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SUSTAINING THE JUDICIAL ONSLAUGHT AGAINST DISCRIMINATORY CUSTOMARY RULES OF SUCCESSION IN NIGERIA: THE PLACE OF LEGISLATION

By

Dr. Osaretin Aigbovo*
and
Anthony Osaro Ewere*

Abstract

The use of legislation to proscribe discriminatory customary practices relating to succession upon intestacy has become necessary to sustain judicial onslaught against discriminatory customary law rules of succession and give definite effect to constitutional provisions and the global trend against gender-based discrimination in Nigeria. This is in view of the fact that judicial pronouncement against discriminatory customary practices is lacking in sanctions for subsequent violations of succession rights. As a result, it does not offer any guarantees against the perpetuation of discriminatory customs upon intestacy. At best, the court can only refuse to enforce the unjust customary practice in the particular case before it and nothing more. The advocacy for state laws that would specifically protect women's succession rights is hinged on the belief that such specific criminal laws would help to mitigate the negative effects of discriminatory customary rules of succession in Nigeria and promote gender inclusiveness in other aspects of the Nigerian contemporary society.

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1.0 INTRODUCTION

Most customary law rules of succession in Nigeria are discriminatory against females and younger male children.[1] Discrimination against females takes two forms. There is discrimination against female children and discrimination against widows.[2] For example, the *ili-ekpe* or *eli-ekpe* custom of the Igbos of the South Eastern part of Nigeria denies daughters the right to inherit real property. Where a deceased man is survived by only female children, his nearest paternal male relation is entitled to inherit his property. Under the custom, the only way a female child can inherit her father's real property is to perform the *nrachi* ceremony during her father's lifetime. The *nrachi* ceremony demands that the daughter of a man who dies without a male child remains in her father's house without marriage. She is expected to bear male children in her father's name in order to continue his lineage.[3] On the other hand, a widow cannot inherit her deceased husband's real property - only her male children can inherit.[4] If she has only daughters for the deceased, then neither herself nor her daughters can inherit. Needless to say that if she has no child for the deceased she cannot also inherit. The primogeniture rule which underlies discrimination against females also results in discrimination against younger male children where the custom mandates the eldest male child to take all or the lion share of the deceased's property. For

1. Diala, A.C "Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa" *AHRLJ* 14 (2014): 633-654.
2. See Aigbovo, O "Turning the Tide: Adjudicating Women's Customary Law Rights in Nigeria," *Benin Journal of Public Law* 1, no. 1 (2003): 17.
3. Obi, S.N.C, *The Ibo Law of Property, 6th ed.* (London: Butterworth African Law Series, 1963) 154, 158.
4. See Aigbovo, *supra* note 2.

example, under Benin customary law, the eldest surviving male child of a deceased Benin man takes all his property including his title, if he was a hereditary title holder; or the principal house, the *igiogbe*, if the deceased was a non-hereditary title holder.[5]After a number of false starts, the Supreme Court of Nigeria finally struck down the Igbo customary law of succession which discriminates against female children and widows in the cases of *Ukeje v. Ukeje*[6] and *Anekwe v. Nweke*[7] respectively. It has been argued that this judicial assault on the Igbo customs in question marks the beginning of the end of discriminatory customary succession rules in Nigeria.[8] However, customary succession rules which discriminate against every sibling in favour of the eldest male child have been upheld by the Supreme Court of Nigeria in a long line of cases.[9]

In this contribution, it is argued that there is a limit to the efficacy of judicial decisions in combating discriminatory customary law succession rules in Nigeria, and that judicial effort should be supported by legislation if the fight against discriminatory customs is to be sustained. Part two of the paper discusses the rationale for advocating the use of legislation in the fight against discriminatory succession rules

5 See Aigbovo, O"The Principal House in Benin Customary Law." *University of Benin Law Journal* 8, no. 1 (2005): 16Aigbovo, O, "Inheritance of the Estate of Hereditary Traditional Title Holder in Benin: An Appraisal of the Nigerian Supreme Court Decision in *Lawal-Osula v. Lawal-Osula"NELJ* 5, no. 1 (2002): 54.

6. (2014) 11 NWLR (Pt.1418) 384; (2014) 234 LRCN 1.

7. (2014) 9 NWLR (Pt.1412) 393; (2014) 234 LRCN 34.

8. See Aigbovo O, andEwere, A O, "Adjudicating Women's Customary Law Rights in Nigeria: Has the Tide Finally Turned" *Journal of Private and Property Law* 34 (2015): 104-123.

9 See *Ogiamien v. Ogiamien* (1967) All NLR 203; *Oke v. Oke* (1974) 3 All NLR 401; *Arase v. Arase*(1981) 5 SC 33; *Idehen v. Idehen* (1991) 6 NWLR (Pt. 198) 382; *Agidigbi v. Agidigbi*(1996) 6 NWLR (Pt. 454) 300, 312.

under customary law. Part three discusses the international instruments and advocacy in support of such legislation, while part four discusses the domestic instruments which support the recourse to legislation in criminalizing native customs that discriminate against females in succession matters. Part five discusses the way forward in the search of a nationwide legislative response, while part six concludes the paper.

I. Rationale for Advocating the use of Legislation

Although some contributors have argued that the Supreme Court decisions in *Ukeje* and *Anekwe* have dimmed the fortunes of discriminatory customary law rules,[10] not every contributor is enthused about the decisions. For example, Diala argued that:"At face value, the April 2014 judgments of the Supreme Court [in *Ukeje* and *Anekwe*] on male primogeniture appear like the judicial reform of the customary law of inheritance. Regrettably they are not."[11]While not discounting the importance of cases like Ukeje and Anekwe, in significantly abating hardship associated with succession rights of widows and daughters in Nigeria, the courts have recognized the fact that judicial pronouncements alone cannot sufficiently deter potential offenders from perpetrating and perpetuating discriminatory rules of succession. In *Muojekwu v. Ejikeme*,[12] the Court of Appeal specifically invited the legislature and the Supreme Court to act swiftly in checking discriminatory customary rules of succession in the interest of justice. While striking down the twin customs of *ili-ekpe* and *nrachi*, the court said:

10 See Aigbovo and Ewere, supra note 8.
11 See Diala, pp. 651-652, supra note 1.
12 (2000) 5 NWLR (Pt. 657) 402

....That the twin practice which has all the trimmings of a primordial evolution should survive the 20th century ... is one irony of the legacy on the cultural horizon that will be bequeathed to the new millennium. It is retrograde. However, since the abrogation of such obnoxious practice rests absolutely with the legislature of the state that still clings to such absurdity and the burden of containing the incidence of its manifestations in judicial matters lies upon the apex court, the best that can be done at this level of judicial hierarchy is to shun the practice as repugnant to natural justice, equity and good conscience and therefore unenforceable, hoping that sooner than later the authorities that are in a position to do so [legislature] will hasten the interment of a custom that has outlived its usefulness and has become counter-productive.[13]

Also, in the case of *Okonkwo v. Okagbue*,[14] the Supreme Court stated that a customary law principle declared invalid by the court for being repugnant to natural justice, equity and good conscience does not necessarily become illegal and may well continue to be practiced publicly by the people after the decision - all the court can do is to refuse to enforce the rule in subsequent cases.[15]Another justification for the use of legislation in combating discriminatory customary succession rules is the fact that the rules will thereby fail the incompatibility test for the validation of customary law.[16] If the practice of the rules is penalized by penal sanctions, then such rules will not only be incompatible with written law, they could also be illegal. Aside from the penal aspects of such legislation, the positive civil aspects setting out the rules for a fair and equitable distribution of property upon intestacy

13. *Ibid*, 438, per Olagunju, JCA.
14. (1994) 9 NWLR (Pt. 368) 301.
15. *Ibid*, 326-7.
16. See s. 18(3) Evidence Act, 2011.

(which is recommended) would contain provisions which must be enforced by the courts. As for the penal provisions, the most important impact will be the deterrent effect it will have on persons who would otherwise insist on applying the discriminatory customs. Customary law will remain relevant if it is in line with prevailing global trends against discrimination as expressed in international normative instruments.

II. International Instruments and Advocacy in Support of Legislation

A wide range of international instruments contain provisions that capture the essence and need for States to use every possible means to curb the injustice associated with the continuous implementation of discriminatory customary law rules of succession. For instance, the African Charter on Human and Peoples' Rights (African Charter) 1981, also known as the Banjul Charter, was designed to uphold the rule of law, guarantee freedom from any form of discrimination and safeguard the human rights of all individuals within its jurisdiction without exception.[17] In line with this objective, article 2 of the Charter guarantees individual right to non-discrimination. It provides thus:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group,

17 ACHPR, art. 1 is an undertaking by parties to the Charter to recognize the rights, duties and freedoms enshrined in the Charter, and to take steps to adopt local legislations and other relevant measures that will give effect to the provisions of the Charter. As an instrument which promotes peoples' rights, the Charter gives rights to the generality of the public or people of common ancestry or cultural origin.

colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

In the same vein, article 3 of the Charter emphasizes the equal status of every individual before the law and guarantees the equal protection of all by the law. Article 18 obliges State parties to eliminate every form of discrimination against women and gives credence to the application of other international declarations and conventions that protect the rights of women and children against discrimination in States where the Charter is applicable.[18] This provision creates a healthy atmosphere for the advancement of gender equality and freedom from discrimination as contained in related international instruments like CEDAW. The beauty of the African Charter is that its provisions, as far as gender-based discrimination are concerned, are totally compatible with the corpus of Nigerian law of which the constitution forms the basis.[19] By article 1 of the ACHPR, state parties are under obligation to take steps to adopt local legislations and other relevant measures that will give effect to the provisions contained therein. Pursuant to article 1 and in obedience to section 12(1) of the CFRN, Nigeria domesticated the Charter in 1983 vide the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983,[20] even before

18 Article 18(3) provides that "The State shall ensure the elimination of every form of discrimination against women and shall also ensure the protection of rights of the women and the child as stipulated in international declarations and conventions."

19 U.O. Umozurike U. O, "Nigeria's Ratification of the African Charter on Human and Peoples' Right- Implications and Consequences," *The Calabar Law Journal* 2, (1988): 24, 28.

20 Cap A.9 Laws of the Federation of Nigeria, 2004. It is remarkable that Nigeria domesticated the African Charter before it came into force in 1986. The African Charter Act is made up of two sections and a schedule which sets out the provisions of the Charter. The first section provides that as from

the Charter came into force in 1986.[21] In *Ogugu v. State*,[22] the Supreme Court of Nigeria made it clear that since the African Charter has become part of Nigerian domestic law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, the enforcement of its provisions, like all other municipal laws, fall within the judicial powers of the courts as provided by the constitution and other laws relating thereto.[23]

Also, the text of the African Union Protocol on the Rights of Women (Maputo Protocol), adopted in 2003, which entered into force in 2005, supplements the provisions of the African Charter on Human and Peoples' Rights of 1981 in making human rights a reality in Africa.[24] This is in line with article 66 of the African Charter which provides for special protocol or agreements to supplement the provisions of the Charter,

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March 17, 1983 the African Charter has force of law in Nigeria and should be given full effect by all relevant authorities in Nigeria like any other municipal law, while the second section contains the full citation of the Act.

21. Section 12(1) of the CFRN provides that "[n]o treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly." By virtue of this provision, courts in Nigeria are only bound to give effect to provisions of indigenous laws made by federal or state parliaments in Nigeria. However, in matters relating to industrial relations, section 254C(2) of the CFRN (Third Alteration) Act 2010, confers jurisdiction on the National Industrial Court to apply provisions of international conventions, treaties, or protocol that have been ratified by Nigeria, even though such instrument may not have been domesticated in accordance with the requirements in section 12(1) of the CFRN.
22. (1994) 9 NWLR (Pt. 366) 1.
23. *Ibid*, 26; Enabulele, A. and Bazuaye, B. *Teachings on Basic Topics in Public International Law* (Benin City: Amink Press, 2014), 90-91.
24. Heyns, C and Killander, M, eds. *Compendium of Key Human Rights Documents of the African Union, 5th ed.* (South Africa: Pretoria University Law Press, 2013), viii.

where necessary. Since the African Charter covers human rights for all Africans, the Maputo Protocol, which is specifically designed to protect women against any form of discrimination in Africa, was necessitated by the continuous subjection of women to discriminatory tendencies, despite the adoption and ratification of the African Charter and other international human rights instruments.[25] The Protocol, which is a corollary to the African Charter, further promotes the view that women's right against discrimination in Africa is a necessity and not a luxury. Accordingly, article 2 of the Protocol provides:

(1) State Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

25 Martin Semalulu Nsibirwa, "A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" *African Human Rights Law Journal* 40 No. 1 (2001): 41.

(c) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

(d) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

(2) State Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

This provision places responsibility on State parties to the Protocol to take every necessary step to discourage discriminatory practices against women. On succession rights of widows and daughters, article 21 of the Protocol specifically provides that:

(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

(2) Women and men shall have the right to inherit, in equitable shares, their parents' properties.

Article 25 obliges State parties to: (a) provide appropriate remedies to any woman whose rights or freedoms guaranteed by the Protocol have been violated; and (b) ensure that such remedies are determined by competent judicial, administrative

or legislative authorities, or by any other competent authority provided for by law. However, article 28 of the Protocol clearly makes the application of its provisions subject to the constitutional procedures applicable in individual States that are parties to the Protocol.

Further to the above instruments on human and women's rights in Africa, the Resolution on the Status of Women in Africa, adopted in 2005, was necessitated by the continuous subjection of African women to discriminatory laws and practices despite the ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and related regional and international instruments geared towards the promotion of the rights of women. Paragraph 4 of the Resolution urges member States that have ratified the Protocol to the African Charter on Women's Rights, to urgently adopt measures to domesticate the Protocol and amend municipal laws to conform to the provisions of the protocol. Similarly, paragraph 7 of the resolution urges member States to respect their commitments under CEDAW and the Beijing Platform of Action and urgently repeal or amend all laws and policies, and eradicate all practices that are discriminatory against women.

It is unarguable that the purpose of making the African Charter applicable in Nigeria, as a local legislation, is to enhance the protection of human rights of all citizens without exception and to promote the safeguards of the Charter within Nigeria. This is even more so as the apex court in Nigeria, has recognized the special status of the Charter and the strong influence of international obligations, within the domestic circle in Nigeria. In *Abacha v. Fawehinmi*[26], the Supreme Court affirmed that the African Charter on Human and Peoples Rights

26. (2000) 6 NWLR (Pt. 660) 228.

(Ratification and Enforcement) Act is a special statute which stands on a higher pedestal to all other statutes in Nigeria, but that it was subservient to the constitution. This view was expressed by Ogundare JSC, in his lead judgment as follows:

No doubt Cap. 10 [the ACHPR (Ratification and Enforcement) Act] is a statute with international flavour. Being so, therefore ... if there is a conflict between it and another statute, its provisions will prevail over those of other statutes for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree with their Lordships of the court below that the Charter possesses 'greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution . . . .[27]

Even though the comparison in *Fawehinmi's case* was between the African Charter and domestic statutes, the African Charter by analogy, has a similar effect on other norms or existing laws in Nigeria, including customary law. Again, it is safe to posit that there would be problem with the application of the provisions of the African Charter in Nigeria if there are inconsistencies between the provisions of the Charter and the Nigerian Constitution as it relates to the issue of discrimination since the constitution is superior to the Charter. However, it is noteworthy that the provisions of the African Charter are in tandem with the provisions of the Nigerian Constitution with regard to the issue of discrimination on ground of sex or

27. *Ibid*, 289. For instance, whereas the rights contained in chapter two of the constitution are not enforceable by virtue of s. 6(6)(c) of the constitution, such rights like the right to education, socio-economic, and cultural rights are made enforceable under articles 17, 18, 22 of the Charter. In cases where conflict arises from this difference, it is the constitution that will prevail as the paramount law in Nigeria.

circumstances of birth.[28] Furthermore, the African Charter replica in the constitution as it relates to discrimination and other provisions against inequality are contained in Chapter IV of the CFRN. To this end, the rights contained in the said Chapter IV of the constitution (fundamental rights provisions) are of greater value in that such rights are not affected by the strangulating effects of section 6(6)(c) of the constitution. It is therefore incumbent on relevant authorities, including the court, to ensure that the noble objective that goaded the legislature and makers of the constitution to recognise the need to discourage discrimination on ground of sex is not only sustained but improved upon in the overall interest of justice to all manner of persons in Nigeria.

III. Domestic Instruments which Support the Recourse to Legislation

The Nigerian Constitution and a few state legislation on the point form a formidable foundation and veritable platform upon which the use of legislation in the fight against discriminatory customary law rules of succession can be built. To buttress this assertion, it is pertinent to set out the relevant constitutional provisions against discrimination. The 1999 Constitution of the Federal Republic of Nigeria (CFRN) specifically condemns discriminatory practices on grounds of sex or circumstances of birth in section 42 which provides as follows:

(1) 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

28 See the provisions in the Const. FRN, s. 42 and the Charter, arts. 2, 3.

or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any 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 citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Also important is section 1 of the same constitution which places the provisions of the constitution above any other law applicable in the country. The section provides as follows:

(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

Going by the above constitutional viewpoint, the need for courts to give definite effect to the provisions in section 42(1) and (2) of CFRN, particularly in relation to issues of discrimination against widows and daughters on ground of sex, cannot be overemphasized. The introduction of "sex" as an element or ground for which no citizen of Nigeria can be discriminated against in the 1979 Constitution is not a mere

formality.[29] Besides, as the foundation of all laws in Nigeria, any law that is not in tandem with provisions of the constitution cannot stand. Aguda, CJ emphasized the supremacy of the constitution over every other law and the need for courts to reverence the provisions of the constitution in their judgments when he said:

If the constitution entrenches fundamental rights, these must be regarded as the basic norm of the whole legal system. Therefore all laws and statutes which are applicable to the state must be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the declared basic norm of the constitution. It is clear from this that there is no room here for a rigid application of the common law doctrine of *stare decisis*. It is submitted therefore that a court can refuse to follow the judgment of a higher court which was given before the enactment of a constitution if such a judgment is in conflict with a provision of the constitution. Also the final court of the land must regard

29 Prior to 1979, the constitutions did not contain "sex" as a ground upon which discrimination was prohibited. For instance, the constitution of the Federal Republic of Nigeria, 1963, s. 28(1) simply provided that a Nigerian citizen cannot be subjected to any form of discrimination on the bases of his community, tribe, place of origin, religious or political opinion. However, the Constitution of the Federal Republic of Nigeria, 1979, s. 39(1) provides thus: "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject." This was a significant change influenced by variance in the prevailing social circumstances as different from what was prevalent in the Nigerian society prior to 1979.

itself absolutely bound only by the constitution and not by any previous decisions of the same court.[30]

Thus stated, it is clear that as an existing law in Nigeria,[31] any customary law which denies widows, daughters or any other individual succession rights on the basis of gender or circumstances of birth is unconstitutional and void. Therefore, the courts should have the courage to declare such rules unenforceable if they are not modified by relevant authorities.[32] To do otherwise is to do violence to the existing legal framework which forms the basis of customary law in Nigeria. In its construction of the provisions in sections 1(1) and (3) of the constitution, the court has held in a number of cases, that the constitution is supreme over any other existing law applicable in Nigeria, including customary laws. Therefore, as rightly held in *Obaba v. Military Governor of Kwara State*,[33] any law that is inconsistent with the provisions of the constitution is null and void to the extent of its inconsistency. In *Uke v. Iro*,[34] the court clearly spelt out the

30. Aguda, T.A "The Role of the Judge with Special Reference to Civil Liberties," *East African Law Journal* 10, no. 2 (1974). 158.

31. Const. FRN, 1999, s. 315(4) (b) defines "existing law" as meaning any law and including any rule of law or any enactment or instrument whatsoever which is in force immediately before the constitution came into force or any rule that came into force after the constitution came into force.

32. In *Itsueli v. SEC* (2012) 2 NWLR (Pt. 1282) 329, 362, Peter, JCA reiterated the principle that the constitution is superior to any other law, authorities, or individuals in Nigeria, and that all inconsistent laws fall to be declared null and void. Indeed, as rightly declared by Lord Denning in *Macfoy v. UAC* (1961) 3 WLR 1405, 1409, one cannot put something on nothing and expect it to stand. It therefore means that an unconstitutional rule of custom is unenforceable at law and must as a matter of necessity be set aside by the court.

33. (1994) 4 NWLR (Pt. 336) 26, 39.

34. (2001) 11 NWLR (Pt. 723)

legal consequence of discriminatory customary practices. According to Pats-Acholonu, JCA, customary practices that discriminate on ground of sex offend the constitutional provision which guarantees equal rights and protects the rights of all sexes under the law in Nigeria. In the words of Pats-Acholonu, JCA:

> Any customary law which flies against decency and is not consonant with notions, beliefs or practice of what is acceptable in a court where the rule of law is the order of the day should not find its way in our jurisprudence and should be disregarded, discarded and dismissed as amounting to nothing. Any laws[sic] or custom that seek[sic] to relegate women to the status of a second class citizen thus depriving them of their invaluable and constitutionally guaranteed rights are laws and customs fit for the garbage and consigned to history.[35]

The court further stated that a custom which strives to deprive a woman of constitutionally guaranteed rights is otiose and offends the provisions that guarantee equal protection under the law. It also offends all decent norms applicable in a civilized society.[36] This is because gender equality and women empowerment are basic human rights that lie at the heart of equitable development. As a viable tool for eradicating poverty and advancing national development, Nigeria is committed to fostering gender equality and a healthy respect for persons irrespective of race, class, disability or gender. This policy statement of government is underscored by its inclusion as one of Nigeria's eight Millennium Development Goals (MDGs).[37] This position flows from the global commitment of many institutions all over the world which every nation is expected

35. *Ibid*, 202.
36. *Ibid*, 203.
37. See Nigerian Vision 20:2020 Economic Transformation Blueprint (National Planning Commission: 2009).

to promote through domestic legal framework as a signatory to some of the relevant international instruments against gender-based discrimination.

In addition to the above general non-discrimination provisions of the constitution, it is encouraging to note that some state parliaments in Nigeria have enacted laws to proscribe discriminatory customary practices relating to succession, even though a number of limitations are noticeable in the existing laws. The efforts made by Enugu, Imo and Cross River States Houses of Assembly in protecting the rights of widows and daughters upon intestacy deserve commendation. Also, the Violence against Persons (Prohibition) Act 2015 which defines harmful traditional practices prohibited by the Act to include the denial of inheritance or succession rights to women or girls is also a commendable legislative effort as it would help to discourage discrimination against widows and daughters upon intestacy in the Federal Capital Territory (FCT).[38] These statutes would serve as springboard for other states with similar problems to emulate.

In Enugu State, section 4(1)(i) of the Prohibition of Infringement of Widows and Widowers' Fundamental Rights Law of 2001 safeguards the right to occupy matrimonial home for the lifetime of a widow and widower. This provision is in tandem with the position maintained by the Supreme Court in *Nezianya v. Okagbue*[39] and *Nzekwu v. Nzekwu*.[40] However, the provision in section 4(2) of the law does not enhance the value

38 See s. 46 of Violence against Persons (Prohibition) Act 2015. The Act also recognises issues arising from marriages under the Act and Islamic and customary law marriages.

39. (1963) 3 NSCC 277.

40. (1989) 20 NSCC (Pt. 1) 581.

of section 4(1), not only because it makes the provision in section 4(1) subject to customary law, but because the section only reiterates the guarantee of right of possession of deceased's estate to the surviving partner.[41] The law does not also contain any provision in favour of daughters with regard to succession matters. Besides, the penalty prescribed for the contravention of provisions of the law is not severe enough to deter potential offenders.[42] Compared with the position in Enugu State, the Imo State Gender and Equal Opportunity Law of 2007 however contain more progressive provisions against gender-based discrimination upon intestacy. The law which nullifies and makes unenforceable any customary law that promotes discrimination against any person,[43] specifically guarantee succession rights for widows and daughters in section 21 which provides as follows:

Women and men shall have the right to inherit their parent's properties.

(a) A widow shall have the right to an equitable share in the inheritance of the property of her husband

(b) A widow shall have the right to live in the matrimonial house provided she does not remarry.

The above provision is an improvement on the position in Enugu State as it protects the succession rights of widows and

41 Section 4(2) of Enugu State Prohibition of Infringement of Widows and Widowers' Fundamental Rights Law provides that subject to the Marriage Act, Wills Law, Administration of Estates Law, or any customary law that is not repugnant to natural justice, equity and good conscience, a widow/widower shall not upon the death of the husband/wife, be dispossessed of property acquired by the deceased husband/wife without the consent of the surviving spouse.

42 In s. 6, the law prescribes a fine of N5, 000 or a two year term of imprisonment as punishment for offenders.

43 See s. 4(c) of the law.

shall be distributed in accordance with the provisions of section 3 of this Law.

S. 3(1) The widow or husband of the deceased, where the marriage produced no issue, shall inherit the intestate property.

(2) Where the deceased is survived by a wife or husband and any issue of the marriage, the surviving wife or husband and any such issue of the marriage shall jointly inherit and own the intestate property.

(3) Where the deceased in addition to the beneficiaries as stated in subsection (1) and (2) of this section, is survived by any issue out-of-wedlock whose paternity is acknowledged or an issue of any other marriage contracted by the deceased, any such issue shall jointly with all other beneficiaries inherit and own the intestate property.

S. 4. Notwithstanding the provisions of section 3 of this law, where all the beneficiaries of the intestate property agree by consensus to distribute amongst themselves, such distributions shall be done in portions equal in value.

S. 5. Subject to the provisions of any other written law, where a man has two or more wives married under native law or custom, they shall enjoy equal rights, and have equal status in law..

Unfortunately, section 9 of the law which provides for punishment for violators of the succession rights of widows and daughters as guaranteed by the Nigerian constitution and the law however trivializes the object of the law in view of the negligible punishment prescribed by the law which cannot deter potential offenders. The section provides that

any person who coerces, compels or subjects a female person to any form of degrading traditional rite, or anything which contravenes her fundamental rights as entrenched in the constitution commits an offence and shall on conviction be liable to a fine not exceeding N5, 000.00 (five thousand naira) or to imprisonment not exceeding 3 months or to both such fine and imprisonment.

The Violence Against Persons (Prohibition) Act, 2015 (VAPA Act) of the Federal Capital Territory (FCT) is the latest legislative installment in the onslaught against discriminatory customary on traditional practices. Adopting a broad definition of "harmful traditional practices" section 46 of the Act provides that:

"harmful traditional practices" means all traditional behaviour, attitudes or practices, which negatively affect the fundamental rights of women, girls, or any person and includes harmful widowhood practices, denial of inheritance or succession rights, female genital mutilation or female circumcision, forced marriage and forced isolation from family and friends.

Section 20 of the Act prohibits harmful traditional practices, and provides for imprisonment of up to 4 years, or fine of ₦500,000, or both imprisonment and fine. The Act also introduced novel provisions which are directed against domestic violence[44] generally, but especially against the culturally accepted practice in Nigeria which expects the female spouse to be the one to leave the matrimonial home in the case of marital disagreement or marital breakdown. These are sections 28, 29, 30 and 31 of the Act. Section 28

44 Domestic violence is defined in section 46 of the Act to mean any act perpetrated on any person in a domestic relationship where such act causes harm or may cause imminent harm to the safety, health or well being of any person.

empowers a complainant to make an application for a protection order before the High Court of the FCT. If such an order is granted it is effective throughout Nigeria.[45]Under section 29, the court may issue an interim protection order, while under section 30, the court may issue a protection in default of appearance of the respondent, or after hearing both parties.

Section 31(1) empowers the court to by means of a protection order, prohibit the respondent from:

(a) Committing any act of domestic violence;
(b) Enlisting the help of another to commit any such act;
(c) Entering a shared household provided that the court may impose this prohibition only if it appears to be in the best interests of the complaint;
(d) Entering a specified part of such a shared household;
(e) Entering the complainant's residence;.
(f) Entering the complainant's place of employment;
(g) Preventing the complainant from entering or remaining in the shared household or a specified part of the shared household;
(h) Alienating or disposing the shared household or encumbering same

Apart from directly attacking discrimination generally and cultural expectations in marital affairs, this section also strikes at discriminatory inheritance rules indirectly, by making it possible for a man(if he is the respondent or offending party) to be denied of access to his acquired or inherited property. In

45 Section 46 of the Act defines a protective order as an official legal document, signed by a judge, that restrains an individual or state actors from further abusive behaviour towards a victim.

our present state of cultural milieu, such an event would be clearly impossible without the use of legal coercion.
It is recommended that the other jurisdictions in Nigeria should adopt the commendable provision of VAPPA in fashioning provisions against customary law rules of succession.
However, the effect of the legislative efforts in the various jurisdictions may be hampered by lack of awareness[45].
There is also the problem of lack of awareness about the existence of laws made by parliament to mitigate gender-based discrimination in states where the law has been passed.

The Way Forward in the Search for Legislative Response

This paper urges states in Nigeria where widows and daughters are discriminated against upon intestacy to use the position in Cross River, Enugu, Imo states and the FCT as a springboard for developing progressive intestate succession rules in their various states. Steps should also be taken to create awareness about the existence of the laws, particularly among the rural dwellers. The need to promote awareness of anti-discrimination laws is not limited to states without legislation on anti-discrimination in succession matters. This proposition is based on the observation that many people in Cross River, Enugu, and Imo states are not aware of the existence of such laws in their various states. In view of the trifling sanctions provided in the laws existing in Enugu, Imo, and Cross River States, the need for review of the existing laws is also suggested. This can be done by introducing more stringent punishment for perpetrators of gender-based discrimination

46. NdomaAkpet, "Women's Rights in Cross River: The Need for Further Public Enlightenment" in http://www.crossriverseyes.com/women-rights-cross-river-need-public-enlightenment-ndoma-akpet/- accessed 23/04/2015.

upon intestacy. Any sanction below N200, 000.00 fine and two-year term of imprisonment may not deter potential offenders from propagating discriminating customary law rules of succession against widows and daughters.

Also, the argument that statute might stunt growth of customary law does not arise because no legal system is perfect. The legislature can avert the problem by carrying out periodic review of the law to ensure that it accords with the dictates of contemporary Nigerian society. To have effective legislation and promote justice in judicial decisions, the prevailing social realities in contemporary society must be taken into consideration. The effects of social interactions and intercourse among the cultures of the world must also be allowed to permeate and influence legislative and judicial processes. This is so because no nation can successfully live in isolation in the world of today. In addition, law as a means of social engineering and societal control cannot exist in vacuum, if it must be obeyed.[47] Therefore, the state parliaments must identify the essence of prevailing social happenings, the tenor of the constitution, judicial decisions, and applicable international instruments in approaching the issues bordering on gender-based discrimination upon intestacy.

The reluctance exhibited by the National Assembly in domesticating the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW) of 1979, even though Nigeria has assented to the

47. Legislative intervention in intestate succession cases has been adopted successfully in other jurisdictions for similar reasons. In South Africa for instance, widows had no rights of succession under the inheritance principles of *Schependomsrecht* until the Succession Act 13 of 1934 was enacted. See *Ex parte Leeuw* (1905) 22 SC 340; Corbett, M M, Hofmeyr, G and Kahn, E*The Law of Succession in South Africa, 2nd ed.* (Claremont: Juta Law, 2010), 566.

convention, bespeaks of the conservative posture of the majority of past and present national legislators in Nigeria as far as gender-based discrimination is concerned.[48] It has been argued that this attitude of the national legislators makes it impossible for specific effect to be given to the general provision in section 42(2) of the CFRN, which prohibits discrimination perpetrated on ground of sex or circumstances of birth.[49] The domestication of relevant international conventions against gender-based discrimination will go a long way to influence the state legislatures in enacting specific laws to proscribe gender-based discrimination under customary law. This is why the legislature in some jurisdictions with similar provisions in their constitutions are expressly required by law to enact relevant laws to specifically give effect to the part of the constitution that generally guarantees right to equal protection to citizens.[50] This approach commends itself to Nigerian legislators as a veritable means of checking discriminatory customary practices upon intestacy, with the hope that the executive arm of government would muster the

48 Going by antecedents, it appears that the Nigerian legislature has not realised the usefulness of gender equality in succession matters. This has largely contributed to the delay in coming up with legislations which promote gender balance on succession matters. The legislature must consider advancement in this area of Nigeria's jurisprudence against the backdrop of contemporary global orientation and general societal developments.

49 See Chinwuba, N.N "Can Trust be used to Promote Better Gender Equity in Property Distribution in Nigeria?" *University of Ibadan Law Journal* 1, no. 2 (2011): 61.

50 See the Constitution of the Republic of Kenya, 2010, art. 27, and the South African Constitution, 1996, art. 9. Besides the general prohibition of discriminatory practices on grounds of sex, these constitutions require the legislature to enact specific legislations designed to redress any disadvantage suffered by individuals or groups because of discrimination in order to give full effect to the realisation of the rights guaranteed under the constitution.

desired political will to implement the laws after enactment.[51] Alternately, the National Assembly can amend the extant constitution to give room for direct application of any international instrument ratified by Nigeria, the way it has done in the third alteration of the 1999 constitution which now gives power to the National Industrial Court of Nigeria to directly apply international conventions, protocols, and related instruments that Nigeria has ratified in the determination of industrial disputes brought before it.[52]

To achieve optimal result from legislative intervention, the administrative arm of government should complement legislative efforts in more than one ways. For instance, the executive arm of government can complement efforts of the judicial and legislative arms of government in two major ways. Firstly, bills for the prohibition of discriminatory customary practices on intestacy can be initiated and sponsored by the executive. This approach will provide a solid platform for such bills to receive the needed attention from the legislature. Secondly and more importantly, is the determination to implement the law after passage by the legislature. The executive controls the public funds needed to effectively enforce the law when it is enacted by the legislature. It is also the executive arm of government that controls the Police and other state apparatus needed for enforcing court judgments. To ensure that the object of any reform agenda is not defeated, the executive must be dedicated to sincere implementation of

51 Executive input is necessary because as has been observed, the major problem militating against reform in Nigeria is lack of proper implementation of laws and not absence of laws. See Ayoola, O, "How the Church can Fight Corruption," *TELL Magazine*, February 1, 2010, 52.

52 See s. 254C(2) of the CFRN (Third Alteration) Act 2010.

relevant laws and court decisions.[53] It is for this reason that the view has been expressed by various writers that the major problem militating against criminal law regime in Nigeria is not the absence of applicable laws but lack of the desired political will to enforce existing laws.[54] In addition, the executive arm of government can champion the move for aggressive sensitization of the people in traditional communities, where discriminatory customary practices are common, on the provisions of the laws passed by the legislature and the implication of decisions given by the courts.[55] This is necessary because the actualization of succession rights of women can only be realized if there is widespread awareness and if proper understanding of such rights is encouraged. The executive arm of government should also fortify the institutions responsible for promoting the protection of human rights. This includes the courts, the Police and other relevant public institutions.

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53. Ayoola, O "How the Church can Fight Corruption," *TELL Magazine*, February 1, 2010, 52.

54. Okogbule N.S, "The Nigerian Factor and the Criminal Justice System," *University of Benin Law Journal* 7, (2004): 165, 182; Okogbule N.S andIhua-Maduenyi, C "Impact of Traditional Practices on the Reproductive and Health Rights of Women in Nigeria," *Property and Contemporary Law Journal* 7, (2002-2003): 21; Ewere, A.*ONEITI and Good Governance in the Nigerian Oil Industry* (Benin City: Ambik Press, 2011), 225.

55. Since culture is always in constant flux, people will change their behaviour when they are made to understand the hazards and indignity associated with discriminatory customary practices, and that it is possible to give up unjust practices without giving up meaningful aspects of their culture. Non-governmental organizations can equally complement the role of government in ensuring that sensitization on appropriate laws is extended to rural communities where majority of those subject to customary laws reside. See Okogbule N.S and Ihua-Maduenyi, C "Impact of Traditional Practices on the Reproductive and Health Rights of Women in Nigeria," *Property and Contemporary Law Journal* 7, (2002-2003): 23.

IV. CONCLUSION

There is no gainsaying the obvious that discriminatory customary practices obviously offend the inviolable non-discrimination norm of the Constitution. They are also inconsistent with applicable international instruments against gender-based discrimination. It is equally established that judicial pronouncements against discriminatory customary law rules of succession cannot significantly redress the perpetration and perpetuation of discriminatorycustomary practices. The legislature has the potential to check discriminatory customary practices or improve on the efforts made by court in addressing the problem if adequate laws are enacted to proscribe discriminatory customary law rules of succession. The need to resort to penal measures against perpetrators of discriminatory customary practices was acknowledged by the Court of Appeal in *Muojekwu v. Ejikeme*[56] where the court condemned the *oli-ekpe* and *nrachi* customs. This same step was taken by the Supreme Court in *Anekwe*where a punitive sum of two hundred thousand naira was awarded against the appellants as costs for denying the respondent (widow) the right to inherit her deceased husband's estate under Awka native law and custom.[57] Like every other criminal acts in society, the use of legislation may not completely eradicate discriminatory customary practices relating to inheritance, it would however go a long way to further suppress the inequitable practices and mitigate the hardship presently experienced by Nigerian widows and daughters following the perpetuation of lopsided rules of inheritance under customary law.

56. (2000) 5 NWLR (Pt. 657) 402.
57. (2014) 9 NWLR (Pt. 1412) 393, 422.

THE WAR AGAINST BOKO HARAM INSURGENCY IN NIGERIA: BETWEEN IMPUNITY AND HUMAN RIGHTS PROTECTION

By

Dr. Y. A. Fobur, Ph.D.,BL*

Abstract

This discourse overviews the evolution of the Boko Haram insurgency in Nigeria to the nature of the insurgents operations. It also examines the legal status of the Boko Haram insurgents in law both under municipal and international laws. The result of the examination reveals that as insurgents, they are no more than ordinary common criminals. Against the background of their legal status as common criminals, the exposition further examines their fundamental rights (if any) vis-à-vis the war against the insurgency by Nigeria's armed forces. The nature and extend of the protection insurgents have in law especially under the Geneva Conventions of 1949 and their additional protocols 1977 and 2005 respectively in the course of the efforts to bring them under control are also examined. The nature of the offences that can be committed in the war against the insurgency by members of the Nigeria's armed forces as well as the insurgents are also examined. Individual and command responsibilities by members of the Nigeria's armed forces are also discussed. A conclusion is drown and the way forward suggested.

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1. INTRODUCTION

A part from the civil war Nigeria's military fought between 1967 – 1970, at no time has Nigeria's military capabilities to maintain law and order as well as the protection and defence of the territorial integrity of the nation been challenged and put to test as the war against the Boko Haram insurgency in the North Eastern part of Nigeria.[1] The Maitatsine insurgency of the early 1980s consumed thousands of lives and properties (both civilians and security forces) yet the degree and magnitude of the loss of lives and property did not match the level being witnessed under the Boko Haram insurgency.[2]

Nigeria in its efforts to defeat or bring the insurgency to bearable or tolerable limits has deployed its military and other arms of its security forces as well as seeking foreign assistance from foreign nations, especially its neighbours.[3] In the process of fending off the Boko Haram insurgency, Nigeria's security forces, especially the military, have used or been using different methods or approaches in the war. Initially, it started with negotiations to extra judicial killing of the leader of the sect, late Mohammed Yusuf, when negotiations failed to full scale military confrontations using its armed forces, especially the army and air force, in its efforts to defeat the insurgents.

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1. The Nigerian civil war was a rebellion by the Igbo speaking tribe of South East Nigeria attempting to break out of Nigeria for alleged marginalization of the tribe in political administration/power sharing in Nigeria. The war lasted between 1967 – 1970 and over One Million people were reportedly killed.
2. The Maitatsine insurgence occurred in Maiduguri, Borno State but later spread to Kano, Kano State and Yola, Adamawa State in the early 1990s. It came about as a result of preaching by one Mohammed Marwa Maitatsine against the imperfections in the practice of Islamic religion in the Northern parts of Nigeria then and his desire to sanitize the faith. Over Five Hundred Thousand people were allegedly killed in the course of the insurgency.
3. The Republics of Benin, Cameroon, Chad and Niger.

The consequences of full scale military confrontations with the insurgents are casualties on both sides of Nigeria's military as well as the insurgents to civilians who are neither the military or the insurgents.

The methodology for the execution of the war against the insurgents by Nigeria has been criticized by many who view it as being contrary to the rules and customs of war. In particular, it has been argued that the methodology for the prosecution of the war is against the four (4) Geneva Conventions of 1949 and their 1977 and 2005 Additional Protocols which offer protection to combatants, the sick, wounded and civilians in times of armed conflict be it international or internal. Nigeria's military operations against the insurgents has been viewed as barbaric and primitive.[4]

4. The war against Boko Haram insurgency by Nigeria's armed forces has attracted a lot of opinions and commentaries both local and globally. It has been criticized by some nations such as the United States that the conduct of the war has been contrary to all known international humanitarian laws or the laws and customs of warfare which Nigeria has either ratified or acceded to, and thus bound to apply in the conduct of the hostilities with the Boko Haram insurgents. It is in protest to the methodology of the war against the insurgents that the US Congress invoked the Leahy (Amendment) Act of 2001 against Nigeria by refusing to assist it with military aids/assistance in the prosecution of the war. The Law is a US law that amends the Foreign Assistance Act, 1961 which is a human rights law that prohibits the U.S State and Defence Departments from providing military assistance to foreign military units that violate human rights with impunity. To implement the law, US embassies and the Bureau of Democracy, Human Rights and Labour and the appropriate regional bureau of the US Department of state vet potential recipients of security assistance. If a unit is found to have been creditably implicated in serious human rights abuses, assistance is usually denied until such a nation's government takes effective steps to bring the responsible institutions or persons within the ambit of justice. The US

This discourse examines the meaning, evolution, the status of the Boko Haram insurgents under Nigeria's and international laws, the legality of the methodology being used by Nigeria's military in the war against Boko Haram to the protections offered the insurgents in law. It also considers

government has long been a major, if not the largest provider of assistance through funding, training, non-lethal equipment, and/or weaponry to foreign military and other security forces globally. This is the essence of the Leahy (Amendment) Act of 2001. For instance, in 2014 it spent 25 Billion Dollars on training and equipping foreign militaries and law enforcement agencies of more than 100 nations. Security assistance is driven by overriding US national security objectives, including a desire to challenge/overturn communist regimes during the Cold War era, counter drug trafficking in the 1990s, or counter anti-western terrorism in the 2000s. Notwithstanding US's long history of providing assistance to foreign armed forces, some portion of the assistance has been provided to forces that repress and abuse their own populations. The US government through the State Department implements the Leahy law through a process known as the Leahy vetting. A prospective aid recipients unit is searched for evidence of past or present commission of gross human rights violations. The State Department has interpreted "gross human rights violations" to mean a small number of heinous acts such as murder of non-combatants, torture, disappearing of people to raping of women. The US in the implementation of the Leahy law has politicized its application to suit is strategic national and security interests. At times, the application of the law has gone contrary to the letter and spirit of the law. Agreed, Nigeria's military in its desperation to cow or defeat the Boko Haram insurgency might have overstepped its bounds on human rights obligations, other nations to which the US has extended or still extends assistance have done worse human rights abuses. For instance, there is no moral or legal justification for the continous extension of such aids to Israel which has the worst human rights records against the Palestinians in West Bank and the Gaza strip. It clearly indicates a gleeful hypocrisy in US foreign policy. In as much as this author concedes to Israel's rights to existence and self defence Israel has been using unproportionate and excessive force in Gaza which has caused the deaths of hundreds of thousands of civilians, to the demolition of settlements constructed in the West Bank. The law also does not apply where the US national security interests is involved even when there is flagrant human right abuses.

whether or not Nigeria's military are culpable of human rights violations resulting in war crimes, genocide and crimes against humanity in the prosecution of the war against the insurgents. Individual and command responsibilities in armed conflicts are also examined. A conclusion is drawn and the way forward on the war suggested.

2. EVOLUTION OF BOKO HARAM INSURGENTS

Boko Haram insurgents actually began as a group which claimed to be innocently exercising the freedom of its members to associate with each other, to freely worship as an Islamic body that sought to commit members to spiritual devotion to Allah. Sometime in 2002, the group, then known as ***"Talibans"***, surfaced in a border village called Kanamma in Yobe State and they codenamed the territory they occupied as ***"Kandahar"***, borrowing the name from Afghanistan. Not long, the Talibans, as they were called, had a violent battle with policemen in Kanamma. Soldiers had to be deployed during that battle and the Taliban went underground with some members killed while others fled.[5]

By 2004, another group of a resurgent Talibans attacked a Divisional Police Headquarters in Bama and Gwoza local government areas of Borno State, killing police officers, setting the police stations ablaze and carting away rifles. Again soldiers had to be deployed to fight them around the Gwoza hills. Some were killed, others fled into Cameroon Republic.[6]

The Talibans went quiet until 2007, when they appeared in Kano around Panshekara, attacking a police station and they

5. Daily Trust News paper July 26, 2015, p. 43.
6. *Ibid.*

fled with some killed. After the 2007 elections, the late Mohammed Yusuf, whose strange preaching caused some uproar in earlier years, resurfaced with far more intense war waged against Western education and democratic system. Again, Mohammed Yusuf was dangerously exercising his democratic freedom of expression and freedom of worship by way of preaching and was having followers who were exercising their democratic rights to freely associate as a group.[7]

Before the 2007 elections, key political actors including serving and aspiring governors, serving and aspiring national and state assembly lawmakers as well as other top government officials under Nigeria's democracy, particularly in most parts of the poorer Northern Nigeria, had introduced the distribution of free motorcycles to youths in the name of job creation and empowerment. The motive was also to court votes. The million of motorcycles everywhere across the country led to a national policy introduced by the Federal Road Safety Commission (FRSC) making it mandatory for all riders to acquire and wear crash helmets.[8]

The followers of Mohammed Yusuf in Borno State were called ***"Yan Yusufiyya"*** and not Boko Haram. These followers mostly rode on motorcycles and because the members did not recognize constitutional democracy, they defied the policy on crash helmet. In the second week of July, 2009, the Yusuffiyya members were moving on funeral procession in Maiduguri and were intercepted by members of a Joint Military and Police Anti Robbery team called ***"Operation Flush"***, set up by the then Government of Borno State. Hot

7. *Ibid.*
8. *Ibid*, p. 44.

arguments over the crash helmet ensured, leading to a member of ***"Operation Flush"*** opening fire and injuring some members of the sect in self-defense. A week after that incident, the late Mohammed Yusuf issued a sermon, directing all his members to arm themselves. He cited instances that there was neither a commission of enquiry nor any punishment meted out on the man that opened fire on his followers as well as denied access to offering blood donations to their wounded colleagues.[9]

Few days after Yusuf's sermon to his followers asking them to arm themselves in preparation for jihad, about seven of his members were arrested in Biu, Borno State, with frightening materials like empty shells, gun powder, fertilizer and chemicals used in making improvised explosive devices. Two days after these men were paraded, there was the first bomb explosion in Borno State, However, that very week, there was an attack in Bauchi around July 26, 2009 with followers of Mohammed Yusuf attacking police formations. Less than 48 hours after attacking Bauchi, the sect launched more coordinated and deadlier attacks, on different police formations in Maiduguri in the early hours of July 27, 2009. That was the first major crisis and it lasted till July 30th when Yusuf was killed.[10]

The name Boko Haram actually emanated from Bauchi, Bauchi State as a product of media reports. While the insurgents were called 'Yan Yusufiyya' in Maiduguri, the people of Bauchi called them 'Yan Boko Haram' and within a matter of days, the Nigerian media adopted the name Boko

9. *Ibid.*
10. *Ibid.*

Haram which remains up to today. Meanwhile, Mohammed Yusuf was arrested by security agencies and arraigned in court on different occasions before the July 2009 crisis but on all occasions, he was released on bail by courts in line with principles of law enshrined in democracy where accused persons are presumed innocent until proved guilty by the court. Whenever Yusuf was granted bail, he was received by motorcades in a political rally-like manner by his followers at the Maiduguri International Airport.

3. LEGAL STATUS OF BOKO HARAM INSURGENTS

The Black's Law Dictionary defines an insurgent as a person who, for political purposes, engages in armed hostility against an established government.[11] Insurgency however has been defined as a violent move by a person or group of persons to resist or oppose the enforcement of law or running of government or revolt against constituted authority of the state or taking part in insurrection.[12] Thus, insurgency refers to a violent move by a person or group of persons to resist or oppose the enforcement of law or running of government or revolt against a constituted authority or government of a state as Nigeria.

Within the context of the definitions and descriptions of insurgents and insurgency in this presentation Boko Haram members comprehensively qualify as insurgents engaged in the acts of insurgency. Initially when they emerged in early 2009 they and their leadership claimed to have arrived Nigeria's scene to clean up the mismanagement of Nigerias political, social and economic scenes of corruption social vices and the

11. 8th Edition p. 823.
12. S. I. Nchi, The Nigerian Law Dictionary, 1st Edition, Zaria: Tamaza Publishing Company Ltd, 1996, p. 175.

mismanagement of the economy by the political class. Then, their targets of attacks were members of security offices (all ranks) but subsequently changed their mission to opposition to western education. After the change in mission, their targets of attacks became every body and no longer restricted to security personnel. Every Nigerian and foreigner became subject of attack to them as well as the destruction of both private and public buildings using sophisticated weaponry. They launched all sorts of atrocities on people living in Nigeria.[13]

Boko Haram insurgents can rightly be regarded as common criminals unleashing attacks on defenceless civilians and their property resulting into injuries, loss of lives and property as well as forced or massive internal displacement of people out of their habitual places of residence. Their attacks also have the concomitance of driving business/investors both local and foreign away from an insecured Nigeria to the constitution of elements of treasonable felony, terrorism, murder, crimes against humanity war crimes to genocide punishable under Nigeria's municipal law and in international laws.[14]

In the words of Professor Ladan insurgency involves situations of confrontational acts of violence, which can assume various forms; from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the state authorities in power. In these situations, the authorities in power call upon extensive police forces, or even armed forces

13. M.T. Ladan, "Diagnostic Review of Insurgency in Nigeria: The Legal Dimension" in Bayero University Journal of Public Law (BUJPL) Vol. 2. No. 2, December, 2010, 1, p. 2.
14. *Ibid*, p. 4.

to restore internal order. As for normal tensions, the term usually refers to either situations of serious tension be they political, religious, ethnic, social, economic, etc or sequels of internal disturbances or an armed conflict.[15]

The activities of Boko Haram insurgents are clear crimes under both Nigeria's municipal law as well as international law. For instance, their indiscriminate use of violence becomes crimes of terrorism when they use arbitrary violence or threat of force deliberately aimed at causing fear, harm or kill by attacking defenceless civilians and their property or undermining peace by disrupting social, political and economic lives of Nigeria or any part thereof.

In international law, there is no rule against rebellion as it is strictly a matter within the domestic jurisdiction of a state to deal with according to its municipal laws. Once a state has defined its attitude and characterized the situation as in the case of Boko Haram insurgency as crime, the matter is purely within its domain to legitimately interfere.[16] Boko Haram insurgents are criminals and not belligerents that are entitled to some rights and recognition by third party states. However, where rebels as Boko Haram insurgents have been so designated by the state, then other states may or may not agree to grant them certain rights i.e. other forms of protection recognized in international law. The insurgents however, are not belligerents. Accordingly, other states are at liberty to define their legal relationship with them.[17] Insurgency as in the case of Boko Haram is a purely provisional classification and a state may decide, for example, to protect its nationals or

15. *Ibid.*
16. Shaw, M.N. International Law, 5th Edition Cambridge: Cambridge University Press Ltd. 2003, 1064.
17. *Ibid.*

property in an area under the ***de facto*** control of Boko Haram insurgents. On the other hand, belligerency is a formal status involving rights and duties. In the eyes of classical international law, other states may accord recognition to rebels when certain conditions have been fulfilled.[18] However, the concepts of insurgency and belligerency are lacking in clarity and are extremely subjective. The absence of clear criteria, particularly with regard to the concept of insurgency, has led to a great deal of confusion. The issue is of great importance since the majority of conflicts in post Second World War have been in essence civil wars.[19]

4. HUMAN RIGHTS PROTECTION IN CONTEMPRARY JURISPRUDENCE

There is no doubt that the Boko Haram insurgents are criminals since they are not belligerents. International law especially international human rights laws and the laws of armed conflict both under customary and under the Geneva Conventions of 1949 along with their respective additional protocols however, offer Boko Haram insurgents certain protections against any and every method or means of warfare.[20] Nigeria has an obligation under its municipal and international laws to protect, defend and preserve most, if not all of the fundamental guarantees/rights conferred upon Boko Haram insurgents in the course of the prosecution of its war against them. The foundation of the Geneva Conventions systems is the principle that both combatants and those not

18. Ibid.
19. Ibid.
20. Ibid.

actively engaged in warfare have a minimum standard of treatment.

The promotion, protection and preservation of fundamental human rights by nation states which began as mere philosophical thoughts of natural law theorists have achieved global acceptance that the international community now regard the concept as a rule of ***jus cogens*** in international law. Thus, it is the responsibility of the international community to promote and protect human rights of all parties engaged in armed conflicts be they international or intra-state. However, at times the international community intervenes to prohibit flagrant violations of human rights embarked upon by a state and such a state cannot claim or hide under the cover of interference in its internal affairs which ordinarily would have fallen within its domestic jurisdiction.[21] It is a basic rule in international law that states have no right to encroach upon the preserve of other state's internal affairs.[22] This is because the United Nations Charter provides that sovereign equality of states is the principle upon which the United Nations operates. The Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the

21. Y.A. Fobur "Balancing the Same Sex Marriage (Prohibition) Act, 2014 within Fundamental Human Rights in Nigeria" in Nigerian National Human Rights Commission Journal (NNHRCJ) Vol. 4, December, 2014, p. 84. See also Y.A. Fobur "The UN Security Council and the Politics of Intervention in Regional Conflicts. A Case Study of the Intervention in the Libyan Crisis" in Bayero University Journal of Public Law (BUJPL) Vol. 2, No. 2, December, 2010, 82.
22. Fobur, Loc. cit.

members to submit such matters to settlement under the present Charter.[23]

In consideration of the imperative of sovereign equality of states in international law, Brownlie observed as follows:

If international law exists, then the dynamics of state sovereignty can be expressed in terms of law and as states are equal and have legal personality, sovereignty is, in a major aspect a relation to other states (and of organization at states) defined by law.[24]

The same international law has, however, qualified the doctrine of state sovereignty/domestic jurisdiction by the authority of the international community to intervene at any instance where a state flagrantly abuses the human rights of its citizenry. Once the international community determines that there is the flagrant abuses of human rights by a state, it cannot hide under the cover of the doctrine of state sovereignty or domestic jurisdiction to perpetuate human right abuses. The determination of whether or not a matter is within a state's domestic jurisdiction is a question for international law to determine. In the celebrated case of ***Tunis Morocco Nationality Decrees Case,*** the Permanent Court of International Justice in its advisory opinion succinctly held inter alia:

The question whether or not, a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially a relative question. It depends upon the development of international relations. Thus, in the state of international law, questions of nationality are, in the opinion of

23. Article 2 (7) of the United Nations Charter.
24. Brownlie, I. Principles of International Law, 4th Edition, 1990, 283.

the court, in principle within the exclusive preserved domain of states.[25]

No doubt, virtually all matters that today are classified as human rights issues were during the 19th Century classified as within the internal sphere of national jurisdiction. However, since the conclusion of the beginning of the 20th century and particularly after the Second World War, the concept of state domestic jurisdiction lost ground on matters related or connected with human rights violation. In the words of Professor Shaw:

In more recent years, this argument has lost ground when human rights are at stake. The Second World War is a turning point in the way the international community regards its respect for human rights. The long standing principle of state sovereign vis-à-vis its national/s has in the course of the years been eroded. The UN Charter explicitly proclaimed human rights to be a matter of legitimate international concern.[26]

Sharing the same stand with Professor Shaw is Magdalena Sepulveda when she posited as follows:

First, how a state treats its own subjects is nowadays a legitimate concern of the international community. Secondly, there are now superior international standards established by common consent, which may be used for appraising standards of domestic laws, and the actual conduct of sovereign states within their own territories and in the exercise of their internal jurisdiction.[27]

25 (1923) PCIJ Series B. No. 41. See also the case of The Prosecutor v. Tadic (1996) 35 ILM 35.

26. Shaw, op. cit, p. 1071.

27. Magdalena, S. et.al. Human Rights Reference Handbook (Ciudad Colon Costarica: University for Peace) 2004, 15.

Thus, it follows from the above analysis that human rights issues presently cannot be deemed to be matters which fall essentially within the domestic jurisdiction of any state (Nigeria inclusive) and international action in respect of their abuse cannot be seen as affront to state sovereignty. States cannot embark on a flagrant violation of human rights under the façade of state sovereignty. In the words of Yerima:

Most importantly, the principle of domestic jurisdiction, under Article 2 (7) of the UN Charter does not extend its tentacles to matters covered by Chapter VII of the same charter. The legal implication of this is that where flagrant violation of human rights constitute breach of, or threat to peace or acts of aggression, the international community may intervene.[28]

Distilled from the above position of international law on the status of protection and preservation of fundamental human rights, Nigeria cannot hide under the façade of the war against Boko Haram insurgency to violate the fundamental rights of the insurgents.

5. METHODOLOGY OF THE WAR AGAINST BOKO HARAM

In response to Boko Haram's attacks in the north-east, the Nigerian military have arrested at least 20,000 young men and boys since 2009, some as young as nine years old. In most cases they were arbitrarily arrested, often based solely on the word of a single unidentified secret informant. Most were arrested in mass "screening" operations or "cordon-and-

28. Yerima, T. F. "Balancing State Sovereignty and Human Rights Protection under the African System: The Local Remedies Rule in Focus" in Human Rights Review Vol. 2, No. 2, July, 2011, 425.

search" raids where security forces round up hundreds of men. Almost none of those detained have been brought to court and all have been held without the necessary safeguards against murder, torture and ill-treatment. Detainees are held incommunicado in extremely overcrowded, unventilated cells without seminary facilities and with little food or water. Many are subjected to torture and thousands have died from ill-treatment and as a result of dire detention conditions.[29]

5.1 Overcrowding and Suffocation

The conditions of detention in Giwa barracks in Maiduguri and detention centres in Damaturu are reportedly overcrowded that hundreds of detainees are packed into small cells where they have to take turns sleeping or even sitting on the floor. At its peak, Giwa barracks – which was not built as a detention facility – is accommodating more than 2,000 detainees at one time. Hundreds have been killed in detention either (by soldiers) shooting them or by suffocation.[30]

5.2 Fumigation

In order to combat the spread of disease and stifle the stench, cells are regularly fumigated with chemicals. Fumigation may have led to the deaths of many detainees in their poorly ventilated cells. Many Boko Haram suspects have died as a result of fumigation. They are fumigated with the chemicals used for killing mosquitoes.[31]

29. Amnesty International Report, June, 2015, p. 31.
30. Ibid.
31. Ibid.

5.3 Torture

There have been consistent reports as well as video evidence of torture by the military during and after arrest. Former detainees and senior military sources described how detainees are regularly tortured to death, hung on pole over fires, tossed into deep pits or interrogated using electric batons. These findings are consistent with widespread patterns of torture and ill-treatment documented by Amnesty International over a number of years.[32]

5.4 Extrajudicial executions

More than 8,200 people have been unlawfully killed by the military and associated militias in north-east Nigeria. The worst case documented by Amnesty International took place on March, 2015 when the military summarily killed more than 640 detainees who had fled Giwa Barracks after Boko Haram attacked. Many of the killings appeared to be reprisals following attacks by Boko Haram.[33]

The assertions by Amnesty International Report in June, 2015 represents the version of the stories being told by the Boko Haram insurgents. However, Nigeria's Military High Command which is actively engaged in the war against the insurgents have continuously denied the claims/allegations by Amnesty International and the insurgents as false. The command instead blame the insurgents for the high incidences of the destructions of lives and property in the course of the fight against them. It would appear in the considered opinion

32. Ibid.
33. Ibid.

of this author that both sides in the war against the insurgency are being economical with the truth. It seems from local and international reports that both sides are involved in the destructions of lives and property.

6. FUNDAMENTAL RIGHTS OF BOKO HARAM INSURGENTS

It is in the area of fundamental human rights protection, defence and preservation that international human rights and international humanitarian law or the law and customs of war converge and overlap. They are binding on all states and nations which are engaged in either interstate or intrastate wars[34]. States, which are engaged in armed conflicts either local or international are bound to maintain certain minimum standard i.e. humane treatment in the conduct of hostilities with the other party.[35]

Boko Haram insurgents are entitled to certain minimum standard of treatment from members of the Nigerian armed forces and its militias especially the Civilian Joint Task Force (JTF) in the prosecution of the war against them. As insurgents or even common criminals who are out on destruction of lives and property, theft and other forms of criminal activities, yet, the law especially international law confers upon them certain fundamental rights which a nation at war with them must protect, defend and preserve.[36] The breach of any or all the

34. Nigeria has not only ratified but also domesticated all the Geneva Conventions and therefore bound by it.
35. Article 22, of the First Geneva Convention, 1949 as amended. See also Green, The Contemporary Law of Armed Conflict, 2nd Edition, Manchester, 2008, 461.
36. Article 16.

fundamental rights in the prosecution of the war, amount to either genocide, war crimes or crimes against humanity.[37]

The Geneva Conventions of 1949 and their additional protocols of 1977 and 2005 especially Protocol II, seek to provide protection to a wide range of persons who are engaged in armed conflict such as the Boko Haram insurgents. The basic distinction has always been between combatants and those who are not involved in actual hostilities. The Geneva Conventions and their Additional Protocols in the main seek protection for war victims such as the wounded and sick in land warfare;[38] the wounded sick and shipwrecked in warfare at sea;[39] prisoners of war;[40] and civilians.[41] The First Geneva Convention provides that the conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting party, even if the state of war is not recognized by them and to all cases of partial or total occupation of the territory of the high contracting party, even if the said occupation meets with no armed resistance.[42] The First Geneva Convention deals with the protection of the wounded and sick on land warfare as is the case with Boko Haram insurgency in Nigeria. It provides that members of the armed forces and organized militias such as the Civilian JTF, including those accompanying them, where duly authorized shall be respected and protected in all

37. Article 17.
38. First Geneva Convention, 1949 as amended
39. Second Geneva Convention, 1949 as amended.
40. Third Geneva Convention, 1949 as amended.
41. Fourth Geneva Convention, 1949 as amended.
42. Common Article 2.

circumstances.[43] They are to be treated humanely by the party to the conflict into whose power they have fallen on a non-discriminatory basis and any attempts upon their lives as violence on their person is strictly prohibited.[44] Torture or biological experimentation upon them is forbidden, nor such persons to be willfully left without medical assistance and care.[45] Further, parties to a conflict as the war against Boko Haram insurgents shall take all possible measures to protect the wounded and the sick and ensure their adequate care and to search for the dead and prevent their being despoiled.[46] The parties to the conflict shall give details of any wounded, sick, or dead persons of the adversary party and to transmit them to the other side through particular means. The Convention also includes provisions relating to medical units and establishments noting in particular that these should not be subject of attacks.[47]

The Third Geneva Convention is concerned with prisoners of war and consists of a comprehensive code centred upon the requirement of humane treatment in all circumstances. The definition of prisoners of war under the convention covers members of the armed forces of a party to the conflict (as well as members of militias and other volunteer corps forming part of such armed force) and members of other militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict provided the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed

43. Article 7.
44. Article 8.
45. Article 9.
46. Article 10.
47. Article 11.

distinctive sign recognizable at a distance; (c) carrying arms openly; (d) conducting operations in accordance with the laws and customs of war.[48]

The additional Protocol II of 1977 provides that combatants are members of the armed forces of a party to a conflict. Such armed forces consist of all organized armed units under an effective command structure which enforces compliance with the rules of international law applicable in armed conflict[49]. The Additional protocol further provides that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack as in a military operation preparatory to an attack[50]. When an armed combatant cannot so distinguish himself, the status of combatant may be retained provided that arms are carried openly during each military engagement and during such time as the combatant is visible to the adversary while engaged in a military deployment preceding the launching of an attack.[51]

The Third Geneva Convention further provides that where there is any doubt as to the status of any person committing a belligerent act and falling into the hands of the enemy, such person shall enjoy the protection of the convention until such time as their status shall be determined by a competent authority.[52] However, Additional Protocol I has qualified Article 18 by providing that any person who takes part in hostilities and falls into the powers of an adverse party shall be

48. Article 6.
49. Rule 2.
50. Rule 3.
51. Rule 4.
52. Article 18.

presumed to be a prisoner of war and therefore shall be protected by the Third Convention.[53]

The rationale for obligations covering prisoners of war in all armed conflicts is founded upon certain principles under the Third Geneva Convention. These include prisoners of war must at all times be humanely treated and must at all times be protected particularly against acts of violence or intimidation and against insults and public curiosity. Thus, displaying prisoners of war on television in a humiliating fashion confessing to crimes or criticizing their own government is a total breach of the convention. Prisoners of war are entitled in all circumstances and at all times to respect to their persons and their honour.[54]

Prisoners of war are bound only to disclose their names, date of birth, rank and serial number to their adversary.[55] There must be no physical or mental torture nor may any other form of coercion be inflicted upon a prisoner of war to secure from them information of any kind whatsoever.[56] Prisoners of war who refuse to answer any question may not be threatened, insulted, or exposed to unpleasant or disadvantageous or dishonourable treatment of any kind.[57] Once captured, prisoners of war are to be evacuated as soon as possible to camps situated in an area far enough from the combat zone for them to be out of danger.[58] No prisoner of war shall be sent to, or detained in an area where he may be exposed to the fight or within the combat zone, nor may his presence be used to

53. Rule 10.
54. Article 16.
55. Article 17.
56. Article 18.
57. Article 19.
58. Article 20.

render certain points or areas immune from military operations.[59] However, prisoners of war are subject to the laws and orders of the state or party holding them.[60] They may be punished for disciplinary offences and tried for offences before capture i.e. war crimes.[61] They may also be tried for offences committed before capture against the law of the state holding them.[62]

The Fourth Geneva Convention deals with the protection of civilians in times of war. A civilian has been defined as any person who is not a combatant and in cases of doubt as to the status of such a person, he is to be considered and treated as a civilian.[63] The Convention provides a highly developed set of rules for the protection of such civilians, including the right to respect for person, honour, convictions and religious practices and the prohibition of torture and other cruel, inhuman and degrading treatment, hostage taking and reprisal attacks. The wounded and the sick shall be the object of particular protection and respect.

It is trite law in the law of armed conflicts that civilian population must be protected against the effects of armed hostilities.[64] Thus, parties to a conflict must at all times distinguish between civilian population and combatants and between civilian objects and military objectives.[65] Military

59. Article 21.
60. Article 22.
61. Article 23.
62. Article 24.
63. Article 52 (1).
64. Green op. cit.
65. Ibid.

operations must be directed at all times against military objectives.[66]

Military objectives are limited to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[67] Issues may arise particularly with regard to so-called ***'dual use'*** objects such as bridges, roads, power stations and so forth and care must be taken to interpret these so that not every object used by military forces becomes a military target, especially in view of the actual terms used in Article 52 (2) that such objects make 'an effective contribution' to military action and offer a 'definite military advantage.[68]

Article 51 of the Convention further provides that the civilian population as such, as well as individual civilians, 'shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. Additionally,

66. *Ibid.*
67. Article 52 (2).
68. See, as to the Kosovo conflict 1999, e.g. J. A. Burger, 'International Humanitarian Law and the Kosovo Crisis', 82 International Review of the Red Cross, 2000, p. 129; P. Rowe, 'Kosovo 1999: The Air Campaign', ibid., p. 147, and W. J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia', 12 EJIL, 2001, p. 489. See also the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia by a review committee of the Yugoslav War Crimes Tribunal recommending that no investigation be commenced by the Office of the Prosecutor: see http:www.un.org/pressrel/nato061300.htm, and the attempt to bring aspects of the bombing campaign before the European Court of Human Rights: see Bankovic v. Belgium, Judgment of 12 December 2001.

indiscriminate attacks[69] are prohibited.[70] Article 57 provides that in the conduct of military operations, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'. Civilian objects are all objects which are not military objectives as defined in article 52 (2).[71] Cultural objects and places of worship are also protected,[72] as are objects deemed indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and

69. These are defined in article 51 (4) as: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be as a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by Protocol I; and consequently in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.

70. See 21 (5) UN Chronicle, 1984, p. 3 with regard to an appeal by the UN Secretary General to Iran and Iraq to refrain from attacks on civilian targets. See also Security Council resolution 450 (1983). The above provisions apply to the use by Iraq in the 1991 Gulf War of missiles deliberately fired at civilian targets. The firing of missiles at Israeli and Saudi Arabian cities in early 1991 constituted, of course, an act of aggression against a state not a party to that conflict: see e.g. The Economist, 26 January 1991, p. 21.

71. This provides that military objectives are limited to those objects which in their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage.

72. See article 53. See also the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 together with the First Protocol, 1954 and the Second Protocol, 1999. The protections as to cultural property are subject to 'military necessity': see article 4 of the 1954 Convention and articles 6 and 7 of the 1999 Protocol. Under articles 3 and 22 of the Protocol, protection is extended to non-international armed conflicts: see below, p. 1072.

irrigation works, so long as they are not used as sustenance solely for the armed forces or in direct support of military action.[73] Attacks are also prohibited against work or installations containing dangerous forces, namely dams, dykes and nuclear generating stations.[74]

7. FUNDAMENTAL RIGHTS IN TIMES OF INSURGENCY

The application and enforcement of law in times of crisis such as wars or insurgencies may be described as one of the most misunderstood aspect of law itself. It is rarely discussed in academic or ever practical circles and published treatise. It rarely comes up for adjudication; as such its jurisprudence remains exotic, abstract, inaccessible and confusing. Yet emergencies such as wars or insurgencies have always been with mankind from time immemorial, and have been subjected to varied uses, abuses and protective of the security of nations and the rights of individuals.

International law does not prohibit war either between nations or within a nation but only regulates the conduct of hostilities between the warring parties. With the adoption of the Geneva Conventions and their protocols, international law has almost completely covered the regulation or the methodology of warfare. The consequences of the violations of these rules of warfare are the punishments enshrined in the Rome Statute that establishes the International Criminal Court (ICC). Thus, international law, in addition to seeking to protect victims of armed conflicts also tries to constrain the conduct of military operations in humanitarian fashion. In

73. Article 54
74. Article 56.

analyzing the rules contained in the "Law of the Hague" it is always important to bear in mind the delicate balance to be maintained between military necessity and humanitarian considerations. The International Court of Justice in its Advisory Opinion on the ***Legality of the Threat or Use of Nuclear Weapons case*** summarized the situation in the following authoritative manner:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants, it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, states do not have unlimited freedom of choice of means in the weapons they use.[75]

The court emphasized that the fundamental rules flowing from these principles bound all states, whether or not they had ratified the Hague and Geneva Conventions, since they constitute intransgressible principles of international customary law.[76] At the heart of such rules and principles lies the overriding consideration of humanity.[77] The court has emphasized that, in examining the legality of any particular

75. ICJ Reports, 1996, pp. 226, 257.
76. *Ibid.*
77. *Ibid.*

situation, the principles regulating the resort to force, including the right to self defence, need to be coupled with the requirement to consider also the norms governing the means and methods of warfare itself.[78] Accordingly, the types of weapons used and the way in which they are used are also part of the legal equation in analyzing the legitimacy of any use of force in international law.[79]

The law of armed conflicts contained in the Geneva and the Hague Conventions in the considered opinion of this author apply to the war against Boko Haram insurgency in Nigeria. In the formative era of international humanitarian law it was thought that there existed a distinction between internationals and non- international armed conflicts based on the difference between inter-state relations which was the proper focus for international law and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus, in principle impervious to international law regulation. However, this distinction has been collapsing in the recent decades especially in humanitarian law with the gradual application of such rules in internal armed conflicts. The International Criminal Court (ICC) Prosecutor, Fatou Bensudah in September, 2015 assessment of the war against the Boko Haram insurgency opined that the crises is no longer an internal crises to Nigeria alone. She argued that it has become an international armed conflict since states like Niger, Cameroon and Chad Republics have also come under attacks by the Boko Haram insurgents just as members of the armed forces of this nations also attacked the insurgents. In her opinion, which tallies with the stamp of this author that the

78. *Ibid.*
79. *Ibid.* See also the Corfu Channel case ICJ Reports 1949, pp. 4, 22.

Geneva Convention apply to the conflict and any party to it who offends any part of the Conventions or the ICC Statute should face the full wrath of the law either locally or before the ICC[80]. The Appeals Chambers of the International Tribunal on War Crimes in former Yugoslavia in its decision in the Tadic case[81] refused to recognized the distinction between international and intra-state armed conflicts in the application of international humanitarian laws. It held inter alia:

...an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.[82]

Meanwhile, what may be described as an intra-state or internal armed conflict may turn out into an international armed conflict if other nations/states become parties to the armed conflict. The Appeal Chambers in the ***Tadic case supra*** approved this position when it further held inter alia:

It is indisputable that an armed conflict is international if it takes place between two or more states. In addition, in case of

80. ICC Report, September , 2015.
81. Case No. I.P. 94-1-AR 72.
82. Ibid. p. 488.

an internal armed conflict breaking out on the territory of a state, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another state intervenes in the conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.[83]

8. LIABILITIES FOR CRIMES IN THE WAR AGAINST BOKO HARAM INSURGENTS

The war against Boko Haram insurgents by Nigeria's military has led to the destruction of lives, property and other forms of criminal activities. For instance, Amnesty International has reported series of extrajudicial killings, starvation, rape and looting by members of the Nigerian armed forces in the execution of the war. All these activities are criminal offences under Nigeria's criminal laws as well as in international law. For the purpose of fixing either individual or command responsibilities, some of the offences such as genocide, war crimes to crimes against humanity established by the Rome Statute of the International Criminal Court (ICC) as alleged to have been or being committed by members of the Nigerian armed forces are examined hereunder.

8.1 GENOCIDE

For the purpose of the Statute, the offence of genocide has been defined to mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,[84] as such, as killing members of the

83. *Ibid*, p. 492.

84. Article 6 (9) of the Rome Statute of the International Criminal Court, 2002. Nigeria has ratified the statute and therefore bound by it.

group,[85] causing serious bodily or mental harm to members of the group,[86] deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group[87] or forcibly transferring children of the group to another group.[88]

8.2 CRIMES AGAINST HUMANITY

Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with the knowledge of the attack most likely to cause murder,[89] extermination.[90] enslavement,[91] deportation or forcible transfer of population,[92] imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;[93] torture,[94] rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;[95] persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under

85. Article 6 (b).
86. Article 6 (c).
87. Article 6 (d).
88. Article 6 (e).
89. Article 7 (1) (a).
90. Article 7 (1) (b).
91. Article 7 (1) (c).
92. Article 7 (1) (d).
93. Article 7 (1) (e).
94. Article 7 (1) (f).
95. Article 7 (1) (g).

international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;[96] enforced disappearance of persons[97], the crime of apartheid[98] and other inhuman acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health.[99]

For the purpose of the offence of crime against humanity, "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 of Article 7 against any civilian population, pursuant to or in furtherance of state or organizational policy to commit such attack.[100] "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of a population[101] while "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.[102] "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are law fully present without grounds permitted under international law.[103] "Torture" has been defined by the statute to mean the intentional infliction of severe pain or suffering, whether

96. Article 7 (1) (h).
97. Article 7 (1) (i).
98. Article 7 (1) (j).
99. Article 7 (1) (k).
100. Article 7 (2) (a).
101. Article 7 (2) (b).
102. Article 7 (2) (c).
103. Article 7 (2) (d).

physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions[104] while "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. However, the definition shall not in any way be interpreted as affecting national laws relating to pregnancy.[105]

The statute defines persecution to mean intentional and severe deprivation of fundamental rights by reason of the identity of the group or collectivity.[106] The statute further defines the crime of apartheid to mean the inhumane acts of a character similar to those referred to in paragraph 1 of Article 7, committed in the context an institutionalized regime or systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention, of maintaining that regime.[107] "Forced disappearance of persons" has been defined as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state, or a political organization followed by a refusal to acknowledge the deprivation of freedom or to give information on the site or where about of those persons, with the intention of removing them from the protection of the law

104. Article 7 (2) (e).
105. Article 7 (2) (f).
106. Article 7 (2) (g).
107. Article 7 (2) (h).

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104. Article 7 (2) (e).
105. Article 7 (2) (f).
106. Article 7 (2) (g).
107. Article 7 (2) (h).

for a prolonged period of time[108]. Under the statute the term "gender" refers to the two sexes, male and female, within the context of society.[109]

8.3 WAR CRIMES

The statute further confers jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.[110] War crimes have been defined by the statute as grave breaches of the Geneva Conventions of 12 August, 1949 namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions such as willfully killing,[111] torture or inhuman treatment, including biological experiments;[112] willful causing great suffering, or serious injury to body or health;[113] extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;[114] compelling a prisoner of war or other protected person to serve in the forces of a hostile power;[115] willfully depriving a prisoner of war or other protected person of the right of fair and regular trial;[116] unlawful deportation or transfer or unlawful confinement,[117]

108. Article 7 (2) (i).
109. Article 7 (3).
110. Article 8 (1).
111. Article 8 (2) (a) (i).
112. Article 8 (2) (a) (ii).
113. Article 8 (2) (a) (iii).
114. Article 8 (2) (a) (iv).
115. Article 8 (2) (a) (v).
116. Article 8 (2) (a) (vi).
117. Article 8 (2) (a) (vii).

unlawful deportation or transfer or unlawful confinement to taking of hostages.[118]

War Crimes have also been defined to include other serious violations of the laws and customs applicable to international armed conflict, within the established framework of international law, namely intentionally directing attacks against the civilian population such as or against individual civilians not taking part in hostilities;[119] intentionally directing attacks against civilian objects, that is, objects which are not military objectives;[120] intentionally directing attacks against personal installations, material, units or vehicles involved in a humanitarian assistance or peace keeping mission in accordance with the charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[121] Intentionally launching attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct military advantage anticipated;[122] attacking and bombarding, by whatever means town, villages, dwellings and buildings which are undefended and which are not military objectives;[123] killing or wounding a combatant who, having laid down his arms or having no longer means of defence has surrendered at

118. Article 8 (2) (a) (viii).
119. Article 8 (2) (b) (i).
120. Article 8 (2) (b) (ii).
121. Article 8 (2) (b) (iii).
122. Article 8 (2) (b) (iv).
123. Article 8 (2) (b) (v).

discretion;[124] making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;[125] the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;[126] intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected provided they are not military objectives;[127] subjecting persons who are in the power of an adversary party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons;[128] killing or wounding treacherously individuals belonging to the hostile nation or army;[129] declaring that no quarter will be given;[130] destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;[131] declaring abolished, suspended or inadmissible in a court of law the rights and

124. Article 8 (2) (b) (vi).
125. Article 8 (2) (b) (vii).
126. Article 8 (2) (b) (viii).
127. Article 8 (2) (b) (ix).
128. Article 8 (2) (b) (x).
129. Article 8 (2) (b) (xi).
130. Article 8 (2) (b) (xii).
131. Article 8 (2) (b) (xiii).

actions of the nationals of the hostile party;[132] compelling the nationals of the hostile party to take part in the operations of the war directed against their own country, even if they were in the belligerent's service before the commencement of the war;[133] pillaging a town or place, even when taken by assault;[134] employing poison or poisoned weapons;[135] employing asphyxiating, poisonous or other gases, and all analogous liquids; materials or devices;[136] employing bullets which will expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;[137] employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in the annex to the statute establishing the court, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123 of the statute;[138] committing outrages upon personal dignity, in particular humiliating and degrading treatment;[139] committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7,

132. Article 8 (2) (b) (xiv).
133. Article 8 (2) (b) (xv).
134. Article 8 (2) (b) (xvi).
135. Article 8 (2) (b) (xvii).
136. Article 8 (2) (b) (xviii).
137. Article 8 (2) (b) (xix).
138. Article 8 (2) (b) (xx).
139. Article 8 (2) (b) (xxi).

paragraph 2 (7), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;[140] utilizing the presence of a civilian or other protected person to render certain points, area or military forces immune from military operations;[141] intentionally directing attacks against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;[142] intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.[143] conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.[144]

In the case of an armed conflict not of international character, serious violations of Article 3 common to the four Geneva Conventions 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause;[145] such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;[146] committing outrages upon personal dignity, in particular humiliating and degrading

140. Article 8 (2) (b) (xxii).
141. Article 8 (2) (b) (xxiii).
142. Article 8 (2) (b) (xxiv).
143. Article 8 (2) (b) (xxv).
144. Article 8 (2) (b) (xxvii.
145. Article 8 (2) (c).
146. Article 8 (2) (c) (i).

treatment;[147] taking of hostages;[148] the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[149] However, all these conditions are only applicable where the armed conflicts are not of an international character, and thus, does not apply to situations of internal disturbances and tension, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.[150] Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law,[151] namely, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;[152] intentionally directing attacks against buildings materials, medical units and transport, and personnel using the distinctive emblem of the Geneva Conventions in conformity with international law;[153] intentionally directing attacks against buildings dedicated to religion education, art science or charitable purposes historic monuments, hospitals and places where the sick or wounded are collected, provided they are not military objectives;[154] pillaging a town or place, even when

147. Article 8 (2) (c) (ii).
148. Article 8 (2) (c) (iii).
149. Article 8 (2) (c) (iv).
150. Article 8 (2) (d).
151. Article 8 (2) (e).
152. Article 8 (2) (e) (i).
153. Article 8 (2) (e) (ii).
154. Article 8 (2) (e) (iii).

taken by assault;[155] committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 3, paragraph 2 (8) of the statute, enforced sterilization, and other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;[156] conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;[157] ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;[158] killing or wounding treacherously a combatant adversary; declaring that no quarter will be given;[159] subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiment of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned not carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;[160] destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.[161] The applications of these conditions are subject to armed conflicts not of an international character and thus, does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.[162] It

155. Article 8 (2) (e) (iv).
156. Article 8 (2) (e) (v).
157. Article 8 (2) (e) (vi).
158. Article 8 (2) (e) (vii).
159. Article 8 (2) (e) (viii).
160. Article 8 (2) (e) (ix).
161. Article 8 (2) (e) (x).
162. Article 8 (2) (f).

however, applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. Notwithstanding these exceptions, nothing shall affect the responsibility of a Government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means."[163]

8. INDIVIDUAL CRIMINAL RESPONSIBILITY

The concept of individual criminal responsibility with respect to the law of armed conflicts cannot be separated from the concept of ***jus in bello*** since as a matter of fact, individual criminal responsibility can only arise when there is a breach of ***jus in bello.***

A precedent for individual criminal responsibility was set and put in proper perspective after the Second World War with the trial of German Nazi leaders and followed by the Japanese trials of military leaders who committed war crimes. The world witnessed an unprecedented level of barbarism, violence and destruction during the war. By the end of the war in 1945, there seemed to have been a consensus among the Allied powers i.e. Britain, US, France and Russia that the perpetrators of the crimes against the laws and customs of war should be brought to justice in view of the fact that there existed overwhelming evidence against the then Nazi Germany, that; it had targeted different categories of individual civilians, including homosexuals, gypsies, mentally ill and particularly Jewish nationals. Then was the height of

163. Article 8 (3).

anti-semitism as shown in the callous manners in which Jewish nationals were treated and killed in concentration camps of Auswictch and Sobibor.

At the London conference of August 8, 1945 the Allied powers concluded to establish an International Military Tribunal based in Nuremburg, Germany. The tribunal indicted, tried and convicted individuals who were held to have been individually liable for atrocities committed by the Nazi Government during the Second World War. The crimes proven against them included conspiracy, crimes against peace, war crimes and crimes against humanity. These convictions were termed a watershed and became fairly established in international criminal law that individuals in the course of armed conflict are liable for any criminal offence committed in the course of the conflict and cannot rely on any immunity. The Nuremburg Tribunal further held that states could no longer be held responsible for crimes committed by members of their armed forces in the course of armed conflict since states were mere abstract entities and that only holding individuals liable would the provisions of international humanitarian law be fulfilled. The same position was taken by the Tokyo Tribunal that was also established after members of the Japanese armed forces were accused of war crimes, genocide and crimes against humanity. The tribunal convicted two former Japanese Prime Ministers and other senior government officials for individual criminal offences committed during the war.[164]

164. T.U. Akpoghome & Anor "Individual Criminal Responsibility in Armed Conflict Situations: From Impunity to Accountability" in Nigerian National Human Rights Commission Journal (NNHRCJ) Vol 2, December, 2012, 134.

18. COMMAND RESPONSIBILITY

Command responsibility, sometimes referred to as the *Yamashita standard* or the *Medina standard*,[165] and also

165. The Doctrine of Command Responsibility was applied for the first time by the German Supreme Court in Lipzig after the First World War in the 1921 trial of Evil Muller. The doctrine also known as the "Yammashita or Medina standards" is based on the precedent set by the United States Supreme Court in the case of Japanes General Tomoyuki Yamashita. He was prosecuted in 1945, in a still controversial trial, for atrocities committed by troops under his command in the Philippines. Yamashita was charged with unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes: The Medina standard is based upon the 1971 prosecution of US Army Captain Ernest Medina in connection with MY Lai massacre during the Vietnam War. It was held in that case that a commanding officer being aware of human rights violation or a war crimes is liable for those crimes if he fails to take action. In ***Re: Yamashita*** before a US Military Tirbunal, General Yamashita was the first to be charged solely on the basis of responsibility for an omission. The General was commanding the 14th Area Army of Japan in the Philippines when some Japanese troops engaged in atrocities against civilians. By finding him guilty, the commission adopted a new standard, holding that where vengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable. General Yamashita lost his appeal before the US Supreme Court and was executed. In the ***High Command case***, the US Military Tribunal held inter alia that for a commander to be criminally liable for the actions of his subordinates, there must be a personal derelection which can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constituted criminal negligence on his part based upon a wanton, immoral disregard of the actions of his subordinate amounting to acquiescence. However, in the ***Hostage case***, the US Military Tribunal seemed to have limited the application of the doctrine where a commander has a duty to know to instances where he has already had some information regarding his subordinates unlawful criminal actions. Since after the Second World War,

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known as superior responsibility, is the doctrine of hierarchical accountability in cases of war crimes committed during war time or hostilities he they international or intrastate as the war against Boko Haram insurgency. Command or superior responsibility is often misunderstood. First, it is not a form of objective liability whereby a superior could be held criminally responsible for crimes committed by subordinates of the accused regardless of his conduct and regardless of his knowledge of the crimes committed. Nor is it a form of complicity whereby the superior is held criminally liable for some sort of assistance that he has given to the principal perpetrators. For instance, superior responsibility is a form of responsibility for omission to act i.e. a superior may be held criminally responsible under the doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.

The commission of one or more crimes attributable to a subordinate is a pre-requisite for application of the doctrine. In addition, the following requirements have been identified as forming part of the doctrine of superior responsibility under customary international law:

a. A relationship of superior – subordinate linking the accused and those who committed the underlying offences at the time of the commission of the crimes;
b. The knowledge on the party of the superior that his subordinate have committed or taken a culpable part in the commission of a crime or are about to do so; and

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the parameters of command responsibility have been in creased, imposing liability on commanders for their failure to prevent commission of crimes by their subordinates when they have reasons to know or have known their commission.

c. A failure on the part of the superior to take necessary and reasonable measures to prevent or punish those crimes.

The doctrine might apply in principle, to military commanders at whatever level in the military structure) or paramilitary leaders. Whilst, under customary international law, the elements of the doctrine are the same as matter of law regardless of the nature of authority which the superior exercised, the International Criminal Court Statute draws a certain difference between military and non-military superiors. The person to whom the doctrine is relevant must be superior, hierarchically, to those who have committed the crimes in the sense that there must have existed between them a hierarchical relationship within a common chain of authority or command. The relationship would be ***de jure*** (i.e. it is recognized and sanctioned in the relevant - internal or domestic - legal regime) or ***de facto*** (where the relationship of authority is one based, not on legal regulations, but a state of affairs). There is contradictory jurisprudence as to the time that is relevant to establishing the existence of such a link (the time when the crimes were committed or the time when the superior is said to have failed in his duty).

The superior must have been sufficiently aware of the commission of a crime by subordinates and/or of the real and concrete likelihood that a crime was about to be committed. Under customary international law, the superior must be shown to have known (i.e. he actually knew) or had reason to know (i.e. the superior possessed some general information putting him on notice of the commission of the crime by his

subordinates or that such information as was available to him should have put him on notice of the strong likelihood that his subordinate was about to commit an offence). To be liable under the doctrine the superior must also have failed to prevent or punish crimes committed by subordinates. A failure to fulfill either or both of these separate obligations (duty to prevent and duty to punish) could render a superior liable. Not every sort of failure would trigger superior liability. To meet his obligations, a superior is required to adopt necessary and reasonable measures.

In sum, the doctrine of superior or command responsibility could be defined as follows. A superior whether ***de jure*** or ***de facto,*** may beheld criminally responsible under the doctrine in relation to crimes committed by subordinates against humanity albeit with the active support or connivance of Nigeria's high military command. For instance, Amnesty International in its ***June, 2015 Report,*** has specifically mentioned the names of General Azubuike Ihejiraka, former Chief of Army Staff (from September, 2010 – January, 2014); Ola Sa'id Ibrahim, former Chief of Defence Staff (from October, 2012 – January, 2014) Air Chief Marshal Badeh, Chief of Defence Staff (from January, 2014 – July, 2015); General Ken Minimah, Chief of Army Staff (from January, 2014 to July, 2015) as being culpable for the war crimes of murder torture and enforced disappearance of captured insurgents. Other senior military officers indicted in the report include Major Generals John, A.H. Ewansiho, Obida T. Ethnan and Ahmadu Mohammed as well as Brigadier Generals Austin O. Edokpayi, Rufus O. Edokpayi and Rufus O. Bamigboye respectively.

No doubt the senior military officers indicted by the Amnesty International report would be liable if, at the time relevant to the charges, they were in a relationship of

superior/subordinate with the perpetrators, knew or had reason to know, should have known that these crimes had been committed or were about to be committed and, with and despite that knowledge, willfully and culpably failed to prevent or punish those crimes.

The doctrine of hierarchical accountability in cases of war was established by the Hague Conventions and has since then been regarded as a customary rule of international humanitarian war. It was applied both after the First and Second World Wars as well as subsequent tribunals established to try members of the armed forces engaged in either inter or intra states conflicts.

III. CONCLUSION AND THE WAY FORWARD

The war against the Boko Haram insurgency in North East Nigeria has generated a lot of issues as regards the protection, preservation and defence of human rights by Nigeria's armed forces in the prosecution of the war. This is as a result of the high number of casualties resulting from either side of the parties participating in the war. However, critics tend to look at the figures from Nigeria's armed forces and keep blind eye to the activities of the insurgents which has led to deaths of hundreds of thousands of human casualties apart from the destruction of properties in the affected areas.

In the process of the war, members of Nigeria's armed forces have been accused of violating human rights and the laws of armed conflicts as enshrined in the Geneva Conventions of 1949 and their additional protocols. Arguably, there is evidence of the extrajudicial killings, arbitrary arrests, torture, rape and indiscriminate attacks on civilians and even

the insurgents as reported by Amnesty International in June, 2015. It would appear from the report that Nigeria's armed forces seem to have been violating human rights of not only the insurgents but the laws of armed conflicts as well. The same argument can also be made against the Boko Haram insurgents.

The concomitance of the violations of the human rights and laws of armed conflict are arrest and trial by either Nigeria's municipal courts or referral to the International Criminal Court. In particular, members of Nigeria's High Military Command mentioned in Amnesty International's Report of June, 2015 should be property investigated by Nigeria's military high command and if they are indicted in the investigation, should be made to face justice. In the same vein, Boko Haram insurgents and their commanders, who have been captured and proven to have committed war crimes as well should be made to face the full wrath of the law either in Nigeria or at the Hague before the International Criminal Court (ICC).

RE-EXAMINING THE RIGHT TO SAME SEX MARRIAGE AS A HUMAN RIGHTS CLAIM

By

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and
Ifeoluwayimika Bamidele*

Abstract

The concept of human rights, like every other human concept, has its imperfections and must be carefully applied with prudence using values in the society to guide its evolution otherwise it becomes counter-effective. This research paper seeks to expose the sociological and legal values of human rights and the possibilities of abusing the concept to the detriment of mankind. Additionally, this research examines the evolution of human rights claims as there are attempts to expand it to cover claims that are not in consonance with the ultimate aim of human rights. Consequently, this paper argues that the ultimate aim of human rights is the preservation of humanity and, therefore, uses this as basis for refuting or confirming the validity of same sex marriage.

KEYWORDS: Human rights, humanity and same sex marriage.

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1.0 INTRODUCTION

Outside the society, man is either a beast or a god[1]. The aforementioned statement from Aristotle appropriately sets the tone for a discourse on human rights, for, human rights cannot be understood without reference to the sociological relationship man has within and with his society. Every human being maintains an interior and exterior lifestyle. His interior life refers to his attitude within himself, whereby he adopts a philosophy, makes decisions and eventually establishes a character. His exterior life refers to his relationship with his neighbour, beginning with his family, friends and the world at large. Consequently, the human society has a significant role or value in the definition and discourse of human rights since it would amount to nonsense if removed from the human society; for outside the society man is either a beast or a god. Human rights are therefore, relevant in relation to fellow humans; either to compel others to respect one's right or to impose a duty for the purpose of protecting human rights. A tiger cannot be compelled to respect human rights or be imposed with a duty to advance human rights. The authors are not unaware of the views by some environmentalists, who according to Professor Idowu William[2], claim that animals are equally entitled to rights thus requiring/arguing for a more elastic definition of rights. However, what the author are particularly concerned with here is "human rights" and nothing else as not

1. Aristotle, "*Politics*,"available at *https://www.goodreads.com/quote/183598-man-is-by-nature-a-social-animal-an-individual-who*, accessed on the 17th of August, 2015.
2. The Special Rights Theory Within the Context of Human Rights: How not to Reconstruct Sexual Equality, *Human Rights Review*, Vol. 3, February, 2012, (A Publication of Department of Public Law, Ahmadu Bello University and the National Human Rights Commission, 2012), p. 5

all rights are human rights. This paper would, therefore, be restricted to rights available to human beings only.

It is further argued forcefully in this piece that the main arbiter for testing the validity of human rights claims should be whether it is consistent with the interest of humanity. In other words, if a human rights claim threatens to empower the individual as to make him either a beast or a god, or, as to always ignore, avoid, or relegate the preservation of human life, dignity and race to irrelevance, that human rights claim must fail. In other words, a human right claim that seeks to make an individual's right to personal liberty so bogus as to legalize actions that would ultimately lead to the extinction of humanity, is as good as legalizing murder with all its attendant consequences.

This paper will consider the various definitions of human rights and subsequently identify its ultimate goal and eminently consider the validity of evolving human rights claims. Upon this background, this paper will examine the validity of the right to same sex marriage as a human right claim.

2.0 CONCEPTUAL CLARIFICATIONS

It is settled or trite that human rights concept, being an emotive one has successfully evaded a universally acceptable definition. Therefore scholars all over the world, of various fields ranging from anthropology, sociology, political science, psychology to law, are cursed to continuously seek definition that may be acceptable by all. The author recognizes this dilemma but seeks to examine the concept all the same, with a view to exposing the objective of the human rights agenda.

Before one can fully appreciate the concept of human rights, it is important to understand other cognate terms such as liberty or freedom, humanity and many others[3]. It has been said quite

3. See I. Williams, p. 5.

abundantly in many texts that human rights accrue to every individual by virtue of his being human[4]. It is then important to understand what it means to be human.

2.1 Human Being

Professor Idowu Williams examined what it means to be human in his work, and referred to Rene Descartes, Plato and Manuel Velasquez. The common theme in the attempts to define human being is the ability to reason. This ability helps man to understand his environment as well as the ramifications and consequences of his actions. In this context, morons may also be regarded as human beings who have a defect. It is because man can reason that he recognizes oppression and knows when he hurts others, he therefore agitates when he is oppressed and offers to compensate when he injures others. This ability to reason is thus useful only in the human society. A human person has also been defined as one who has all those things that enable him to live as a full human being. Angle and Svensson have argued that in order to be a person, one must have all those things that enable him preserve his life, which includes food, shelter and clothing.[5]

2.2 Liberty/Freedom

The term liberty is closely and sometimes used interchangeably with human rights but it is much more similar to freedom. The French Declaration, recognizing the possibility of abusing liberty or freedom has defined liberty as freedom to do anything so long as the action does not harm others. One is

4. O. P. Gauba, An Introduction to Political Theory, 4th Edition, New Delhi: Macmillian, 2003, p. 282, cited by I. Williams at p.3.
5 Stephen C. Angle and Marina Svensson :*The Chinese Human Rights Reader: Documents and Commentary*, 1999 – 2000, p. 142, retrieved from https://books.google.com.ng/books?accessed on 16th August, 2015.

able to or ought to know when he has injured another because of his ability to reason. In other words, one is free to act so long as he does not harm others or his community. The Black's Law Dictionary 2nd edition has defined freedom as:

The state of being free; liberty; self-determination; absence of restraint; the opposite of slavery. The power of acting in the character of a moral personality, according to the dictates of the will, without other check, hindrance or prohibition than such as may be imposed by just and necessary laws and the duties of social life. The prevalence in the government and constitution of a country, of such a system of laws and institutions as secure civil liberty to the individual citizen.[6]

It goes without saying that freedom of an individual is not absolute and is everywhere qualified because limitless freedom is anarchy. Jean Jacques Rousseau has, therefore, said, giving force to this argument, that, "man is born free, and everywhere he is in chains. One man thinks himself master of others, but remains more of a slave than they are"[7]. The idea that freedom is not absolute is important in human rights discourse because human rights are usually considered freedoms too. Where human rights claim becomes destructive to the ultimate aim of human rights and to the collective interests of global existence, such rights cannot but fail. It is upon this basis that certain acts that are inimical to human environment are prohibited, even though those actions may be regarded as an exercise of human rights. The Criminal Laws in Lagos State for instance, prohibits attempt to commit suicide

6 See the Black's Law online dictionary, available at http://thelawdictionary.org/freedom/; accessed on the 11th of August, 2015.

7 Jean-Jacques Rousseau, "Social Contract", retrieved from http://www.rjgeib.com/thoughts/rousseau/rousseau.html, last accessed on the 17th August, 2015.

and prescribes punishment for same. The philosophy underlying this law considers the right to life subject to the overall interest of the State.

2.3 Human Rights And Humanity

Human right has been defined by Angle and Svensson as:

Those conditions necessary for one to be a person and the condition for attaining the goals of an individual's becoming the best person he or she can be, thus enjoying the well being of individual life and also of humanity's becoming the best that it can become, thus allowing the great majority to enjoy the greatest possible well-being.[8]

This definition contemplates the well-being of the individual as well as the well-being of humanity since the individual is inextricably linked to humanity. It, therefore, goes without saying that human rights are values that are meaningful only in the society of humans and for the sake of humanity. It would, therefore, be myopic to define human rights and seek the aspiration of individuals yet turn a blind eye to the yearnings of humanity, or, seek those desires of an individual to the detriment of humanity. As Angle and Svensson put it:

...At the same time, we must realise that we are no more than single elements of humanity. My being a person cannot but be simultaneously related to humanity in many ways. My well-being is related to the well-being of the whole of humanity: when I am the best I can be and [fulfil] my responsibilities to humanity, the service of cementing together

8 Stephen C. Angle and Marina Svensson :*The Chinese Human Rights Reader: Documents and Commentary*, 1999 – 2000, p. 142, retrieved from<u>http://books.google.com.ng/books?</u>accessed on 16th August, 2015.

humanity allows humanity as a whole to attain the best possible [level]. Finally, this will enable humanity to attain the greatest well-being of the greatest number.[9]

The above definition does not suppress the theory that every individual is a separate entity capable of pursuing his own desires but that those desires be x-rayed in the lenses of humanity for, it is not all desires that are worth pursuing.[10]Humanity has been defined as human beings collectively and as also implying moral force.[11] Thus, human right is a Siamese twin of the concept of morals and cannot or should not be advanced without bearing the well-being of all human beings in mind.

Human rights is that value which the international community has been able to establish as an aspiration, standard or criteria which all institutions, whether of government or not, societies and every human community is required to strive towards for the preservation of mankind. Human right does not therefore depend on laws to remain valid. They are valid even where the laws do not so provide. The Nigerian Supreme Court has therefore stated in a well renowned case that, it:

> is a right that stands above the ordinary laws of the land and which is in fact antecedent to the political society itself. It is a primary condition to a civilized existence, and what has been done by our constitution since independence is to have these rights enshrined in the constitution so that the right could be immutable to the extent of the immutability of the constitution itself[12]. .

9. Ibid.
10. Ibid.
11. Robin Coupland, "Humanity: What is and how does it influence International Law?" *IRRC December, 2001, Vol. 83 No. 844, p 969.*
12. See the case of Ransome Kuti V. the Attorney-General of the Federation (1985) 8 NWLR (pt 6) 211, 230. Per Kayode-Eso, JSC.

The definition offered by the Nigerian Supreme Court underscores human rights as a value which transcends the provision of law hence its validity is universal and its origin from the great beyond. Human rights have also been regarded as God-given[13] and available to every man by virtue of him being human[14]. Professor Yemi Akinseye-George has lent force to the proposition that human rights remains valid without any law recognizing it within a given political system. He writes that, "human rights exist irrespective of whether or not they are recognized by a given society or legal system. Thus any human society which fails to recognize them is patently unjust and *unsustainable*"[15][emphasis mine]. Conversely, a human society that disregards human rights is heading towards extinction, because an unabated and continuous abuse of human rights would sure lead to the loss of human lives and properties and eventual annihilation of the human race[16]. It was for the sake of preserving each and every life that every individual is considered to have human right inherent in his person. Authors are settled on this point. M. Macdonald has articulated his views on the inherent nature of human rights as follows;

They are inherent rights to be enjoyed by all human beings in a country or nation and not gifts to be withdrawn, withheld or

13 See I. William, Op. Cit. at page 6.

14 O. P. Gauba *An Introduction to Political History*, 4th Ed., New Delhi: Macmillan, 2003, p. 282.

15 Y. Akinseye-George, *Improving Judicial Protection of Human Rights in Nigeria*, (Abuja: Centre for Socio-Legal Studies, 2011), 2.

16 For instance in the holocaust whereby Jews were being annihilated, six million Jews died. In Nigeria, the wanton destruction of lives and properties by the Boko Haram sect has claimed many lives. Without standards and values of human rights and campaigns for same it would be vague to condemn the actions of Boko Haram as unjust and liable for military response.

granted at a particular person's whims and caprices. They are part of the very nature of a human being and attach to all human beings everywhere in all societies, just as much as do his arms and legs.[17]

It is gratifying to deduce the following points from the foregoing statement:

i. Without human right, the human society is unsustainable; and

ii. human rights are meaningful only in the context of human society as they all invariably contemplate elements such as human society, law and the individual (the repository of rights).

Consequently, human rights issues could not have evolved if there were no human society. But what are the purpose, aim and use of this dogma tagged human rights? Why must human society strive towards observance of human rights? What does humanity stand to gain in the campaign of human rights? Does absolute liberty not negate the essence of human right? In providing answers to the posers above, it behoves the writer to consider the evolution of human rights and the events surrounding same.

3.0 HISTORY OF THE EVOLUTION OF HUMAN RIGHTS

Human rights as is known today, is a concept that has survived and thrived after intense friction between the mighty and subjects, it being the profit gained[18] after those struggles; the events that followed the American Revolution (April 19, 1775-

17 M. Macdonald, Natural Rights, in Waldron, ed, Theories of Rights, Oxford University Press, 1982, p 22

18 Profit here is used in the sense that human rights became recognized, acknowledged and admitted into legal instruments so that the contents were in force as much as the law was in force.

September 3, 1783), the French Revolution (1789- 1799), the Holocaust (1941 – 1945) and the Magna Carta 1215, all confirm that human rights gained more emphasis after a, most often than not, bloody resistance to oppression. But before the age of liberation human rights were initially considered natural rights which concept accorded **"God"** an eminent position in human rights debate. Natural rights theorists posited that human rights were God-given, inherent, inalienable, universal and immutable. Unfortunately, owing to the controversy surrounding the epistemology of God, natural rights was secularized and re-named human rights[19]. In ancient times, human rights were regarded as abstract concepts, left for philosophers to ruminate. But continuous oppression in most human societies led to revolutions and then a new dawn was set the stage for the reign of human rights campaign.

After each of the revolutions aforesaid, human rights instruments were produced, made to forestall future human rights abuses and to curtail the excesses of erstwhile tyrants. By and by the human rights contents began to expand as progressive legal instruments were made to enshrine human rights. The Magna Carta, which is a product of a struggle between the King of England and the Barons, during the reign of King John (1199 – 1216), is the oldest human right document. The Magna Carta, although controversial as to its legality,[20] provided that the King was subject to Law. It further guaranteed that:

> No free man was to be seized or imprisoned, or stripped

19 I. Williams, Op. Cit., p. 5-9

20 The Papal Bull issued by Pope Innocent III on the 24th of August, 12 15, abolished the Magna Carta and pronounced it abhorrent to royalty and a disgrace to the English People. See Claire Breay and Julian Harrison, *Magna Carta: An Introduction*, available at, http://www.bl.uk/magna-carta/articles/magna-carta-an-introduction; assessed on the 29th of July, 2015.

of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.[21]

In the period before the emergence of the Magna Carta, the Barons were being extorted by the King with incessant taxation required to fund the nation's army. These taxes were demanded and obtained without evidence that they were actually needed or used for the purpose for which they were collected. Similarly, when Britain was colonizing the United States, the indigenes were relegated to a lower class, their dignity trampled upon and the race pushed to the brink. In response, the American People resisted and there was an outbreak of severe conflict which led to the American Revolution. After the American Revolution, the British Colonial government was overthrown, an event which culminated into American Independence. The American Declaration of Independence 1776, provides as follows:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are, life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[22] A prominent feature of the American Declaration of Independence is, the human rights content which spells out the equality of all men, their liberty and their right to the pursuit of happiness. Similarly, the French revolution culminated in the *Declaration*

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21. Claire Breay and Julian Harrison, Op. Cit.
22. Masakazu Takayuki, Human Rights, the Right of Self-Determination and the Right to Freedom, The International Journal of Peace Studies, available at; http://www.gmu.edu/programs/icar/ijps/vol4_1/takayuki.htm; assessed on 29th July, 2015.

of the Rights of Man and of the Citizen, which emphasised the equality of man.[23]The French Constitutional Convention adopted in 1789 the Declaration of the Rights of Man and Citizen. The document, similar to America's provides something similar in the following words;

Men are born and exist free and with equal rights. The purpose of all political unions is to preserve men's inalienable natural rights. These rights are freedom, ownership, security, and opposition to repression. All principles of sovereignty resides in the citizens. Liberty means the ability essentially to take any actions without hurting others.[24]

The most recent international document, which was a reaction to massive carnage (World War II), is the United Nations Charter, 1945 and the concomitant Universal Declaration of Human Rights, 1948. The Universal Declaration of Human Rights (UDHR) did not mince words in recognizing the barbarous acts that threatened the existence of mankind. The Declaration abundantly recognises the inherent and inalienable rights of man which includes equality of all men, the right to dignity[25] of the human person amongst many others. As a matter of fact the Declaration gave boost to human right campaign by stating most elaborately, a comprehensive list of human rights thus serving as a template and galvanizer for modern constitutions. It further encourages

23 Ashley Kannan, *How Were Human Rights Influenced by the French Revolution?*, available at: *http://www.enotes.com/homework-help/how-were-human-rights-influenced-by-french-469355*: accessed on the 29th July, 2015.

24 See Munakata Takayuki, Op. Cit. The Nigerian Constitution as well as in many other civilized world, the equality all men, their liberty and the fact that sovereignty belongs to the people are all firmly established by the Constitutions. See s. 42, 35 and 14 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

25 Article 1 of the Universal Declaration of Human Rights, 1948.

all nations as well as institutions to strive to observe the standards of human rights enshrined in the document. Shortly after the UDHR, the United Nations, in furtherance to its intention to oblige nations in more concrete terms went further to establish the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICCPR which provides for immediate rights, otherwise known as negative rights, guarantees the rights of individuals Toeing the line of the United Nations, regions such as the African Union, European Union, *et cetera* have made similar human rights treaties, for example, the African Charter on Human and Peoples' Rights,1981. Further, nations have established Constitutions that acclaim the rights of citizens. In view of the above, one can safely say that human rights legal instruments are the middle ground between a binary population: one, the oppressed and the other, the mighty.

Be that as it may, a common feature in the human rights documents include the equality of all men, their liberty, the right to own property and the security of all men. All these rights are considered *sine qua non* to the preservation of humanity, especially in relation to his fellow man. With the benefit of hind sight, human rights discourse since the World War II has become unending. As a matter of fact human rights are evolving, reaching latitudes that would ensure the preservation of human species.

But human rights have equally been used as a platform to promote desires which are generating a lot of anxiety, controversy and argument. Right to same sex marriage is one of those rights being discussed and promoted in the international fora. It is our contention here that while these tensions are being managed, it is important to look at the purpose of human rights so as to determine whether right to same sex marriage qualifies as human right.

4.0 PURPOSE OF HUMAN RIGHTS

Gleaning from the evolution of human rights (product of resistance to oppression, struggles and revolutions) and taking a look at the preambles to international treaties on human rights, it is easy to say that the purpose of human rights concept is to preserve the specie of mankind, or, put in another way preventing actions or inactions that are inimical to the preservation of human existence. As a matter of fact human rights go to the root of humanity. For instance, the lessons from the holocaust (a tragedy that saw to the extermination of six million Jews) emphasised all the more, the need to individualize human rights for the purpose of preserving the human person and dignity. Accordingly we have the first, second and third generation rights, representing the civil and political rights; economic, social and cultural rights; and environment and development rights respectively. So far, lessons learnt indicate that for human rights to be effective, it must pertain to an individual. Further, aplethora of authorities confirm/re-echo that human rights pertains to every human being as a distinct entity and entitled to protection from the whims and caprices of any illegitimate contrary force. Consequently, the claim to human rights is available to any human being and those rights are not diffused into the rights of a community to which he belongs because they are distinct and legitimate. In short, human rights are inherent and inalienable. The Civil and political rights include:

1. the right to life[26];
2. right to dignity of the human person[27];
3. right to liberty of a person[28];

26. S. 33 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
27. S. 34 of the CFRN

4. right to fair hearing[29];
5. right to privacy[30];
6. right to freedom of thought conscience and religion[31];
7. freedom of expression[32];
8. right to freedom of assembly[33];
9. right to freedom of movement[34];
10. right to freedom from discrimination[35]; and
11. right to own moveable and immoveable property[36].

The second generation rights, which are also called positive rights require the government to provide those services that would enhance the living condition of the citizens. These rights include:

1. The right to education;
2. Right to adequate shelter;
3. Right to a decent means of livelihood;
4. Right to social services[37], *et cetera*.

These rights are required from every government because they have a huge control over the resources of state and they are humanitarian. In Nigeria for instance, the Constitution provides that mineral resources which generates a significant amount of revenue confers control and ownership on the Federal government.[38] Consequently, drawing from the stated

29. S. 35 of the CFRN
30. S. 36 of the CFRN
31. S. 37, CFRN
32. S. 38 of the CFRN
33. S. 39 of the CFRN
34. S. 40 of the CFRN
35. S. 41 of the CFRN
36. S. 42 of the CFRN
37. S. 43 of the CFRN
38. See s. 17 of the CFRN
39. See s. 44 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

primary purpose of government[39], the Nigerian constitution in its chapter II provides for the fundamental directives and directive principles of state policy, which underscore social and economic rights of citizens.

The third generation rights include:

1. the right of people to self-determination;
2. the right to development;
3. the right to peace
4. the right to humanitarian assistance;
5. the right to safe environment; and
6. the right of sexual minorities, ethnic religious and linguistic.[40]

The third generation rights represent the concomitant duty on the government to utilize natural resources at their disposal for the good of the people and much emphasis on the humanity. All these are efforts in the human right campaign made to consolidate the values of human rights which should serve as a yardstick for justifying or condemning actions[41]. While the civil and political rights represent the very barest minimum rights every government ought to guarantee, the second and third generation rights represent a much more advanced level of human rights. The view presented above may suggest the thought that human right is divided and therefore set up against the argument that human right is one indivisible phenomenon. The writer is aware of those arguments but is here more

39 See s. 14 of the CFRN, which provides that the primary purpose of government shall be the welfare and security of all the citizens.

40. Adrian Vasile Cornescu, "the Generations of Human's Rights", *Days of Law: the Conference Proceeding*, 1st Edition., Brno Masaryk University, 2009, p 4

41 See the preamble to the UNDHR, 1948

concerned with the evolution of human rights and how they have come to be categorised. Consequently, the point we are struggling to make here is that as events unfold (natural or artificial), the function of human rights campaign has been to advance theories that would expand the human rights content towards preserving humanity. Hence human rights concept is applied, explained, developed and promoted to preserve human beings and the specie at large, in spite of events that threaten its existence. At this juncture, it may present a clearer picture if one were to consider the human society without the concept of human rights.

E. LIMITATIONS ON HUMAN RIGHTS

It is an axiom that although human rights are guaranteed and in fact inherent, the expression of such rights cannot be without limits. The understanding of human rights as a guarantee without limits, easily leads to individualism whereby every individual is right depending on what he wants and his choices must be respected and protected. The American Declaration of Independence, in a bid to promote, preserve and protect the individual provides that every individual is entitled to the pursuit of his own happiness. But this pursuit of happiness must be done with care so as not to interfere with the rights of others and in order to avoid self-destruction. Consequently, the expression of one's rights is regulated by the law, and ultimately the community since that is where sovereignty resides[42], otherwise an unlimited guarantee of human rights would definitely lead to anarchy[43]- a situation the observance of human rights is meant to avoid. Consequently legislations all over the world define certain acts as criminal and to that

42 See s. 14 of the CFRN, 1999 (as amended)

43 See s. 45 of the CFRN which legitimizes restraint on human rights where crime has been committed. These crimes, being a product of the legislature and ultimately the society.

extent, anyone caught in such act would have the weight of the law visited upon him which would lead to a further limitation imposed on the rights otherwise available to him. As a corollary, the Nigerian Constitution provides that laws that are reasonably justifiable and laws meant to protect public morality, public safety, public health may remain valid in spite of the right to personal liberty or any other rights guaranteed in the constitution.[44]

Recognizing the danger in unqualified right to personal liberty therefore, Article 30 of the Universal Declaration of Human Rights, 1948 provides that, "nothing in this declaration may be interpreted as implying for any state, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein"[45].

The society owes it as a duty to protect the rights of individuals hence governments are engendered to carry on the functions that are humanitarian in nature, of protecting the weak and ensuring the general welfare of the populace[46]. It is not in doubt that people, governments, etc, are duty bound either in conscience or in law, to protect the weak from having his rights violated. As a matter of fact human rights are considered to reach such limits as to promote the rights to self determination whereby an individual has the right to choose options he considers appropriate to his circumstances. In applying the principles underlying the rights to self-determination, individuals have been considered capable of determining their sex, pattern of reproduction, whom or what to associate with in the name of marriage and even who would exercise the option of euthanasia should the need arise. The

44. *Ibid*
45. See Art. 30 of the UNDHR
46. See s. 14 of the CFRN

question this paper seeks to answer is to determine whether the community in which one lives has a role to play in the right to marry the same sex.

II. THE RIGHT TO SAME SEX MARRIAGE

The world today continues to grapple with human rights issues and international organizations are committed to ending human rights abuses perpetuated by government or persons. Consequently, there is a push to advance the frontiers of the right to personal liberty, to be expanded as to allow the marriage of persons of the same sex. Same sex marriage is defined as the ceremonial union of two people of the same sex[47]. This means that a man may marry another man and a woman another woman. Although same sex marriage arouses other issues other than human rights, such as the definition of marriage, the major focus here is to consider whether the right to personal liberty is elastic enough, given the jurisprudential stance as well as the social construct of our society, to validly regard homo sexual rights as human rights. Homosexuals argue that they have the right to exercise their liberty to the extent of redefining marriage and that a confrontation to their choices is discrimination or infringement on their human rights. As a matter of fact, the same sex protagonists are very keen in combating the stigma that gays suffer in the society. The continuous push for the right to personal liberty, freedom from discrimination and right to association of homosexuals has led to the legalisation of same sex marriage in some States.

III. SAME SEX MARRIAGE IN THE U.S.

The United States, Norway, Netherland and a host of other countries have successfully challenged the traditional definition

47. Garner B. A. *et al* (eds) *Blacks Law Dictionary 8th Edition* (USA: Thomson West Publishing Co., 2004), 994

of marriage and have therefore prepared a fertile ground for the promotion of rights to have same sex marriage. The United States, on the 26th of June, 2015 became the 21st Country in the world to allow same sex marriage nationwide. The Supreme Court in the case of *Obergefell, et al v. Hodges, Director, Ohio Department of Health, et al,*[48] decided that States should cease and desist from disallowing same sex marriages. Drawing inspiration from this decision, the President of the United States, Barack Obama has urged African States including Nigeria to legalise same sex marriage. Right to same sex marriage was justified in the aforementioned judgment with the right to personal liberty[49], freedom from discrimination, right to marry[50] and freedom of association[51]. In our opinion, the right to personal liberty is the root of the claim, the others are meant to protect the option already exercised. The Supreme Court made this abundantly clear when it gave reason for its judgement as based on the right to individual autonomy, liberty and the right to marry. The court said that:

> *The first premise of this court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and*

48. See Obergefell, *et al* v. Hodges, available at http://edition.cnn.com/2015/06/26/politics/scotus-opinion-document-obergefell-hodges/index.html; accessed on the 15th of August, 2015.
49. See Obergefell, *et al* v. Hodges, *supra*.
50. Loving v. Virginia, 388, U.S., 1, 12 confirming right to marry across race and Turner v. Safely, 482 U.S. 78, 95, confirming the right of prisoners to marry.
51. Kabo, S. E., Same Sex: A Rejected Human Right Culture in Nigeria, *Kogi State University Bi-annual Journal of Public Law* (KSU BJPL), vol. 5, No. 1, 2013, p. 100 - 101

liberty is why Loving invalidated interracial marriage ban under the Due Process Clause[52]

SAME SEX MARRIAGE IN NIGERIA

The jurisprudence in Nigeria, as at today, is radically contrary. In Nigeria as well as in most African countries, same sex marriage stands prohibited. In 2013, Nigeria enacted a law that prohibits and criminalizes[53] same sex marriage. The Act provides that any person who contracts a same sex marriage or even civil union commits a felony and upon conviction is liable to a term of imprisonment for 14 years[54]. The Act even goes further to prescribe 10 years imprisonment for those who register, operate, or participate in gay clubs, societies and organization, or directly or indirectly makes public show of same sex amorous relationship[55]. The same punishment awaits persons who administer, witness, aid or abet any of the acts aforementioned[56]. To make its point clearer, the National Assembly seized the opportunity of the same sex marriage legislation to close up the lacuna existing hitherto, on the definition of marriage. In its section 7 the Act defined marriage as a legal union between persons of opposite sex in accordance to the Marriage Act, the Islamic Law and Customary Law. Beyond prohibiting same sex marriage, the Same Sex Marriage (Prohibition) Act prohibits a civil union of same sex[57]and even voids any same sex marriage contracted outside of Nigeria in Nigeria[58]. This radical stanceh as

52. See Obergefell, *et al* v. Hodges at p. 3 (full text of the judgment)
53. See the Same Sex Marriage (Prohibition) Act, 2013
54. See s. 5 (1) of the Same Sex Marriage (Prohibition) Act, 2013
55. See s. 5 (2) of the Same Sex Marriage Act, *supra*
56. See s. 5 (3) of the Act
57. See s. 1 (1) of the Act
58. S. 1 (2) of the Act.

therefore attracted pressure from western countries to make Nigeria revoke its stance on same sex marriage. Interestingly, even the US Supreme Court in 1986 had once upheld a law from Georgia criminalizing same sex marriage as well as certain homosexual act as criminal[59].

While the same sex marriage apologists like the U.S. Supreme Court has posited and based their argument on the liberty and autonomy of the individual, States like Nigeria on the other side argue that it is immoral, against the cultural definition of marriage and even self-destructive to those who engage in it[60].

G. SAME SEX MARRIAGE AND HUMANITY

Bearing in mind the platform on which the protagonist of same sex marriage make their claims – human right, particularly personal liberty - it is pertinent at this stage to analyse same sex marriage based on the submission earlier made on the purpose of human rights, which is to preserve the human race. Before we proceed it is pertinent to state that no human right is absolute;[61] this notion is settled. Granted that the right to personal liberty is a human right, in its exercise recourse must, in this context be made to the ultimate purpose of human right which has already been argued here as humanity. The question agitating for answer here is does the right to same sex marriage not violate the interest of humanity?

59 See Bowers v Hardwick, 478 U.S. 186

60. See Messerli, J. 'Should Same Sex Marriage be Legalized?' retrieved from www.balancedpolitics.org/same_sex_marriages.htm accessed on 7th December, 2014, cited in Kubo, S. E., Same Sex: A Rejected Human Right Culture in Nigeria, *Kogi State University Bi annual Journal of Public Law* (KSU BJPL), vol. 5, No. 1, 2013, p. 102 - 103

61. The CFRN states that the rights guaranteed notwithstanding, any law that is reasonably justifiable in a democratic system limiting those rights shall remain valid.

As said earlier, human right loses relevance as soon as the element of humanity is obliterated, for, a single individual is an integral part and a product of humanity. As Aristotle puts it, the society precedes the individual[62] and anyone who can do without society is a beast or a god. Further, as Angle and Svensson have argued, an individual is not more than an element in humanity. His rights and aspirations should therefore be pursued bearing in mind the interest of humanity since not all desires of the individual are worthy to be pursued or attained; the well-being of an individual should be closely related to the well-being of humanity[63]. Freedom without limits obliterates the element of society in human rights discourse. Therefore, the right to freedom without limits is vain and clearly destructive to humanity as a whole because:

1. **It Does Not Allow Procreation;**

Although the law cannot compel procreation or marriage, the biological requirement for procreation is sexual communication between a male and female. When males, for instance, marry and communicate sexually, no amount of ingenuity will help any of the partners conceive and bear children. If everyone engages in same sex marriage procreation would definitely be halted and humanity pushed to the brink of extinction. The right to same sex is therefore an attempt to cut off the very source of validity of human rights.

2. **Same Sex Marriage Distorts The Fabrics Of The Family And Society;**

The family is the smallest unit in the society made up of the father, mother and children. Same sex marriage is diametrically opposed to this construct of the family and is

62. Aristotle; *"Politics"*, *Supra*
63. See Angle and Svenason, *Supra*

bound to create problems such as confusing the role of the father with that of the mother. In same sex marriage who is the father? This question would definitely cause psychological imbalance for children adopted by such families;

3. Same Sex Marriage Is An Affront To Religious Beliefs;
A large number of religions all over the worldabhor same sex marriage. Since marriage is an institution considered to have been created by or involving the creator, God or whatever diety the faith subscribes to, it is believed that such an institution should not be desecrated on the altar of satisfying an individual's desires in the name of same sex marriage. Marriage for Christians as well as Moslems and even traditional worshippers has a divine purpose which we believe cannot be attained in same sex marriage.

4. Same Sex Marriage Diminishes The Life Expectancy Of The Partners Involved;
Researches conducted and concluded shows that partners of same sex marriage are very likely to die 20 years before others who are married normally[64]

5. Same Sex Marriage Could Provide A Slippery Slope In The Legality Of Marriage
Legalization of same sex marriage may be considered opening the flood gates on the definition of marriage as it has already been done in the United States and other jurisdictions, negating the *Hyde v. Hyde* definition, now allowing anybody to define marriage based on their personal desires and aspirations[65]. The

64 See https://www.lifesitenews.com/news/yet-another-study-confirms-gay-life-expectancy-20-years-shorter , accessed 9th December 2015

65 See statutory definition in Interpretation Act Cap132,L.F.N 2004

dope may suggest new unions between man and an animal, man and trees or objects.[66]

8. CONCLUSION

Human right, being a legal and sociological phenomenon, does not exist in vacuum. It is therefore important that in the evolution of human rights, care must be taken to look at the humanity of the claims being promoted as human rights because not all human desires and aspirations are whole or ought to be pursued. For instance, an injured victim in a communal clash would definitely nurse the idea of revenge thereby contemplating the plans to take the law into his hands. That desire ought not to be pursued in the name of the right to personal liberty otherwise the communal clash would never end.

Again, it is because of humanity that we have values and concepts such as human rights, how can one use human rights to destroy the very source of human rights? Accordingly, the issue of right to same sex marriage is quite novel and its validity as a human right claim fails for the reason that:

1. right to same sex marriage is in excess of human rights because it does not serve any purpose in humanity but is opposed to the essence of humanity;
2. right to same sex marriage is opposed to known and accepted biology, nature as widely accepted, tradition and the legal system in Nigeria, hence it ought not to be propagated;
3. same sex marriage disorientates children thereby giving room for psychological problems;[67]
4. same sex marriage reduces life expectancy[68].

66. See S. E. Kabo, *ibid*, p. 102 - 103
67. *Op. Cit* at n.64
68. ibid

I. RECOMMENDATION

Bearing in mind the interest and well-being of humanity, it is recommended as follows:

a. That same sex marriage opposes the well being of humanity and should therefore be curtailed otherwise irreversible danger will occur;
b. Apart from criminalizing same sex marriage, the government, family, traditional and religious leaders should sensitize people about the importance of the family and the need to avoid same sex marriage;
c. Same sex marriage is being promoted on the platform of right to personal liberty; care should be taken in defining personal liberty so as to avoid encouraging a personalised definition that would be destructive to humanity;
d. An immediate response to the wave of campaign for same sex marriage should be planned by the African Union and articulated on international fora such as in the United Nations;
e. Persons of same sex orientation should be counselled, rehabilitated and integrated into the society but not discriminated against;
f. Although same sex marriage is not to be encouraged, the punishment for same sex marriage in the Same Sex (Prohibition) Act, 2013 seems excessive, community treatment orders which align with rehabilitation is encouraged.

ABORTION AND THE RIGHT OF THE NIGERIAN WOMAN TO HER PRIVACY: BENCHMARKING THE ROLE OF THE MEDIA IN HUMAN RIGHTS EDUCATION

By

Lydia Nimo Mmadu*

Abstract

This paper examines the concept of right to privacy within the context of abortion and the sanctity of life on the one side and the role of the media in human rights education, especially in the face of extreme illiteracy and male-dominated polity on the other side. The questions asked are: Should the right to privacy of a woman override her unborn child's aspiration to live? Should a woman in exercise of her constitutional right to privacy terminate her pregnancy, particularly in a patrimonial society like Nigeria where the woman and her unborn child are often seen as commodities owned by the husband? At what stage should the right of a woman to privacy give way to competing demands of equality of justice - justice for the woman, justice for the unborn child and justice for the society? To answer these questions, the paper did a comparative analysis of the right to privacy and the abortion question in other jurisdictions. The paper made use of primary research materials from relevant statutes and libraries. Secondary research materials such as textbooks and law journals, ecetera were also considered. The paper finds that while a woman should be allowed to enjoy her right to privacy without undue interference, granting her an untrimmed right to abortion under the guise of the right to privacy, is

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counterproductive. There is strong need to expand the frontiers of abortion law in Nigeria to include not only situations when the life of the pregnant woman is in danger but also to cases where her health is in issue, where she is a victim of rape or ravishment by armed robbers, or where the child will be terminally ill or handicapped, thus becoming a burden and a liability on the family and society. This is where the media must come in to educate women of their rights and the needs for them to act within the framework of allowable practices in their best interest.

KEYWORDS: Right to Privacy, Abortion, Nigeria, Media.

1. INTRODUCTION

Abortion is a topical and highly volatile subject any day, anytime, anywhere. This perhaps prompted a learned writer to describe the phenomenon of abortion as a 'conundrum'.[1] One area of interest in the everlasting debate on abortion is how to create and maintain a balance between women's inalienable right to do what she wants without interference from the state and other people etc and the right of the state to protect society as a whole, through the instrumentality of the criminal law.

Arguments for or against the criminalization of abortion draw some support from the right to privacy which is one of the underpinnings of constitutional bills of rights in modern democracies. The question then is: To what extent, if any, should the criminal law be used to police a woman's right to decide whether to have a child or not? This is the fulcrum of this paper.

Part 1 of the paper introduces this work while part 2 examines the concept of abortion and privacy. Part 3 focuses on abortion and the law with analytical emphasis on Nigeria. Comparative examination of the subject is also considered in this part of the work. In part 4, the paper examines the role of the media in human rights education especially among the rural women of Nigeria. The paper attempts to find a nexus between the right to freedom of information and the press to include the right to educate and disseminate information needed for good governance and education of the people, particularly women who may lack the necessary educational and intellectual capability to fully understand and hold on to their right as

1 Ademola Yakubu , 'Abortion Conundrum: The Legal Dimension', in Essays in Honour of Prof. C.O. Okonkwo (SAN); E.S. Nwauche & F.I. Asogwah, Eds. (2000) P.51.

enshrined under the law. In part 5, the paper is concluded and recommendations for reform are offered.

2 CONCEPTUAL CLARIFICATIONS

2.01 Abortion – Meaning And Nature

Abortion is the destruction or bringing forth prematurely of a human foetus before it is capable of sustaining life on its own[2]. The Blacks Law Dictionary[3] defines abortion as the spontaneous or artificially – induced expulsion of an embryo or foetus.

Akin Ibidapo-Obe explained that abortion is the termination of a pregnancy by the willful act of any person[4]. This paper adopts the above definitions particularly that of Ibidapo-Obe and sees abortion as a form of miscarriage of pregnancy brought about by intentional human intervention. Abortion may be lawful or unlawful, depending on the criminal law of the jurisdiction concerned but one certainty of abortion is that it is usually induced by human beings.

2.02 What Is Right To Privacy?

The right to privacy or right to private life, like most legal concepts, is nebulous and ipso facto, defies an easy definition. One difficulty in formulating a concise definition of the right to privacy is how to determine the extent and plenitude of 'privacy' itself and when it is legitimate to violate that right.

2 See Ferlico's Criminal Law and Justice Dictionary (2001) P.5. 310th edn.

4 See 'Comparative perspective on Nigerian Abortion Laws' in Essays on Human Rights Law in Nigeria. (2002) P.163.

According to Jadesola Akande, it is 'uncertain' as to how far the right is available[5].

Other dilemmas confronting the articulation of what the right to privacy connotes are that the concept is vague, uncertain and problematic. For instance, some of the critical issues associated with the concept range from: On what basis can the right be compromised? Is it for detection of crime, for protection of public morality or for the protection of public interests? The difficulties are legion. However, Steve Foster,[6] has formulated what he considered the meaning of the concept. The learned writer asked rhetorically: 'What do we actually mean when we talk of the right to privacy or right to private life?'[7] In answering the question, he explained as follows:

In one sense, when we talk of the right to privacy, we are referring to the general right to be left alone, a desire to be allowed to enjoy a particular space... which the state or others should not be allowed to penetrate.[8]

Continuing, the learned author stated further that the right to privacy, or more specifically the right to private life, may also refer to the right to make choices about one's life, such as whom to marry or associate with, whether you should undertake an operation, and decisions relating to sexual orientation or activity. [9]

This paper agrees with the above definitions but prefers the second arm of the definitions. What the right therefore entails in essence is the autonomy of an individual to make

5 Akande: *Introduction to the Constitution of the Federal Republic of Nigeria.* 1999 P. 89.

6 Human Rights and Civil Liberties (2003) pp. 358-359.

7 *Ibid* at p.358.

8 *Ibid* at p.359.

9 *Loc cit.*

life's choices without undue interference by the state or others. But Obafemi Awolowo, contended that such a definition as formulated by Foster, is 'a speculative abstraction'[10], what can only be confined to Thomas Hobbe's State of Nature; which in itself, existed only in a 'Sugar-gandy perspective'.[11] In his view, the right to private life is worthwhile and beneficial only when its enjoyment is relative.

From the above reasoning, it is suggested that the right to privacy is not absolute but relative to other rights and interests of other people and society. This thinking appears coterminous with the philosophy which underlies legislative restrictions, through the criminal law, on the constitutional guarantee of the right to private life in most countries in modern time. Jadesola Akande seemed to pitch her tent with this view when she submitted as follows:

It must be noted that the right to privacy may be abrogated by a law which is reasonably justifiable in the interests of defence, public safety, public order, public morality and for protecting the rights and freedoms of other persons.[12]

No doubt, these needs to protect public morality, the rights and freedom of other persons etc, have been strongly canvassed in some of the debates on abortion and a woman's right to privacy. But as Mr. Justice Brennan of the United States Supreme Court noted in the case of *Eisentidt vs. Beard;*[13]

If the right to privacy means anything, it is the right of the individual or single, to be free from unwarranted governmental

10 Obafemi Awolowo, The Peoples Republic, (1968), p.75.

11 This phrase is borrowed from George Orwell's Animal Farm P.5, meaning a thing that only exists in the figment of imagination of a person.

12 *Op. Cit* at p.90.

13 405 U.S 438 (1972).

intrusion into matters fundamentally affecting a person, as the decision to bear a child.

3. ABORTION AND THE LAW: THE NIGERIAN SITUATION

The 1999 constitution of Nigeria as amended, in section 37, provides that the privacy of citizens' life is guaranteed and protected. The constitution does not however define what the right to privacy stands for. The restriction and derogation clause embodied in section 45 (1) of the same constitution preserves the validity of any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons. Perhaps, relying on this derogation clause, the Nigerian state has enacted penal laws criminalizing abortion in the country.

Currently, there are three sections under the Criminal Code[14] pertaining to abortion. These are sections 228, 229 and 230. Section 228 deals with a situation where any person unlawfully administers to a woman or applies force of any kind or uses other means to procure her miscarriage. It is immaterial whether the woman is with a child or not.

Section 229 contemplates a situation where a woman procures her own miscarriage without connivance with a third party; while section 230 deals with any third party that unlawfully supplies drugs or instruments or procures same for any woman to effect her miscarriage.

According to Mowoe, it is doubtless that the above sections make it unlawful for anyone, such as a pregnant

14 C.A.P. C381..F.N; 2004.

woman or any other person to procure abortion or supply implements for procuring abortion.[15] It seems that for abortion to be a crime under the sections it must have been done unlawfully. Thus, in the case of *R. vs. Eidgal*,[16] the West African Court of Appeal held that the expression, 'unlawfully' used in the sections presupposed that there must be some situations in which it is lawful to effect abortion for example, to save the life of the mother. The court relied heavily on the English case of *R.vs.Bourne*[17] where McNaghten J. interpreted the word 'lawfully' under the Offences against the Person Act, 1861, as follows:

If a doctor is of the opinion, on reasonable grounds and with adequate knowledge that the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who under the circumstances and in that honest belief operates, is operating for the purpose of preserving the life of the mother.... The word unlawfully implies, in my view that abortion may be lawful under such circumstances.

According to Mowoe, section 297 of the Criminal Code seems to reflect this philosophy.[18] In the words of the section: A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

15 'The Abortion question: A comparative Analysis; in A Blueprint for Nigerian Law', Professor A. O. Obilade (ed). 1995, P.271 at 273.

16 (1938) 4 WACA 133.

17. (1939) 1 K.B 687.

18 *Op. cit.* at p.273.

This no doubt suggests that under the Criminal Code, abortion is not absolutely prohibited; rather it can be restrictively done to save the life of the woman concerned. Thus, a person procuring abortion under such a situation may be relieved of criminal liability but not civil liability.[19] Concurring with this position, Ademola Yakubu, submitted that therapeutic abortion is allowed under the Criminal Code.[20]

Where a person does an act in the prosecution of an unlawful purpose to wit: procurement of an abortion, and death results, he may be charged with murder. This was the position of the Supreme Court, per Salami J.S.C in the case of Ajah *vs. State*.[21]

Generally, there is a dearth of case law on the interpretations of section 228 – 230 of the Criminal Code, thus nullifying the development of the law in this regard.

Under the Penal Code,[22] sections 232, 233 and 234 deal with abortion. By section 232 of the Code, whoever voluntarily causes a woman with child to miscarry if the miscarriage was not caused in good faith for the purpose of preserving the life of the woman is guilty of an offence. Under this section, the woman must be with a child. This is unlike the Criminal Code provision where it is immaterial whether the woman is with a child or not. Like the Criminal Code provision, this section permits restrictive abortion for the purpose of saving the woman's life. As Ademola Yakubu puts it, "It can then be concluded that under the provisions of the laws in Nigeria, the only justifiable reason for causing a miscarriage or for procuring an abortion is for the purpose of

19 Mowoe, *Ibid*.
20 *Op. cit*, at p.58.
21 (1993) 4 NWLR (Pt. 288) 403 at 421.
22 The Penal Code, L.N. No. 25 of 1960 as amended.

preserving the life of the mother'.[23] Thus, within the context of a woman's constitutional right to privacy, that is, freedom to decide whether to beget a child or not (even when her life is not in danger), is outside the contemplation of Nigerian abortion laws. Sadly, the constitutional provision of section 37 of the 1999 Constitution of the Federal Republic of Nigeria on the right to privacy has not been tested by any woman in Nigeria thus making the issue to be a mark point.

3.01 Abortion Law In The United States Of America

In the United States of America, abortion law is largely influenced by the decision of that country's Supreme Court in the case of *Roe vs. Wade*[24], which voided nearly all abortion laws in every state. The facts of the case are as follows: Jane Roe, a single who was residing in Dallas County, Texas, instituted a federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas Criminal Abortion Statutes were unconstitutional. She contended that she was unmarried and pregnant and that she wished to terminate her pregnancy by an abortion performed by a competent licensed physician under safe clinical conditions, but was unable to get a 'legal abortion' in Texas because of the criminal law. She further contended that the law abridged her right to privacy protected by the 1st, 4th, 5th, 9th and 14th amendments. A three judge District court declared the abortion statutes as vague and infringing plaintiff's right to privacy. But no injunction was granted to restrain the state from enforcing the laws. On appeal to the Supreme Court, by a majority of seven to two, the court upheld the decision of the lower court. The decision of the

23 *Ibid* at p.59.
24 410 U.S. 113 (1973).

Supreme Court per Mr. Justice Blackburn, can be summarized as follows:

(i) That abortion was a constitutional right that the state could only abridge after the first six months of pregnancy.
(ii) That the right of privacy included the right to abortion
(iii) That since abortion was a fundamental right, state regulation must meet the strict scrutiny standard which meant that state must show it had a compelling interest in having an abortion law.
(iv) That the word 'person' in the 14th amendment did not apply to the unborn
(v) That the state has an important interest in both preserving the health of a pregnant woman and in protecting foetal life.
(vi) The State's interest in maternal health became compelling at three months.
(vii) The State's interest in foetal life became compelling at six months.
(viii) That the state may regulate abortion during the second three months but only for the protection of the woman's health
(ix) That the state may regulate or ban abortion during the third trimester to protect foetal life.[25]

Following closely on the heels of *Roe vs. Wade,*[26] was the case of *Webster V Reproductive Health Services.*[27] In this case,

25 See generally, Ademola Yakubu *op. cit* pp.63-64 of Mowoe op. cit. pp. 282 and see also Laurence Tribe's American Constitutional Law, (1988) pp. 1341-1362.
26 410 U.S. 113 (1973).
27 492 U.S 490 (1989).

the US Supreme Court allowed a Missouri statute stating that human life began at conception. The court also barred the use of state resources for abortion. It was further held that viability test for advanced pregnancies should be conducted, that a 24 hour waiting or reflection period should be observed by the woman before abortion is carried out and that an informed consent or parental consent for minors should be obtained. In fact, it was the opinion of the court that the state had a compelling interest in foetal life throughout pregnancy and the trimester framework of Roe and its viability line ought to be discarded.

According to Laurence Tribe,[28] this reasoning perhaps stemmed from the state's general obligation to protect life. But the learned author contended that biologically and medically, it is controversial to ascertain whether life begins at conception. He further stated that the reason must have been influenced by religious undertone and the extant normative order. This observation cannot be far from the truth.

Be it as it may, the case comprehensively reviewed the case of *Roe vs. Wade*[29] and is now the dominant precedent on abortion law in the United States of America. Nevertheless, it is worth stating that the law of abortion in the U.S. has assumed the status of a constitutional challenge. However, bearing in mind the apparent conflict between the decisions in *Roe vs. Wade,*[30] and subsequent cases like *Planned Parenthood vs. Casey*[31] and *Webster vs. Reproductive Health Services,*[32] the point is well made that a woman can abort a pregnancy in the U.S. as an extension of her constitutional right to privacy

28 Ibid. pp. 1341 – 15.
29 410 U.S. 113 (1973).
30 410 U.S. 113 (1973).
31 505 U.S. 833 (1992).
32 492 U.S. 490 (1989).

but the critical issues are; when should that be done vis-à-vis the state's role in balancing private interest with the interest of the state to ensure that a life in the womb is not unnecessarily terminated? The law recognizes that a woman has a right to decide her reproductive destiny but where the foetus is medically examined to be viable; the state may intervene, upon proof of compelling interest, to ensure that the foetus is preserved for the continuity of the human race.

3.02 Abortion Law In The United Kingdom

Historically, the common law of abortion applied after a child had quickened in the womb. Until this period was reached, it was not an offence to procure abortion. But in 1803, it became a capital offence to procure the miscarriage of a woman quick with a child. There was a problem as to when a woman was or was not quick with a child. Common law did not recognize a foetus as a human being capable of being killed hence, homicide was defined to be 'unlawfully killing a reasonable person who is in being and under the king's peace'. The phrase 'a reasonable person who is in being' means that the victim must be a living human being.[33] The modern law of abortion in England is the Abortion Act of 1967 as amended by the Human Fertilization and Embryology Act, 1990.

Section 1(1) of the 1967 Act states that the law relating to abortion means sections 58 and 59 of the Offences against the Person Act, 1861 and any rule of law relating to the procurement of abortion. By section 58 of the Offences against the Person Act, 1861, it is an offence for every woman who is

33 See Smith & Hogan, Criminal Law, 10th edn, p.401 cf. Dr. Yakubu, op. cit, 60 see also Clarkson & Keating: Criminal Law: Text and Materials, (2003) opp. 629 – 630.

with a child to procure her own miscarriage, or for any person to procure her miscarriage whether or not she is with a child. This leg of the section echoes the position under Nigerian law.

Under section 59 of the 1861 Act, it is an offence to unlawfully supply or procure any poison, instrument or noxious thing to procure the miscarriage of a woman, whether she is with a child or not. In *R. vs. Whitchurch*,[34] the defendant was convicted under this provision.[35]

The amendment effected on section 1 of the Abortion Act of 1967, by the Fertilization and Embryology Act, 1990, has changed the face of abortion law in England. Section 37 of the 1990 Act provides inter alia:

Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith:-

(a) That the pregnancy has not exceeded its 24th week and that the continuance of the pregnancy would involve risk greater than the physical or mental health of the pregnant woman or any existing children of her family, or

(b) That the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman or

(c) That the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated or,

(d) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

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34. (1890) 24 & 130.

35 See Smith & Hogan, Op. cit at p.324.

One feature of the above provision is that an abortion may be lawfully carried out only by a qualified medical practitioner under the stated circumstances. Also, abortion is permitted where it is medically certified, to protect the health of the pregnant woman. This contrasts with the Nigerian position where it is restricted to saving the life (not health) of the woman. Also, unlike the British law, abortion law in Nigeria has not drawn a distinction between abortion carried out by registered medical practitioners and those performed by quacks. This is evident from the provisions of section 228 of the Criminal Code and 233 of the Penal Code which prohibit 'any person' or 'whoever' from carrying out abortion.

Another provision of interest under the British Abortion Law is section 1 of the 1990 Act which amends section 5 (2) of the 1867 Abortion Act. By the amendment, multiple pregnancies can be reduced, by killing one or more of the fetuses.

The case of *R.vs. Bourne*[36] epitomizes the attitude of English Courts to the Abortion Law in that country. In that case, Mr. Bourne, an experienced Surgeon, performed an abortion on a fifteen year old girl who had been raped. The jury considered that he had acted in good faith for the preservation of the health of the pregnant girl and he was acquitted. Health, in this sense may mean a state of complete physical, mental and social well being and not merely the absence of disease or infirmity, as defined by the World Health Organization.

This paper supports that judgment. Imagine the mental trauma the girl would have lived with throughout her life with

36 (1938) 3 All E.R. 615 or (1938) IKB 687.

the child as a product of her ravishment by rapists. From the above analysis, we submit that abortion in England focuses on the fact that life must be protected from conception, but that it is also necessary to terminate a pregnancy for the purpose of protecting the pregnant woman and also for the purpose of not giving birth to physically or mentally abnormal or handicapped children.

On how the law on abortion relates to privacy right in the United Kingdom, it has to be borne in mind that historically, no general right of privacy existed in the domestic law of England.[37] But under the Human Rights Act, 1998, incorporating article 8 of the European Conventions' right to privacy into British municipal law, there appears to be a privacy right now well recognized in England. Though there is no direct case yet on the issue whether article 8 confers a right on a pregnant woman to have abortion, in *St George's Health Trust vs. S*[38] it was held that a pregnant woman of full age and capacity had a right to refuse a caesarean section. The court held that such a right was founded on the woman's private right to physical integrity or autonomy and bodily dominion. Since the right to privacy protects individual autonomy and choices from interference, perhaps, this reasoning by the court would be called in aid when the issue relates to an abortion.

4. THE MEDIA AND PROMOTION OF HUMAN RIGHTS

The place of the mass media in the promotion of human rights in any given society cannot be overemphasized. The mass media generally, can be used to bring about positive attitudinal

37 See the case of *Malone vs. Metropolitan Police Commissioner (No. 2)*; (1979) Ch. 344.

38 (1998) 3 All ER 673.

change in individuals. According to McQuail,[39] emphasis is laid that a belief in the power of mass media was initially based on the observation of their great reach and apparent impact, especially in relation to the new popular newspaper press. The popular press was mainly funded by commercial advertising, its content was characterised by sensational news stories and its control was often concentrated in the hands of powerful press barons. The media are a collective means of communication by which the general public or populace is kept informed about the day to day happenings in the society. The media are also said to be an aggregation of all communication channels that use techniques of making a lot of direct personal communication between the communicator and the public. While talking of mass media however, the word 'mass' means a large number of people or a collection of organs of communication and information dissemination that reaches out to a large number of people. The information circulation is not only confined within members of the public but the media also serves to coordinate the information flow between government and the public and vice versa, in our own case, between leaders and the led and vice versa.

McQuail[40] describes the mass media as the organised means for communicating openly and at a distance, to many receivers within a short space of time. Murphy, as cited by Daramola,[41] sums up societal impacts of the media in different ways: as oil, glue and dynamite. As glue, social cohesion is maintained by communication. Murphy contends that the

39 McQuail, D. (2005). *McQuail's Mass Communication Theory*. London: SAGE Publications Limited.

40 Ibid.

41 Daramola, I. (2003). *Introduction to Mass Communication*. Lagos: Rothan Press Ltd.

media give all of us, including strangers, something to talk about, by setting agenda of discussion. He likewise describes the mass media also as dynamites that can rip society apart. Milton, as cited by Egbon,[42] agrees with Murphy when he says the press is capable of making or destroying government given the appropriate conditions: it can cause war or create peace. It can promote development or create difficulties in the way of development. Merril, cited by Asemah,[43] says the media possess the power to work against it. The media can oil and ease the economic wheel of a country or bring them to maintain social equilibrium, facilitate change or to seek radical alternatives.

Human rights violation in most developing nations has become an issue of utmost concern. Human rights law has been developing in an unprecedented way and has become part of international law as a whole. International human rights law serves as a standard against which to measure national behaviour. This is found in the human rights protection system of states, international institutions, transnational professional associations, corporations, trade unions, churches, nongovernmental organisations and other bodies, who respond to distress signals from abroad on the basis of these instruments. With the World Conference on Human Rights in 1993, efforts are being made to develop a rationalised

42 Ebgon, M. (1995). *Social Responsibility and the Nigerian Mass Media: Strategies and Tactics for Balance Media Coverage of Crisis*. Lagos: Rothan Press Ltd.

43 Asemah, E.S. (2011a). "Mass Media as Tools for Promoting Girl- Child Education in Jos Metropolis": A Paper Presented at the Second Professor Idowu Sobowale Conference, held at Caleb University, Imota, Ikorodu, Lagos, Between 14th and 15th of May, 2011.

framework within which human rights should be promoted and protected.[44]

Theoretically, McQuail,[45] outlines the principles of the social responsibility theory as:

i. media should accept and fulfill certain obligations to the society;
ii. these obligations are mainly to be met by setting high or professional standards of information, truth, accuracy, objectivity and balance;
iii. in accepting and applying these obligations, the media should be self-regulating within the framework of law and established institutions; the media should avoid whatever might lead to crime, violence or civil disorders or give offence to minority groups; the media as a whole should be pluralist and reflect the diversities of their society. Giving access to various points of views and granting all the right to reply.

Society and the public, following the first named principles, have a right to expect high standards of performance and intervention can be justified to serve the public good; and journalists and media professionals should be accountable to society as well as to employers and the market. The theory is relevant to the study because it calls for responsibility on the part of the journalist. Thus, the journalist should be able to use the mass media to promote human rights in Nigeria.

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44 Shikyil, S.S. (2002). —International Institutions for the Promotion and Protection of Human Rights. | in Dakas, D.C.J. (Eds). *New Vistas in Law*. Vol 2. Jos: St. Stephen Books.

45 McQuail, D. (1987). *Mass Communication Theory* (2nd ed). London: SAGE Publications.

Agenda setting theory on the other hand says that the media are not always successful at telling us what to think, but they are quite successful at telling us what to think about. The theory was proposed by Maxwell McCombs and Donald L. Shaw in the year 1972/1973. According to McCombs and Shaw, cited in Asemah,[46] in choosing and displaying news, editors, newsroom staff and broadcasters play an important part in shaping political reality. Readers learn not only about a given issue, but how much importance to attach to the issues from the amount of information in a news story and its positions. Wimmer and Dominick[47] observe that the theory on agenda setting by the media proposes that the public agenda or what kind of things people discuss, think and worry about is powerfully shaped and directed by what the media choose to publicise. The theory is therefore relevant to the study because the media can be used to set the agenda of human rights in Nigeria, so that the people will think along that line.

4.01 Conceptual Classification Of Human Rights

Human rights can be seen as all those rights that every citizen of a state ought to have without any deprivation. They are those inalienable rights of every individual, whether old or young, poor or rich, male or female. They are not given to human beings as gifts. This explains why Arinze[48] argues that human rights are not gifts from men to women or other men that are open to withdrawal or cancellation at the whims and

46 Asemah, E.S. (2011a). __Mass Media as Tools for Promoting Girl- Child Education in Jos Metropolis'': A Paper Presented at the Second Professor Idowu Sobowale Conference, Held at Caleb University, Imota, Ikorodu, Lagos, Between 14th and 15th of May, 2011.

47 Wimmer, R. and Dominick, J. (2000). *Mass Media Research: An Introduction*. New York: Wards Worth Publishing Company.

48 Arinze, E. (2008). *Domestic Violence against Women in Nigeria*. Onitsha: Folmech Printing and Publishing Com. Ltd.

caprices of the giver. Human rights are not subject to withdrawal or to be held at the pleasure of anybody or granted when it pleases the giver. Eze, cited in Gasiokwu,[49] sees human rights as that which represents the demands or claims, which individuals or groups make on society, some of which are protected by law and have become part of Lex Lata while others remain aspirations to be attained in the future. Gasiokwu[50] avers that some human rights provisions have been enacted into various national constitutions of the world, some of which are being referred to as fundamental rights. Perrett, cited in Gasiokwu,[51] argues that if the fundamental rights being asserted are intended to be legal rights, such rights are properly called fundamental when they are expressed in or guaranteed by laws, which are basic or pre-eminent laws of the legal system in question. For example, rights which are specified in a written constitution or in judgments of a legislature designed to render the constitution more specific in certain areas. Some other legal rights may be called fundamental where, although the rules containing them are not all constitutional, in the sense that they are or closely appertain to the rules that could be call part grundnorms or the basic rules of recognition, adjudication and change of the legal system. Nevertheless, these rights are legally basic in the sense that their existence and content is essential to the existence and content of many other lesser rights of the system.

From the foregoing, fundamental human rights may be seen as such freedoms, which are expressed in or guaranteed by basic or pre-eminent laws. These rights are usually referred

49 Gasiokwu, M.O.U. (2003). *Human Rights: History, Ideology*. Jos: National Books.
50 *Ibid*
51 *Ibid*

to in some constitutions as the rights to freedoms of thought, conscience and religion, right to freedom of press and speech, right to freedom of movement, freedom from discrimination. The freedom of information law that was signed into law in Nigeria recently is a fundamental human right. Thus, in this context, fundamental rights are tied to fundamental freedoms. The media have a very crucial role to play in the promotion of human rights in any country. The media, according to Asemah,[52] are agents of social change that can bring about positive attitudinal change in the audience; they set agenda for the people to follow in any society. The mass media are crucial to opinion formulation and eventual outcomes of events. The media are champions of human rights. They act as the eyes, ears and voices of the public, drawing attention to abuses of power and human rights, often at considerable personal risk. Through their work, they can encourage governments and civil society organisations to effect changes that will improve the quality of people's lives. Journalists, photographers and programme-makers frequently expose the plight of children and women caught up in circumstances beyond their control or abused or exploited by others. It is important to consider and educate the women of their rights to privacy and the scope as well as limit of the rights. A situation whereby the pregnant woman submits to the whims and caprices of the husband or even a male partner to abort her pregnancy or to keep the pregnancy irrespective of the wishes and health and psychological implications that may attend an abortion, is an abnormal show of discrimination to the woman in her exercise of the right to privacy and dignity of her person.

The media as the watchdog of the society have a crucial role to play in promoting and protecting human rights in

52 *Ibid* note 46.

Nigeria. The media serve as an effective network for educating and informing the people of human rights and also making those who often trample on people's rights to know that they are doing the wrong thing. The media, generally, could be of immense assistance in this direction. The role of the media in safeguarding human rights cannot be overemphasized. Through the media, the people can be aware of their fundamental human rights and the constitutional protection of their rights. Through constant vigilance on infringement of human rights and by exposing police brutality and repression, the media have caused a significant rise in public awareness of these issues. The media can be used to fight against child tracking and women tracking in Nigeria and the world beyond. This implies that the media can create awareness about gender issues. In societies where human abuses are rampant, the media can be used to raise international and national awareness of human rights. Only the media can presently fulfill this watchdog function of promoting human rights. Pate[53] argues that the role of the press in the protection and advancement of human rights within the context of its social responsibility in the society includes:

i. exposing cases of human rights abuses and violations;
ii. to expose perpetrators of human rights abuses for moral condemnation and legal actions;
iii. to publicise the plights of victims for people to know or see, so that they could wake up, react and demand for justice;
iv. to discourage human rights abuses;

53 Pate, U.A. (2011). —The Press, Social Responsibility and the Coverage of Human Rights Issues in Nigeria During the Abacha's Regime, || in Oso, L and Pate, U. A. (Eds). *Mass Media and Society in Nigeria*. Ibadan: Malthouse Press.

v. to help secure redress or compensation for victims;
vi. to enlighten and sensitise the general public on possible human rights violations;
vii. to assist law enforcement officials and human rights groups to track down cases of human rights abuses; and
viii. to educate the people on how to use appropriate communication channels to articulate their views and give expressions to their aspirations.

In summary, the media play an important role in promoting and protecting human rights. This is because they are agents of information and they can educate the public on their fundamental rights. To this end, the paper makes the following recommendations:

a. The media should be massively employed to promote the issue of human rights in Nigeria, because they are persuasive in nature.
b. The media, whether broadcast or print, must know the values that are non-negotiable; one of these issues is the issue of human rights. The media must address these fundamental issues to be able to practise its delegated duties effectively and efficiently.
c. There is the need to pass laws banning the early marriage practices that normally keep girls out of schools. When a girl marries at a very tender age, it affects her chances of getting a quality education.

To fight against human rights abuses, the media can work with non-governmental organisations to strengthen human rights and the media can also be used to wage war against gender discrimination and religious extremists and can also oppose violence against women and children.

5. CONCLUSION

This paper has touched on the abortion laws in three jurisdictions. There is no absolute right to abortion in any of the jurisdictions. Law does not operate in a vacuum but must be situated within the culture and social practice of the people. In Nigeria, both Islamic and Christian religions abhor abortion in whatever forms because by the tenets and dogmas of these religions, life begins at conception. So, 'a child within a mother's body is not part of that body but is an autonomous life of its own'.[54] Thus, the soul of the foetus belongs to the child from the moment of conception and is therefore murder to prevent a life from coming into existence via abortion. This view accords with traditional attitude towards abortion in Nigeria. According to Mowoe, 'all over Nigeria, children are regarded as gifts and blessings from God. To abort a pregnancy is generally seen as a taboo. Thus, criminalizing abortion, therefore originally agreed with the *volkgeist* of the people'.[55] But despite the criminalization of abortion in the country, there is a boom in abortion through even quacks. Unwanted pregnancies and abandoned babies cannot be totally unconnected with lack of opportunity and access by teenage girls to safe and legal abortions.

There are also the rampant cases of V.V. S. phenomenon, especially in the North, arising from teenage pregnancies which perhaps could have been managed through safe and legal abortion. But the strict abortion law in the country does not contemplate any abortion that is not performed solely to save the life of the pregnant woman.

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54 Yakubu, Op. cit. p.

55 Op. cit, p.272.

Professor Akin Ibidapo-Obe has queried such a legal regime, contending that in a sexually permissive society where economic deprivations are rife, welfare programmes are minimal, yet the state prohibits abortion when the ultimate responsibility of child-care devolves on the individual' one wonders what moral right the state has to determine when and in what circumstances one can take on the added responsibility of children.[56]

While we do not subscribe to a woman's complete right to abortion under the guise of right to privacy, there may be need to expand the frontiers of abortion laws in Nigeria to include not only when the life of the pregnant woman is in danger but also to cases where her health is in issue, where she is a victim of rape or ravishment by armed robbers, or where the child will be terminally ill or handicapped and thus become a burden and a liability on the family and society. This suggestion accords with the law in England. The American situation which even recognizes the stigma of unwanted pregnancy, of large family size and poverty, etc as reasons for abortion, is not subscribed to in this paper as that approach can impact negatively on the right of society to procreate and perpetuate itself.

The strict regulation of abortion in Nigeria has encouraged underground abortions sometimes leading to complications and untimely death. If the law is reformed along this line, may be many people and families, could be saved the agonies of unwanted pregnancies, abandoned children and untimely death associated with abortion cases. The issue is really contentious and needs a proper synthesis between the religious, moral and legal arguments for or against abortion,

56 Op. Cit. p. 176.

but certainly, this paper endorses a paradigm shift in the current Nigerian abortion laws.

THE UTILITY OF ELECTRICITY AS POWER TO FUEL NIGERIAN DEVELOPMENT

By

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Abstract

Electric power is a major driver of the global economy. This is because it is an enabler for development. This makes the Power sector of any country very important and strategic as it can affect the level of development and thus global influence, of that country. This paper discusses the utility of electricity as power in that regard. It pays attention to electric power as a national resource in Nigeria, discussing also the current reforms in the Nigerian Power sector which aim to make for improved electric power supply to citizens for greater developmental strides. The paper concludes that with the overriding importance of electricity as power with regards to development, Nigeria has to do all she can to ensure that her citizens have the required access to electric power that can ensure her economic development.

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INTRODUCTION

Human rights generally, are those inalienable rights that accrue to all humans the world over. There are three generations or categories of human rights- civil-political, socio-economical and collective-developmental.[1] Civil-political rights which are regarded as first-generation rights are rights which deal with "liberty and participation in political life."[2] They are directly possessed by individuals and are constructed negatively (i.e. things the government should not do) in a bid to protect individuals from the powers of the State. [3] They are "rights of protection."[4] Socio-economic rights are second-generation rights and they "guarantee equal conditions and treatment."[5] These rights are not individualistic, and are not directly possessed by citizens of States. Rather, they consist of positive duties (i.e. what the government should do) imposed on States/governments which they are to fulfil for the benefit of the individuals.[6] They are "rights of provision."[7] Collective-

1 This division into three generations is said to have been introduced by Karel Vasak, a Czech jurist in 1979. See Globalization 101, "Three Generations of Human Rights," <www.globalization101.org/three-generations-of-rights/> accessed 11 December 2015.

2. *ibid.*

3. *ibid.*

4. Spotlights on Health and Rights, "History and Categories of Human Rights," <www.healthandrights.ccnmtl.columbbia.edu/human_rights/history_categories_human_rights.html> accessed 11 December 2015. These rights can be found in Articles 3-21 of the United Nations Declaration on Human Rights, and the International Covenant on Civil and Political Rights.

5 Globalization 101, "Three Generations of Human Rights."

6 *ibid.*

7 Spotlights on Health and Rights, "History and Categories of Human Rights." These rights can be found in Articles 22-27 of the United Nations

developmental rights on their own part are third generation rights, and they are said to be "rights of peoples and groups held against their respective States."[8] They are also referred to as "solidarity rights"[9] and are said to cover "global concerns like development, environment, humanitarian assistance, peace, communication and common heritage."[10]

Of importance to us in this work, is the right to development, a sub-set of the collective-developmental human rights. The right to development is said to be founded in the provisions[11] of the United Nations Charter,[12] the Universal Declaration of Human Rights (UDHR)[13] and the two International Covenants on Human Rights i.e. the International Covenant on Civil and Political Rights (ICCPR)[14] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[15] This right was proclaimed in 1986 by the United Nations in its "Declaration on the Right to

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Declaration on Human Rights, and the International Covenant on Economic, Social and Cultural Rights.

8 Globalization 101, "Three Generations of Human Rights."

9 S. Marks, "The Human Right to Development: Between Rhetoric and Reality," (2004) 17 Harvard Human Rights Journal, 138.

10 *Ibid*. This generation of rights it is noted, "constitute a broad class of rights that have gained acknowledgment in international agreements and treaties but are more contested than the preceding types [the other generations]." See Globalization 101, "Three Generations of Human Rights."

11 See generally United Nations Human Rights, Office of the High Commissioner (OHCHR), "Declaration on the Right to Development at 25,"
< www.ohchr.org/EN/Issues/Development/Pages/Backgroundrtd.aspx > accessed 11 December 2015.

12 (1945) 1 UNTS XVI.

13 (1948) G A Res.217A (III), UN Doc A/810.

14 (1966) 999 UNTS 171.

15 (1966) 993 UNTS 3.

Development."[16] The Declaration in its Article 1 defines the right as follows:

...an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[17]

The right to development has been noted to include the following: "full sovereignty over natural resources; self-determination; popular participation in development; equality of opportunity ; and the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights."[18]

Electricity is known to be one of the resources that enable national development thus directly promoting the right to development. The Lao's Electricity Law of 1997[19] defines electricity in Article 2 as follows:

...a form of energy such as electrical power, electrical current, electrical voltage, and electrical energy, produced from

16 The Declaration was adopted by the United Nations General Assembly Resolution 41/128 of 1986. It is noted that before this declaration, the right to development had been recognised in Article 22 of the African Charter on Human and Peoples' Rights 1981 which provides thus: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

17. Declaration on the Right of Development, Article 1.

18 OHCHR, "Declaration on the Right to Development at 25."

19 No 02-97/NAL 2/4/ 1997

electrical production, sources, such as hydropower, wind power, solar energy, fuel, and coal. [20]
However, 'The Electricity Law Handbook: A Montanan's Guide to Understanding Electricity Law' [21] states that "electricity is a form of energy."

The Electricity sub-sector is part of the generic power or energy sector,[22] which is a strategic sector and major infrastructural resource for development.[23] Electricity is utilized in every part of modern day life and in every sector of the economy. Electrical energy is calculated in units described as a flow of current, and measured as voltage. Electricity is both energy and light.[24] It is in this case either a means or an end. As a means, it can be utilized to produce energy, as an end it can be regarded as a product of energy by itself. Thus in the first case, electricity is defined as a form of energy which

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20 This definition however excludes nuclear power, wave power and fuel cell technology which are also viable sources of electrical energy. However, this is because many States have separate legislation for nuclear energy.

21 'The Electricity Law Handbook: A Montanan's Guide to Understanding Electricity Law' (Environmental Quality Council Legislative Environmental Policy Office) <http://www.leg.mt.gov/lepo.asp> accessed 31 November 2012.

22 The relationship between energy, power and electricity is that the first and second are precursors to the latter. Thus power and energy come before electricity and yet energy is a unit of electricity as defined as the capacity it has to do things. The usefulness of energy is its ability to create a sustained change in an environment and ,create the environment for change and development. It is also in this context that the extant research addresses the issue of assessing the effectiveness of harnessing electrical power for development to increase the capacity of what the individual and by extension a nation can achieve.

23. S., Thomas, 'Electricity Liberalisation: The beginning of the end,' PSIRU Research paper, September 2004. 1.

24 International terminology refers to the energy sector as a holistic sector comprising of oil and gas, nuclear and other sources of energy with electricity as a subsector.

is used to power machines for increasing productivity.[25] It can either power simple appliances as in domestic appliances or complex machines used in large scale production in industrial factories. In the second place, it can be used to produce light. Light is an integral aspect of life. Without it some of the most mundane tasks that attend humanity cannot be done. In the analysis of utility, it is light as a component of electricity that enables activities related to development. In fact, the constant availability of light announces the wealth of the nation and of the individual, especially if the allusion to light as being power is made. The importance of energy and its younger sibling, light in the form of electricity makes them an important aspect of the world's political, economic and social interactions. Thus, they are subject to the attention of the international global organizations such as the World Bank. In addition, they are an important aspect of global economic cooperation and trade.

1.2 Electric Energy as an Enabler for Development

Man with the discovery of energy has largely subdued nature under him as decreed by God Almighty, [26] with the use of power external to his body thus increasing overall productivity of the individual or corporate entity or even State. Enhanced productivity is the advantage the human animal has over all other animals apart from thought/reason. This is linked to the ability of man to harness and utilize energy/power from sources other than itself for use. This enables him carry out

25 'Electricity Law Handbook'(n 23).

26 "...and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground." Genesis 1:26-27:NIV, Quran 2: 36 (Creation of Man)

feats that are greater than his own natural endowments. Energy is an enabler in the sense that it allows for more to be done, by individuals, businesses, industries and even the State. Harnessing energy has therefore enabled man to go beyond his ordinary physical attributes to expand his capacities beyond the usual. The question that then arises from this is what exactly is energy?[27] A working definition is that 'energy is the ability to do work.' Energy includes concepts such as vigour, force and power. These words all imply the ability to move or the innate ability to effect a change in an existing situation. According to the Montana Handbook of Energy Law; "...energy is a useful unit of power."[28] It is by this simple definition, force that is useful in effecting an action. Energy or power can also be said to be the component within things that provide force and movement, (that is vigour). The words energy and power are synergistic in nature and are inter-used in common discourse. However, power also connotes the ability to move externally as in strength or might. The terms are an essential aspect of all living organisms, as energy is an incidence of all existence.[29] The term "energy" could also be used to describe any source of energy, such as coal, petroleum oil, gas or nuclear energy, or it could be used to describe the end use of the modification of such energy source such as gasoline or electricity. Additionally, energy could also refer to the things that could be utilized from the use of electricity or gasoline.[30] In

27 This is the umbrella definition for all sources of power and their uses.

28 'Electricity Law Handbook'(n 23).

29 These words describe the ability of a living organism including the human being, to exist and impact on its/his environment by acting on it either positively or negatively by its/his various actions as a living being or as a consequence of a pre-determined action.

30 An example in this case would be the energy derived from using gasoline to fuel and move a vehicle or that from utilizing electricity to perform a task such as threshing rice in a mill.

contradistinction, Electricity or Electric Power is a generic term that is used to describe the gamut of sources that are used as the primary energy source for enhancing productivity for development.

The early days of social evolution of human beings were premised on the movement of social groups from place to place as hunter/ gatherers. The skills needed for this were sling and spear throwing and wielding of cutting instruments which required strength on the part of the hunter. However, the need to settle down in specific location to farm required new skills such as tilling the ground, milling the harvested grain and carrying water. Man turned to animals to harness their *power* in enabling the work. The ox, horse[31] and donkey that had provided a means of transport for their owners were recruited as enablers in the field. These animals provided more strength for the work being prosecuted and increased work capacity, which amounted to an increase in productivity. Over time, it also became known that water and wind in the form of watermills and windmills could be harnessed as a means of producing power with the resultant increase in output and productivity. This knowledge resulted in the discovery and use of machines and expanded the realms of human possibilities into the industrial age, which is powered by electrical power from a variety of sources, such as nuclear, coal, hydro and gas powered plants. The resultant industrialization has empowered man both physically and financially and resulted in wealthier societies.

Man's subordination of his environment is such that the term *power* is regarded as being a factor outside the human

31 This is the origin of the term *horsepower* to indicate the capacity of work that a machine can do.

body, properly described as a unit of capacity or enablement. The irony of *power* in whatever guise, is however the fact that although it is intended to simplify life, it has only succeeded in making life more complex[32]. This is to the extent that living in today's world, especially in the developed societies, entails such an array of skills connected to the utilization of power, that have to be upgraded every so often.[33] Thus, those who are unable to cope with the pace of electricity dependant progress in these societies or the world, end up as the dregs of humanity, poverty stricken and unable to function or integrate fully as productive members of the larger society. This may be extrapolated to show that the same is true of nations; thus nations that are unable to generate power/energy and utilize it, end up at the bottom of the world development table, mired in poverty.

Power also called electricity or energy, is the common denominator of development worldwide. Electricity therefore has a converse relationship with development, thus increased electricity generation means more development. Conversely then, the less electricity a nation generates the lower the development curve. The importance of energy in the development of a nation is also implicit in its classification as one of the basic infrastructure needed for the movement to a machine tool based society and developed economy with the implicit capacity of such an economy for increased productivity and competitiveness in the global economy. The

32. See 'Plugged-In Age Feeds a Hunger for electricity' <http://www.nytimes.com/2009/09/20/business/energyenvironment/20efficiency.html?_r=1&pagewanted=2&ei=5040&partner=MOREOVERNEWS> accessed 22 January 2015.

33 Development has progressively become a matter of what is possible rather than what is necessary. This has seen a vain reeling out of technology and energy utilizing products intended only to occupy the mind that is now free from engagement as a result of some other technology.

basic denominator of development is the availability of infrastructure and services which are based on the infrastructure. Electricity is in this sense, both a basic infrastructural requirement, the facilitator for the efficient operation of other infrastructure as well as a service. Electricity is also unique in the way that it is essential for the commencement of the initial development of any nation and at the same time the indicator of a seamless development process.

Today a large part of national development indices are measured in terms of the energy produced and consumed therein. The situation today also, is that there are many sources of power ranging from orthodox to unorthodox sources. The former are those commonly in use the world over, while many of the latter are still in the research stage/ and or not generally accepted. The plethora of research efforts generated by the search for more energy sources indicates that alternative sources for energy supply are a high priority for the world today. This is due to the fact that present sources of energy are either finite and/or expensive in nature; the implication is that any research which results in a viable new energy source will be welcomed enthusiastically in the world community.

The importance of energy in the development of a nation is implicit in its classification as one of the basic infrastructure needed for the movement to a tool based economy and the inherent capacity of such an economy for increased productivity. This correlation between energy and development is clear in the sense that, just as it was in the creation story, energy use is a reflection of development anywhere. This is due to the fact that produced or harnessed energy has become a means of impacting on the natural environment thereby increasing productive capacity and in that sense is utilized in

industrial organizations for maximized production of goods and services.

Marc A. Rosen and Ibrahim Dincer in their research titled *Exergy as the Confluence of Energy, Environment and Sustainable Development*, [34] coined a new word *exergy* to describe the connection between these factors. They note that, The results suggest that exergy provides the basis for an effective measure of the potential of a substance or energy form to impact the environment and appears to be a critical consideration in achieving sustainable development.

This definition introduces the concept of sustainable development which has dominated recent discussions on development. Thus development to be valid must be viable and sustainable in the short and long term. This can be achieved by incorporating elements in the development process which ensure its durability in the society in which it is applicable assures that the process becomes ingrained in the society and is therefore long lasting. In addition, the process ensures that future generations are not deprived of their means of sustenance in the form of natural resources. Sustainability pertains to the environmental, social and economic dimensions of development. It is usually portrayed as that development which is socially and culturally acceptable to the people and can be maintained by them economically and is environmentally friendly.

As noted above, electricity is a commodity that is ubiquitous in modern development. Thus measurements relating to development such as the per capita rate or Gross National Product/Development are (GNP/GDP) intricately tied up to the electrical power utilization of States. This is because all the accoutrements of modern civilization are tied up

34 Published in the Abstract 2001, *EditionsScientifiqueetMédicales Elsevier SAS.*

intrinsically to the utilization of massive amounts of energy. It is a truism today that electrical power generation and utilization as a whole is a valid indication of national development. The classification of nations as poor is due to their inadequacy in electricity generation as reflected in low economic productivity replicated in poor Gross Domestic Product (GDP) and Gross National Product (GNP). The more energy consumed, the more the productivity, whether for positive or negative ends. It is only to be expected in this case, that GDP per capita is a significant indication of electricity access;[35] the larger the urban population in a country then, the higher the demand for electricity. This is because the sophisticated demands of urban life are connected to the use of externalized or artificial power supported by electricity.[36] The more the urban centres the more the demand for energy/electricity. Since developed nations tend to have more urban centres with even the areas referred to as rural having access to the same facilities as the urban centres, it follows therefore, that the usage of electricity will be more. In fact, it can be stated that the provision of energy in form of electricity encourages the development of urban centres as the productive ability of the rural farming populace is increased through the use of electric implements to sustain larger urban populations. In addition fewer people are needed to provide sustenance for the population, thereby freeing more persons to have a life

35 Y., Zhang, D., Parker and C., Kirkpatrick 'Electricity Sector Reform in Developing Countries: An Econometric Assessment of the Effects of Privatisation, Competition and Regulation' Sponsored Research of the Centre on Regulation and Competition, in the IDPM, University of Manchester.

36 The lack of electricity supply generally reflects the overall shortfall in development and industrial capacity of any nation.

outside the farm, in the industrial and service sector. The developing nation on the other hand still relies on manual farming methods which involves more people with lesser yields from the farm and a corresponding low industrial production. The use of electricity has therefore become a ubiquitous aspect of development at all levels, whether corporeal or State,[37] as the more developed entities consequently utilize a higher percentage of electricity to sustain their leading developmental edge.

1.3 Electric Power as a National Development Resource in Nigeria

Nigeria has for many years, suffered from insufficient electricity supply. This has proved to be one of the greatest hindrances to her developmental aspirations as industries as most businesses need constant power supply for maximum productivity and output. The low rate of development/industrialization in Nigeria connected with the chronic electricity failure is a development disaster. Nigeria's potential for greatness lies in the harnessing of her human, material and natural resources for growth. This can be done by utilizing functional infrastructure especially electricity as the foundation for her development.

It has been noted that "the provision of regular, affordable and efficient electricity is crucial for the growth, prosperity, national security as well as the rapid industrialization of any society."[38] If it is agreed that access to power by way of

37 It has been noted as a truism that "any nation that desire to develop will ignore the power sector at its peril." I.O. Joseph, 'Issues and Challenges in the Privatized Power Sector in Nigeria,' *Journal of Sustainable Development Studies*, ISSN 2201-4268 (2014) 6 (1), 162. <http://www.infinitypress.info/index.php/jsds/article/download/704/324> accessed 13 November 2015.

38 Joseph (n 39) 162.

electrical energy is an indicator of the ability of a nation to achieve its development objective, then the present situation where the nation does not produce enough electricity, will impact negatively on the populace restricting her developmental aspirations. This electricity supply failure both on business and social life is all pervasive due to the interconnectedness of socio-economic activities with electricity supply. In addition, since widespread national poverty is related to economic independence, it can only be the case that improvement of Nigerian electrical capacity will increase the ability of the poor to afford electrical power to operate small scale businesses and contribute positively to the national project. Despite the importance of electricity energy, in 1999, it was estimated that about 90 million persons were without access to the national grid;[39] at the same time, no new electricity infrastructure had been built since 1991, and out of 79 generation units, only 19 were in operation, producing on the average 1750MW daily.[40] That period is regarded as the electricity sector's lowest point in the nation's history.[41] The return to democratic rule in the country in 1999 kick started reforms that have eventually led to the privatisation of the power sector. However, during the years leading up to the eventual privatisation in 2013, the sector was still

39. The Presidency- Bureau of Public Enterprises (BPE), 'Update- Privatization Issues,' A Presentation at the 1st National Council on Power Conference (NACOP) by Mr. Benjamin E. Dikki, Director General BPE, August 11, 2014, 3, <http://www.power.gov.ng/National%20Council%20on%20Power/UPDATE%20ON%20%20PRIVATISATION%20ISSUES.pdf> accessed 14 November 2015.

40. *Ibid.*

41. *Ibid.*

characterized by low electricity generation and supply. Statistics below shown that PHCN's generation capacity remained stagnant between 2,000 and 4,050 MW[42] despite reform measures and population increase in the years considered. To put this in perspective, it is important to note that the global standard for electricity is 1MW to 1000 persons. Thus, Nigeria with her current population of approximately 160 million persons requires about 160,000 MW for the "for attainment of optimal industrial, economic and technological development in the country."[43] This goes to show the very wide divide between the power currently generated and supplied in Nigeria and the ideal.[44] The poor generation of energy and failure to distribute through the public grid system has led to resort to private generation of electricity.[45] The reliance on private generating sets for power limits productive ability due to the high fuelling costs and low

42 Megawatts.

43. Iko Electricity Distribution Company (EKEDC), Lagos, "Seminar on Dividends of Privatization of Power Sector: Lingering Issues in the Nigeria Power Market." A presentation to the Lagos Chamber of Commerce by Engr. Oladele Amoda, Managing Director/CEO, September 2014, 7, <http://www.lagoschamber.com/download/DIVIDENDS%20OF%20NIGERIAN%20POWER%20SECTOR%20PRIVATISATION%20AND%20OTHER%20PRESENTATIONS%20COMBINED.pdf> accessed 14 November 2015.

44 It is noted that South Africa with a population of about 45 million people, produces more than 40,000MW. Ibid.

45. In 2010, it was estimated that privately generated electricity was in the region of about 6000MW, about twice that produced by PHCN in 2009. The use of alternative off grid power translated to about 80 naira per kWh where the individual user utilizes candles and kerosene as an alternative, 60 naira per kWh for those using industrial generators and between 50-70 naira per kWh for those using private (petrol) powered generators. This obviously was very much higher than the 8.5 naira per kWh charged by PHCN as tariff at that time. See The Presidency, Federal Republic of Nigeria, 'Roadmap for Power Sector Reform,' August 2010, 17.

capacity productive ability. It therefore reduces the output of both the small scale industrial enterprises engaged in by the poor and also large scale businesses in Nigeria.

The implication is that there is increase in production costs and in addition there is downtime when the industry has to switch from one power source to the other. This means that the labour component of production is redundant during this period. The electricity issue in turn reflects on the labour absorption capacity of local enterprises. It also affects negatively the quality of goods which are produced with this unstable electricity supply. The importance of energy in the development of a nation is implicit in its classification as one of the basic infrastructure needed for the movement to a machine tool based society and developed economy with the implicit capacity of such an economy for increased productivity and competitiveness in the global economy. All said, Nigeria's electrical power deficiency is a hindrance to its ability to compete effectively both locally and in the global market. This is due to the fact that globalization means that goods have access to the international markets, and such low quality goods limit the competitive capacity of the Nigerian industrial sector vis-a-vis international markets and therefore reduces potential foreign exchange inflow into the local economy.

1.4 Electricity Reform to Increase Power Generation in Nigeria

Power or Electricity sector reforms have been a feature in both developed and developing nations to remedy the paucity of electrical power. This is connected to the fact that the single most important factor in the development of a country in the new globalization of economies is the availability of a constant

supply of electricity. Finance is especially important to the reform of the sector as electricity is a very capital intensive venture. The idea of reform therefore is to attract private investors to commit funds to improve the sector for better electricity supply and access. The importance of the electricity sector and the need to revitalize the sector led to the electricity reform movement, which was pioneered by Chile and the United Kingdom in the early 1980s and emulated by Argentina in the 1990s. Other countries such as New Zealand, the United States and Mexico have also reformed successfully. The success of these reforms has instigated other countries[46] to embark on the privatization of what were regarded previously as the strategic services sector of the economy.[47] Although the reforms are similar in many respects, each nation has taken its own unique requirements into consideration.[48]

The major objective for countries undertaking electricity sector reforms is to increase generation and divest the government of burdensome responsibilities as well as encourage more efficient production of electricity by the private sector. Related issues which are local to the country in question are type of private capital, method of promotion of competition and the new legal, institutional and regulatory structures. The reform typically involves the unbundling of the existing utility, into separate organizations for generation,

46 This includes countries such as Peru and Colombia, Bolivia, Jamaica and Trinidad and Tobago and Nigeria. In fact most States seem to be implementing some reform of their electricity sectors.

47 Bacon, RW and Besant-Jones, J, 'Global Electric Power Reform, Privatization and Liberalization of the Electric Power Industry in Developing Countries,' 26 Annual Review of Energy and the Environment. (2001).

48 Report on Reforms and Private Participation in the Power Sector of Selected Latin American and Caribbean and Industrialized Countries, March 1994 and the Power Sector in LAC: Current Status and Evolving Issues, June, 1995, 14.

transmission, distribution and supply providers; privatising or corporatizing the state-owned electricity organization as well as the introduction of new operators to the sector. An important aspect of the reform is the establishment of new regulatory bodies to regulate the sector. The rationale for electricity sector reform includes increasing the effectiveness of the electric power sector, encouraging private sector investment in infrastructure construction and thereby releasing the government from spending on the sector. Due to the strategic nature of the sector, sometimes restrictions such as limit on extent of foreign capital and restriction to certain areas of operation by the incoming private operators have been implemented. In addition, the regulatory body is also in most cases rarely as independent as envisaged.

There is extensive literature on the different aspects of reform in the electricity sector of developing countries. For instance, studies like that of Zhang *et al*,[49] examine the relationship between power sector liberalization and market performance in terms of improved supply. Their research explores the econometric effects of reforms such as privatisation, competition and regulation on the power sector using several performance indicators, such as panel data. The results indicate that competition appears to bring about some favourable results to industrial end users of electricity. They note however that privatisation and regulation alone do not provide major gains in States economic performance; thus when privatising electricity under conditions of monopoly as is

49 Zhang Y. F, Parker, D. and Kirkpatrick, C., "Electricity Sector Reform in Developing Countries: An Econometric Assessment of the Effects of Privatisation, Competition and Regulation." Publication of 'The Centre on Regulation and Competition; IDPM' University of Manchester. (November 2002).

the case in most developing States, emphasis should be placed on implementing an effective regulatory framework. They also note that, introducing competition does seem to be effective in stimulating performance improvements, irrespective of changes in ownership or regulation.

There seems to be no clear consensus on the application of the best model of privatisation to the provision of public services especially in the developing States. Alexander,[50] notes in this respect that, 'institutional, political and legal issues cover a wide range of aspects of the framework within which business and politics take place within a country and without full understanding of these conditions it is difficult to make any but superficial recommendations as to how reform should occur." Adams[51] notes that some segments of the populace may oppose economic reforms like the privatisation of state firms, due to doubts about the benefits of these reforms or because they believe that these reforms will harm their economic interests. The success of reforms therefore depends according to him, on the political weight of the opposing group. If the opposition has more political clout they will endeavour to truncate the reforms. Liberalization of a State controlled economic sector is the introduction of competition and sector regulation through market forces.

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50 Alexander, I., "UK Model on Developing and Transitional Economies: Common Issues and Misconceptions." Senior Economist, South Asia Energy and Infrastructure Unit, the World Bank. (The paper reflects the personal views of the author and should not be attributed to his employer), Available at *papers.ssrn.com/* (2/10/14).

51 Adams, R.H. Jr, "The Politics of Economic Policy Reform in Developing Countries," Policy Research Working Paper Series *2443*, (2000).electronic copy available at, *ideas.repec.org/e/pad90.html* – also at *papers.ssrn.com/sol3/papers.cfm?abstract_id=632514.*

Some researchers such as Parker and Kirkpatrick,[52] as well as Pollitt,[53] have addressed policy issues in privatisation. They observe that the creation of an environment where there is competition and effective regulation for the optimum performance of the electricity sector is fraught with problems. Other researchers have shown the relationship between privatisation, regulation and competition. Stern and Holder [54] focus on the regulatory process as well as institutional design and formal and informal accountability of regulatory institutions. They note that while formal institutional mechanisms are in the overall legislation, informal mechanisms are seen as the regulatory process itself including implementation of the regulatory laws. The later process involves interpretation and understanding of law among the stakeholders (namely regulators, regulated participants and consumers). On their part, Spiller and Levy[55] highlight the interaction of political institutions with regulatory process and potential impact of such interaction on the regulatory performance. They argue that, "the credibility and

52 Parker D. and Kirkpatrick C., "Privatisation in Developing Countries: a Review of the Evidence and the Policy Lessons", *Journal of Development Studies*, 41(4), (2005) pp. 513-41.

53 Pollitt, M., "The Role of Efficiency Estimates in Regulatory Price Reviews: Ofgem's Approach to Benchmarking Electricity Networks," *Utilities Policy*, Vol. 13 (4), (2005) pp.279-288.

54 Stern, J and Holder, S., "Regulatory governance: Criteria for Assessing the Performance of Regulatory Systems. An Application to Infrastructure Industries in the Developing Countries of Asia. *Utilities Policy*, (1999) pp.33-50.

55 Levy, B and Spiller, P.T., "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunication Regulation." *Journal of Law Economics and Organisation*, Vol. 10, No. 2, (1994) pp.201-246.

effectiveness of a regulatory framework- and hence its ability to facilitate private investment-varies with a country's political and social institutions." They conclude that: "...success of regulatory systems depends on how well it fits with a country's prevailing institutions, if a country lacks the requisite institutions or regulatory system that is incompatible with its institutional endowment, efforts at privatisation may end in disappointment, recriminations, and the resurgence of demands for re-nationalisation."[55] Finally Prizzia[57] notes that,

...the negative consequences of privatisation are often masked or go undetected because the effectiveness of privatisation is based primarily on economic performance. I recommend that those responsible for planning of future privatisation activities should refocus the present economic emphasis and strive for a balance of economic and social performance to improve long-term benefits for all sectors of the affected communities.

Power sector liberalization in Nigeria is a relatively new process. Due to the monopoly of the State owned organization, the reform has been based on sectoral deregulation including privatization of the State owned monopoly organization, the now defunct Power Holding Company of Nigeria (PHCN) and encouraging competition through entry of both local and foreign private investors, the Independent Power Producers (IPPs) into the sector. There was established an independent regulator, the Nigerian Electricity Regulatory Corporation (NERC) to oversee the implementation of the law as well as monitor the operations of all the participants in the sector. The framework for the reform of the Nigerian Power Sector is as outlined under ESPRA with NERC as the regulatory body in

56 See also pages 28-32.

57. Prizzia, R "An International Perspective of Privatization: The Need to Balance Economic and Social Performance." *The American Review of Public Administration*, vol. 33, No. 3 (September 2003) pp 316-332.

the newly privatized power sector in Nigeria.[58] Before the entire Privatisation process came to be, the government-owned company, the National Electric Power Authority (NEPA) had sole control over the Nigerian power sector. NEPA, which operated as a monopoly, had control over the generation, transmission and distribution of electricity to all parts of the country. NEPA however was not very good at its job.[59] Weighed down by "needless bureaucracy and official corruption," there was very poor supply of electricity to Nigerians which affected the nation's economic growth adversely.[60] The focus of reform of the sector is the implication that there will be increased quantity of electricity available in the country. This has not proved true as there continues to be poor energy supply post privatisation.
Factors affecting electricity energy supply post reform in Nigeria are:

(i) Although NEPA was unbundled and handed over to private investors on November 1, 2013,[61] the Transmission Company of Nigeria (TCN) is still controlled by the government under the management of the Manitoba Hydro International (MHI) for a 3 to 5 year contract.[62] The strategic importance of the sector makes it difficult for the State to summon the political will to fully effect a comprehensive

58 Joseph (n 39) 163-164.

59 This is evidenced in the nickname given to the company by Nigerians- "Never Expect Power Always, Please Light Candle," a play on the company's acronym, NEPA Plc.

60 Banwo & Ighodalo, "The Nigerian Power Sector Reforms: Overcoming Post-Privatisation Challenges," 1.

61 Joseph (n 39) 165.

62 The Presidency- BPE (n 41) 13.

implementation of the reform. The implication of State control of the transmission aspect of the energy sector is that the problems of State ownership still attend the generation and transmission of electricity in Nigeria. It was acknowledged that the basic issue with Nigerian electricity sector was the generation and transmission capacity. Increased generation alone clearly cannot increase electricity supply in Nigeria, without increased transmission capacity, there cannot be increased electricity supply. The problems of the heavy hand of the State has already affected the transmission sector as there has been at least one change in the management contract from the original Indian company approved for the sectoral reform on 23 August 2011, to the present operators, the MHI company.

(ii) Another factor is the inadequate consideration of "fundamental sectoral issues such as inadequate gas supply and grid capacity" before the conclusion of the privatisation process.[63] There is heavy reliance on the use of gas for power generation in Nigeria. Thus adequate gas supply is essential to efficient power generation and thus transmission and distribution in Nigeria. The gas supply remains insufficient and this takes its toll on power generation.[64] The over reliance on gas for power generation in Nigeria is in itself, a huge problem. Nigeria has other resources which could be exploited as fuel supply for power generation. It has been stated that "an ideal economy should have at least five (5) different sources of

63. Banwo & Ighodalo, p 3.

64 Ezra Ijoma, 'Why Power Outage has Continued Despite Privatisation-NERC,' *Leadership Newspapers*, (1 August 2014), <http://leadership.ng/business/381577/power-outage-continued-despite-privatisation-nerc> accessed 14 October 2015.

fuel actively supporting its power generation efforts."[65] The use of other sources of energy can increase the supply of electricity to Nigerians.

(iii) The cost of the electricity involves two aspects that limit any gains that privatisation and reform may have brought to Nigerians. Firstly, the cost of the resource has increased and is still set to increase. Furthermore, there is a set price in the nature of an access fee which is paid by all consumers. It is the claim that this access fee is a disincentive to the new owners of the energy companies to invest into the sector, as this fee does not encourage the new companies to expand their business.

(iv) There are allegations by the new operators that the prepaid meters are not cost effective. They claim that many consumers fraudulently bypass the payment systems of the meters thereby depriving the operators of their legitimate revenue. There are therefore attempts to retain the old meters with all their attendant inefficiencies. In the meantime access to electricity is limited for consumers wishing to utilise the prepaid meters as the DISCO's deny their availability.

1.5 CONCLUSION

Electricity also called power is derived from the fracturing of energy sources such as coal, petroleum oil as well as other sources like nuclear energy, hydroelectric sources and renewable energy sources. It reduces the work burden of the

65. Mojola Ola, "Telecoms Sector Privatisation: Lessons for the Nigerian Power Sector," August 10, 2015, <www.linkedin.com/pulse/telecoms-sector-privatisation-lessons-nigerian-power-mojola-ola?trk=prof/post&trkSplashRedir=true&forceNoSplash=true> accessed on 11 October 2015.

individual by providing an alternate source of energy to carry on daily life and consequently expanded the limits of man's physical capacities. Prior to the discovery of electricity, man had used his own energy or that of animals as a means to produce electric power. The discovery of how to produce electricity from energy sources changed the course of development as it allowed the use of complicated machinery to ease both industrial production and domestic chores. Electricity has evolved and become a ubiquitous aspect of modern technology based life as it facilitates the use of technology based gadgets; this time expanding the intellectual capabilities of man via the computer and other allied machines for the establishment of the information age. The technological progress achieved in the world today and the globalization of economies mean that more and more energy is required to drive the economies of countries, such that the more industrialized a country, the more energy it uses. There is thus an ongoing global competition by countries for energy sources to feed their increased energy usage which is also an indication of their listing on the global development scale. This ongoing drive by nations to harness more energy from new sources is not only to fuel development but to secure their standing among the most powerful and influential in the world.

Nigeria lags behind in the listing of powerful nations as she lacks the minimum electricity supply required for national development. The electricity supply in Nigeria thus needs to be improved upon and this is being done through a reform of the sector, which has seen the private sector take over the provision of electricity to a very large extent since November 2013, as opposed to the previous arrangement where electricity was provided by the State owned NEPA/PHCN. The electricity deficiency has consistently had a negative impact on the productivity of all sectors of the economy. It is reflected in

the low industrial productivity, poor quality of goods and ever decreasing employment rate of Nigerian businesses. It is also a factor in the industrial, domestic and information technology backwardness keeping the nation back from entering the league of developed nations. Addressing the nation's development crisis has involved both law and policy measures intended to ameliorate the power situation, and also the introduction of private investors as participants in the management and infrastructural revival of the sector. These have so far not been effective as the country has continued to suffer from poor electricity supply as a result of dilapidated, obsolete infrastructure, poor management and lack of finance in the sector, among others. The revival of the sector requires that these issues are addressed. The modernizing of the Nigerian electricity sector will require huge investment inflow and the use of modern technology as the sector is capital intensive.

The utilization of technology for all aspects of both domestic and industrial life has made electric power a resource that must be reckoned with. Lacking such a key resource is not an option for any country wishing to be part of the ongoing global development. The reform is focused on the change from government controlled and regulated sector to privately held interests. While acknowledging that the privatization of the power sector is still in its infancy, initial statistics have not been encouraging. There has actually been a drop in the amount of electricity supplied in the period after the handover of the GENCOs and DISCOs to the private investors. Before the handover, it is noted that power generated was about 4000MWs. At June 2014, power generated and supplied

dropped to about 2900MW.[66] However, as at November 1st, 2014, power generated was estimated to be less than 3500MW.[67] These go to show that there are still serious problems bedevilling the nation's power sector which do not allow for desired developmental strides. The public still has to resort to private generation of electricity through the use of generating sets.

Some of the problems noted to bedevil the power sector post-privatisation include the inadequate supply of gas to power plants, thus reducing their generation capacity;[68] financial challenges including the fact that the existing tariff is said to not be "cost effective"; vandalism; energy theft resulting from fraudulent practices such as tampering of meters, etc;[69] the very inadequate transmission capacity of the national grid;[70]etc. All these result in the continued inadequate electricity supply which does not help the nation's economic

66. Onyedika Agbedo, 'Power Supply: Nigerians Still Await Stability One Year After Full Privatisation,' *Guardian Nigeria*, 31 October, 2014 < http://ngrguardiannews.com/business/185066-power-supply-nigerians-still-await-stability-one-year-after-full-privatisation > accessed 14 November 2015.

67 Tunde Dodondawa, 'One Year of Power Privatisation, Consumers Groan Under Inadequate Power Supply,' *Tribune Nigeria* 15 November, 2014) < http://tribune.com.ng/business/tribune-business/item/20560-one-year-of-power-privatisation-consumers-groan-under-inadequate-power-supply/20560-one-year-of-power-privatisation-consumers-groan-under-inadequate-power-supply> accessed 14 November 2015.

68 Ezra Ijoma, 'Why Power Outage has Continued Despite Privatisation-NERC,' *Leadership Newspapers*, (1 August 2014), <http://leadership.ng/business/381577/power-outage-continued-despite-privatisation-nerc> accessed 14 November 2015.

69 EKEDC (n 45) 12-19.

70 The national grid is said to have a wheeling capacity of only about 5000MW. Whenever generation peaks above that, it would lead to a system collapse. See Dodondawa (n 69). This is grossly inadequate and needs to be overhauled as soon as possible.

development. Attention therefore needs to be paid to these problem areas so that whatever challenges inherent therein can be resolved and whatever changes needed, be made.

In summation, it is clear that any modern day country without electricity is powerless to function in the modern technology driven age. Such a nation has been left behind in terms of development and remains literally in the dark ages and will certainly die off like the now extinct dinosaur. Since Nigeria wishes to be a participant in the progress of global development today, she needs to ensure that her citizens are provided with supply and access to electricity which will empower her citizens economically. This will enable her be a contributing member of the international economic community. It is imperative that the issues plaguing the Nigerian electricity sector for new operators and consumers be addressed quickly so that the benefit of privatising the sector will be immediately reflected in the nation's economy. The time is now and the process must be fast so that Nigeria can catch up development wise with other countries.

AN EVALUATION OF THE INTERNATIONAL COMMUNITY'S EFFORTS IN PROMOTING RIGHT TO DEVELOPMENT AND THE IMPERATIVES OF ACCOUNTABILITY FOR POST-2015

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Abstract

The need for constant improvement on the well-being of the global population at large and specifically individuals on the basis of active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom is at the core of the concept of right to development. There is also an interface between the conception of right to development, sustainable development and the actualization of the various classes of human rights particularly the Economic Social and Cultural Rights (ESCRs). However, the international community having conceptualized right to development, has continued to face practical challenges in ensuring the implementation of RtD in recent times. Given the need to review the Millennium Development Goals, and the yearnings for a proactive means of ensuring the realization of

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sustainable development this paper therefore, examines the international community's efforts in promoting RtD, the attitudes of various Multinational Corporations (MNCs), Sovereign States. It concludes that irrespective of the nature and challenges of RtD, accountability at all levels is a positive direction which is capable of transforming the futuristic aspirations of achieving sustainable development.

KEYWORDS: Development, Right to Development, Millennium Development Goals.

INTRODUCTION

Development is the continuous process of positive change in the quality of life of an individual or a society, reduction of poverty, unemployment and inequality.[1] Over the years, Right to Development (RTD), which emerged in the post-colonial era of the 1960s, initially in the context of the developing countries' demand for reforms in the international economic rules and policies, has been noted to be highly controversial, particularly as a third-generation human right.[2] The RTD potentially changed the way development is understood, both nationally and in effect. It also affected the international cooperative efforts to a larger extent. However, there continue to be challenges on the conception of RTD, as the current human rights and development discourse suggests that a pure RTD model is problematic.[3]

The right to development was proclaimed by the United Nations General Assembly (GA) in the Declaration on the Right to Development,[4] This right is also recognized in the African Charter on Human and Peoples' Rights, the Arab Charter on Human Rights[5] and re-affirmed in several

1 Jamo I.A., "Democracy and Development in Nigeria: Is There a Link?" Arabian Journal of Business and Management Review (OMAN Chapter) Vol. 3, No.5, Oct. 2013, p. 85

2 See Vasak K., "A 30-year struggle, the sustained efforts to give force of law to the Universal Declaration of Human Rights", UNESCO *Courier*, 1977, 29.

3 According to Iqbal K., the RTD is not binding in customary international law and this weakness is being used as a pretext by the developed countries to avoid their obligations of international cooperation. Secondly, with the exception of a few African states, most of the developing countries, have not legally recognized the RTD as a human right at the domestic level. See Iqbal, K., The Right to Development in International Law - the Case of Pakistan (USA: Routledge, 2010) p. 3

4 See Resolution 41.128 of the United Nations General Assembly (GA), 1986.

5 See Article 43 of the Arab Charter on Human Rights.

instruments.[6] According to the Declaration on the Right to Development, the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[7] This class of human also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.[8]

Oyelade in considering the interface between human rights, development and sustainable development stated as follows:

> *The right to development is all-encompassing. It demands the realization of all human rights: civil, cultural, economic, political and social and based on this premise, people will be at their utmost and give their best to their community.*[9]

Therefore, it is apposite that the most comprehensive perception of development is one that conceives it as a multi-dimensional process involving changes in structures, altitudes

6 See generally the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous Peoples.

7 Article 1.1, Declaration on the Right to Development

8 Article 1.2

9 Oyelade O.S., "Human Rights: A Veritable Tool for Sustainable Development in Nigeria." IFJR (2013) Part I (January – June) 130 – 150 p. 138

and institutions, as well as the acceleration of economic growth, the reduction of inequality and eradication of absolute poverty.[10] According to Adetiba, development is not purely an economic phenomenon but rather a multidimensional process involving reorganization and reorientation of entire economic and socio-political system.[11] He argued that in essence, development must be seen as representing the whole gamut of change by which an entire social system, turned to the diverse basic needs and evolving aspirations of individuals and groups within that system, moves away from condition of life widely perceived as unsatisfactory toward a situation or condition of life.[12]

The impact of under-development is grave particularly in developing nations as under- development fosters several social, economic and cultural challenges. For instance, 70% of the over 140 million Nigerians currently live below the poverty line of one dollar per day;[13] about 1.2 billion people lives on less than $1 a day and the additional 1.6 billion lives on less than $2 a day.[14] Poverty in all its forms is the greatest challenge to the international community. This paper now

10 Akpomuvie, B. O., "Sustainable Rural Development in Nigeria through Microfinance: The Place of Women." African Journal Review, Vol. 4 (2) April, 2010 Pp. 252-264 at 252. Accessed online at http://afrrevjo.net/journals/multidiscipline/Vol_4_no_2_art_20_Akpomuvie.pdf on 14th March, 2015.

11 Adetiba T.C., "Uncivil Politics: The unnecessary precursor to under development in Nigeria." Greener Journal of Social Sciences. Vol. 3 (9), (2013) pp. 479-488.

12 *Ibid.*

13 Kanayo O., "Poverty Incidence and Reduction Strategies in Nigeria: Challenges of Meeting 2015 MDG Targets." Kamla-Raj. J Economics. Vol 5(2) (2014) pp. 201-217

14 *Ibid., 204*

examines the international communities' efforts in promoting the Right to Development today.

2.0 EFFORTS TO PROMOTE THE RIGHT TO DEVELOPMENT

The international community has tried to promote the right to development through the following;

2.1 United Nations

The right to development today forms an integral part of the canon of human rights and is supported through the UN human rights machinery.[15] Various intergovernmental and international institutions and regional arrangements based on cooperation and assistance towards development in Third World states have been on the increase. Over the last thirteen years, it has adopted a range of new policies and programs.[16]

Former Secretary General, Kofi Annan's organizational reforms emphasize the centrality of human rights to all activities within the UN system. Thus, efforts to ensure peace and security, to provide humanitarian relief, or to promote development, must all consider the cross-cutting nature of human rights.[17]

On the development side, a key agency within this mandate is the UN Development Program ("UNDP"). In this

15 Salomon M.E., "Legal Cosmopolitanism and the Normative Contribution of the Right to Development. Proposals" in Marks, S.P. eds. *Implementing the right to Development: the role of International Law*. Retrieved on 23rd Oct. 2011 from http://library.fes.de

16 UNDP, Integrating Human Rights with Sustainable Human Development, World Bank, *Development and Human Rights*. Retrieved on 28th Sept. from http://magnet.undp.org/Docs/policy5.html

17 Marks S., "The Human Rights Framework for Development: Five Approaches", François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, Working Paper. Retrieved on 28th Sept. from http://www.harvardfxbcentre.org

regard, the role of the United Nations Development Programme(UNDP) has been outstanding. Even though the UNDP was not originally committed to human rights,[18] it has increasingly become a potential role actor in the implementation of human rights generally, and Economic, Social and Cultural Rights (ESCR) in particular. Its direct involvement through a wide range of country-based operations is of strategic importance.[19] The effort of the UNDP particularly since the inception of its annual *Human Development Reports* in 1990, is also becoming increasingly significant in the evolution of a rights-based approach to human development.[20] Highlighting the crucial links between the three key goals of the United Nations Charter in the areas of peace, development, and human rights, the UNDP has set forth a policy to integrate human rights with sustainable development.

The UNDP outlines three levels of commitment to human rights. First, it "works for the full realization of the right to development," particularly in the eradication of poverty. Second, it advocates human rights as part of sustainable development and third, it promotes good governance. The

18 Gallagher P., in his book "Guide to the WTO and developing countries" 156-157 noted that it was not until the 1990s that the UNDP experienced a paradigm shift "from economic development to sustainable human development... which aims at expanding people's choices and improving their quality of life"

19 Ranging from participating in electoral processes to judicial reforms, and to gender empowerment activities, the UNDP has acquired tremendous relevance as a resource base for development-oriented projects at national levels.

20 Olowu D., "Conceptualizing an Integrative Rights based Approach to Human Development in Africa: Reflections on the Roles and Responsibilities of Non-state Actors." Retrieved on 28th Sept 2011 from http://www.equalinrights.org

overall approach reflects how development and human rights complement, as well as depend upon, each other.[21] UNDP's involvement as a key player in international sustainable development initiatives means that many of its programmes and activities have a potential impact on indigenous peoples and their territories. For example, UNDP is active in supporting the development and adoption of new World Bank-assisted Poverty Reduction Strategies (PRSPs) in highly indebted developing countries.[22] UNDP also jointly administrates with the World Bank and UNEP the Global Environment Facility whose grants to developing country governments finance the establishment of large protected areas.[23]

Other development-related agencies also play a role in the implementation of the right to development, including the UN Industrial Development Organization, the UN Conference on Trade and Development, and the UN Development Fund for Women. The United Nations Development Group facilitates coordination amongst the agencies.

Several UN Specialized Agencies, such as the International Labor Organization and the World Health Organization, are also involved in the debate on the realization of the right to development. Efforts to coordinate the implementation of the right necessarily extend beyond

21 Piron, L., "The Right to Development. A Review of the Current State of the Debate for the Department for International Development." UK Department for International Development (DFID) Report. Retrieved on 16th January 2015 from www.odi.org/resources/docs/2317.pdf

22 UNDP, UNDP support for Poverty Reduction Strategies: the PRSP countries. Retrieved on 20th Sept.2011 from http://www.undp.org/mainundp/propoor/docs-propoor/PRSPFinal2001.doc

23 Griffiths T., "Indigenous Peoples, Human Rights and Development Agency Standards: A Comparative Review." Retrieved on 20th Sept. 2011 from http://www.salvaleforeste.it

the UN system. Thus, intergovernmental organizations such as the European Commission, the Organization for Economic Cooperation and Development ("OECD"), and the World Bank have also consulted with various working groups.[24] Moreover, reflecting the scope and diversity of human rights and development concerns, many non-governmental organizations ("NGOs") have worked to implement the right to development.[25]

Apart from the UN program and policy initiatives expressly related to the right to development, a further range of activities includes efforts under all human rights treaties, which advocate, for example, the right to food, the right to health, the right to adequate shelter and services, the right to education, the right to culture, the right to work, the rights of workers, and the rights of minorities, indigenous peoples, women, and children.

2.2 European Union (EU) and European Commission (EC)

European commitment to uphold indigenous peoples' rights began to strengthen in the early 1990s and was clearly affirmed in European Parliament Resolution A3-0059/94 in 1994 in which the Parliament officially recognised UN standards on the rights of indigenous peoples in development. By 1998, the European community had enshrined its progressive position on indigenous peoples and overseas

24 Bunn, I.D., "The Right to Development: Implications for International Economic Law", (2000) 15 American University International Law Review, pp. 1439, 1440

25 These include the World Council of Churches, International Rehabilitation Council for Torture Victims, International Commission of Jurists, International Confederation of Free Trade Unions, International Planned Parenthood Federation, Commonwealth Medical Association, and Oxfam.

development co-operation in two related policy documents: a fairly detailed 16-page EC "Working Document" endorsed by the EU Council in May 1998 and a short EU Council Resolution passed in November 1998 which affirms the political commitment of Member States to support for indigenous peoples in European development cooperation.[26] The Working Document was developed in consultation with indigenous peoples' organizations. As well as incorporating indigenous recommendations, the standards and principles in policy are based on international instruments relating to human rights, environment and development and also on European treaties and conventions relating to development co-operation.
The strengths of the documents included;

1. Provisions and key principles are based on progressive existing and emergent international standards;
2. Key elements are based on recommendations made by indigenous peoples themselves (e.g., territorial rights, "right to say no"; gender, intellectual property etc);
3. Recognizes the right of free, prior informed consent;
4. Accepts that people must be compensated for harm caused by failed development intervention

The weaknesses include:

1. Many observations and suggestions, but few clear rules or preconditions that must be complied with before the EC releases funds for development aid;
2. Not backed up by institutional mechanisms to implement the policy.

26. Griffiths T., *Op Cit* at n 23

2.3 The World Bank

The Bank has no formal, written policy on human rights, either in terms of the Bank's role, or lack thereof, in promoting and requiring respect for human rights in its operations or internally in terms of its policies. Consequently, attitudes toward human rights must be deduced from the statements of Bank officials, its publications, and practices. From this, we can see that the Bank has progressed from outright rejection of human rights in the 1960s to cautious engagement in a few, defined areas.[27] In recent years, the Bank has been more forthcoming about what it perceives its role to be in promoting human rights and the place of human rights in overall development and poverty reduction efforts. In his 1999 Proposal for a Comprehensive Development Framework, for instance, the President of the Bank stated unequivocally that:

> *Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible.*[28]

The most comprehensive statement of what the Bank considers its role to be in promoting human rights is found in the 1998 Bank publication entitled, *Development and Human Rights:*

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27 Mackay F., "Universal Rights or a Universe unto itself? Indigenous peoples' Human Rights and the World Bank's draft Operational Policy 4.10 on Indigenous Peoples." *AM. U. INT'L L. REV.* 17:527. Retrieved on 28th Sept. from http://www.wcl.american.edu

28 Memorandum from James D. Wolfensohn, President of the World Bank, to the Board, Management, and Staff of the World Bank Group, 10 (Jan. 21, 1999) *at* http://www.worldbank.org/cdf/cdf.pdf.

The Role of the World Bank.[29] Therein, the Bank states its belief that creating the conditions for the attainment of human rights is a central and irreducible goal of development, that sustainable development is "impossible" without human rights and that it is the manner in which economic reform lending programs are implemented that is crucial to secure the needs of the poor. Additionally, the Bank holds that poverty spreads deeper when the poor are subject to inequalities that disable them from accessing the tools needed for economic growth.

Furthermore, the Bank believes that human rights cannot be guaranteed without a strong, accessible and independent judiciary. These statements clearly show, in principle, the Bank's acceptance, albeit through the lens of poverty reduction, of human rights as fundamental to development and that the Bank does have a role to play in promoting, and through its good governance programs, enforcing human rights.[30]

3.0. THE RIGHT TO DEVELOPMENT AND THE MILLENNIUM DEVELOPMENT GOALS

There is an international consensus around the Millennium Development Goals (MDGs), following the endorsement of the UN Millennium Declaration. These have also been endorsed by international organizations, such as the Organization for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF), the World Bank, and the EU.[31]

29 Development and Human Rights. The Role of the World Bank, (The International Bank for Reconstruction and Development. The World Bank 1998) Retrieved on 23rd Sept. 2011 *from http://www.worldbank.org/html/extdr/rights/hrlext.pdf.*

30 Mackay, *Op Cit* at n 27

31 Piron, *Op Cit* at n 21

In September 2000, the 189 member countries of the United Nations at that time adopted eight Millennium Development Goals(MDGs) committing themselves to making substantial progress toward the eradication of poverty and achieving other human development goals by 2015. The MDGs are the strongest statement yet of the international commitment to ending global poverty. By the first five year review in 2005, these goals had become central to the way governments, international development agencies and non-governmental organizations carry out their development efforts.[32]

MDGs are a set of quantifiable, time-bound goals that articulate the social, economic and environmental advances that are required to achieve sustainable gains in human development. Goals 1 to 7 are committed to raising the poor out of poverty and hunger, getting every child into school, empowering women, reducing child mortality, improving maternal health, combating HIV/ AIDS, malaria, and other diseases, and ensuring environmental sustainability. Goal 8 explicitly recognizes that eradicating poverty worldwide can only be achieved through international cooperation.[33]

The human rights framework provides an important tool for achieving the MDGs by helping to ensure the Goals are pursued in an equitable, just and sustainable manner. Linking MDGs and human rights, provides a platform to stay true to the spirit and vision of the Millennium Declaration, which places human rights at the heart of efforts to achieve human

32 Todaro, M. P., et al. Economic Development. 10th ed (England, Pearson education ltd. 2009) p.16

33 Sengupta, A., "The Right to Development as a Human Right." Retrieved on 20th Sept. 2011 from http://www.harvardfxbcenter.org

development.[34] Using a human rights lens to address development challenges, including those under the MDG framework, changes the way "we look" at the problem. When looking at development challenges, human rights seek to identify the groups of people whose rights or entitlements have been violated, neglected or ignored, and identify who has a responsibility to act. Once these actors are identified, the human rights framework then tries to understand the reasons why certain groups and people are unable to enjoy their rights such as discriminatory laws and social practices.[35]

Human rights and the MDGs have much in common. They share guiding principles such as participation, empowerment, national ownership; and, most fundamentally, they share the ultimate objective of promoting human well-being and honouring the inherent dignity of all people.[36] Close to these common elements, however, some important differences exist between the two strategies.

The most evident is that MDGs are not phrased in terms of human rights, but in terms of development outputs to be reached. However, many studies have shown that it is possible to identify specific human rights norms behind each Millennium Goal.

In this sense, the Millennium Project explicitly affirms:

> *The Millennium Development Goals are the world's time-bound and quantified targets for addressing extreme poverty in its many dimensions—income poverty, hunger, disease, lack of adequate shelter, and exclusion—while promoting gender*

34 UNDP, "Human Rights and the Millennium Development Goals: Making the Link." Retrieved on 20th Sept. 2011 from http://hurilink.org

35 *Ibid*

36 *Ibid*

> *equality, education, and environmental sustainability. They are also basic human rights—the rights of each person on the planet to health, education, shelter, and security as pledged in the Universal Declaration of Human Rights and the UN Millennium Declaration*[37]

The integration of some points of the RTD framework into the MDGs strategy can turn out to be very useful. In particular, a better definition of mutual responsibilities, including for example, the responsibilities of transnational corporation or other private agents, an highlighted consideration of development procedures, especially concerning participation, non-discrimination and a more direct link to international human rights standards can be very useful tools to foster development in a faster and more sustainable way.[38]

4.0 THE RIGHT TO DEVELOPMENT AND ITS PROMOTION BY STATES

Different countries or groups of countries promote different views on the Right to Development. The perception of what the Right to Development could mean is very diverse. The most prominent positions are as follows:

37 UN Millennium Project. *Investing in Development. A Practical Plan to Achieve the Millennium Development Goals.* (New York, 2005) p. 1

38 Sitta A., "The Role of the Right to Development in the Human Rights Framework for Development". Paper prepared for the Human Development and Capabilities Approach Association p. 9. available at http://www.capabilityapproach.com/pubs/5_1_sitta.pdf

4.1 Germany

Germany supports and agrees to the concept of Right to Development. However, it emphasizes the fact that the Right to Development does not necessarily focus on international co-operation, stressing instead that the primary duty to create an enabling environment lies with the developing states themselves. The Right to Development is not viewed as enabling any specific legal obligation of individual states vis-à-vis any other particular state. From Germany's point of view, the Right to Development attach importance to both development outcomes and processes of development. In its 'Development policy action plan on human rights 2004-2007, the German Federal Ministry for Economic Co-operation and Development laid out its policy approach towards mainstreaming human rights in development co-operation. Among the measures named in the paper is the effort to implement the Millennium Development Goals (MDG'S) and to realize human Rights.[39]

4.2 United States of America

The US position shows some ambiguity. When the drafting group was established in 1981, the U.S. government, under the Reagan Administration, made it clear to the other members that the United States would not allow the Declaration to create any entitlement to a transfer of resources.[40] Aid was a matter of sovereign decision of donor countries and could not be subject to binding rules under the guise of advancing every human being's RTD. That bargain was kept insofar as the Declaration of 1986 does not purport to establish any legally binding obligations and remains at the level of general

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39 Kirchmeier F., "The Right to Development-where do we stand?" Retrieved on 20th Sept 2014 from http://library.de/pdf

40 *Ibid*

principles. The United States, nevertheless, voted against the Declaration.[41] The rejections seem to result from some concerns shared by each of the U.S. administrations and some of such concerns will be discussed below;

Firstly, the US had reservations about the "equal attention and urgent consideration" provision of the preamble and Article 6 of the Declaration, since it would require such attention be paid to economic, social, and cultural rights, which is not the position of the U.S. government.

In 2003, the U.S. delegation explained:

> *In our estimation, the right to development (RTD) is not a "fundamental," "basic," or "essential" human right. The realization of economic, social and cultural rights is progressive and aspirational. We do not view them as entitlements that require correlated legal duties and obligations. States therefore have no obligation to provide guarantees for implementation of any purported "right to development."*[42]

Also, the United States has complained that the formulations and definitions used are not clear and require rethinking before they can be taken seriously. U.S. representative Novak said in 1981:

> *The concept of 'development' is itself in need of development. The fact of development in certain nations under*

41 United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (Feb. 10, 2003)

42 *Ibid*

> *certain conditions is clear. But theories as to why such development has occurred are not clear.*[43]

Similarly, the concept of the clarity of development was at issue in 1998, when the U.S. delegate, Nancy Rubin, said:

> *as this morning's debate on the agenda shows, there is no agreement on what comprises the Right to Development. While we all hope to be able to reach consensus on this issue, the numerous and, at times, contradictory opinions expressed in the last Working Group indicates that we still need more time to discuss the Right to Development to find common ground on which we can all agree.*[44]

However, U.S. opposition to the RTD has not been systematic. There were two principal moments when the United States joined a consensus on the RTD. The first was at the World Conference on Human Rights in Vienna, when the Vienna Declaration and Programme of Action was adopted by consensus. In the debates in the Commission on Human Rights, the United States has acknowledged:

> *In Vienna, we affirmed the RTD as a universal and inalienable right with the human person as the central subject of development."60*

43 Statement by Nancy Rubin, U.S. Delegate to the U.N. Human Rights Commission, Comment on the Working Group on the Right to Development, 54th Sess., (Apr. 27, 1998)

44 Marks S., 2004. "The Human Right to Development: Between Rhetoric and Reality." *Harvard Human Rights Journal*. Vol. 17, 139

The second time the United States joined a consensus was in 1998, when the mechanism of the OEWG and the position of the Independent Expert were created. At that time, the U.S. delegate said that it;

> *was pleased to be able to join the consensus on the draft resolution despite some serious reservations concerning paragraph 4(c), which implied that developing countries were being actively excluded from the globalization process, the reference in paragraph 4(d), to structural reforms and the statement in paragraph 3(a) that the right to life included a right to the "minimum necessities of life...*[45]

The United States has thus expressed opposition to international standard setting regarding the RTD that it perceives as either challenging its neoliberal priorities, acknowledging rights and duties in the area of economic, social, and cultural rights, perpetuating conceptual confusion, introducing conflicts of jurisdiction with economic negotiations, or proposing regulation of state behavior. Where such concerns are not present, it has gone along with consensus positions on the RTD.[46]

4.4 United Kingdom/European Union (EU)

During the time of its EU presidency, the UK strongly promoted a new approach to development co-operation. The

45 Statement by Nancy Rubin, U.S. Delegate to the U.N. Human Rights Commission, Comment on the Working Group on the Right to Development, 54th Sess., (Apr. 27, 1998) para 9.

46 Marks, *Op Cit* at n 44

basic ideas are laid down in its paper 'Rethinking Conditionality'. According to the UK submission to the 2005 meeting of the High level Task force on the RTD, 'the UK's understanding of what makes aid effective is changing'. An overriding principle of its new approach in development cooperation is therefore to move away from classic notions of conditionality to a broader understanding of partnership, which involves leaving decisions about the development processes largely up to partner countries. The UK is committed to supporting partner governments to fulfill their human rights obligations and will agree with governments how to assess progress in this area.[47] This approach fits well in the context of the RTD but it is not guided by the principles of this right. In this respect, the UK provides a vivid example of the European position. While an action taken may be grounded in, and in line with the demands of the RTD, the donor countries prefer to keep their commitments on a voluntary basis seeking to avoid the perception that their approach is based on the RTD. In abiding by this practice, they are seeking to protect themselves against possible further demands by developing countries.[48]

4.5 African Union (AU) and Non Aligned Movement (NAM)

The formal rights framework in Africa centers on the 1981 African Charter on Human and Peoples' Rights which came into force in 1987. As with all Regional Charters, it is derived from the 1948 Universal Declaration, but takes into account the African experience which saw a greater emphasis on economic, cultural and social rights; that is, those which

47 Kirchmeier F., "The Right to Development-where do we stand?" Retrieved on 20th Sept 2011 from http://library.de/pdf

48 *Ibid*

pertain directly to material well-being or 'development'. In keeping with the OAU's beliefs and, more importantly, the tenets of international law, the Charter and Commission have to recognise the primacy of individual states.

The RTD appears as a right of peoples, not individuals. As such a right, it is also incorporated into several national constitutions. The members of the AU committed themselves in the Banjul charter, which dates to a time prior to the Declaration on the Right to Development, to an understanding of the RTD that is not shared by many developed states.[49] Article 22(1) provides that;

> *All people shall have the right to their economic, social and Cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind*

The existence of Article 22 of the African Charter is proof of the transcendence of this right beyond the realm of soft international human rights law, even though only at a regional African level. Whatever its formal legal status, the RTD has certainly exhibited the tripartite properties of law-generation; law-regulation; and law (de) legitimation.[50] Every African state does therefore have the primary duty to ensure the realization of the RTD of all the peoples within its territory. It is these same African states that also bear the primary obligation of

49 Kirchmeier, *Op Cit* at n 39

50 Okafor, O.A., "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South- North 'Entente" *African Journal of International and Comparative Law*, vol. 7, 878.

intervening internationally on behalf of all of their peoples in order to ensure their enjoyment of the RTD.[51]

5.0 INTERNATIONAL CONSENSUS ON RIGHT TO DEVELOPMENT

Simply looking at whether or not the RTD is mentioned in international statements may not reveal the full extent of its current relevance. This section reviews the "international consensus" around development assistance and assesses whether or not it appears to have been influenced by the RTD debate, or at least corresponds to some of the principles of the RTD.

5.1 Justification for International Assistance

On some interpretations, the RTD is seen as a right of developing nations to receive development assistance. This is certainly inconsistent with the justification given for the provision of development assistance by developed countries. The Organization for Economic Cooperation and Development (OECD)'s *'Shaping the 21st Century: the Contribution of Development Co-operation'* provides the most straightforward justification for international assistance. It represents the collective views of development ministers, heads of agencies and other senior officials responsible for development co-operation. The motives for official assistance are[52]:

(i) Humanitarian: a compassionate response to extreme poverty and human suffering; the "moral imperative of support for development is self-evident";

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51 Okafor, O.C., "Righting" the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights." Retrieved on 23rd Oct. 2011 from http://library.fes.de

52 Pinon, *Op Cit* at n 21

(ii) Enlightened self-interest: political stability, social cohesion, human security and economic prosperity in developing countries benefit developed countries in terms of access to markets and international stability; and
(iii) International solidarity: people from all nations can come together to address common problems, and deal with issues that know no borders, such as environmental protection.

The OECD report, and most international development policy documents, does not refer to international co-operation as an international duty or an obligation owed to developing states.

The documents, however, makes references to mutual commitments and shared responsibilities between developing and developed countries towards the goal of poverty eradication. For example, when endorsing the International Development Targets (IDT), heads of states and agencies declared: "In accepting these goals, the international community makes a commitment to the world's poorest and most vulnerable and to itself." Such statements are not of a legally binding nature, but they do have some force as political and moral commitments.[53]There are now different dynamics on the discussions on sustainable development as the UN Member states and international Civil Organizations considers follow-up and review of the progress on the implementation of the post-2015 sustainable development agenda.[54]

For instance, CESR and many others agreed that accountability for the post-2015 commitments is a core

53 *Ibid*

54 Donald K., "Breaking the Accountability Taboo in Sustainable Development Negotiations." Retrieved on 23rd June from http://www.cesr.org/article.php?list=class&class=20

priority, given the stark failures of accountability in the context of the MDGs.[55] Based on over a decade of experience with development progress and challenges, there are now widely accepted arguments that governance should play a stronger role in the post-2015 development agenda: effective governance institutions and systems that are responsive to public needs deliver essential services and promote inclusive growth, while inclusive political processes ensure that citizens can hold public officials to account. In addition, good governance promotes freedom from violence, fear and crime, and peaceful and secure societies that provide the stability needed for development investments to be sustained.[56]

6.0 CONCLUSION

There has been considerable efforts by the international community to advance the right to development and promote its realisation. Also, there are ongoing efforts targeted at ensuring the full implementation of Right to Development across the globe. Development is key particularly in third world nations as a vast majority of human beings now exist in conditions which are far from the acceptable standards ranging from standards of living, health, and environmental conditions. The authors are of the opinion that given the potentials of the principles of RTD, a considerable improvement in the Third World nations can be achieved irrespective of the present challenges and issues faced in the implementation of the concept of development. It is also important to note that the

55 *Ibid*

56 UNDP Discussion paper on Governance for Sustainable Development Integrating Governance in the Post-2015 Development Framework March 2014. Retrieved on 22nd June 2015 from http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Discussion-Paper--Governance-for-Sustainable-Development.pdf

review of the level of realisation of the MDGs will further enhance the realization of the RTD, and continue to provide hope for the futuristic aspirations of achieving sustainable development.

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