes aimed at ensuring the rule of law and assess the factors that undermine the rule of law in this context. We are considering these issues as part of the ‘interzone’ idea.

## **9.1 CONCEPTUALIZATION OF RULE OF LAW IN THE CONTEXT OF CULTURAL SOCIAL JUSTICE DISCOURSE**

There are two strands to the conception of rule of law- formal and substantive. The formal relates to how or the manner which law was promulgated by the authorised person or authorised manner. “ The clarity of the ensuring norm (as it sufficiently clear to guide an individual’s conduct so as so enable a person to plan his or her conduct etc.); and the temporal dimension of the enacted form (was it prospective or retrospective, etc.)”<sup>354</sup> The formal conception does not concern itself with the appropriateness of the content of the law or its moral or rationale behind the content, as enunciated with its content. The formal conception is not concerned about whether the law is good or bad , provided that the procedural steps for the making of the law has been complied with in making the law, such law, once it has gone through the law making processes will suffice to meet the rule of law.

The substantive conception of rule of law is concerned about the content of the law, in ascertaining if certain substantive rights are said to be based on, or derived from,

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<sup>353</sup> See Matthew Stephenson, *The Rule of law as a Goal of Development Policy* (World Bank, Washington D.C, 2001) and Thomas Nagel, *The Problem of Global Justice*, 33(2) *Philosophy and Public Affairs* 113(2001).

<sup>354</sup> Paul Craig, *Formal and substantive conceptions of the rule of law: an analytical framework*, *Public Law*, (1997) Autumn p.467

the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between “good” laws, which comply with such rights, and “bad” laws which do not”.<sup>355</sup> Craig in his seminal article had highlighted the two conceptions and identified Joseph Raz, Dicey and Unger as those of the formal conception school of thought and Dworkin to be of substantive conception. He articulated the middle way, which he said is applicable in public law writing now and identified St John Laws and Jowell as leading authorities in that school of thought. This thesis identifies with the middle way, because of its importance in judicial review and central obligations to the core idea of fidelity to the “principled application of the law” as identified by Raz.<sup>356</sup> We will return to this theme below, in the context of the role to be apportioned to the judiciary in achieving good governance through the rule of law.

The classical conception is associated with A. V. Dicey (1885) and it emphasizes the need for express breach of ascertainable law before punishment can be imposed; equality before the law and need for rights of the citizens to be guaranteed by adjudication of such rights by the courts for certainty and protection.

This classical enunciation is reiterated:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land . . . .

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<sup>355</sup> *ibid*

<sup>356</sup> See the discussion in chapter 10 and 13, Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics*, at p.373 cited in Paul Craig, *Forma and Substantive Conceptions of the Rule of Law: an analytical framework. Op cit*

We mean in the second place . . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals . . . .

[Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

Dicey's three aspects of the rule of law—regulating government power, imply inequality before the law, and privileging judicial process—are commonly regarded as basic requirements of a formal understanding of the rule of law.<sup>357</sup>

These conceptualizations are still relevant in the determination of good governance and protection of citizens from the arbitrary power of the state in 21<sup>st</sup> century contemporary world.

The regulation of government power to avoid arbitrariness is imperative in guaranteeing the rights of the citizens against parameters by which governance is measured. Citizens are responsible for the election of their rulers, at least in functional democracies, where there is check and balance and an effective judiciary that protects the human rights of the citizens against the exercise of government powers by functionaries and officials.

Access to government machinery should be based on free and fair elections and those elected must be accountable to the citizens and finalization of judicial conflicts between the state and citizens and citizens and agents of the state should be the courts.

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<sup>357</sup> Quoted from Simon Chesterman, *An International Rule of Law?* 56(2) *AM.J. Com. L.* (2008)



The decisions of court should be respected and adhered by both citizens and state functionaries. The United Nations Human Development Report has acknowledged the five indicators of compliance to rule of law as fair and public hearing of criminal cases; competent, independent, and impartial judiciary; availability of legal counsel; provision for review of convictions in criminal cases; and whether government officials or pro-government forces are prosecuted when they violate the rights and freedoms of other persons. All these indicators revolve around the need to have an effective adjudication system that is bias free and ensure equality before the law. The approach in this discourse goes beyond criminal justice administration to articulate rule of law as a governance issue. We will now consider rule of law application and the impact intended in the course of seeking good governance for Nigeria.

### **APPLICABILITY OF RULE OF LAW IN NIGERIA**

The pursuit of good governance in Nigeria is anchored on the protection of human rights, respect for democratic principles and the third perspective to be explored in this regard is the respect and adherence to rule of law. We will discuss each aspect of these tenets and contextualize it in relation to democratic governance in Nigeria and make suggestions of how to strengthen the rule of law in Nigeria. The fidelity to the core idea of “Principled faithful application of the law” is central in determining how the different organs of government in Nigeria have been complying with the rule of law.

## **9.2 REGULATION OF GOVERNMENTAL POWER AS AN ATTRIBUTE OF RULE OF LAW**

The nascent democratic governance in Nigeria, which commenced in 1999 after about three decades of military dictatorship, engenders its peculiar problems of how to manage conflicts from the different arms of government, especially the legislature and the executive and the paramount role of the judiciary as the organ charged with adjudication and determination of constitutionality of actions taken by the other two arms of government. In the context of Nigerian federalism and its heterogeneous nature, we will discuss the issue of revenue allocation, impeachment of governors and the exercise of executive power on declaration of state of emergency in constituent states of the federation.

The reliance on oil for revenue has caused enormous problems between states producing oil and non- oil producing states, which are both entitled to different amount from the Revenue Mobilization Allocation and Fiscal Commission (RMAFC). This has caused on- going problems for the federal government because of agitation from oil producing areas for more revenue based on 13 % derivation principle and non-oil producing areas for inadequate revenue. The sharing allocation for the oil revenue between the federal government, littoral states and non-oil producing states cause disaffection and agitation. The federal government is often accused of taking excessive share from the revenue allocation. The federal government justification is the need for large revenue to take care of National Security and Defence, Universal Basic Education Programme, federal government projects and the machinery of

governance. The federal Government share is 53.69%, states share is 31.10% and 15.21% to the 774 Local Governments in Nigeria.

An equitable sharing of revenue to be accompanied with accountability will lead to even development of the states and the local development areas in Nigeria. It is inevitable for conflicts to arise in relation to revenue sharing and the ability to resolve this conflict will go a long way in ascertaining if it is in compliance with rule of law. The federal government through the Ministry of Finance publishes the exact allocation of revenue to the states and Local Government authorities. This is to ensure transparency and accountability, and the local citizens can be aware of the amount of revenue coming into the purse of their authorities as distinct from internally generated revenue. A major problem that often causes maladministration and graft during the military dictatorship is non-release of revenue for state and local authorities. The present dispensation which has implicit transparency will assist the citizens to hold their government accountable for the revenue received from the federal government.

The federal government has been in breach of rule of law, in exercising federal revenue power by incurring expenditure outside budget allocation and delaying the remission of state revenues on some occasions and outright refusal to allocate revenue in accordance to constitutional requirement. The Fiscal Responsibility Act 2005 is quite explicit on the processes of fiscal federalism. The issue of revenue allocation came to fore in the case of *Attorney General of Federation v Attorney General of Abia State and 35 others*.<sup>358</sup> The decision in the case centres on the constitutionality of the claims of the littoral states to revenue from oil produced in deep sea adjacent to the states. They argued based on the derivation principle, that they should be entitled to

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<sup>358</sup>(2002) 4 Supreme Court Report (Part 1), page 47.

share in the revenue, just like the oil producing states are entitled to thirteen per cent allocation from the oil revenue. The Supreme Court assumed the constitutional role granted under the constitution in section 232, which vest it with original jurisdiction to interpret and resolve any constitutional matter between the federal government and the constituents' states. The Supreme Court had a unique opportunity to interpret section 162 of the 1999 Constitution in relation to entitlement of littoral states to revenue from the oil located in the deep sea adjacent to their states.

The saga of revenue allocation and tendency to subdue state to comply with Federal Executive Directive came to be resolved by the Supreme Court of Nigeria in year 2000, in the case of *Attorney General of Lagos state v Attorney General of the Federation*.<sup>359</sup> The Lagos State government in 2000 created additional 37 local governments beyond the 20 created under the 1999 constitution<sup>360</sup>. The Federal Government under President Olusegun Obasanjo illegally withheld the allocation of revenue meant for the state because of the allegation that the creation of new local government authorities was in breach of the constitution. This is an abuse of power, because the Federal Executive Government does not have that power to unilaterally withhold the revenue allocation entitlement of the constituent states. It is unconstitutional to withhold the revenue due to the state in those circumstances. The Supreme Court held that the enabling law of Lagos State Number 2 of 2000 that created the local government was valid and the newly created local Government Authorities are inchoate until the National Assembly ratifies the creation of the Local authorities created by Lagos state government by virtue of section 8(5) of the 1999

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<sup>359</sup>(2003) 6 Supreme Court (Part 1)24; (2002) 6 NWLR (Part 763) 264.

<sup>360</sup> The first Schedule of the 1999 constitution listed all the 36 States in Nigeria and all local government Council under each state and the fourth schedule stated the function of a local government council.

constitution, which requires that the National Assembly ratifies the creation of new local government authorities as created by a state legislative Assembly. The Federal Government through the President cannot withhold the revenue allocation entitlements of the newly created local government in Nigeria. The rationale behind this decision is that citizens of the state should not be subject to arbitrary exercise of executive power and funds needed for the development of the area cannot be withheld as punitive measure against the state government.

The Federal Government historically abused the principles of federalism by blurring the remits and responsibilities constitutionally assigned to the constituent states and the local government within the states. The states often abide by this abuse of power during the military dictatorship, because of the unitary nature and hierarchy order in the military, which prevents a state governor to challenge orders given by a superior officer, even where such orders are manifestly arbitrary and illegal. Military dictatorship did not augur well for accountability and the principles of federalism. The fusion of executive and legislative functions in the military ruling council undermines the principle of separation of power and ouster clauses in military decrees and edicts and undermines the efficacy of the judiciary as the bulwark against tyranny and arbitrariness of military dictatorship. Entitlements to revenues are explicitly stated in the constitution and the Revenue Mobilization Allocation and Fiscal Commission must also comply with the Allocation of Revenue legislations.<sup>361</sup>

The other issue which we want to discuss is the removal of state governors without following the due process of the law or at least manoeuvring of the political process

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<sup>361</sup> Finance(Control and Management)Act, CAP.F.26 ,Laws of the Federation 2004,Fiscal Responsibility Act, 2007 and more importantly section 80 on the establishment of Consolidated Revenue Fund and 162 of Nigerian Constitution (as amended).

by The Presidency<sup>362</sup>. All elected governors come into office on the platform of a political party. However, some governors after having being elected move their allegiance to a different political party; this is called ‘cross carpeting’ in political parlance in Nigeria. The state legislators are given huge sums of money by the political machinery of The Presidency to impeach such erring governors on thumped up charges. In some instances, the legislators hold nocturnal meetings to remove the elected governors. This happened recently in the removal of former Governor Muritala Nyako of Adamawa state. The Legislators have accrued so much arbitrary power used in such impeachment with impunity; even where court order restrains them from carrying out the impeachment. This is not conducive for the sustenance of nascent democracy in Nigeria.

The declaration of State of Emergency in the constituents’ states in Nigeria is another power vested in the Federal Government which has been subjected to abuse.<sup>363</sup> There are specific provisions that can necessitate a declaration of state of emergency by the president and are explicitly stated in section 305(3) A- G of the constitution- which are : federation at war; imminent danger of invasion or involvement in a state of war; actual breakdown of public order and public safety in the federation or any part thereof to such extent as to require extraordinary measures to avert such danger;

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<sup>362</sup> Section 188 of 1999 Nigerian Constitution (as amended) lays down the procedure for removal of state governors. Basically, on the receipt of complaint of gross misconduct against the Governor, signed by not less than one-third of the members of state legislative assembly, the speaker of the House will provide a copy of the complaint to the governor and to the Chief Judge of State, who shall set up a seven man committee to investigate the indictment and present a report of their finding to the Assembly. After the committee’s hearing, if the allegation is proved against the Governor, he will be removed and the Speaker of the State Assembly is to act as the governor pending the election of a new governor. When the Governor of Adamawa was removed, by virtue of section of 189 of the 1999 constitution, the Deputy Governor should become the acting Governor. The Deputy Governor was pressurized to resign by the Peoples’ Democratic Party dominated House of Assembly, doing the bidding of the Presidency in removing the Governor and his Deputy, for having the temerity to move to the opposition party- All Peoples Congress Party (APC).

<sup>363</sup> Section 305 of 1999 Constitution (as amended) provides for the procedure for declaration of state of emergency.

occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the federation; any other public danger which clearly constitutes a threat to the existence of the federation; or the president receives a request to do so from the Governor of a state. The declaration of state of emergency order had been made not in accordance with these well specified conditions but based on partisan political consideration. This is not ideal for sustenance of rule of law and consolidation of democratic governance.<sup>364</sup>

### **9.3 EQUALITY BEFORE THE LAW AS AN ATTRIBUTE OF RULE OF LAW**

Another strand of rule of law in the context of governance and protection of human rights is the need for equality of the citizens before the law. The pursuit of equality is a normative value which all democratic governments must aspire to achieve because of its inherent value and human right attribute. The pursuit of equality in this regard presupposes three responsibilities for the state: the need to provide enabling environment and law for the citizens to actualise their potential and aspiration without the prejudice of discrimination; the need to provide legislations that prohibit discrimination and punish same and the need for effective remedies for breach of equality legislations by both private individuals, organization and the state and its agencies. The Nigerian 1999 constitution seeks to achieve one of these aims to a limited extent.

Section 42 (1) provides-

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<sup>364</sup> See Akin Ibidapo-Obe, Impeachment and its implications for Democracy in Nigeria, in Lai Olurode(ed.) Impeachment and Rule of Law, pp. 46-77,(Lagos: Faculty of Social sciences Publication, University of Lagos,2007).

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

*(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the Government, to disabilities or restriction to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or*

*(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.*

*(2) No citizens of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.*

It is important to note that section 42(3) acknowledges that, nothing in subsection 1 above should undermine any appointment of any person to any office under the state or as a member of the Nigeria Armed Forces or Nigerian Police or to an office in the service of a body corporate established directly by any law in force in Nigeria.

There are two issues that emanate from the provision of this constitutional right; enforceability of this provision and lack of effective remedies for breach of the right. The jurisprudence of human right enforceability in Nigeria is still developing; the Nigerian courts are still timid when it comes to enforcement of constitutional rights



against the state and its agencies. Unlike, United Kingdom where all public bodies are under a duty under section 10 of the Equality Act 2010 to promote equal opportunities and also under section 6 of the United Kingdom Human Right Act 1998, where all state agencies have a duty to protect the human rights of the citizens and where there is breach of these duties, substantial damages lies against the state. The courts are public authority, which is obliged under section 6 Human Rights Act 1998 to carry out a compatibility test to ascertain if any act of the court is in breach of convention rights of the litigant before the court. The court is under a statutory duty to act in a way not to jeopardise the human rights of the citizens who are parties seeking adjudication on any breach or attempt to remedy the wrong perpetrated by the public bodies.

There is lack of effective remedies and damages, which is anchored on lack of express binding obligations on the state to protect and enhance this right to non-discrimination. The regime of enforcement is still weak even though the provision is under chapter four of the constitution on enforcement of Fundamental Human Rights. The procedural challenges for enforcement of Human Rights are also a constraint on enjoyment of this right to non-discrimination. We have discussed some of the case law in relation to non -discrimination with regard to school admission and the operation of Federal Character Principle in the chapter relating to enforcement of socio-economic rights.

There is a recent surge in facilitating the return of citizens that are not indigenes of states, where they live in transient and illegal structures in urban areas of some of the affluent states like Lagos state. There are two sides to this controversy. The state

government is claiming that as part of its urban renewal and regeneration policy, it is legitimate to rehabilitate the non-indigenes back to their state, because of their lack of means of livelihood and menace posed to the community because of lack of social and family support in Lagos State. The Human rights argument is anchored on this non-discrimination clause in the constitution, which advocates rely on to argue that the action of the state government is illegal, and the basis of the illegality is that, it amounts to breach of their human right against non-discrimination. The Human Right Advocates have erroneously called this practice ‘repatriation’ of non-indigenes to their original state of origin.<sup>365</sup>

In discussing equality before the law, the issue of gender discrimination is paramount in articulating how to overcome gender based discrimination in areas of family law, criminal law, employment and industrial relations and other areas of public and private lives in Nigeria.<sup>366</sup> The operation of the Federal Character principle in Nigeria undermines the attributes of equality of opportunity because of the fact that the philosophical orientation of the federal character principle is positive discrimination in favour of citizens from ‘educationally disadvantaged’ states in Nigeria.<sup>367</sup> We have discussed the imperative and disadvantage of Federal Character principle in chapter four, when we discussed socio-economic rights as fundamental human rights.

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<sup>365</sup> Repatriation is applicable to removing of persons from one country (foreign) to another country, which is deemed as their country of origin. The use of repatriation in this context is wrong, as the citizens are only be facilitated to return to their state of origin, which is still within Nigerian territory.

<sup>366</sup> See for further analysis, Iyabo Ogunniran, Legal Perspective on the Educational Rights of the Girl- Child, in Child and Development Issues in Nigeria, Abuja Public Interest Law, Vol.1, No.1 2007, pp.41-54 ; Protection Against Domestic Violence: Challenges and Opportunities for Women in Nigeria(2009) Journal of Property and Private Law, Vol.27, pp.15-34; and Male Offences, Female Trials: Rape and the Quest for Gender Justice in Africa(2012) The Nigeria Journal of Contemporary Law, Vol.18, No.1, pp-19-38

<sup>367</sup> Educationally disadvantaged states are mainly the northern states which historically do not have sufficient educational institutions (both at primary, secondary and tertiary level) because of predominance of sharia practice, which does not emphasise the importance of western education.

The relationship between the executive and legislature in the present democratic dispensation is riddled with constraint, crises and attempt by the executive to manipulate the legislature to undermine it in its constitutional roles of legislation making, approval of budgets and oversight roles in relation to the executive ministers and executive bodies. This interlocking and dialectical relationship often degenerates into crises and lawlessness on the part of executive, when it finds the legislature not surmounting to its pressure and manipulation. This had led to inevitable crises of governance, which does not augur well for the sustenance of Nigerian nascent democratic governance.

#### **9.4 PRIVILEGING THE JUDICIAL PROCESS AS AN ATTRIBUTE OF RULE OF LAW**

The judiciary is the arbiter between the executive and legislative arms of government, and any democratic governance system that does not guard the role of the judiciary is likely to fail and will not ensure the guarantee of the human rights of the citizens against the arbitrary tendency of the executive acts and officialdom. It is against this background, that the role of the judiciary will be discussed. The constitutional guarantee for the independence of the judiciary and its paramount role in ensuring the protection of the citizens' human rights and the factors militating against its role to ensure rule of law in this context will be discussed in this regard. The constitutional role of the judiciary is explicitly stated in section 6 of the 1999 constitution (as amended) which unequivocally provides that the judicial powers of the Federation shall be vested in the courts established under the constitution. The constitution created the original jurisdiction for the Supreme Court in section 232 and provides for

the finality of the determination of the Supreme Court decision in section 235 of the constitution:

*Without prejudice to the powers of the President or of the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.*

To compliment this provision, section 236 gives the Chief Justice of Nigeria the power to make rules for practice and procedure of the Supreme Court of Nigeria. The independence of the judiciary is meant to be guaranteed to a large extent by the constitutional provision, which charges their salaries and other remuneration to the Revenue Mobilisation Allocation and Fiscal Commission and the creation of National Judicial Council for vetting the appointment and dismissal of judges for untoward conducts.<sup>368</sup>

The role of the judiciary as the last bastion against tyranny for the protection of the citizens is a pivotal one, which the constitution guarantee and must be upheld in a democratic society. All the principles of rule of law become meaningless, if the judiciary as the final arbiter is incapable and unwilling to call executive actions into scrutiny and ensure accountability for the exercise of executive power. In this regard, the exercise of power of scrutiny by court is limited to mechanism by which the court can exercise its supervisory roles over the executive actions. There are limited circumstances when the court can review executive actions for compliance with rule of law. In judicial review, the head of review are limited to rationality, reasonableness, proportionality procedural impropriety and more recently human right compliance.

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<sup>368</sup> Chapter seven of the constitution created the Supreme Court, Court of Appeal, Federal High Court, State High Courts, Sharia Court of Appeal and Customary Court of Appeal and Section 285 created Election Tribunal and Section 292 provides for removal of judicial officers from office.

The action of the executive and its agencies can only be reviewed under these traditional heading. The classical test for judicial review was enunciated in the case of *Associated Provincial Pictures Houses v Wednesbury Corporation*<sup>369</sup>

The Wednesbury principle has been expanded by the emerging human right jurisprudence, which now requires that judicial review should assess the compatibility of the acts of public authorities with Human Rights Act 1998 in United Kingdom. The jurisprudence of African Human Rights has not developed into this universal compatibility test that obtains in United Kingdom.<sup>370</sup>

Another area which the “Wednesbury *principle*” has been applied in England is the exercise of discretion in relation to public policy and decision making. The court needs to exercise a supervisory role, to ensure that the decision maker follows the necessary procedure and in doing so, it is not acting as an appellate court, just acting to conduct a sifting to determine that the decision maker follows its published public policy and exercising the discretion appropriately.

The exercise of discretionary power given to public officials must be robustly scrutinized to ensure that its exercise does not engender abuse and tyranny. Lord Bingham aptly captured this concern:

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<sup>369</sup>(1948) 1 K.B. 223.

<sup>370</sup>The African Charter was the first African regional human rights treaty to establish an institutional mechanism for the promotion and protection of rights in the continent: the African Commission on Human and Peoples’ Rights (“African Commission”). Although the erstwhile OAU, now reconstituted into African Union (“AU”), had earlier adopted treaties and resolutions having some bearing on human rights, the African Charter was the first real human rights treaty for the continent. ”For details of OAU Human rights initiatives see, Claude Welch Jr. ‘The OAU and Human Rights: Towards a New Definition’, 19 J.MOD.AFR.STUD.401, (1981) cited in Udombana, *Between Promises and Performances*, infra. For further literature, see U.O. Umozurike, *The African Charter on Human rights and Peoples’ Rights* (Amsterdam: Martinus Nijhoff Publishers, 1997), N.S.Nembe, *The System of Protection of Human Rights under the African Charter on Human and Peoples’ Rights: Problems and Prospect* 1991), Carlson Anyangwe, *Obligations of State Parties to African Charter on Human and Peoples’ Rights*, 10 AFR.J.INT’L & COMP.L.625 (1998), N. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM.U.INT’L. L.REV.1177 (2002).

The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.<sup>371</sup>

There are two issues that limited the enforcement of human rights provisions under the 1999 constitution and reviewing of governmental actions in Nigeria. The first one is the issue of *Locus standi* of the applicants. Section 46 (1) of 1999 constitution provides:

*“Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him, may apply to a high court in that state for redress”.*

There are two constraints that emanate from this provision. There is a restricted court, which one can apply to enforce human right as stated here- which is the High Court. This undermines the potential efficacy of this provision. Vast majority of Nigerians live in rural areas where access to any court, let alone the High Court is non-existent. The second issue is that of the rigorous criteria to be met as stated under the Human Rights Enforcement Procedures Rules 2009. Unlike the provision of section 6 United Kingdom Human Rights Act 1998, which designates courts and tribunals as public authorities with duties to assess compatibility test, there is no similar provision under Nigerian law or indeed African Charter on Human and Peoples’ Rights.

Also, the regime of judicial review of executive actions in Nigeria is limited to review to assess principle of legality of executive actions unlike the wider scope in United

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<sup>371</sup> Lord Bingham, Sir David Williams Lecture on “The Rule of Law” (2007) Cambridge Law Journal 67 @ 72.

Kingdom. An effective regime of judicial review should include “reasonableness, irrationality, perverseness, legitimate expectation and human rights compatibility assessment”.

These are some limitations that affect the efficacy of the judiciary in exercise of its duties as the last resort for the common man in guarantying his human rights and prevention of tyranny from the state. The judiciary cannot interfere for the purpose of adjudicating on the right of the citizens, except if the citizens bring an action that will provide jurisdiction for the court to exercise its power in providing remedies for breach of the citizens’ human rights and other acts of lawlessness by the state against the citizens. The Judiciary’s inability to initiate legal action has been described by Nwabueze as an inherent limitation that affects the efficacy of the judiciary.<sup>372</sup> He however suggests that, it provides a formidable bulwark to prevent partiality in matters of adjudication:

*It is eminently sensible and politic that the court should not intervene in disputes except at the instance of a complaint. A meddling judiciary poses the danger of abuse, and of conflict with the government, and it is well calculated to undermine, if not destroy, the court’s popular image of an impartial, disinterested arbiter between contestants in a dispute. It is this posture of impartiality and disinterestedness that makes a decision invalidating a government act, tolerable to the government. Realising that the court is not the prime mover or instigator of its discomfiture, that its only role is to interpret its machinery between the government and its*

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<sup>372</sup> Ben Nwabueze, *Constitutional Democracy in Africa*, Volume 3, page 51,(Ibadan: Spectrum Books Limited) 2004.

*opponents, the government should have no reason to feel antagonised by an adverse decision. It might well feel some disappointment or embarrassment, but not antagonism. But if the court were itself to initiate action, it would at once take the posture of an interested contestant, of an opponent of government, and would thereby forfeit all claims to impartiality in the eyes of the government.* <sup>373</sup>

Three issues are discernible from this illustration cited from the work of Nwabueze: the need for the judiciary to be independent; policy reasons for the justification of its independence and contention that citizens must initiate legal action for the judiciary to adjudicate upon. What Nwabueze overlooks is the level of illiteracy among Nigerians, inevitable lack of awareness and social economic status of the citizens which make litigation a luxury which many cannot afford? This contention must be contextualized against the background, that the judiciary in Nigeria, having being under military dictatorship for over three decades has become timid because of the implications of ouster clauses in the military decrees and edicts.<sup>374</sup>

To overcome this trend and ensure an effective judiciary that can protect the human rights of the citizens in a robust manner, a regime of judicial activism becomes inevitable in developing countries like Nigeria, where the executive power and bodies

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<sup>373</sup> *Ibid* at p.52.

<sup>374</sup> The judiciary cannot accept a military dictatorship as a *fait accompli*. It cannot rely on the ouster clauses of military decrees to deny citizens remedies for breach of their fundamental human rights. The judiciary has been said to blow a 'muted trumpet' as far as the protection of civil liberties was concerned. See for example, *Wang Chin-Yao and others v. Chief of Staff, Supreme Headquarters*, Suit No. CA/L/25/85 on 1<sup>st</sup> Nov. 1985 (unreported); *Nwosu v. Imo State Environmental Sanitation Agency*, (1990) 2 *NWLR* (part 135) 688, cited in Akin Oyeboode, *Law and Nation-Building in Nigeria* (Lagos: Centre for Political and Administrative Research, 2005). For a wider analysis, see B.O. Nwabueze, *'Military Rule and Constitutionalism'* (Ibadan: Spectrum Publishers, 1992).



are inclined to be arbitrary and often indulge in lawlessness and impunity in the exercise of executive powers.

The judiciary has also over the years shy away from its constitutional roles by refusing to adjudicate on issues, termed as “political questions”. The rationale for this restraint is anchored on the need to ensure that the judiciary does not descend to the arena of policy making, by deciphering the legislative intent in legislation and assessing executives’ actions by its own criteria of measures that the Judiciary deems to be adequate in achieving the policy intent of the executive actions and administrative review. On the other hand, the argument in favour of judiciary adjudicating on so called “political questions” is that the judiciary as the independent arm of government, (which is not involved in political arm twisting in governance between the executive and the legislature,) can ensure that public policy of protection of human rights and avoidance of arbitrariness and executive impunity are avoided.

Under the Nigerian 1999 constitution, the restraint placed on the judiciary not to interpret compatibility of government actions and policies with the Fundamental Objectives and Directives of State Policy set out in Chapter II of the 1999 constitution(as amended) is rather unfortunate and constitute non- adjudication of “ Political Questions”.<sup>375</sup> We have, however, analysed this issue in chapter seven, articulating it to be socio-economic rights which should be justiciable.

The judicial review process is not a normative- neutral process, as the courts (judges) in the determination of the disputes will need to identify all the competing interests

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<sup>375</sup> Section 6 (6) C provides that “The Judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this constitution.

and pitch at the most pragmatic position, depending on its interpretation of the public interest or public policy in issue. This is a constraint which is intended to constrain the uninhibited exercise of governmental power. The inclusion of proportionality as a head of judicial review is perhaps the most efficacious way to restraining arbitrariness and overzealousness in exercise of public power or duties.

In this regard, some might argue that, there can never be value free enunciation and interpretation of public policy. This is on the assumption that judges are potentially politically inclined. Even though they do not profess their inclination in public; they still have deep-seated convictions and inclinations on most public issues. This process of normative evaluation cannot be decided without explicitly or implicitly relying on some background conception of justice.<sup>376</sup> It is pertinent to conclude that the judiciary, being the most insulated arm of the government should continue to enjoy this important role as part of the strategy to ensure the survival of democratic governance.

### **Final Thoughts on The Rule of Law, Social Justice and the Nigerian state.**

This thesis has dealt with the overarching strategies and mechanisms to ensure good governance in Nigeria. In Chapter One, we examined the importance of cultural jurisprudence as aid to articulate the importance of indigenous governance as the basis of re-reading constitutionalism that will focus on a peculiar Africanism.

This is the theoretical framework which underpins this work. The thesis urged a re-reading of constitutionalism in formulating a Nigerian understanding of good governance. This re-reading espouses the importance of the rule of law and respect for human rights as the vital parts of what we call 'Interzone'. It is a kind of contact zone

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<sup>376</sup> Paul Craig, *op cit*

between some liberal ideas and some African ones. These ideas are canvassed in our quest for the regeneration of the Nigerian state, and sustenance of democratic government.

Chapter Two of this work identified the importance of international bodies' benchmark or indicators of good governance and the conceptualization of good governance. We also explored, within the context of cultural jurisprudence as set out in this work, the possibility and feasibility of using the congruent indigenous values in the major ethnic groups in Nigeria as the basis of social justice. We referred to this as the feasibility of good governance anchored on cultural jurisprudence.

The adherence to the rule of law and protection of human rights in Nigeria issues were sign posted in Chapter Two as part of the measures that can make the good governance achievable. In this chapter, we contextualised the possibility of meeting the World wide Governance Indicators (WGI) and alluded to some of the challenges of meeting the criteria and most especially our concern that the issue of social justice is not central to the analysis of this worldwide Governance Indicators.

Chapter Five discussed the Human rights obligations of the Nigerian state and adumbrated the principles enunciated in the African Charter of Human and Peoples' Rights and case law to ascertain the jurisprudence of the court as a better and more effective mechanism in providing remedies for breach of human rights in Nigeria. In our discussion of constitutional theory, adapting the framework by Galligan in distinguishing between constituent power, constitutional form and constituted power, we contextualized these different variables. The importance of constitutional theory in the context of Nigeria is how to ensure that the citizens remain the source of

constitutional authority. The power to govern the people should be derivable from the people as the constituent power. We assess the importance of the people as the source of constituent power, and how the government must rely on the citizens in deriving their constitutional authority. In Nigeria there is an urgent need to reverse the trend of military dictatorship by ensuring that the present democratic government becomes well consolidated and entrenched. A consolidated democratic government will become sustainable, if not truncated by military coups. To achieve this, there is the need for a renewal of the state, focusing on respect for human rights and the rule of law.

However, we acknowledged the problems of socio-economic rights that are presently not enforceable under the Nigerian constitution. This issue was discussed extensively in Chapter Six, positing the adoption of the South African model on enforcement of socio-economic rights.

Chapter Five of this thesis examined the legal and institutional framework for good governance. We identified the need to have federalism informed by the principles of social justice in Nigeria. We emphasized the importance of managing the cultural attributes of different ethnic groups in Nigeria as assets that can be used in articulating a social justice entitlement from the state.

We have argued that to overcome the challenges facing Nigeria in the 21<sup>st</sup> century, it is pivotal that a renewal of the state as a compassionate inclusive engaging partner becomes paramount. To achieve this objective, it is important that the Nigerian state should be more passionate in the attainment of good governance based on respect for human rights and social justice. The social justice agenda which we advocate is based

on a new version of the rule of law which makes the attainment of social and economic rights enforceable under the Nigerian Constitution.

We moved on in Chapter Seven to explore this issue of non-justiciability of socio-economic and cultural rights under the Nigerian constitution. We advocated for the adoption of the South African Model of applicability and enforcement of socio-economic rights as human rights. We consider the crucial issues of right to health, education; housing and clean environments as species of socio-economic rights that should be enforceable in Nigeria, following the South African Model.

Chapter Eight discussed the importance of ensuring that military dictatorship is kept at bay, by the need for the Nigerian nascent democratic governance to abide by the rule of law, by obeying courts decisions, complying with tenets of the constitutionalism as enunciated in separation of powers, due process, accountability, and independence of the Judiciary.

In Chapter Seven we reemphasise the importance of re-reading the rule of law by making the enjoyment of socio-economic rights as justiciable rights under the constitution. We also identify specific human rights provisions relating to right to life under section 33, right to own property under section 43 and right not to be discriminated against under section 42 of the 1999 Nigerian Constitution. All these provisions are contextualized within the context of Nigerian government obligations under the African Charter for Human and Peoples' Rights.

The importance of cultural jurisprudence as the philosophical underpinning<sup>377</sup> of ensuring that the governance problems among other issues in Nigeria has to be understood in the context of the importance of indigenous knowledge and thought which were examined in Chapter One. The importance of eliciting the congruent values from the major ethnic groups of the Yoruba, Igbo and Hausa were contextualized on the need to push forward this ‘Africanism’, which we argued can be used to cater for the welfare of Nigerian citizens. The Nigerian people, just like other Africans, are essentially communitarian in nature by their inclination to be altruistic to others. This altruism is founded on kin, lineage and ethnic affiliation.<sup>378</sup> The resort to cultural jurisprudence is meant to harness these traits, and find the modalities for transferring them to the Nigerian state.

There are already well-entrenched loyalties to kin and ethnic grouping. Citizens perceived the idea of the state as a nebulous organ that assumed the control of resources hitherto belonging to the people. The relationship between citizens and state has therefore been antithetical and antagonistic.

There is apathy by the citizens towards the state. The citizens only engage with the state in order to obtain resources that they believed were forcibly taken by the state. This is the reason why citizens have different attitudes when dealing with the state. The attitude of the citizens in their private relations is more benevolent. However, when dealing with the state, it is capricious. The loyalties held for one another must be

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<sup>377</sup> See Akinola Ibidapo-Obe, *‘A Synthesis of African Law’* (Lagos: Concept Publishers, 2005), and Akinola Ibidapo-Obe, ‘Snippets of an African legal Philosophy: The Legal Content of Ifa Tradition’ 2004, Vol.1 *Annals of Nigerian Law*, p.172.

<sup>378</sup> See Joel Barkan, ‘Hometown’ Voluntary Associations, Local Development, and the Emergence of Civil Society in Nigeria’ *Journal of Modern African Studies*, (1991) 29: pp.457-480. Also Steve Onyeiwu, ‘Altruism and Economic Development: The Case of the Igbo of South-Eastern Nigeria’, *Journal of Socio-Economics*, Vol.26, Issue 4, 1997, pp.407-420.

negotiated by the state to have it transferred to her. The only way to achieve this is to have inclusive citizenship that transcends the present stratification of the citizens into two strands: political elites and ordinary citizens. Ordinary citizens are outside the political arrangements put in place by the elites to perpetuate themselves in power, and use the resources of the state in a comprador manner. The invigoration of the sense of inclusive citizenship must reiterate the indigenous notion of rights, responsibilities, restraint, reciprocity and rehabilitation within the context of African philosophy. The notion of humanness and its attributes as shared by all the cultures of Nigerian people must be engaged, and its importance reiterated as the basis of inclusive citizenship.

Re-reading these attributes to make them human rights- compliant is vital. The importance of constitutional provisions to achieve the protection of human rights is examined in juxtaposition with the African Charter on Human and Peoples' Rights. The role of civil society in this regard cannot be over emphasised. We argued that the doggedness and tenacity of purpose used by civil society during the civil resistance and advocacy, which led to the end of military dictatorship that usurped power and governance from January 1984 to May 1999, when the present democratic dispensation was ushered in, should be replicated by consolidating the present democratic governance. Civil society must intensify its efforts to ensure the sustenance of democratic governance in Nigeria.

In this regard, there is a need for civil society groups to diversify and reach out to all sectors and tribes of the country. Civil society organisations with strong and persistent profiles for human rights advocacy are more prevalent in the south west of Nigeria.

This needs to be replicated in other parts of the country especially in the northern part of Nigeria where the high level of illiteracy and Islamic fundamentalism make it more difficult for citizens to understand the dynamics of human rights protection or to seek robust accountability for resources and governance powers exercised by their elected representatives.

The recent incidents of bombing and other acts of terrorism in northern Nigeria have caused concern for state security, which impinges on the political stability of Nigeria.<sup>379</sup> The need for the federal government to overcome these security lapses in the country becomes paramount and urgent. Some Former Governors in Nigeria like Mr Babatunde Fashola of Lagos State and Rotimi Amechi of Rivers state have suggested that security can be improved by the introduction of State Police in the thirty six constituent states of Nigeria.

However, some opponents of State Police believe that state Governors will use it as instrument of repression and oppression of political opponents. The present police structure is a federal arrangement, where states' Police Commissioners are independent of the Governor because they are appointed by the Inspector General of Police. The Inspector General of Police is appointed by the President. The Governor of a state is not at liberty to give instructions to the State Police Commissioner; the ultimate responsibility for security in any one state lies with the Governor.

Peter Ekeh's elucidation of kinship ideology, and our articulation of its potential in transferring ethnic loyalties with its fissiparous tendencies to that of national

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<sup>379</sup>The United Nations Building in Abuja was bombed on 26 August 2011. A sect called Boko Haram claimed responsibility for the terrorist bombing. [www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/8724468/Massive-bomb-blast-hits-UN-building-in-Nigeria.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/8724468/Massive-bomb-blast-hits-UN-building-in-Nigeria.html). There was so much concern for security, that the 51<sup>st</sup> National Independence day on 1<sup>st</sup> October was held at Aso Rock and was very low key, instead of the usual elaborate ceremony at the Eagle Square, Abuja.



consensus which is ideal for nation building because of its centripetal values, provided us the background from which to examine the importance of kinship among Nigerian people as an asset which can be used to build a new re-orientation for citizens' support of community initiatives and national transformation for good governance and cohesion.

The government must ensure that the state harness the developmental potential in “politicized ethnicity” in building new capacity for a national transformation government. At the moment, ethnicity is used by different Nigerian citizens in gathering communal support and collaboration in executing projects which the community of that particular ethnic group will benefit from.

The use of ethnicity and its attributes in the determination of those who have access to the rein of power and government remain a major concern in ensuring accountability. The prioritisation of the importance of one ethnic group over the other has undermined the desire to have competent people to run the affairs of the country. The role of the Hausa-Fulani oligarchy in the military facilitated the advent of military dictatorship from January 1966 to October 1979, and in the third republic from January 1984 to May 1999. This brought about three decades of military dictatorship in Nigeria. The decadence caused as a result of this military dictatorship caused a savage dislocation in the development of democratic government in Nigeria and the principles of constitutionalism.<sup>380</sup>

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<sup>380</sup> The Nigerian Supreme Court in the *Lakanmi* case in upholding the supremacy of the Nigerian 1963 Constitution met the rebuff and overwhelming assertion of coercion by the promulgation of the Military Decree Supremacy and Enforcement Decree which was meant to neutralise the impact of the *Lakanmi* case. However the preponderance of the opinions of the judges involved in cases challenging the validity of the military decrees after the *Lakanmi* case, asserted the supremacy of military decrees over the Nigerian Constitution. That was the origin of the abuse of Kelsen's theory in the analysis of military regimes and the constitutionality of the regime

In Chapter Eight of this work, we identified the advent of military dictatorship as the administration that caused so much havoc to the human rights of Nigerians, and its negative impact on the entrenchment of bad governance, abuse of human right and the use of violence and coercion in sustaining the various military regimes during this period. A new regime of strategies to avoid military coup, such as human rights protection is discussed in this chapter, and the need to consolidate the protection of human rights in accordance with Nigeria's obligations under the African Charter on Human and Peoples' Rights. The judiciary must be proactive in the role of ensuring that the human rights of the citizens are protected robustly and rigorously.

The judiciary as an arm of the government cooperated with the military class in the entrenchment of military dictatorship in Nigeria. We have analysed the complicity of the judiciary in an attempt to preserve their posts as judges during military regimes. This complicity entailed the pronouncement of the validity of military decrees and edicts regardless of their unconstitutionality and the blatant abuse of Nigerian citizen's human rights<sup>381</sup>. We have alluded to the crises caused to the jurisprudential analysis of

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in relation to the constitution. The decadence caused by the advent of Nigerian army through military coup degenerated the human rights protection regime, and caused enormous stultification of the development of the Nigerian legal system. For a succinct discussion of Lakanmi case and ouster clauses, see Awoyemi-Igbokwe, Y.B, Ouster Clauses as a Tool of Military Dictatorship in Nigeria- A Case for Social justice, in Akanki, E.O, ed. UNILAG's Readings in Law,(Lagos: Faculty of Law, University of Lagos Publication)

<sup>381</sup> This is what Ogowewo described as Implicit Bargain Theory, which ensures that the Judiciary remains after a coup d'état, which normally sweeps away the executive and legislative arms of government. He posits that "The Importance of the implicit bargain theory, apart from its explanatory force, is that it calls attention to the fact, hitherto unnoticed, that judges were accomplices to unconstitutional usurpations and the evidence of their guilt is furnished by the very decisions they gave. To depend now on the jurisprudence they spawned is to perpetuate the cycle of coups. It is worth remembering that the bargain the judges reached with usurpers was not induced by duress in the form of a threat to their positions of privilege. To enter the bargain for the former reason is an affront to the judges' freely accepted duty to adjudicate justly and fearlessly, but to enter the bargain for the latter reason is itself-at least to objective minds-evidence of judicial corruption. Whilst it is certainly true that a successfully executed coup presents the political system with a *fait accompli* and it would therefore be unrealistic to expect every segment of society not to "collaborate" passivity, yet in the case of judges that enter into this implicit bargain their collaboration is active, not passive, and their validating actions contribute in no small measure to the legitimization of coups". See Ogowewo 'Self- Inflicted Constraints on Judicial Government in Nigeria' *Journal of African Law*, 49, 1 (2005), 39-53, at p.45.

the Nigerian legal system as a result of the interpretation of the validity of the Nigerian constitution after the advent of a military coup.

Most of the cases decided on the abuse of the human rights occurred during the military administration. Cases like *Nemi v Nigeria*, and *Constitution Rights Project of Nigeria v. Nigeria*, which went before the Supreme Court of Nigeria and before the African Commission respectively, provided effective judicial precedents which made the human rights protection obligation of the Nigerian state imperative. The Nigerian state cannot use the provision of section 43 of the 1999 Nigerian Constitution as an excuse not to comply with its human rights obligations. This provision provides for restrictions and for derogation of Fundamental Human Rights. Citizens can have recourse to the African Charter on Human and Peoples' Rights. The most radical contemplation of this thesis in terms of constitutional interpretation is the suggestion that section 33 of the Constitution, which deals with the right to life, should be interpreted to embrace Economic, Social and Cultural rights. Any act of government and multinationals acting under its auspices which leads to loss of life and property, is an infringement on the rights to life of the citizens affected. This is essential in view of the plight of the people of the Niger Delta of Nigeria.<sup>382</sup>

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<sup>382</sup> See Wunmi William, 'Citizenship Questions and Environmental Crisis in the Niger Delta- a Critical Reflection' *Nordic Journal of African Studies*, 11(3): 377-392(2002), and E. Osaghae, (1995) "The Ogoni Uprising: Oil Politics, Militant Agitation, and the Future of the Nigeria State", *African Affairs*, Vol.94.

## CONCLUSION

The federal set up in Nigeria can augur well for the economic development of the country, provided a measure of fiscal federalism is allowed. Fiscal federalism should reflect the contribution of the states to the revenue generation of the federal government.<sup>383</sup> The arrangement of the three tiers of government - federal, state and local government - can be complimented by effective mechanisms for sharing of internally generated revenue equitably among the three tiers of government. The states' exclusive right to create and control local government is not complimented by sustainable resources allocation to the local government. The constitution provides for financial autonomy for the Local Government authorities but this provision is subverted by the state governors. The state government overwhelms local authorities with a catalogue of regulatory measures, aimed at generating revenue for the state government. The local governments are not able to generate internal revenue that will meet their recurrent expenditure. The over reliance on revenue allocation from the federal government makes the financial viability of the local governments precarious, and undermines the autonomy of local government authorities in the federal system. The level of corruption at local government levels is unprecedented. State governments are not able to monitor local governments effectively, because of lack of political will and accountability at the state government level as well. There is patronage system which allows State Governors to impose their cronies and proxies as chairmen of Local government authorities, and control their finances by ensuring they

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<sup>383</sup> See A. Ikelegbe, 'Civil Society, Oil Conflict in Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Control.' *Journal of Modern African Studies*, 39(3) 437-469.

provide money for political activities and re-elections of such governors.<sup>384</sup> The Local governments need to be more transparent, accountable and cut down political and bureaucratic corruption. This is essential if the local government authorities want to achieve development of their areas. The present allocation of 20.60 % federal revenue allocation for all the 774 local government authorities in Nigeria is substantial, if prudently managed and expended on capital projects in their territories. The unfortunate incidents of massive corruption and misappropriations of such funds undermine the ability to deliver on the laudable aims of the creation of local government authorities.<sup>385</sup>

Local government authorities are the engine room of rural development and have the leverage to understand and articulate development programmes in their areas. In the developed world, local government administrations provide the training ground for officials and political activists to distinguish themselves, before aspiring for higher roles in the central or state government. The social justice agenda we advocate here can only become realisable if local government administrations are committed to the transformation of their areas, by judicious use of their allocated revenues from the federal and state government. This revenue derivable from the federal and state governments can also be consolidated if the local governments intensify their internal revenue generating machinery.

The federal and state government must redress the oppression of the minorities. The state must be secular in accordance with Section 10 of the 1999 Constitution. The

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<sup>384</sup> See Ndubisi Nwokoma, "Power, Political Parties and Socio-Economic Welfare in Africa- The case of Nigeria's Fourth Republic, UNILAG Journal of Politics, Vol.1, No.1 December 2014, pp.58-81 and on bribery - A. O .Bello, Gift Giving, Anti -Bribery Laws and the Nigerian Constitution- Matters Arising

<sup>385</sup> See S. Akindele, 'Fiscal Federalism and Local Government Finance in Nigeria'  
<http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008121.pdf>

state should refrain from sponsoring citizens for religious pilgrimages. The advantage of a secular state is that the federal and state government can divert the resources hitherto allocated to religious activities to the provision of infrastructures and towards the realisation of social justice as we argued in Chapter Two. The other advantage is that policy formulation and implementation will become less cumbersome when religious considerations or biases are excluded from the process. However, the freedom of religion should be protected and citizens' rights to exercise this right under section 38 of the constitution should be rigorously protected.

A federalism informed by social justice and human rights is paramount in ensuring the national cohesion of Nigeria. The disparity between the northern and southern parts of Nigeria in resource allocation is one of the reasons causing ethnic tensions and disputes. The importance of the application of social justice measures that we discussed in Chapter One will go a long way to manage ethnic relations between all the ethnic groups in Nigeria.

We considered the notion of good character, family lineage obligations, nemesis, and the repercussions of the belief in life after death as the guiding principles that ensure that different citizens in Nigeria strive to embark on in the pursuit of the welfare of everybody in their community. The analysis presented in this regard was founded on the animistic conviction of the Nigerian people as the basis for their benevolence and altruism to others.

The ideal of involving indigenous governance, as discussed, is meant to provide the opportunity for citizens to engage with governmental processes outside the praxis of political parties which are dominated by elites. This focuses on the need to harness the

consensus from the citizens in formulating the policies and in implementing the duties of the state. The importance of consensus politics in Nigeria emphasizes that governance cannot be concentrated around the political elites and the machinery of political parties. There are millions of Nigerians who are outside the remit of the entrenched political machinery which perpetuates the political class in power and governance to the detriment of ordinary citizens. As a result of this arrangement, the state has become a leviathan that ordinary citizens cannot decipher.

The ineffectiveness of political parties as a mechanism for harnessing consensus, and for choosing the right candidates that can be elected to govern the country, has led to a call to disregard political parties, and focus on the indigenous traditional rulers as the new partner to be integrated in governmental processes and structures. A brief history of political parties in Nigeria indicates that they have always been based on ethnic patronage. A reworking of party politics will lead to reforms that will enhance participation in the political processes in Nigeria. Party politics in Nigeria is bedevilled with corruption, assassinations of political opponents and electoral malpractices. The recent election in Nigeria in April 2011, and April 2015 improved the credibility of conducting elections because it was adjudged as being relatively free and fair, as compared to previous elections in 1999, 2003 and 2007. The election in 2015 witnessed for the first time in the history of Nigeria, where an opposition party- All Progressive Congress (APC) won election from an incumbent government of Dr. Jonathan Goodluck of People Democratic Party (PDP). The government needs to consolidate on these gains in order to make the 2019 elections more successful.<sup>386</sup>

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<sup>386</sup> For an analysis of Political Party and Elections, see A. Amuwo, *The Political Economy of Nigeria's Post Military Elections, 1999-2007*, *Review of African Political Economy*, Vol.36, No.119, 2009, pp.37-61.

Political parties are meant to be organisations that articulate consensus for policies and programme to be transposed into government policies on their ascension to power. This process needs to involve all segments of the population as members of such political parties. A party political system where a significant number of women are ostracized from party politics because of cultural bias and male chauvinist attitudes cannot be appropriate for the political process. This is antithetical to the notion of consensus politics that we have advocated. We have identified the disparity in the literacy level, economic wellbeing, and social initiatives among women in the urban and rural areas. This disparity is also reflected in the north and south divides of the country. The plight of rural women is one of double jeopardy: women living in the rural areas are more likely to be uneducated, poor and suffer cultural bias and discrimination. This has been described as the ‘feminization of poverty’<sup>387</sup>, a condition which affects 70% of women in Nigeria. The government commitment to affirmative action has to be rigorously implemented. However, what is more urgent is the need to embark on massive and intensive education programmes for the rural populace, as part of the emancipation and empowerment of the citizens and in particular children and disadvantaged women.

The present All Progressives Party administration is committed to the transformation of the economy by focussing on the provision of infrastructures and creating an enabling environment for foreign direct investment. The government’s agenda for government New Economy is aimed at the privatization of public utilities corporations

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<sup>387</sup>See Risikat Dauda, ‘Women Participation in Nigeria’s Democratization Process: Some economic Consideration’ *University of Lagos Journal of Politics*, Volume 1, No 1 December 2004, pp.82-100 at p89, citing a worrying statistic that recent Federal Office of Statistics report (1999), observed that the female-headed households are over-represented among the poor. See also Remi Anifowose, (2004) “Woman Political Participation in Nigeria: Problems and Prospects” in Solomon Akinboye, ed. *Paradox of Gender Equality in Nigeria Politics: Essays in Honour of Dr. (Mrs) Veronika Adeleke* (Lagos: Concept Publications), pp.23-45.



to ensure they are productive by generating investment from multinationals and creating more opportunities for employment.<sup>388</sup> In this regard, the railway, electricity and other public utilities that are selected for privatization will be valued and put forward for the process. The President has set up the Presidential Task Force on Privatization; the body is chaired by the President and meets every month.<sup>389</sup> The National Technical Committee on Privatization and Commercialization is meant to be the initial steering body for this process, and the Public Enterprises (Privatization and Commercialization) Act 1999 established the Bureau of Public Enterprises to manage the tendering process and the privatization of public corporations. The legal framework for ensuring that the privatization works effectively is in place; the overwhelming problems are those of corruption, interference by the supervising ministry, and lack of compliance with due process in the privatization and commercialization process.<sup>390</sup> Past privatization exercises undertaken by the Obasanjo regime between 1999 and 2007 were flawed and gave rise to accusations of corruption and the transfer of public corporations to party supporters and stooges. Out of the 450

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<sup>388</sup> See Goodluck Jonathan, Political Manifesto for Presidential Election in April 2011- Nigeria Shall Arise Again- My Case for A New Economy- at page 2, “ New Economy is a community –based enterprises programme that envisages the growth of our economy from the bottom-up, which will exploit and infuse traditional agriculture across the entire value chain. For this reason, all existing supporting agencies shall be transformed to support this need. Nigerians by their nature are entrepreneurs, yet in the past, we turned the mentality of our youth to a hand-out culture of expecting the government to provide practically everything for them. Figures from the office of National Statistics shows that as at March 2009, approximately 20% of the labour force is unemployed while 37% have no formal education and 47% illiteracy rate was recorded. 25 million new jobs are needed for the economy in the next 10 years to accommodate new entrants and halve existing unemployment. This is the statistical backdrop against which the New Economy provides solutions.”

<sup>389</sup> This task force includes the Vice President, Minister for Finance, Economic Planning and Development, the Governor of the Central Bank and minister for Petroleum Resources.

<sup>390</sup> See D.O Adeyemo and A. Salami, “A Review of Privatization and Public Enterprises Reforms in Nigeria” Contemporary Management Research, December 2008, Vol.4, No. 4, pages 401-418, [www.cmr.journal/article/download/607/2280](http://www.cmr.journal/article/download/607/2280)

privatized corporations, only 10% remain functional. The remainder have had their assets stripped and their landed property has been sold to speculators.<sup>391</sup>

The President has also set up the Presidential Task force on Electricity Power which is headed by the Minister for Mines and Power. This is part of the efforts to generate regular and sustainable power supply. At the moment Nigeria only produces 29 megawatts per capital<sup>392</sup>, which is extremely low for a country with a population of about 140 million people.

The road map unveiled for the generation of electricity is on target to deliver the privatization of the production, distribution and sale of electricity in Nigeria. The National Power Holding of Nigeria is privatized, and there are on-going strategies and policies for the actualization of this process.<sup>393</sup> The paramount issue for the success of this process and the realization of the electricity generation scheme is to ensure that competent multinationals are awarded the entities to ensure the objectives of the privatization scheme.

Finally, it is pertinent to mention the establishment of Sovereign Wealth Fund, and the state of national security in Nigeria. The Excess Crude Oil Account in Nigeria was set up to collect excess revenue that became available from the sale of crude oil above the budget price. The original intention of the funds was that it would be used for the development of infrastructures in Nigeria. The military regime of Babaginda set up

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<sup>391</sup> Director General for the Nigerian Bureau of Public Enterprises, Bola Onagoruwa confirmed this abysmal statistics recently.

<sup>392</sup> Cited in President Goodluck Jonathan's Presidential election manifesto.

<sup>393</sup> See Prof Bart Nnaji paper on "Nigerian Power Sector Reform- an Overview of Power Sector Reform in Nigeria." Available on [www.nigeriapowerreform.org](http://www.nigeriapowerreform.org), also available on the website of the Bureau of Public Enterprises- [www.bpeng.org/electric\\_power/pages/default.aspx](http://www.bpeng.org/electric_power/pages/default.aspx)

the Directorate for Rural Electrification and Development. Funds from the Excess Crude Oil Account were made available for such projects.

The military administrators and the Obasanjo regime, which took over on 29<sup>th</sup> May 1999, turned these funds into slush money to provide for their cronies and political party stalwarts. In an attempt to stop the abuse of this Excess Crude Oil Account, President Goodluck Jonathan introduced the Sovereign Wealth Fund Act 2011. The Act allowed the administration to set aside \$1 billion dollars to be invested in international financial institutions. The idea behind the Sovereign Funds scheme is to set aside resources for posterity rather than have all the revenue from the sale of crude oil dissipated. The Act is a laudable initiative but some critics are concerned about the viability of the scheme in view of the volatility of the international investment market.

The most serious underlying problem facing the present administration is the recurrent state of national insecurity in Nigeria. There has been a spate of bombing recently in Nigeria. This is being linked to a religious fundamentalism sect called *Boko Haram*. There is concern that this group is linked to the *Al-Qaida* network.<sup>394</sup> The government needs to make concerted efforts to tackle the problem of security in Nigeria. There cannot be an enabling environment for investors if the state of security in the country is precarious and volatile.

Nigeria's fledgling democracy will develop if the government is committed to an inclusive government that trusts the citizens, empowers them and provides an enabling environment for industries to flourish and for wealth creation. At the moment unemployment among the youth and university graduates is unprecedented and needs

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<sup>394</sup> See 'Terrorism in Nigeria: a Dangerous New Level', *The Economist*, [www.economist.com/node/21528307](http://www.economist.com/node/21528307).

urgent attention. There is a need to create an enabling environment for small and medium scale industries to create employment for the citizens.

There is a big gap between the rich and the poor, and the government needs to reduce this gap, by embarking on policies and programmes that will transform the public sector corporations into self- sustaining entities, which can meet their statutory obligations and at the same time create wealth, that can be diverted into the private sector and create employment opportunities for Nigerians. There is an urgent challenge for parliament in ensuring that its overseeing role is robustly and rigorously carried out in the process of transforming Nigeria into a sustainable country ready to consolidate its democratic government. There is enormous expectation from all sectors of the population for the government to deliver good governance, economic development, and adhere to the rule of law.

The renewal of the Nigerian state founded on the attributes of indigenous governance will be a pragmatic way forward, and its importance cannot be over emphasized as the vast majority of the population live in the rural area. They are quite familiar with the hegemonic and informal distinct law and order exercised by the traditional rulers, and their governance structure in place. There is an urgent need for government to formalise these existing arrangements and bring them in line with the government's own transformation agenda.

It is also essential to reform the Administration of Criminal Justice as part of the social reform agenda of the government. There are lots of people in prisons waiting for trial and, as it is well known, justice delayed is justice denied. The government must set up a panel to visit all the prisons and carry out assessments of the inmates to

ascertain those who are likely to face a fair trial in contrast to those incarcerated in prison because of thumped up charges and their inability to seek and get legal representation.

The Nigerian Bar Association and the Nigerian Human Rights Commission can play an active role in this exercise to ensure justice and help reduce the number of inmates in prison, especially those awaiting trials. The civil courts must also be overhauled as a lot of cases remain in the system without any likelihood of them being brought to a conclusion; this is because of numerous and frivolous interlocutory applications which aim to stultify the process and delay the progress of the judicial system.

The electoral reforms suggested include charging the funding of the Independent National Electoral Commission (INEC) to the Consolidated Revenue Account, the appointment of Chairman of INEC by the National Judicial Council, that there should be no swearing in of winners of disputed elections until all election petitions have been resolved. These reforms must be urgently appraised and adopted in order to make the electoral system in Nigeria more credible and achieve an accountable, transparent and sustainable government that can live up to the hope of being one of the emerging developed countries by 2020.

The issue of corruption can also stultify the transformation agenda, and render illusory the realisation of social justice programmes. The government must strengthen the anti-corruption agencies. The integrity of the agencies like the Economic and Financial Commission and the Independent Corrupt Practice Commission depends on those who head and work for the Commissions. The government should ensure that the Commissions carry out their statutory responsibilities without political interference.

For the citizens' trust and support to be realised, the government must be seen to be committed to strengthening the institutions established to fight corruption. The government must ensure that all citizens found to have committed corruption offences are brought to justice, not just the public official and functionaries that belong to opposition political parties.

The on -going reform of the Nigerian Police Force must be matched with increasing funding for civil society's Human Rights Advocacy groups to consolidate their work and effectiveness in the protection of the citizens' human rights. The Nigerian government can intensify its efforts to encourage private sector investment for university and tertiary education.

A country that wants to develop rapidly must ensure that the citizens are properly trained and given the skills that can lead to the development of capacities and capabilities that can accommodate the challenges of industrialization and economic development. There is the incontrovertible link between good governance and economic development. The government can only achieve economic development, if the governance structures are strengthened and properly developed. The governance problems in Nigeria can be surmounted if there is sincere commitment to respect for human rights and the rule of law. The government must be committed to the ethos of good governance articulated in this research, and in doing this it is imperative to adhere to governance structures that will accommodate the skills and expertise of the indigenous rulers because of their political leverage and understanding of the rural communities.

The thesis has been an exercise in cultural jurisprudence. One should not underestimate the problematic nature of this term- or- indeed- the way in which the concept is used in the preceding chapters. Cultural jurisprudence is something of a hybrid- but- in making this claim- Homi Bhaba's work is not claimed as any authority.<sup>395</sup> Rather, cultural jurisprudence reflects a peculiar conjunction of liberal theory and ideas drawn from the Nigerian context. These bodies of thought do not simply fit together to produce a coherent whole; but nor are liberal principles and Nigerian concepts simply incompatible. The thesis has tried to 'walk a line'- using a creative sense of moving between (for example) rule of law theory and Nigerian ideas of common law or social justice to try and create problematic, but, useful 'amalgams' that can capture some of the contradictions and problems in the complexity of the Nigerian situation: a nation located between a colonial legacy and African human rights; between dictatorship and democracy- between the sovereign modern state, and the myriad of 'intermediate' institutions ( located in customary law) on which any future for democracy in Nigerian relies.

The main problem that cultural jurisprudence addresses is that of providing theoretical framework in dealing with the challenges of good governance in Nigeria. This takes us back to the concern of the nature of the Nigerian state. In this context, Nigeria's efforts to address governance issues were addressed through concepts of social justice, which clearly draw on a liberal inheritance. In broad outline, our claim was that the government of the state should ensure social justice for citizens by

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<sup>395</sup> See Homi Bhabha, *The Location of Culture*(Rouledge,2004)

articulating policy that ensures equality of opportunities, gender equality, welfare and most importantly protection of human rights. These liberal themes exist in a tension with certain Nigerian cultural values. Thus, to the extent that we can concretely talk about social justice, we need to 'inhabit' this tension; cultural jurisprudence recognise that the challenges in reconciling, or at least producing a workable compromise, between liberal principles and cultural value or inclinations.

We would tentatively suggest that if one can talk of cultural justice- as a working through of cultural jurisprudence in Nigeria- the term signifies that we should work between the specific and universal principles and ideas about good governance.

Whilst liberal theory is important, the clamour for justice is not unique to the western world or indeed should not only be attributed to Eurocentric universalism.

Cultural jurisprudence emphasizes the need to identify indigenous values as the basis of articulation of social justice. One objective is efficacy; the other is legitimacy.

There may or may not be tensions in relation to these values in any particular context of their application- but- the argument of this thesis is that these tensions are not fatal- and- given pragmatism, will (and perhaps time) it may be the case that some form of on-going, dynamic interplay will develop.

We should not, of course, ignore some very real problems. There are presently limits to the creative interplays that inform cultural jurisprudence, especially the tensions between some cultural practices and liberal ideas on consent, individualism, autonomy and gender equality. A central thesis to western liberal theory is autonomy. Crudely, this principle holds that individuals should enjoy, and the state



should refrain from, interference with individual's freedom to act within the law. As a contrast, certain Nigerian social norms give no prominence of individuals' autonomy. This is not to say, however, that the two ideas cannot communicate. Indeed, for a Nigerian (arguably) one's 'individuality' or at least sense of self comes from one's location within families that are themselves located within communities. This notion of the 'rooted individual' is linked to a community's pursuit of common good, which is in turn predicated on the need to ensure cohesion and co-existence by extolling the communal values and have obligations to abide by it for common good. In other words, we may be able to find within Nigerian thinking a way of engaging with a perennial problem of western liberal theory- in other words- the relationship between the individual and the community. Liberal scholars like Will Kimlicka have worked in this direction, as have certain communitarian thinkers (as we noted in the first part of the thesis).<sup>396</sup> Cultural jurisprudence could be understood as joining this debate, and arguing that we need to engage with a specific cultural context to see how these ideas work themselves out.

We argued that – at least in a general way- this concern with the common good might relate to claims that individuals are able to articulate against the state for provision of welfare. In this regard the society make provisions for the less privileged and those members of the society that are vulnerable because of the circumstances of their birth or some other inherent physical disability. However, welfare is a little broader; something we could sketch out as a kind of social structure, a complex of

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<sup>396</sup> Will kimlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford Political Theory) 2000.

norms that (as we have suggested) informs most Nigerian social norms. A liberal might say that these are hierarchical. Well, they are, but, this hierarchy articulates a set of positive values central to communal life- and which- as we will also stress below- are subject to caveats and conditions: and inevitable tensions.

So, in the Nigerian context, we have suggested that notions of commonality can be understood through ideals of respect, responsibility, reciprocity, retribution and rehabilitation. Again, we do seek to work between liberal principles and their concrete cultural articulation. Broadly, our argument has been that respect begets respect and individuals ought to act and conduct themselves in a mutually respectful manner to ensure social cohesion and the pursuit of the common good. We can elaborate a little further. The idea of responsibility signifies that all members of the society have ascribed responsibilities which cannot be abandoned or neglected without opprobrium and such neglect often attracts societal condemnations. The idea of reciprocity signifies that individuals are bound by societal obligations or lineage obligations to act in ways that acknowledge the pursuit of common good or communal goal of ensuring the welfare of one another. The belief that if one act in way that maintain or enhance common good, then one can expect reciprocal conducts and attitude from others.

The idea of retribution is sequel to reciprocity, in that individuals are expected to conducts themselves or engage their communal obligations in manner that promotes cohesion or in pursuit of common good or communal goal. The retribution doctrine has animistic undertone based on the religious inclinations or animistic belief in the

idea of 'life after death', which orient people to conduct themselves while on earth in good conscience because of inevitable repercussion for wrongful acts or inequitable conducts.

To return to a variation on an earlier point- the fundamental tenet of Nigerian social norms is predicated on the need to reconcile communal needs with the vagaries of the individualism. Our articulation of these social norms also emphasizes the need to draw a balance between 'good of the individual' and the 'good of the community'. However, there are tension between the need for communal articulations of the common good and more problematic norms and cultural understandings. Nigerian society is patriarchal and gender discrimination is prevalent. It would be wrong to simply explain this away in cultural terms. Indeed, there is a productive tension between liberal concerns with equality in this context. This is an on -going project; and takes us to the problem of how those wronged by social norms might seek legal remedies. As Barry aptly put it:

if the victims are forced to appeal to 'local norms', they will be in the absurd position of having to invoke norms that are characteristically antithetical to the rights of women, children, ethnic and religious minorities and the poor. The whole point of a universalistic conception of justice is that it provides a basis on which both those inside and those outside a country can criticize practices and institutions that reflect local norms, which typically endorse discrimination, exploitation and oppression<sup>397</sup>

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<sup>397</sup> Brian Barry, *Why Social Justice Matters*, p.27, Cambridge: Polity Press, 2005.

This engagement with Brian Barry needs to acknowledge the fact that, he is a social justice exponent working and theorising within the western liberal environment. We would be on his side and agree that the courts should- as sympathetically as possible- align Nigerian values with liberal principles of equality. This involves many complexities and will take time. We feel that it is a project that is not doomed to failure. The difficulty is in finding those precise points where social norms and principles of equality can be aligned.

However, cultural jurisprudence is not just focused upon this engagement with values. Cultural jurisprudence offers a critique of the elitist theory of the state. Arguably, since independence, the Nigerian state seems to be swung in favour of the ruling class to the detriment of the ordinary citizens. We have seen human rights as part of a possible solution to this problem. We see human rights as political obligations for political actions of the national government. The government must honour the duty to respect, promote, protect and fulfil human rights of the citizens. This is, again, a very general position. One of our more focused concerns has been how this general position is operationalized, and we have asserted the importance of African human rights. The Nigerian government does not provide rights to free health, education, safe and clean housing and environment. This is in breach of the obligations emanating from the fact that Nigeria is a signatory to International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter.<sup>398</sup>

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<sup>398</sup> African Chapter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 49.

The regime of emanating obligations is the duty to respect, protect, promote and fulfil.

The African Commission in the case of *Social and Economic Rights Action Centre V. Nigeria* has painstakingly elucidated the nature of these duties:

“At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to

freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food

(Direct food aid or social security)”.<sup>399</sup>

The reason why we have quoted the African Commission extensively is to put in perspective its jurisprudence, in interpreting the nature of rights which citizens of state parties can enjoy and also to indicate that its philosophy does not recognise any distinction focused on Negative and Positive right, Undefined and vague versus defined, aspirational versus immediate, and resources dependent versus independent of resources availability that often obstructs effectiveness of social and economic, cultural rights to the advantage of prioritising civil and political rights.

The obligation to ensure good governance and ensure social justice are part of the ‘interzone’ inspiration to compliment and reinforce the positive nature of human rights and the need to meet international standards in the protection of citizens’ rights and ensure their welfare. The ‘interzone’ takes us back to the concerns we articulated in the opening paragraphs of this conclusion. The ‘Interzone’ can finally be understood as an on-going dialogue for the critique of the state and a continuing insistence on the need to ensure legitimate governance for the benefit and welfare of the citizens in Nigeria. We do not pretend that the ‘interzone’ will provide us with

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<sup>399</sup>Social and Economic Rights Action Centre v. Nigeria, Communication 155/95, paras 46-48. Available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>, accessed on 24 April 2014.

answers; rather, it seeks to open up space for the interchange of ideas, for the meeting of traditions; not in the spirit of easy coherence and simplistic reconciliation but with the belief that tensions between principles are creative; and that the only way forward is to acknowledge and work in and through these tensions. If nothing else, the ‘interzone’ is an awareness that the problems that animate this thesis require much more work- and that being between liberal principles of the rule of law, human rights and equality, and Nigerian understanding of social norms and the Common good- is a productive and creative place to be: a provocation for much future scholarship.

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