FUNDAMENTAL HUMAN RIGHTS PROVISIONS AS MEANS OF ACHIEVING JUSTICE IN SOCIETY: THE NIGERIAN "BILL OF RIGHTS"

I. INTRODUCTION

The activities of man right from his birth to his death are directed by an incessant desire and search for justice and ceaseless efforts to avoid injustice. Towards these goals different constitutional devices have been adopted. Some countries have found consolation in entrenching fundamental human rights provisions into their constitutions, others have adopted the Ombudsman system, the Parliamentary Commission for Administration, the Permanent Commission of Enquiry, and others have resolved to allow their *inter se* relationships to be governed by the 'rule of law.' A closer look at the various functions of these devices reveals that they are aimed at achieving one objective, namely, the achievement of justice in society. In this paper attention will primarily be focussed on the Nigerian "Bill of Rights" and where necessary references will be made to other jurisdictions. Before we start our discussion, it is perhaps necessary to trace, even shortly, how we come to have the "Nigerian Bill of Rights."

Fundamental human rights in Nigeria are the epitome of the English Bill of Rights, 1688, and the United Nations Universal Declaration of Human Rights.

The focal point though not the beginning of human rights may be traced back to ideals thought to be implicit in *Magna Carta,* 1215, the Petition of Rights 1628, the Bill of Rights, 1688, and from concepts of fundamental law and natural rights expressed in the monumental works of Coke and Locke. While the precise content and limit of chapter 39 of the Charter[1] is still unsettled, it is, at least, clear that the Crown agreed not to rule the state arbitrarily but according to the laws of the land.[2] Sir Edward Coke in his vigorous writings presented a series of procedural safeguards which he labelled "due process of law." He asserted that the 39th Chapter of the *Magna Carta* merely codified the common law as opposed to any grant from the Crown.[3] It was his belief that the common law was "the absolute perfection of reason."[4]

1. See C.H. McElwain, "Due Process of Law in Magna Carta" 14, *Columbia Law Review* (1914) 27, W.S. McKechnie, *Magna Carta* (1950) 436.
2. A.V. Dicey, *The Law of the Constitution,* 10th ed. p. 184.
3. "It is to be observed," Coke said, "this chapter is but declaratory of the old laws of England" — Coke, 2nd *Institutes of the Laws of England,* 6th ed. 50.
4. *Ibid.,* 179.

and argued that condemnation without notice and hearing — a situation not permitted by our Republican Constitution — was unreasonable and therefore unjust. The ultimate effect of this part of the Charter was to give and guarantee full protection to every human being "who breathes English air."[5] The method adopted in Britain to achieve this is quite different from the approach of other states. The rights and freedoms of British subjects are protected by the ordinary law of the land whereas these same rights and freedoms are the subject of judicially enforceable constitutional guarantees in the United States of America and in some Anglo-phone states in Africa, Asia, and Carribean Islands.

Some doubts have, however, been expressed about the usefulness of a judicially enforceable Bill of Rights. The Report of the Simon Commission on the Indian Constitution, 1930, exhibited a naked distrust for a declaration of human rights in a constitution. The Commission observed:

> Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of the individuals.. .Experience, however, has not shown them to be of any great practical value. Abstract declaration are useless, unless there exists the will and the means to make them effective.[6]

The Minorities Commission appointed to enquire into the fears of the minorities in Nigeria was equally doubtful in incorporating human rights into the Nigeria Constitution. The Commission thought that:

> Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interprete. Nevertheless, we think they should be inserted... A government determined to abandon democratic courses will find ways of violating them...[7]

Inspite of these strictures one observes a transformed scene. In 1959, Nigeria had her "Bill of Rights" and this was followed later by some States in Anglo-phone Africa.[8] It seems therefore that constitutional protection of human rights is now a cardinal and generally recognized feature of democratic governments. According to Alexis de Tocqueville it is "one of the most powerful barriers that has ever been devised against the tyranny of political assemblies."[9] The argument that constitutional guarantees are baseless mechanisms because a government determined to flout them can always find loopholes seems to be superficial. Constitutional safeguards as we shall see later provide to a large extent security against a tyrannical government. They make the way of powerful government more difficult. Bills of Rights, says Lien, "are always monumental indictments of regimes in the past as well as promised

5. Sir Edward Greasey, *The Rise and Progress of the English Constitution,* 13th ed. p. 151.

6. Cmnd 3569 (1930) pp. 22-23.

7. Cmnd 505 p. 97.

8. By the end of 1964 Nigeria, Sierra-Leone, Jamaica, Trinidad, Uganda, Kenya, Zambia — all had "bills of rights."

9. *Democracy in America,* Reeve-Bradley Text, Vintage Books, Vol. I, p. 107.

safeguards against the same abuse by regimes of the future."[10] This of course is dependent upon the attitude of the court whose responsibility it is to review governmental activities in all facets. It depends upon whether the court will adopt either the liberal or strict interpretation approach.

Although Nigeria inherited the English common law practice in existence prior to 1900,[11] the Nigerian "Bill of Rights" arose in response to minorities agitation.

II. THE IDEA OF JUSTICE

The concept of justice is one that eludes an acceptable definition. It is neither something that can be seen nor felt. Any definition of the term would depend on individual judgment. Yet in order to accomplish the aim of this paper, an accepted basis for discussion must be found. A learned writer once asked the question — "What is Justice?" His answer was that "justice is not something you can see ... it is what the right-minded members of the community — those who have the right spirit within them — believe to be fair."[12] In order to judge whether something is fair or otherwise, there must be a standard against which that "something" must be measured. A dialogue in the writings of Cicero shows that justice is based upon law. He writes:

> ...the origin of justice is to be found in law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.[13]

There appears to be a common ground between these two definitions — the element of right-mindedness in the members of the community who have the right spirit. Justice for our purpose is therefore what the reasonable members of the society would consider to be fair and just having regard to the legal situation.

The origin of justice in any society, one imagines, is to be found in law however rudimentary it may be. In modern times positive law as opposed to natural law is the only basis upon which rights and duties are determined. No legal recognition can be given to the relationship that exists between one citizen and another on the one hand, and between the citizen and the state on the other hand, unless by and with the approval of the State. Such recognition involves the balancing of the interest of the individual and the corporate existence of the State to ensure fair play. The achievement of this goal depends upon the extent

10. A.G. Lien, in the *UNESCO Symposium on Human Rights*, p. 24, adapted from Cowen: *The Foundation of Freedom*, 1961, p. 123.

11. The rules of common law, doctrine of equity and statute of general application in force in England — on January 1, 1900, were received in Nigeria. See Section 43 of the Interpretation Act, Cap. 89, Laws of the Federation of Nigeria, 1958 ed., (now Miscellaneous Provisions Act, 1964).

12. Sir Alfred Denning, *The Road to Justice*, 1955, p. 4.

13. Cicero: Laws II IV 8-11, adapted from Foster. *Masters of Political Thought* (1947) pp. 184-188.

to which these rights are restricted, and the methods by which they are protected. In the Nigerian context, and indeed in most countries having written constitutions,[14] the individual rights are protected by the Constitution, which by entrenching them makes them inviolable by the ordinary process of legislation.

III. CONTENTS OF FUNDAMENTAL HUMAN RIGHTS

The position of the United States of America, in the realm of human rights, stands unique. Most Anglo-phone States in Africa adopt a modified version of the provisions of fundamental human rights of the Nigerian Constitution.

These provisions are contained in Chapter III which provides for the protection of certain rights and freedoms.[15] These are: rights to life, to personal liberty, to respect for private and family life, to fair hearing, and of enjoyment of property, freedom from inhuman treatment, freedom of conscience of expression, of movement, of assembly and association. Similar provisions are contained in sections 13-24 of the Jamaican Constitution, 1962. These rights and freedoms are, however, not absolute. They are qualified by a number of 'derogatory' clauses. Take for example the right to freedom of assembly and association[16] which is subject to laws that are reasonably justifiable in a democratic society in the interest of defence, public order, public morality or public health. On account of this wide qualification, fundamental human rights have been stigmatised as "abstract declaration" which are "useless unless there exists the will and the means to make them effective."[17] Indeed the various provisos are avenues which allow a wide area for the executive to manouvre. But in so far as these rights and freedoms are entrenched and therefore cannot easily be jettisoned by the ordinary process of legislation, they are effective limitations on the powers of the legislature to cut down these basic rights in the society. Thus they constitute a wedge upon which the judiciary can strike down legislative/executive actions which go contrary to those provisions of the Constitution. In *Doherty* v. *Balewa*,[18] the Commissions and Tribunals of Enquiry Act, 1961, empowered a Commissioner appointed by the Prime Minister under its provisions to punish by imprisonment or fine anyone who failed or refused or neglected, upon summons, to attend as a witness or to produce a book, document, etc., or to answer any question put to him by or with the concurrence of the Commissioner.[19] As this did not fall within one of the specified exceptions to the right to personal liberty granted under section 20 (now section 21) of the Constitution, the provision of the Act was held void. The Act further

14. E.g. see the Constitutions of America and Zambia.

15. Sections 18-28, Nigerian Republican Constitution, 1963.

16. Section 26, Republican Constitution, 1963.

17. *Report of the Simon Commission on the Indian Constitution* Cmnd 3569 (1930) 23.

18. [1961] All N.L.R. 604.

19. Section 15 (a) and Section 18 (b).

provided that neither the Commission itself nor any action by the Prime Minister shall be enquired into in any court of law.[20] The Supreme Court also held this provision to be void and *ultra vires*.

Section 21 of the Constitution guarantees personal liberty of the subject. This provision is very similar to Article 21 of the India Constitution, 1949 (as amended, 5th October, 1965). The object of this section is to serve as a restraint upon the powers of the executive so that it may not arbitrarily interfere with the liberty of the individual. The section comprehends the freedom of movement guaranteed under section 27 of the Constitution. Even in times of emergency, the provisions of sections 21 and 27 of the Constitution have been used to uphold the freedom of the subject whose movement was unlawfully restricted.[21]

The Nigerian Constitution expressly provides for procedural safeguards in respect of persons who are arrested on a criminal charge.[22] This appears to be one of the most important fundamental human rights provisions. Although in some respects it is repetitious of what has already been provided for by the ordinary law of the land,[23] its presence in the Constitution gives a double assurance to the Nigerian citizen that matters aflecting his liberty will not be treated with levity. Any person who is arrested on a criminal charge must be informed promptly in a language that he understands of the reasons of his arrest, he must be brought before a court without delay, and if not tried must be released either unconditionally or with some reasonable condition. When he is charged in court he must be informed in the language that he understands of the nature of his offence, he must be given a fair hearing, an opportunity to prepare his defence; he is entitled to defend himself or by counsel of his own choice. The accused must not be compelled to give evidence at his own trial, and all criminal offences and penalties must be founded upon written law.[24]

In particular, subsections (7), (8) and (9) of section 22 of the Nigerian Constitution are very important. They are similar to Article 20(1), (2) and (3) of the Indian Constitution 1949 (as amended), Section 22(7) prohibits retroactive penal legislation — a device to ensure that subjects are not made liable for acts or omissions that did not at the time it took place constitute an offence. Sub-section 8 of the same section forbids double jeopardy.[25] This sub-section would prevent the prosecution from bringing a fresh charge against the accused after an acquittal. The right against double jeopardy contained in s. 22(8) is founded upon the English common law rule, "*nemo debet bis vexarei*",

20. Section 3(4).

21. *Williams* v. *Majekodunmi,* (1962) 1 All N.L.R. 413.

22. Section 22 subsection (2) — (9) Republican Constitution, 1963.

23. See for example section 5 of the Criminal Procedure Act.

24. Section 22(2), 22(4). 22(5), 22(9) Republican Constitution of Nigeria, 1963; and see *Aoko* v. *Fagbemi* [1961] 1 All N.L.R. 400.

25. See also 5th Amendment to the Constitution of the United States of America which contained similar provisions.

which means that a man may not be put twice in peril for the same offence.[26] This enables an accused person to raise a plea not only of *autrefois convict* but also of *autrefois acquit*.[27] Section 22(4) presumes an accused to be innocent until the contrary is proved. The common law principle that the prosecution should prove the guilt of an accused person has been given constitutional expression under sub-section (9) of section 22 which shields the criminal from being compelled to give evidence at his trial. He may give evidence on his own behalf if he elects to do so, but if he elects otherwise, that fact cannot be used to his prejudice.[28] Neither liberty nor justice would exist if these provisions were sacrificed. Section 22 subsection 1 moreover provides that in the determination of his civil rights and obligations every person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and so constituted in such a way as to secure its independence and impartiality. This provision, no doubt, imports into the Constitution the principles of natural justice, viz, *audi altaren parten* and *nemo judex in causa sua*.

Having highlighted some of the important areas of the human rights of the Nigerian Constitution, we shall now examine in greater details the interpretation of some of these provisions by the courts and see whether these provisions have achieved a measure of justice in our society.

IV. THE COURTS AND FUNDAMENTAL HUMAN RIGHTS

To enumerate the various human rights without a means of testing whether there has been any departure from the tenets would be a worthless exercise. It is in this regard that we have to direct our attention to the courts and to examine their role in the administration of justice. The position of the judiciary in this connection is an enviable one. Arguments have been advanced against the practice of judicial review of legislative/executive encroachment of fundamental human rights.[29] It has been argued that judicial review defeats the people's will and their representation, and that the courts are not better guardians of the rights of the citizens than the legislature itself. It is pertinent to remind these advocates of the people's will that a constitutional document such as we have in Nigeria is essentially a legal document which requires authoritative interpretation by courts. Marshall, C.J. pointed out in the celebrated American case of *Marbury* v. *Madison*[30] that "it is emphatically the province and duty of the judicial department to say what the law is." The authority to interprete the constitution is vested in the courts, and moreover, the limitations in the constitution are mostly placed upon the legislative and the executive arms of the

26. *R.* v. *Barron* [1914] 2 K.B. 570.

27. *R.* v. *Miles* (1890) 24 Q.B.D. 423.

28. *Wilson* v. *United States* (1911) 149 U.S. 60.

29. For detailed discussion see D.V. Cowen: *The Foundation of Freedom* (1961) pp. 139-143.

30. (1803) 1, Cranch, 137 reprinted in Mason & Beaney: *American Constitutional Law: Introductory Essays and Selected Cases* 3rd ed. p. 24.

government. The legislature and the executive should therefore not be allowed to be judges of their powers else the constitution would be turned to an instrument of tyranny — an inescapable calamity envisaged by Motesquieue in his doctrine of separation of powers.

Section 22 of the Republican Constitution requires that an accused person should be given certain basic precedural safeguards which include a right of an accused to be given adequate time and facilities for the preparation of his defence.[31] Any violation of this basic requirement would constitute injustice which the provisions of the constitution are designed to prohibit. Thus in *Gokpa* v. *Inspector-General of Police* this provision was held to have been violated when the accused person was brought before a Magistrate by a bench warrant. He was ignorant of the fact that his case was going to be tried that day. He therefore asked for an adjournment to enable him arrange for a counsel. But the Magistrate only adjourned until the afternoon of the same day even though the nearest place that counsel could be found was 23 miles away. When the hearing was resumed, the accused refused in the absence of his counsel to take any further part in the proceedings which ended in his conviction. The High Court of the former Eastern Nigeria held that the accused had not been given a fair trial as guaranteed by section 22 (5) (b) of the Constitution.[32]

The right to counsel of one's choice guaranteed by section 22(5) (c) is aimed at securing justice between the citizen and another citizen on the one hand, and between the citizen and government on the other hand. It would be a negation of justice if an accused were to have his counsel chosen for him by those prosecuting him. Lord Denning said:

> I know of nothing which is so essential to a right decision as to have the benefit of arguments put forward all that can be said on each side.[33]

The extent of this right came up for decision in *Chief Obafemi Awolowo* v. *The Federal Minister of Internal Affairs*.[34] In this case the plaintiffs who were charged with criminal offences briefed a leading member of the English Bar who was not a Nigerian citizen to defend them. He was, however, prohibited from entering Nigeria by the Minister of Internal Affairs purporting to act under section 13 of the Immigration Act. The action of the Minister was then challenged on the ground that the action was *ultra vires* as being inconsistent with the provisions of section 21 (5) (c) of the Independence Constitution, 1960, dealing with right to counsel.

The court held that the Minister acted within the scope of the power conferred on him by section 13 of the Immigration Act and that the section was not inconsistent with section 21(5) (c) of the constitution.

31. Section 22(5) (b).

32. [1961] 1 All N.L.R. 423. Consider the case of *Shemfe* v. *Commissioner of Police* (1962) N.N.L.R. 87 where the High Court of the former Northern Region came to a different conclusion on somewhat similar facts.

33. *Freedom under the Law* (1949) p. 91.

34. (1962) L.L.R. 177.

Section 21 (5) (c) of this Constitution provides:

> *every person*[35] who is charged with a criminal offence shall be entitled—
>
> (c) to defend himself in person or by legal representatives of his own choice.

It was argued on behalf of the plantiffs that any exercise of executive power must be subject to and directed towards the maintenance of the constitution otherwise such exercise of power would be *ultra vires*. Furthermore, that section 21 (5) (c) of the constitution did not place any limitations on the legal representatives a citizen may choose to retain. The court however, rejected the liberal interpretation of this section by the plaintiffs counsel and said:[36]

> I must state at once that I do not accept as a sound proposition the submission that the provision contained in section 21(5) (c) of the Constitution, liberally interpreted, can be construed to entitle anyone to bring a counsel from the U.K. for the purpose of defending him in a criminal charge. To accept that interpretation would be to strain language. The Constitution is a Nigerian Constitution *meant for Nigerian in Nigeria*.[37]... The natural consequence of this is that the legal representative contemplated in section 21 (5) (c) ought to be some one in Nigeria.

This interpretation by the court, it is submitted with respect, is wrong. First, the opening phrase of section 21(5) says "every person" and this could mean Nigerians and non-Nigerians resident in this country and it cannot be said that the constitutional guarantee is limited only to Nigerians. Second, it is incontestable that the Constitution is a Nigerian Constitution, but it is wrong to suggest that the Constitution is "meant for Nigerians in Nigeria" as this would have the effect of excluding non-Nigerians resident in this country from the protection of the Constitution. This is not, it is submitted, the ordinary meaning of the phrase "every person" as used in the section. It is therefore, submitted that since the Nigerian Constitution is meant for both Nigerians and non-Nigerians, the right to legal representation must not be confined to legal practitioners within Nigeria, and as such the liberal interpretation of the plaintiffs counsel seems to be more in accord with the tenets of the Nigerian Constitution than the restrictive view of the court. The supreme court in upholding the High Court decision said:

> ...The right granted by this section is qualified by various considerations which we need not go into here. Various reasons may curtail the choice of counsel, for example, the counsel of the accused's choice may be under lawful detention or lawfully confined and the like.[38]

These examples are too extreme. It would be sheer madness for an accused person whose liberty is in the balance to choose a counsel under detention or confinement to defend him. The situation in the *Awolowo* case is however different. The accused's counsel was at no time under a disability until after it was known that he was coming to Nigeria to

35. (Empasis supplied).

36. *Awolowo* v. *Minister of Internal Affairs & ors.* (1962), L.L.R. 177 at 184-185.

37. (Emphasis supplied).

38. *Awolowo* v. *Usman Sarki, Federal Minister of Internal Affairs & or.* S.C. 99/1964. Judgment delivered on 24th June, 1966 (Unreported).

defend the accused persons, whereas the examples given by the Supreme Court are events which are likely to take place before the exercise of the constitutional right under section 21(5) (c).

This decision shows judicial self-restraint. It clearly laid greater emphasis on the amplitude of the discretionary power of the executive than on the need to relate it to the purpose of the Immigration Act.

The Minister did not direct his mind to the provisions of section 13 of the Immigration Act when he gave his directive prohibiting the entry of Mr. Gratien into Nigeria. Thus he did not care to know whether or not he had power to do so under the law. This point was succinctly noted by Udoma, J. when he said:

> the rule of practice that where an Act of Parliament is relied upon by way of defence to an action it should be specifically pleaded did not appear to have been followed in this case. Instead it was averred in a daring and nonchallant manner in paragraph 7 of the statement of Defence that the first defendant had directed that *no person, not being a native of Nigeria shall be allowed entry into Nigeria for the sole purpose of defending any of the accused persons in the treasonable felony charge.*

The word 'absolute' qualifying discretion in section 13 of the Immigration Act means that the Minister must not be governed by any other consideration from other person or body of persons. It does not mean that such power can be exercised outside the limits of the law. Where a discretionary power, absolute or otherwise, is vested in an individual or authority, the exercise of such power presupposes that it will be exercised reasonably.[40] According to Lord Halsbury:

> ... discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion... according to law, and not humour, it is to be not arbitrary, vague and fanciful, but legal and regular.[41]

In the particular circumstance of *Awolowo's case* it cannot be said that justice was done according to law but according to the whims and fancies of the executive. The Supreme Court's attitude toward reviewing discretionary powers based upon policy, therefore, appears to be in favour of the executive[42] without a deeper and analytical consideration of the major issues involved.

In the realm of administrative law recourse has been had to the concept of 'fair hearing' under section 22(1) of the Constitution, and the courts have not been slow in quashing decisions that have gone contrary to this principle.

39. *Awolowo* v. *The Federal Minister of Internal Affairs* (1962) L.L.R. 177 at 180.
40. See Lord Macnaghten's statement in *Westminster Corporation* v. *London and North-Western Railway Co.* [1905] A.C. 426 at 430.
41. *Sharp* v. *Wakefield* [1891] A.C. 173 based on *R.* v. *Wilkes* (1770) 4 Burr. 2527.
42. Especially in time of emergency. The courts are always anxious not to impede the emergency efforts of the government mostly in cases where the policy element in the decision looms far larger than the merits of the case of an individual. *Alhaji Adegbenro* v. *Att. Gen. For the Federation* (1962) W.N.L.R. 156. See also the cases of *R.* v. *Halliday ex parte Zadiq* [1917] A.C. 260, and *Liversidge* v. *Anderson* [1942] A.C. 206.

In *Dr. Denloye* v. *Medical and Dental Practitioners Disciplinery Tribunal*[43] the appellant complained against the decision of the respondent which found him guilty of professional misconduct and ordered the removal of his name from the Medical Register without any warning as to the nature of his offence, and without an opportunity to be heard. The Supreme Court held that the appellant was entitled to know the nature of the evidence given against him. The Court further held that it was wrong to withold the evidence in question from him and that this was a denial of justice. The procedure adopted in this case was palpably contrary to the basic requirements of natural justice that one is shocked to note that a member of the tribunal was a legal practitioner of some standing.

The courts in this sphere of administrative law often draw a distinction between what is and what is not judicial or quasi-judicial functions.[44] This distinction is purely a judicial creation and does not seem to reflect the spirit of section 22(1) of the constitution. Rather than employ the judicial-function concept it would seem to the writer that it would be better to analyse a case by reference to the nature of the power given to an administrative authority, the subject matter, the nature of the authority exercising the power and more significantly the effect of the exercise of the power upon the citizen.

We has discussed at length the provisions of section 22 of the Constitution. We shall now examine some important areas of Chapter III of the Constitution. Section 26 dealing with freedom of assembly and association provides:

> Every person shall be entitled to assemble freely and associate with other persons,...

This freedom is qualified by some restrictions in the interests of other persons. Unrestricted freedom of assembly and association would defeat the very purpose for which it was intended in any society. The right to assemble, to form or belong to associations presupposes the existence of similar rights of other persons. In a case decided by the United States Supreme Court, for example, it was held *inter alia* that:

> Civil liberties, as guaranteed by the constitution, imply the existence of an organized society maintaining public order, without which liberty itself would be lost in the exercise of unrestrained abuses.[45]

This provision, one may say, guaranteed nothing but ordered freedom.[45a] It ensures that these freedoms are enjoyed by all.

43. Suit No. SC 91/68 of 22nd Nov., 1968 (Unreported).

44. *Arzika* v. *The Governor, Northern Region*, [1961] 1 All N.L.R. 379; *Owolabi* v. *Permanent Secretary, Ministry of Education, Western State of Nigeria*, Suit No. IK/4M/69 of 6th May, 1969 (Unreported); *Okakpu* v. *Resident, Plateau Province* (1958) N.R. N.L.R. 5; *R.* v. *Director of Audit, Western Nigeria ex parte Oputa & ors.* [1961] 1 All N.L.R. 659.

45. *Cox* v. *State of New Hammshire* (1941) 312 U.S. 569.

45a. *The Queen* v. *The Amalgamated Press of (Nigeria) Ltd., & or* [1961] 1 All N.L.R. 199.

The constitution recognizes that it may be necessary for the government to acquire property compulsorily but in order to safeguard the interest of the individual, it provides that such compulsory acquisition must be authorised by law and that the enabling law must provide for the payment of adequate compensation and for a right of appeal to the High Court. This provision was used in attacking the order made by the Somolu Tribunal and the subsequent Edict and Decrees to validate the order of the Tribunal in the case of *Lakanmi & or.* v. *Attorney-General, Western State of Nigeria.*[46]

The appellants among others had assets which were being investigated by a Tribunal of Inquiry under an Edict[47] of the Western State of Nigeria. The Chairman of the Tribunal made an order prohibiting further dealings with the properties except with the permission of the State Governor.

This order was challenged on the ground that it was made in contravention of section 22(5) (referred to earlier) and section 31 of the Republican Constitution, 1963. Unsuccessful applications for an order of *certiorari* to quash the order were made to the High Court and Court of Appeal (West) respectively. Between the decisions of the High Court and Court of Appeal, the Federal Military Government passed three successive Decrees[48] to aid the respondents as it was apparent from the grounds of appeal that the respondent would run into some legal problems. Decree No. 45 1968 was the climax of the efforts of the Federal Military Government to rescue the Western State Government from this legal cauldron. The Decree, among other things, excluded the application of fundamental human rights provisions in the Constitution in respect of parties named in the schedule[49] and abated all pending proceedings in respect of any Decree. The Supreme Court came out boldly and held that the determination of civil rights of a citizen by a legislative measure was a usurpation of judicial powers and that Decree No. 45, 1968 was not legislation of general application but was spent on the persons named in the schedule to the Decree. The Decree was aimed at certain people with the sole purpose of punishing them or to deprive them of their properties contrary to section 31 of the Constitution. The Federal Military Government reacted by passing Decree No. 28 — The Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970, to make the Supreme Court's decision inoperative. The decision of the Supreme Court may be looked upon as unfortunate. It poses many interesting legal questions for critical analysis and examination. Although one may disagree with the conclusions reached, it must be acknowledged according to Dr. Graham-Douglas:[50]

46. Unreported decision SC58/69 Judgment 24th April, 1970.
47. Public Officers and Other Persons (Investigation of Assets) Edict, No. 5, 1967.
48. Decree No. 37 — The Investigation of Assets (Public Officers and Other Persons) Decree 1968; Decree No. 43 — The Investigation of Assets (Public Officers & Other Persons) (Amendment) Decree, 1968; and Decree No. 45 — The Forfeiture of Assets, etc. (Validation) Decree, 1968.
49. Mr. Lakanmi was one of such parties.
50. Public Lecture delivered under the auspices of the Faculty of Law, University of Ife, Ile-Ife, on 7th May, 1971, pp. 5-6.

as an ingenious piece of judicial literature which shall have a lasting place in the constitutional and legal history of this country as a manifestation of the judiciary and of that requisite judicial courage which in every mature society must be the bastion of the freedom of the individual.

V. LIMITS OF GUARANTEED RIGHTS

There are, however, occasions when human rights provisions would prove ineffective, for example during periods of emergency[51] such as war or civil strife when the government must acquire unusual powers to deal with the situation.[52] In 1966 when democratic government was overrun by a military *coup d'etat* and the country was subsequently engulfed in a civil war, the provisions of human rights in our Constitution were rendered ineffective by various Decrees. They were powerless in preventing the arrest and detention of persons under the various State Security (Detention of Persons) Decrees.[53] Section 6 of the State Security (Detention of Persons) Decree 1966, suspended Chapter III of the Republican Constitution in respect of the persons named in the schedule to the Decree. The various Decrees deprive the courts of jurisdiction to enquire into any question as to whether fundamental human rights provisions of the Constitution "have been or is being or would be contravened" for the purpose of the Decrees. These Detention Decrees no doubt have, in every way, interferred with the liberty of the subject. A law which provides for the interment of the subject without trial is unquestionably oppressive. But there are occasions such as the national emergency of 1967 -1970 when the survival of the state becomes of paramount interest. In such occasions the corporate interest of the society must prevail over that of the individual[54] — *Salus populi suprema lex*.

Apart from these detention Decrees, fundamental human rights appear to speak the same language in war as in peace. The provisions of human rights in the Nigerian Constitution have been called in aid of citizens held in detention under the Armed Forces and Police (Special Powers) Decrees, 1967.[55] Under section 3(1) of the Decree the Inspector-General of Police is empowered to make orders for the arrest and detention of any person or persons if the Inspector-General of Police is satisfied "that any person or person is or recently has been concerned

51. Section 70(3) Republican Constitution of Nigeria, 1963; Section 29 Republican Constitution of Zambia, 1964.

52. Under the Emergency Power Act, 1961, the Governor, later President, was empowered to make regulations providing for the detention of persons whose activities are prejudicial to the interest of the State. In the crisis of Western Nigeria, 1962, the Provisions of the Emergency Power Act, 1961, was brought into operation. See for example Emergency Powers (Detention of Persons) Regulations, 1962, Emergency Powers (Restrictions of Persons) Regulations, 1962. Under these regulations some persons were detained without trial and others were restricted to various places in Nigeria.

53. For example see Decree Nos. 3, 8, 10, and 77 of 1966.

54. *R.* v. *Halliday ex parte Zadiq* [1917] A.C. 260, *Liversidge* v. *Anderson* [1942] A.C. 206.

55. Decree No. 24 of 1967.

in acts prejudicial to public order, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him."[55a]

These appear to be wide and arbitrary powers and tend to derogate from the entrenched clauses of the Nigerian Constitution relating to fundamental human rights in Chapter III. We shall examine two important cases in respect of the wrongful exercise of the powers conferred on army and police officers by section 3(1) of Decree No. 24, 1967. In *Alahaji Mojeed Agbaje* v. *The Commissioner of Police Western State*,[56] the applicant was detained under the orders of the Inspector-General of Police in pursuance of the powers conferred on him by section 3(1) of Decree No. 24, 1967. The reason and authority for the applicant's detention were not disclosed to him in spite of his repeated demands, and he therefore applied to the High Court for a writ of *habeas corpus*. It was held that the order was null and void as it was not in conformity with section 3(1) of Decree No. 24, 1967, and that the arrest and detention carried out under the order of the Inspector-General of Police were illegal. The decision of the High Court, was on appeal, affirmed by the Western State Court of Appeal.

Doubtless, for the order of the Inspector-General of Police to acquire any legal validity it is necessary that the order complies strictly with the letter of the Decree in question, that is to say, the Inspector-General of Police must satisfy himself that (a) the applicant is concerned with acts prejudicial to public order or (b) the applicant has been recently concerned in acts prejudicial to public order or (c) the applicant was preparing or instigating acts prejudicial to public order. But the order of the Inspector-General of Police did not disclose any of the above grounds in detaining the applicant but stated merely that the Inspector-General of Police is:

> Satisfied that the arrest and detention of the persons specified in the Schedule hereto as at the date shown against each person are in the interest of the security of the Federation of Nigeria.

It must be emphasised that those who are empowered to interfere with the personal liberty of others in the discharge of their duty must strictly and scrupulously observe the provisions of the enabling statutes.[57] This point was correctly emphasised by Aguda, J. When he said:

> In a democracy like ours, even in spite of the national emergency in which we have been for over 3 years...it is... high handed, for the police to hold a citizen of this country in custody in various places without, for over ten days, showing him the authority under which he is being held.[58]

55a. This section appears to be similar to Regulation 18B of the British Defence (General) Regulation, 1939.

56. Suit No. CAW/81/69 of 27th August 1969 (unreported).

57. See *Singh* v. *Delhi* 16, Sup. Ct. Journal 326.

58. *Mojeed Agbaje* v. *Commissioner of Police Western State*, Suit No. M/22/69 (unreported).

The detention of the applicant for so long a period was a flagrant disregard of the provisions of section 21(1) of the Republican Constitution of Nigeria, 1963. The section provides that any person who is arrested or detained shall be promptly informed in a language that he understands of the reasons for his arrest and detention.

The second decision arising from the wrongful exercise of powers conferred on the army and police officers under the Decree we are presently considering is *In re Mohamed Olayori &* ors.[59] In this case *Mohamed Olayori & ors*. entered into a contract to supply foodstuffs to the Armed Forces. They were in breach of their obligations under the contract and they were therefore arrested and detained under section 3(1) of Decree No. 24, 1967. The accused persons applied for and were granted a writ of *habeas corpus* (a remedy under s. 32(1) of the Republican Constitution) for their immediate release. It is difficult in this case to see anything in the conduct of the applicants which constitutes an act which was prejudicial to public order of the State. Having regard to the provision of section 6 of the Constitution (Suspension and Modification) Decree, 1966, it would seem that judicial review of legislative action has completely been ruled out, at least for the time being, in Nigeria. The courts in the above cases did enquire into the validity of subordinate legislation made in pursuance of the authority of the enabling Decree. However, review ability of subordinate legislation has now been curbed by s. 1(5)(b) of Decree No. 28 Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970. In *Harriman* v. *Col. Johnson*[60] it was held that the order of the Lagos State Government made in pursuance to section 8 of the Investigation of Assets (Public Officers and Other Persons) Decree 1968 was not reviewable by the court.

Under our present legal system there are a number of different remedies from which the citizen must choose if his rights and freedoms are violated such as the prerogative orders of *mandamus, certiorari*, prohibition and equitable and common law remedies. Sometimes different remedies are prescribed by different statutes. Each of these remedies has its hidden pitfalls. If the citizen chooses the wrong one, even where he has a good case, his claim will be dismissed, and he will be told to start all over again at his own expenses and also at the cost of meeting all legal expenses incurred by his adversary in making good a defence which has no substantive merit. If the defendant is an arm of the government, neither an order of injunction nor a writ of *fi-fa* can be sought against him. The Supreme Court, in the *Williams* case, has, however, given an indication that it would, if necessary, grant an injunction against a government functionary.

On the other hand if the functionary of the government who violates the citizen's right was performing a duty classified as "administrative" and not as "judicial" the order of *certiorari* would be

59. Suit No. M/196/69 of 17th November, 1969 (unreported).

60. Lagos State Suit No. LD/440/69 Judgment dated 6th October, 1970 (unreported). A similar decision was held in *Chief Olowofokeyu* v. *Att. Gen. Western State & Ors*. Suit No. LD/270/69 judgment dated 22nd March, 1971.

unavailable to the injured citizen. *Certiorari*, one must remember, is one of the remedies a person may apply for in the High Court if any of his human rights is violated.[61]

The existence of this dichotomy between "judicial" and "administrative" functions in our jurisprudence has created much confusion and injustice. The cases of *Okakpu* v. *Resident Plateau Province*,[62] *Merchants Bank* v. *Federal Minister of Finance*[63] (cases where licences to operate business were cancelled) and *R.* v. *Director of Audit Western Nigeria Ex parte F. Oputa & ors*[64] (surcharge case where the parties concerned were not given right to be heard contrary to section 22(1) of the Nigerian Constitution) raise some major problems. Would the judicial arm of the government close its eyes and allow a citizen to go without a remedy if his right was violated? Would the courts allow themselves to be used as agents for committing injustice? From all indications it would seem that the courts have the tendency to aid the administration by their insistence that the principle of natural justice in section 22(1) of the constitution need not be strictly adhered to in all cases. The writer thinks that this is a *sine qua non* in judicial or quasi-judicial proceedings. Statutory requirements are needed to displace this constitutional requirement, and unless, indeed they are so excluded they remain the fountain of justice.

VI. CONCLUSION

The Nigerian "Bill of Rights" was achieved as a result of the recommendation of the Minorities Commission into the fears of minorities of this country. This recommendation was itself influenced largely by British practices and beliefs in *Magna Carta*, 1215, Petition of Right 1628, the Bill of Rights 1688, and the European Convention on Human Rights to which Britain was a signatory.

The provisions, though full of loopholes, have presented themselves as the bulwark against executive encroachment. In this connection the courts have played an effective role.[65] Although in the interval the provision of human rights have proved unsuccessful barriers to executive actions, nevertheless, in the majority of the cases, it has achieved no small measure of justice. However, there is urgent need for a change of attitude by the courts in areas where governmental policy conflicts with individual rights. Unless public interest as such looms far larger than that of the individual the courts should not hesitate to uphold the dignity of man.

The present dichotomy of what is and what is not judicial function is causing a great confusion and injustice in the realm of administrative

61. Section 32 of the Republican Constitution, 1963.
62. (1957) N.R.N.L.R. 5.
63. [1961] 1, All N.L.R. 598.
64. [1961] All N.L.R. 659.
65. See for example *Doherty* v. *Balewa case* and the recent case of *Lakanmi* v. *Attorney-General Western State of Nigeria.*

law. A body may be exercising a judicial function even though it would not in ordinary parlance be called a court. Is it, therefore, not better to analyse a case by reference to the nature of power given to the authority, the subject matter and the nature of the donee of the power and the effect of such power on the individual?

The inadequacies of judicial review, especially the concept of "state irresponsibility" are now out-dated. It is difficult to see how justice could be dispensed between the citizen and government functionaries if an order for injunction cannot be issued against them.

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