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JUDICIARY AND HUMAN RIGHTS PROTECTION: A CASE STUDY OF NIGERIA

BY

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A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Comparative Law

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ABSTRACT

Human rights are natural rights of man which have been recognized by generations over the time. Human rights protection is a global phenomenon and responsibilities of every responsible civil society. It is thus one of the yardsticks for determining societal level of civilization. Nigeria as a country is not left out in the recognition and protection of the fundamental rights of its citizens. This research therefore aims at examining the functions of judiciary in the defence of the constitutionally protected human rights. It examines the attitude of Nigerian Courts as the last resort and hope of common man, in the determination of human rights cases for the discharge of its constitutional duty of human rights protection. This was done through doctrinal analysis methodology, in which materials gathered from both the library and electronic media are analysed. The research finds that constitutional human rights in Nigeria are not well protected by the judiciary. In consequence, the research finds that institutional and personal independence needed by the judiciary and judges to carry out this duty are not practically guaranteed in Nigeria. The research also discovers lack of independence as one of the major factors affecting the judiciary in the area of human rights protection. The research finds that the orientation of most of the lower Magistrates in the area of human rights protection is inadequate, and this is occasioned by lack of experience in the practice of law before their appointments as Magistrates. Adequate measures are therefore to be taken to ensure judicial independence and practical experience to be made a pre-requisite for the appointment of Magistrates. This will positively enhance the attitude of the judiciary towards human rights protection.

ملخّص البحث

حقوق الانسان هي الحقوق الطبيعية المهتمّ بها من قبل الأجيال على مدار الزمن. وحماية هذه الحقوق هي ظاهرة عالمية ومسؤولياتٌ لكل مجتمعٍ مدنيٍ محترمٍ. ومن ثمّ، فهي احدي المعايير المعتبرة لتحديد مستوى حضارة المجتمع. نيجيريا كدولة ليست مستبعدةً في الحماية والاعتراف بالحقوق الأساسية لمواطنيها. لذا يهدف هذا البحث إلى دراسة وظائف السلطة القضائية في الدفاع عن حقوق الإنسان التي يحميها الدستور. فإنّه يبحث عن موقف المحاكم النيجيرية في مناقشة الشكاوي المتعلّقة بحقوق الإنسان لانحلال واجبها الدستوري في حماية حقوق الإنسان. وقد تم ذلك باستخدام المنهج الفقهي في تحليل البيانات التي تمّ جمعها من المكتبة والوسائل الالكترونية . ويكتشف البحث بأنّ حقوق الإنسان الدستورية في نيجيريا ليست محمية بشكل جيّد من قبل السلطة القضائية. ونتيجة لذلك ، يرى البحث بأن الحريّة الشخصية والمؤسسية اللازمة للقضاء والقضاة لتنفيذ هذا الواجب ليست مضمونة في نيجيريا. وكما يكتشف البحث عدم الاستقلال واحدا من العوامل الرئيسية التي تؤثّر على الجهاز القضائي في مجال حماية حقوق الإنسان. ويلاحظ البحث بأنّ توجيه مُعظم قضاة المحاكم السفلى في مجال حماية حقوق الإنسان غير كافٍ، وسبب ذلك هو عدم وجود الخبرة في ممارسة المحاماة قبل تعيينهم قضاة. لذلك، ينبغي اتخاذ تدابير كافية لضمان استقلال الجهاز القضائي والخبرة العملية شرطا مسبقا لتعيين القضاة. فهذا يعزّز إيجابيًا موقف السلطة القضائية نحوَ حماية حقوق الإنسان.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.

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Supervisor

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Folorunsho Ahmad Hussein

Signature ..... Date .....

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Signature Date

All praise is due to Allah the Most High. May the peace and blessings of Allah be further bestowed upon the Holy Prophet Muhammad (S.A.W).This dissertation is wholeheartedly and sincerely dedicated to the departed sole of my beloved Father, Mu'allim and Murshid, Sheikh Ahmad 'Abdullah Folorunsho (Hamaullah, "Baba-n-Faagba"). Rahimahullah Waradiyallahu'anh.

Glory be to Allah (SWT), who hath ordained laws and granted Guidance. May the peace and blessing of Allah be further bestowed upon the noble Prophet Muhammad (SAW), his house hold, companions and the all believing Muslim.

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May I conclude by once again thanking Allah (SWT) for His countless blessing by adopting His words where He says:

﴿ دَعْوَىٰهُمْ فِيهَا سُبْحَٰنَكَ ٱللَّهُمَّ وَتَحِيَّتُهُمْ فِيهَا سَلَٰمٌ ۚ وَءَاخِرُ دَعْوَىٰهُمْ أَنِ ٱلْحَمْدُ لِلَّهِ رَبِّ ٱلْعَٰلَمِينَ ﴾

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LIST OF ABREVIATIONS

A.C	Action Congress
A.G	Attorney General
A.I.R	All Indian Report
AC	Appeal Court / Appeal Case
ACHPR	African Charter on Human and Peoples' Rights
AFRC	Armed Force Revolutionary Council
All N.L.R	All Nigerian Law Report
Anor	Another
ASP	Assistant superintendent of Police
AU	African Union
BOR	Bill of Rights
C.A	Court of Appeal
C.E	Christian Era
CHR	Chancery Report
CJ	Chief Judge / Chief Justice
CLJ	Current Law Journal
CPA	Criminal Procedure Act
CPC	Criminal Procedure Code
Doc	Document
DPP	Director of Public Prosecution
ed. / eds.	Editor/ editors
edn.	Edition
etc.	(*et cetera*): and so forth
F.C	Federal Court
F.R.E.P.R	Fundamental Rights Enforcement Procedure Rules
FCT	Federal Capital Territory
FHC	Federal High Court
FIR	First Information Report
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IGP	Inspector General of Police
IL	Ilorin (Capital of Kwara State, Nigeria)
INEC	Independent National Electoral Commission
JCA	Justice Court of Appeal

JSC	Justice Supreme Court
LFN	Laws of the Federation of Nigeria
Ltd	Limited
M	Magistrate
MCO	Magistrate Court
N.N.L.R	Northern Nigerian Law Report
N.W.L.R	Nigerian Weakly Law Report
NBA	Nigerian Bar Association
NCLR	Nigerian Constitutional Law Report
NGO's	Non Governmental Organisations
NLR	Nigerian Law Report
No.	Number
NOPRIN	Network on Police Reform in Nigeria
OAU	Organisation of African Unity
OIC	Organisation of Islamic Conference
Ors	Others
p. / pp.	Page/Pages
P.D.P	Peoples' Democratic Party
Pt.	Part
S.C	Supreme Court
S.C.E.R	Supreme Court Electronic Report
S.C.R	Supreme Court Report
SAW	*Salla Allahu 'Alayhi wa-sallam* (Blessings and Peace of Allah be upon him)
SCGLR	Supreme Court f Ghana Law Report
SCNJ	Supreme Court of Nigeria Judgment
SSS	State Security service
U.S.	United States
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UNO	United Nations Organisation
USA	United States of America
v	Versus
vol. / vols.	Volume / Volumes

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Human Right is a global phenomenon, protection of which is of great concern to every civil society world over, the African continent inclusive, purposely for the welfare of the people. Nigeria as a country is not left out in the world agenda of human rights protection campaign. Most African countries including Nigeria have not been politically stable in the past forty years. For instance Nigeria has been under authoritarian/dictatorial military rule and epileptic democratic governance for an estimated period of more than three decades. During the period under reference (the military era), there were unchecked abuse of human rights due to the suspension of the major constitutional provisions by the military rulers vide their decrees. It was the inherited unconstitutional attitude of the military dictators that occasioned the collapse of the democratic governance in Nigeria during the second republic in 1984, due to administrative excesses by the executive arm, executive dominance of the statecraft, breach of law and violation of human rights, institutionalization of corruption by the politicians, weakness of the judiciary and general unpatriotic attitude of the executives.[1] These and many others have been the general feature and reason for poor governance occasioning abuse of human rights in Africa.

Abuse of human rights has therefore been identified as at the heart of African's problem. While the central theme of the 2002 Human Development Report is that

[1] See the collection of essays in Saddiq Muhammed and Tony Edoh (ed) "*Nigeria: A Republic in Ruins*" published by the Department of Political Science, Ahmadu Bello University, and printed by Gaskiya Corporation, Zaria, 1986.

protection of human rights is central to human development and that system of governance overwhelmed by corruption and lack of respect for the rule of law are main causes for unsuccessful economic growth and perpetual human rights abuse in Africa.[2]

Human right protection is the duty of the government. The system of governance which is expected to have respect for the rule of law and human right is built on the principle of power sharing and participation by the three arms of government (the executive, legislature and judiciary). The concentration therefore of unlimited, unchecked and arrogation of two much authority and power in the hands of one person has been the feature of governance in Africa.[3] Montesquieu has observed for a very long time that, every man invested with power has the tendency to abuse it, and to carry his authority as far as it will go, as absolute power corrupts absolutely.[4] Strengthening governmental institutions and other arms of government especially the judiciary to counter the dominance of executive power is essential for the rule of law[5] and human rights protection. But due to the attitudes of the African politicians/leaders, the military continues to be a prominent threat to civil rule and human right protection in Africa.[6]

It is noteworthy that from the last decade of the twentieth century, African continent experienced an improved situation in the area of constitutionally guaranteed governance and human rights protection. A good number of African countries during

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[2] United Nations Development Report, 2002 available at http://www.undp.org

[3] J. Oloka-Onyango (ed.), *"Constitutionalism in Africa: Creating Opportunities, Facing Challenges"* (2000), at 4

[4] S M. Judd Harmon, *"Political Though: From Plato to the Present"*, (1964), at 281 para 2. See also Ali Farazmand, *"Sound Governance: Policy and Administrative Innovations"* (Greenwood Publishing, 2004), at 20

[5] Lutisone Salevao. "*Rule of Law, Legitimate Governance and Development in the Pacific*", (Asia Pacific Press, 2005), at 42

[6] Garth Andrew Myers, "*Disposable cities: Garbage, Governance and Sustainable Development in Urban Africa*" (Ashgate Publishing Ltd, Burlington, 2005), at 62

the last part of 1990 were able to implement successful transitions from military to civil rule. Nigeria in particular marked its uninterrupted ten years of democratic rule on 29th May, 2009, this practically evident its successful transition from civil to civil rule based on constitutionally guaranteed rights.[7]

Although is it said that there is stabilised civil government on ground, the backlogs of the malpractices that truncated the second republic such as corruption, breach of laws, manipulation of judicial processes and violation of human rights provisions, are still found with the present politicians. If the values in the constitution is therefore to be upheld for the growth and sustenance of the present government and human rights protection, the judiciary as a crucial arm of government has a vital job to do vis-a-vis the discharge of it constitutional duties uninterruptedly and without being influenced.

It is the same constitution which guaranteed some basic rights for the citizens that established the judiciary. Under the constitution, courts are vested with judicial power to interpret the constitutional provisions of human rights and to adjudicate on matters bordering on violation of those rights with a view to protecting and redressing such violation and infringement.

The constitutions of most African countries have since independence contained a reasonable number of human rights provisions.[8] These constitutions presently meet international and regional human rights requirement.[9] Some of these constitutions, for some historical reasons go even further than these instruments.[10]

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[7] Breytenbach, W. "*Democratization in Sub-Saharan Africa: Transitions, Elections and Prospects for Consolidation*" (1997), at 1, See also Donald F. Ketti, "*The Transformation of Governance: Public Administration for Twenty-First Century America*" (The John Hopkins University Press, 2002), at 56

[8] See Chapter IV of the Constitution of the Federal Republic of Nigeria 1999.

[9] The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples' Rights (ACHPR).

[10] See South African Constitution 1996, Act 108.

What has been lacking is putting into practice what is contained in the provisions of these constitutions for the purpose of protecting the rights of the citizens.[11] Analysis of how the judiciary discharges or may be expected to discharge its responsibility to uphold the values of the constitution in the area of human rights protection forms the basis of this study.

1.2 SUMMARY OF THE PROPOSED DESSERTATION

For ease of reference and convenience, the thesis is divided into six chapters. Chapter one focuses on background study, statement problem and the objectives of the thesis. The chapter also states the hypothesis, literature review and the methodology employed. This chapter is concluded with the scope of the research work.

Chapter two discusses the major concepts of the dissertation. That is the conceptual analysis of human rights and the judiciary. The chapter also shows the relationship or interconnectedness of the two concepts.

Chapter three considers the concept of human rights from Islamic perspective. This chapter also examines the concept of judiciary and its role/function from Islamic perspective, with focus on how the court protects the people's rights that are guaranteed in Islam.

Chapter four x-rays the development of human rights and judiciary in Nigeria. The chapter also examines the growth of judiciary in Nigeria with focus on the structure of Nigerian courts and sources of law in Nigerian. This chapter also examines human rights in the Nigerian Constitution.

The next chapter, which is chapter five, examines some selected rights and their protection by the judiciary with reference to some decisions of the superior

[11] Heyns & Stefiszyn, "*Human Rights, Peace and Justice in Africa: A Reader*"(PULP, South Africa, 2006), at 63

courts of records in relation to human rights cases. The chapter also views the factors affecting the judiciary in the discharge of its function of human rights protection.

Chapter six is the concluding chapter of the thesis. This chapter mainly makes summary of the thesis. The chapter also gives suggestions and recommendations as well as the indicating the possible areas of further research.

1.3 STATEMENT OF THE PROBLEM

The study is based on the following problem: that Judiciary is an important arm of government and the last resort of common man. It is also the only institution which is constitutionally vested with the power to interpret the constitution and international treaties in the protection of human rights. But practically due to some factors, access to court is limited.

Factors such as, lack of autonomy and independence due to influence and manipulation by other arms of government (the executive and the legislator) has greatly hindered the functional attitude and effectiveness of the judiciary in the area of human rights protection.

1.4 OBJECTIVES

The study aims at achieving the following objectives:

1. To examine the general responsibilities vested in the judiciary by the constitution and the expectations there from.
2. To probe the role played by the judiciary in the interpretation of bill of rights (BOR) as enshrined in the Nigerian Constitution.
3. To evaluate the role and the attitude of the judiciary towards the human rights protection in Nigeria.

4. To ascertain the internal and external factors that affect the judiciary to fulfil these roles.
5. To suggest possible solutions to the problems facing the judiciary in the discharge of its constitutional duty in the area of human right protection.

1.5 HYPOTHESIS

If judiciary is independent, autonomous and is free of external and internal influences, there will be good and efficient judiciary.

Therefore, with autonomous, independent, effective and efficient judiciary, human rights provisions can be practically protected.

1.6 LITERATURE REVIEW

This literature review is of two segments, the first aspect focuses on the concept of human rights while the second part is on the functions of judiciary especially in the area of human rights protection.

Human Right is an interdisciplinary concept which can be viewed from various educational perspectives such as philosophical, historical, and political etc.[12]This is evident by the historical preview of the concept which is traceable to the passage of the United States Bill of Rights and the issuance of the Magna Carta of the United Kingdom.[13] The modern trend and development of human rights however began about the end of Second World War, [14] the period which marked the issuance of

[12] Tom Campbell, David Goldberg and Sheila Mclean et al, *Human Rights From Rhetoric to Reality*, (New York, Basil Blackwell Ltd, 1986)
[13] See Magna Carta 1215 and Art. 2, USA Bill of Rights
[14] The "Congress of Europe" held a meeting lasting from 7 to 10 May 1948. The meeting was attended by about 1,000 persons, mainly from Europe but with representatives from the United States of America and the Commonwealth. At the end of the meeting declaration was issued known as "Universal Declaration of Human Rights" which was subsequently adopted on 10 December, 1948.

UDHR that eventually gave birth to many regional[15] and international [16]conventions and charters which serve as legal instruments for the protection of human rights across the world.

The development highlighted above created great opportunities for writers and other human right advocates like lawyers to advance their interests in this area. Against this background (Fernand de Varennes 1998)[17] in his edited work referred to the position of Kim Dae Jung and Yi Yul Gok where they maintained that, against the claim of the western writers on the history of human rights, the concept has been in existence thousands of years in Asia as well as in Islam before the acclaimed period by the west. Hart.Hart (1983) [18] in his work proposed that definition of terms such as rights, duty etc should not be of paramount concern, rather to read them in the context of given sentences. In the light of this, many writers instead of attempting to define human rights have rather classified human rights into two different categories. For instance, Karel Vasak (1977)[19] has classified rights in line with the French revolutionary classification as "Liberty, Equity and Fraternity". Following this trend, Peter (1999)[20] also classified it into "First generation, [21] second generation[22] and third generation rights."[23]

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[15] See The African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity (OAU) now African Union (AU); European Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950; The Cairo Declaration on Human Rights in Islam, adopted in 1990; American Convention on Human Rights adopted on 22 November 1969.

[16] For instance, International Convention on Economics, Social and Cultural Rights which came into force in January, 1966; International Convention on Civil and Political Rights which came into force in December, 1966

[17] Fernand de Varennes, *Asia- Pacific Human Rights Documents and Resources,* Vol. 1, (Netherlands, Kluwer Law International, 1998), p.1 Here, the editor refers to the arguments of Kim Dae Jung and Yi Yul Gok

[18] See H. L. Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy*, (Oxford, Clarendon Press, 1983), at 21-48

[19] Karel Vasak, 'A Thirty Year Struggle', *Unesco Courier*, 1977, at 30

[20] Peter Cumper, "Human Rights: History, Development and Classification", in Angela Hegarty and Siobhan Leonard (ed.), *Human Rights: An Agenda for the 21st Century*, (London, Cavendish Publishing Limited, 1999), at 6

From a different perspective, Scott (1993) [24] believed that whatever right that can be enforced against the state is right while unenforceable one is not but just an aspirational target. Among few writers that tried to define human right is Maryann (2005)[25] who casually gave her own definition as "government granted, government guaranteed-things we usually think of as falling under the topic of "due process" and "equal protection of the law".

Human rights under the Islamic law is more cogent real and certain then in the western arena M. Makki (1979)[26] observed that human right has been a well established concept under the Islamic law form the inception of Islam. Mawdudi (1982)[27] maintained that human rights in Islam are much more practical and realistic so that different categories of men were recognised and protected viz their rights as given to them by Islam over one thousand and four hundred years ago. To buttress the practicability of human rights from the Islamic perspective, Baderin (2003)[28] maintained among other things that true human right can only be fully realised under

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[21] These are rights to life, a fair trial, liberty, assembly, privacy, speech and religion as defined by Western nations

[22] These are rights to work, shelter, food, social security and health care as defined by Communist States

[23] These are rights to economic development of third world countries. The persistence for this class of rights by the Asian and African nations led to the world acceptance by a World Conference in 1993 that rights to development is a 'universal and inalienable and an integral part of fundamental human rights'. For detail of this, see Vienna Declaration and Programme of Action UN Doc A/49/669 (1993), Pt 1, para 10

[24] Scott Davidson, *Human Rights*, (Buckingham, Open University Press, 1993), at 25

[25] See Maryann Zihala, *Rights, Liberty and the Rule of Law*, (USA, University Press of America Inc., 2005), at 4

[26] M. Makki, who was the Omani representative to the United Nations made this statement. As contained in the Report of the Third Committee of the U.N General Assembly. United Nations,.1979. U. N. Document A/3/34/SR.27 N.Y.

[27] Mawdudi, S. A. *Human Rights in Islam* (Leicester, Islamic Foundation, 1982), at 11. See Lewis Bernard, 'Freedom and Justice in Islam' *Society* [Serial online]. January 2007; 44 (2): 66-70. Available from: Academic Resource Premier, Ipswich, MA. (Accessed February 14, 2009) Bernard on his own maitained that the idea of equality posed no problem as all Muslims are equal. See also Nais A. Shah 'Freedom of Religion: Koranic and Human Rights Perspective' *Asia- Pacific Journal on Human Rights and the Law* (2005) 1 &2 69-88

[28] Mashood A. Baderin, *"International Human Rights and Islamic Law"*, (Oxford: Oxford University Press, 2003), at 11

Islamic law. Mahbubul Islam (2002)[29] is one of the Islamic writers who attempted to define human rights. According to him, he said human rights are rights which are so basic and applicable to all human beings. In addition to this, he classified right into two and in a similar way, Shaikh Shaukat (1990)[30] also classified human right into two by saying, there are rights which are basically given to man under Islam as a human being and there are those rights Islam accords to different classes of people based on peculiar situations, status and positions. He however provided a proviso that for the maintenance of peace, human rights must have limitation as unlimited right may cause problem in the society. But he did not mention the circumstances for the limitations. In a related way but with another dimension Muhammad Tahir (2003)[31] divided rights into two as right of God and rights of man.

Upholding the divinity of rights in Islam, Ladan (2006)[32] holds that human rights in Islam are those rights divinely granted to man and can neither be suspended, abrogated nor infringed upon by any authority vide the use of any mechanism. Wali JSC (1998)[33] in his judicial pronouncement said that rights under Sharīʿah is universal as same is granted and guaranteed by a universal law. Baderin[34] propounded the principles of "Universality" and "Universalism" in the practice of human rights across the world.

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[29] ABM. Mahbubul Islam, "*Freedom of Religion in Shari'ah: A Comparative Analysis"* (Kuala Lumpur, A. S. Noordeen, 2002), at 1

[30] Shaikh Shaukat Hussain , "*Human Rights in Islam"*, (1990), at 42

[31] See Muhammed Tahir Haji Mohammed, "*Rights and Duties in Shari'ah and Common Law"* (Malaysia: Ilmiah Publishers, 2003), at 66-80. Mohammed substantially referred the works of Al-Qarafi, Al-Taftazani, Al-Shatibi, Ibn Shat, Ibrahim bin Musa and Muhammad Ra'fat, Which is mainly on the classification of right as rights of God and rights of man.

[32] Ladan, M. T., "*Introduction to Jurisprudence: Classical and Islamic"*, (Lagos: Malthouse Press Ltd, 2006), at 227-267

[33] See the judicial pronouncement of Bashir Wali, JSC in the case of *Alkamawa V. Alhaji Bello* (1998) 6 SCNJ 17 at p. 136. See also Maududi, A. A. "*Islamic Law and Constitution"* (ed.) Kurshid, A., (Delhi: Traj Coy. Ltd, 1986), at 52 as quoted by Ladan

[34] Baderin, n. 28

Across the globe, there is no continent without records of human rights violations; it is the gravity and extent that differs. The African continent is known for prevalent human rights violations ranging from social political, cultural and economic abuses. Hope (2005)[35] observed that abuse of human rights in Africa is due to bad leadership, since it is the leaders of nations that ensure development, welfare and protection of the rights of the citizens. Abdul Tejan-Cole (1998)[36] illustrated the horrible evils which man is capable of inflicting on his own kinsmen, as it happens in some African countries. In Nigeria particularly, the most common abuse of human right is the indiscriminate arrest and wanton torture of detainees in police custody. Bamgbose (1995)[37] highlighted the abuse of right to personal liberty perpetrated by the military administrations in Nigeria, despite the conspicuous protection of the said right by the Nigerian constitution. It was also observed by her that the courts owed a duty to Nigerian in the area of human rights protection and justice dispensation. In a similar manner, Amnesty International (2008)[38] compiled and submitted to the

[35] Hope, S. *"Towards Good Governance and Sustainable Development: The African Peer Review Mechanism"* Governance [serial online]. April 2005; 18-(2), 283-311. Academic Source Premier, EBSCO host (accessed February 10, 2009)

[36] See Abdul Tejan-Cole, "Human Rights under the Armed Force Revolutionary Council (AFRC) in *Sierra Leone:A catalogue of abuse"* 10 African Journal of International and Comparative Law, 1998, 481

[37] See Bamigbose O.A "The Protection of Nigerian Citizen form Arbitrary Arrest" in Cherif Bassiouni and Ziyad Motala (ed.), *The protection of Human Rights in Africa Criminal Proceedings* (Martinus Nijhoff Publishers,1995), at 152 and 155.where she enumerated how various military Decrees were used for instance Decree No 1 of 1984 to suspend in part the constitutional provisions of rights to personal liberty under section 32 sub section 3-7of the constitution. Also section 4 (2)Decree No 2 of 1984 suspended the whole of chapter IV of the 1979 Constitution and the same ousted the jurisdiction of courts from hearing any suit relating to matters in the said Decrees.

[38] Amnesty International Report presented to the House of Representative on 17 April, 2008 'Federal Government should ensure that law enforcement officers do not carry out extrajudicial executions, nor resort to torture or inflict cruel, inhuman or degrading treatment on detainees under any circumstance. Several years after the publication of our first report, little has changed. The police continue to execute suspects extra-judicially and torture is widespread in police custody. Detention in police lockups is intended to be for a short time. The Nigerian police tend not to bring suspects of crimes before a judge within the constitutional 24 or 48 hours, but detain them for longer periods of time in police custody. Often no one has access to those in police detention; sometimes families are not aware that their relatives are in police custody. The Nigeria Police Force and the State Security Service (SSS) continue to commit human rights violations with impunity, including extra-judicial executions. Extra-judicial executions are a violation of the right to life, guaranteed in Section 33 of the Nigerian Constitution. The

Nigerian Legislature on the situation of arbitrary arrest, extrajudicial execution and torture by enforcement officers in Nigeria

John K. and Robert T. (1999) [39] are of the view that, in a civil society operating a civil system of governance, the three arms of government are expected to work together for the sustainability of effective governance in other to enhance the protection citizens' rights. Judiciary especially has a major role to play in this respect. Effective judiciary contribute to effective governance by performing important functions necessary to protect the rights of the citizens in complex and diverse societies. Gloppen, Gargarella and Elin (2004)[40] in their own views maintained that, Courts are important for the working and consolidation of the constitutionally protected rights of the citizens. They facilitate civil government by contributing to the rule of law and by creating an environment conducive to economic growth. They also have a key role to play with regards to making power holders abide by the law, uphold the value of the constitutions, conventions and ensure the protection of human rights provisions as enshrined therein. In a democratic system, well-functioning independent courts are central to making political power-holders accountable- that is, ensuring (*transparency*);[41] obliging public officials to justify that their exercise of powers is in accordance with their mandates and relevant rules (*answerability*); and imposing checks if government officials overstep the boundaries for their power as defined in

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Nigerian police execute detainees. Moreover, the police execute people for refusal to pay bribes or during road checks, saying they are criminal suspects. Other cases include the shooting during arrest of suspected armed robbers. On 4 September 2007, Inspector General of Police Mike Okiro made public in his address "100 Days of Pragmatic Policing in Nigeria" that between June and August 2007, some 785 suspected armed robbers were killed in shoot-outs with police.4 The Network on Police Reform in Nigeria (NOPRIN) observes that "Whatever the explanation, extra-judicial executions appear to have become an acceptable tool of policing."" Available in <http://www.amnesty.org/en/library/asset/AFR44/006/2008/en/e171c9c9-25b2-11dd-8864-31715833fec3/afr440062008eng.pdf > (Viewed on 8 March, 2009)

[39] John K. Johnson and Robert T. Nakamura, "*Judiciary and Good Governance"*, (A Concept Paper presented to UNDP, 1999), at 1

[40] Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), "*Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies"* (London: Frank Cass Publishers, 2004) at 1

[41] Ibid.

the constitution, violate basic rights or compromise the democratic process (*controllability*).

On the functions of courts, Rodger (2004)[42] said that judicial review is a very powerful weapon in the armoury of the courts to review a decision that has been made by the executive or an administrator which is alleged: was made improperly; without authority or in excess of the power conferred on the decision-maker; or because of the failure by the decision-maker to observe the rule of natural justice. On the African continent, the growth of judicial review has been largely linked to preventive detention cases, and as such many victims whose rights have been trampled upon by the executive have gained their freedom via judicial review.[43] The Hon Chief Justice Dere Schofield (2004)[44] observed that, to be able to perform this major role, the judiciary must be independent; independent in term of appointments, funding and security of tenure. However, Roux (2004)[45] is quick to place a caution on certain attitudes likely to be exhibited by courts. Thus, he warns that courts should abstain from engaging in judicial review based on social and economic rights, which profoundly affects political resources allocation. This is a domain, according to Roux, often held to belong to the core of politics and outside the proper arena for judicial intervention.

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[42] Rodger MA Chongwe, 'Judicial Review of Executive Action: Government Under the Law' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass Publishers, 2004), at 103

[43] Ibid., 107

[44] The Hon Chief Justice Dere Schofield, "Maintaining Judicial Independence in a Small Jurisdiction" in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies* (London; Frank Cass Publishers, 2004) at 73-74 in fact the appointment and tenure of office of judicial official are fixed and entrenched in the Nigerian Constitution. See sections 230, 238, 250, 256, 261, 266, 271, 276 and 281 of the Nigerian 1999 Constitution.

[45] Theunis Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Courts' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass Publishers, 2004) at 92- 111

In order to ensure that human rights provisions are properly interpreted and enforced, judiciary is at the centre of focus. Although there are limited literatures on judicial functions and judicial protection of human rights, writers like Manfredi (2001)[46] has written on judicial power but concentrated on the African Charter or human rights generally, Reddy (1976)[47] wrote on the rights of man and judiciary particularly focusing on the judicial protection of fundamental rights. Obilade (2007)[48] generally discussed the Nigerian legal system highlighting the structure of Nigerian Courts and their jurisdictions. Akande (2000) [49] made some annotations on the Nigerian Constitution, judicial power on human rights protection inclusive. None of the limited literatures available has, however, focused Nigeria as a case study particularly on the judicial protection of human rights abuses by other branches of government in Nigeria. Thus, this work intends to fill this gap.

1.7 SCOPE AND LIMITATION OF THE STUDY

The study is limited in its geographic scope by its focus on the Judiciary of Nigeria. The choice of Nigeria is based on the following:

Nigeria has experienced uninterrupted democracy in the past ten-years. The long history of struggle against abuse of human rights by various military government years before the 1999 transition is however still on course. This is due to the supremacy of the executive over other arms of governments occasioning manipulation of judicial processes. In addition, Nigeria as a commonwealth country, the judicial

[46] Christopher P. Manfredi, "*Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism"*, (Oxford: Oxford University Press, 2001) and Rachel A. Cichowski, "*The European Court and Civil Society: Litigation, Mobilisation and Governance"*, (Cambridge: Cambridge University Press, 2007)

[47] P. Sarojini Reddy, *"Judicial Review of Fundamental Rights"*, (New Delhi: National Publishing House, 1976)

[48] A.O. Obilade, *"The Nigerian Legal System"*, (Nigeria: Spectrum Books Limited, 2007),

[49] J. O. Akande, *"The Constitution of The Federal Republic of Nigeria: with Annotations"* (Nigeria: MIJ Professional Publishers Limited, 2000)

system of which has common law origin, value and jurisprudence. The constitution of the Federal Republic of Nigeria has also structured the current system of government to reflect the doctrine of separation of power under which the functions of judiciary is defined as the defender of the constitution generally and protector of human rights specifically. The role of Nigerian courts in the interpretation of the constitution and their attitudes in the adjudication of cases involving issues of human rights violation with a view to checkmate both the governmental and individual abuses of human rights.

The study is further limited to only the Superior Courts of Records.[50] There are two types of court systems in Nigeria. That is, there are superior courts of records recognized by the constitution and lower courts referred to as non-superior courts of records.[51] Since the constitution has placed vital roles upon the judiciary in the area of human rights protection, the study will be limited to interpretative and adjudicatory roles of the judiciary. Roles which are known to be the essential roles the judiciary perform in a state. The Islamic perspective on human rights and judicial protection of human rights in Islam will be a good guide for human rights protection.

1.8 RESEARCH METHODOLOGY

The research methodology employed in this dissertation is doctrinal analysis approach. It focuses on conceptual analysis of the subject of this work. In order to achieve the set objectives and answer the hypothesis questions, the researcher essentially made use of the library materials.

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[50] These courts are Supreme Court, Court of Appeal, Federal High Court, State High Court, Sharia Court of Appeal and Customary Courts of Appeal.

[51] In Nigeria, there are lower courts otherwise known as non-superior courts of records; for example, the Magistrate Courts, Customary Courts, District Courts and Area Courts.

In doing this therefore, both primary sources such as the statutes and case law, secondary sources like books about law are used, legal and non-legal materials are also utilised; such materials include relevant materials found in books, chapters in books, articles in academic journals, articles in magazines, documentaries as well as dissertations/thesis, seminars, conference papers/working papers. Online database like LexisNexis, Westlaw, CLJ and other resources available on the internet will also be analysed.

CHAPTER TWO

HUMAN RIGHTS AND JUDICIARY: A CONCEPTUAL ANALYSIS

2.1 INTRODUCTION

Going by the topic of this research work as summarily introduced in the earlier chapter, this chapter is aimed at giving further explanation on the main concepts that form the basis of this work that is, the concepts of human rights and judiciary. The concept shall be succinctly defined, while the evolution and general development of human rights shall be traced. Obviously in the struggle for human rights protection, there are various mechanisms put in place for the enforcement and protection of human rights. Judiciary is most important institution for the protection of human rights. Thus this chapter will particularly look into the general functions of the judiciary and its specific function as the guardian for human rights. The Chapter shall be concluded with analysis of the relationship and or connectedness between the concepts of human rights and judiciary, focusing on specific function of judiciary with regards to constitutional interpretation in the area of human rights protection.

2.2 HUMAN RIGHTS

Human rights is a two word phrase 'right and human' with separate meanings. Before 'right' is attached to 'human' to connote the intended meaning herein, it is important to note the respective meaning of the two words that make the phrase under

discussion. Rights mean different things to different people,[52] depending on the context under which it is used. For the purpose and in the context of the concept of this study, right could be said to mean, what is appropriate or entitlements accordable to people based on some circumstances or due to some reasons. In a related manner, James Griffin sees right in the general connotation as a claim against specific people with regards to their action or omission, which becomes valid when backed up with moral principle or law. While he simply professes human rights as a right which man has simply because he is human being and extended it to cover those rights contained in the regional and international instrument of human rights.[53] Human on the other hand, simply means person other than animal, machine or gods.[54] Human rights in the light of the above can ordinarily be said as those things which human beings are entitled to by virtue of their human nature.

Oxford defines human rights as some of the basic rights of individuals for which duty and obligation are placed upon the government to protect every citizen from any form of cruel or inhuman treatment.[55] Human rights have been looked at from the legal perspective. It has also been defined as set of claims legally granted and guaranteed by the state for the preservation of human dignity.[56] In addition Mark quoted Donnelly who observed as follows:

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[52] Reddy, n. 47, at 2 Where Reddy in examining what rights mean through work of writers quoted Hobhouse as follows, "Rights are what we may expect from others and others from us, and all genuine rights are, conditions of social welfare.Thus the rights any one may claim are partly those which are necessary for the fulfillment of the functions that society expects from him. They are conditioned by correlative to his social responsibilities." As cited in R.N Gilchrist, *"Principle of political Science"* (Madras: 1952) 135

[53] James Griffin, *"On Human Rights"* (New York: Oxford University Press, 2008), at 20

[54] Oxford Advanced Learner's Dictionary 7th edition (Oxford: Oxford University Press, 2005) at 729

[55] Ibid., 730

[56] Mark Goodale. "Locating Rights: Envisioning Law between the Global and the Local" in G. Mark, S.E Merry (ed.), *"The Practice of Human Rights: Tracking Law between the Global and the Local*", (United Kingdom: Cambridge University Press, 2007), at 6. Mark in the introductory part of the work of Alison Brysk in her edited volume Globalization and Human Rights, where the latter expressed the legal approach to human rights as "a set of universal claim to safeguard human dignity from illegal coercion, typically enacted by state agents. These norms are codified in a widely endorsed set of

> Human rights are equal rights: one either is or not a human being, and therefore has the same human rights as everyone else (or none at all).They are also inalienable rights: one cannot stop being human, no matter how badly one behaves nor how barbarously one is treated. And they are universal rights, in the sense that today we consider all members of the species Homo sapiens "human being," and thus holder of human rights.[57]

However, Stone believed that human rights can neither be defined by abstract analysis nor its content can have universal application.[58] Campbell in his own way observed that human rights as a concept in relation individual rights may be discoursed under the sphere of conceptualism, empiricism, positivism, moralism and philosophism.[59]

The concept of human rights is multidisciplinary, which could be viewed from the philosophical, anthropological, political, historical, rhetorical and legal perspectives. Human rights concept is considered as a moral ideal aiming at ascertaining the minimal social conditions for the maintenance of a stabilized political atmosphere so as to ensure a well conducive human existence.[60] It is an ideology of universal acceptance which has become a legal norm. Human rights otherwise called rights of man are products of the school of natural law whereby it is originally of theistic origins. Here it is believed that some basic rights are divine, whereby the grant

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international undertakings: the "International Bill of Human Rights" (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Social and Economic Rights); phenomenon-specific on treaties on war crimes (Geneva Conventions), genocide and torture; and protections for vulnerable groups such as the UN Convention on Rights of the Child and the Convention on the Elimination of Discrimination against Women"

[57] Ibid., 7

[58] A. stone "introduction" in Tom Campbell, Jeffrey Golgsworthy and Adrienne Stone (ed.), *Protecting Human Rights: Instruments and Institutions,* (New York: Oxford University Press, 2003), at 1. With reference to Tom Campbell's chapter where the latter opined that although human rights might seem to be more important if they were universally applicable, but he does not agree to conceptual analysis which seek a context-free determination of the concept from what are rights and what is to be human, as same will either be under- or over- inclusive

[59] T Campbell, "Human Rights: The Shifting Boundaries", in Tom Campbell, Jeffrey Golgsworthy and Adrienne Stone (ed.), *Protecting Human Rights: Instruments and Institutions,* (New York: Oxford University Press, 2003) at 19 to 29

[60] Saladin Meckled-Garcia, Basak Cali (ed.),*"The Legalization if Human Rights: Multidisciplinary perspective on human rights and human rights law"*(London and New York: Routledge, 2006), at 1

and abrogation of which are determinable only by God. For instance, every man is naturally granted the right to life, right to personal liberty and above all every human being is naturally a free born and equal by birth. These inalienable rights accrue to man by virtue of been a human being.[61] With time the concept metamorphosed into natural rights doctrine under which subjective rights of individual were given recognition.[62] Although fundamental rights and human rights in some areas might connote the same, there is a distinctive demarcation between the two in the sense that "human rights" is supranational, and considered as natural rights accordable to every human being. It is the machinery by which fundamental right are considered. Fundamental rights therefore are those rights conferred upon the citizens by the state, codified in the legal documents and for the protection and enforcement of which judicial and other mechanisms are put in place by the state.[63]

2.2.1 Evolution and Developments of Human Rights

According to Naturalist, human rights are natural rights given to man by God. Right to life for instance is one of the prominent rights which features in almost all, and strategically positioned in most of the human rights instruments.[64] Thus there are clear indications that the evolution of human rights links to the evolution man. The creation of man in this sense perhaps signifies the grant of right to life, for instance, although unacknowledged. Even the genesis of human rights abuse and its violation is traceable

[61] Samantha Power, Graham Allison.(ed.), "*Realizing Human Rights: Moving from Inspiration to Impact",* (New York: St. Martin's Press, 2000), at 43
[62] Scott Davidson, *Human Rights*, (Buckingham: Open University Press, 1993), at 24 and 28
[63] David P. Forsythe, "*Human Rights in International Relation*" (United Kingdom: Cambridge University Press, 2000), at 3
[64] See article 3 of UDHR, article 1 of UIDHR, article 2 of the Cairo Declaration on Human Rights in Islam and section 33 of the Constitution of the Federal Republic of Nigeria 1999

to the early man.[65] The slogan of human rights is basically a western idea, although in some other settlements there were some other practices by which human dignity are preserved vide moral principle but not under the title human rights. Most writers have claimed that it was in the west that institutionalization of personal rights of individuals recognized and respected by the authority first came to the lime light.[66]

Prior to the Second World War, there had been a good number of international agreements and treaties dealing with humanitarian issues. Preservation and protection of human dignity have also been considered germane and given attention in some cultures before the advent of the prominent UN Charter in 1945, the development which amplified the Western proclamation and modern trend of human right especially at the international level. It is worthy of notice that the modern concept of human right got to its foot through the respective English, American and French revolutions.[67] These revolutions no doubt greatly contributed to the development of people's individualized rights otherwise known as civil and political rights. The issuance of Magna Carta in England on 15th June, 1215 mainly served as an authority for the division of power in order to ensure check and balances between the then King John and his ministers. Later as a result of the struggle by the parliament (Glorious revolution) to curtail the arbitrariness of the crown that gave birth to the passage of the

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[65] See Qurʿān, Al-Nisā verse: 1 and Qurʿān Al-Māidah: 27-31.The creation of man as contained in the scriptures especially in the Holy Qurʿān that God created man and gave him life, the violation of which began with the early man as contained in the above referred verses where it is clearly illustrated how man killed his brother for trivial thing but did not know what to do with the corpse. God then sent two birds to demonstrate how the culprit would bury his brother

[66] Forsythe, n. 63 at 31 where reliance are placed on works of Donnely "Human Rights and Human Dignity: An Analytical Critique if Non-Western Human Rights Conceptions," American Political Science Review, 76, 2(June 1982),433-499 with particular reference a divergent view of Paul Gordon Lauren, "The Evolution of International Human Rights: Vision Seen"(Philadelpha: University of Pennysylvania Press, 1998)

[67] Reddy, n. 47, while tracing the evolution of human rights maintained that the evolution of human rights at the initial stage has some Religious influence of organized Church. After which reference is made to the influence of the famous English, American and French revolutions and subsequent human rights instruments

Bill of Rights in 1689, in which set the pace of declaring the need for the protection of rights and liberties of individuals. The document also in an attempt to create an assured political atmosphere for the accomplishment of this goal, subjected some vital decisions of the crown to the consent of the parliament. Following this development, other Charters of Liberties passed in England were; the Petition of Right 1628, Act of Settlement of 1701 under which freedom of speech for the members of the parliament was guaranteed. This development served among others two major purposes to wit; it gave rise to the protection of people's rights and liberties against arbitrariness and gave legal efficacy to parliamentary system of government.[68]

Human rights development was further enhanced in 1776 when Thomas Jefferson was detailed to draft the American Declaration of Independence of that year. This was occasioned by the conviction of the American founding Fathers that the British rule was becoming inimical for the colonies due to lack of equality in the treatment of their people and other several infringements on their liberties. Later after the independence, the US adopted the Bill of Rights in1791 which contained the list of guaranteed rights of individuals that are to be protected.[69]

As earlier been mentioned and in a similar development, the French revolution has some peculiarities with the Glorious revolution of the Britain in the area of abolition of old system of governance for a new system of democratic nature. The theme of the revolution was that government for the people was to be by the people themselves. In the pursuant of this goal particularly in 1789, the Declaration of the

[68] Davidson, n. 62 at 2

[69] Ibid., 4. After the adoption of the Bill of rights, the US Constitution experienced several amendments for the purpose of improving the number of rights to be accorded adequate protection. The first amendment incorporated freedom of religion, freedom of the press, freedom of expression and the right to assembly; the fourth amendment protected individuals against unreasonable search and seizure; the fifth which established rule against self-incrimination and right to due process of law; and the Thirteenth which forbade the practice of slavery

Rights of Man and the Citizen came into force, an order which gave legitimacy to government as an important mechanism for the protection of individual liberties and other specified rights, such as property, safety and resistance to oppression. The common feature shared by the American and French revolutions is therefore, the legitimization of democratic system of governance for the protection of the natural rights of man, more so limitation to any of the protected rights must be occasioned in accordance with the law.[70]

Human rights enjoyed tremendous boost and a landmark improvement in the area of development within the framework of the international law in 1948. Before then, the way and manner in which states treat their citizens was exclusively a domestic affair in which no state can intervene in the domestic affairs of the other in this regard. This can be evident by the heinous treatment meted on the citizens by the then German government. It was this practice and other aftermaths of the Second World War that engineered and awakened the international community especially the mother of all human rights organizations (the United Nations Organization) to the sensitization of other member states in the area of human right protection through the international influence and its mechanisms. The above stated factor among others led to the inauguration of a committee to draft the UN Charter which came into force on the 24th day of October, 1945. Although this document had neither a binding force nor any penal implication on erring member states due some deficiencies in its content and the unclear scope of its wordings, it affirmed the existing individual liberties and rights in the context of the earlier instruments. It was the coming into force of the UN Charter and its effects by way of legally strengthening the authority of the United

[70] Ibid., 5, Article 4 of the Declaration reads; "Liberty consists in been able to do anything that does not harm others: thus the exercise of the natural rights of every man has no bounds other than those ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by the Law"

Nations Organization that influenced the draft of what is in the recent time known as the World's first international human rights document and mother of all human rights instrument, the Universal Declaration of Human Rights (UDHR).[71] Despite its own contextual shortcomings, UDHR has been the cornerstone for the protection of human right world over, so much that it has been described by personalities as 'the Magna Carta of the world.'[72] This is no doubt due to its impact in the judicial processes in the adjudication of cases having human rights flavour.

For the effective implementation of the contents of the Articles contained in the UDHR based on the political classification of rights which shall be summarily discussed later, and the technical division of the UDHR into two parts each of which takes care of different categories of rights. The UDHR bifurcated in form of sub instrument into two distinct and separate covenants namely; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights both adopted on 16th of December 1966; the former came into force on 23rd March 1976, while the latter entered into force on 3rd January, of the same year. Apart from the above mentioned instruments, various other regional documents have emerged for the protection human rights as a result of the proclamation of the mother document UDHR.[73]

Among the inspirational effects of the UN struggle in the area of human rights protection which is tantamount to development of human rights in the world history is the establishment of various mechanisms at international regional and state levels for

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[71] Angela Hegarty, Siobhan Leonard, *"Human Rights: An agenda for the 21st Century"*, (London: Cavendish Publishing Limited, 1999), at 5. The declaration was adopted on the 10th of December 1948 comprising 30 Articles which can be divided into two parts. The first part, Articles 1-21 guaranteed civil and political rights. While the second part, Article 22-30 guaranteed economic, social and cultural rights

[72] Ibid., 6. Reference to Humphrey and Pope John II description of the UDHR

[73] Ibid.

the purpose of giving practical effect to the notion contained in the aforementioned human rights instruments.[74]

Complimenting the governmental efforts in the area of human rights and its protection, the role and contributions of the Non Governmental Organizations (the NGO's) cannot be underscored. The pioneer of which is the said to be the International Committee of Red Cross established in1863 for various humanitarian missions. Other prominent ones are the International Commission of Jurists, the Amnesty International to mention but few.[75]

Due to different approaches of different region based on the differences in their cultures which have influenced their perception of what constitute human rights differently, human rights have been classified into three different categories known in the history as; the first-generation human rights which is said to have been promoted by the west, the second-generation human rights found to be the idea of the Communist states, and lastly the third-generation human rights as the title connote is the struggle by the third world countries.[76]

2.3 THE JUDICIARY

Democracy is a constitutional system of government. It is a system of government by the people for themselves. Therefore, it is then not out of context to say that the same system is meant to protect the interest of the people, either politically or economically or socially. People's interests are no doubt encompasses their welfare and other basic fundamental rights and freedom. If the definition of human rights as government

[74] Examples are various Human rights Commissions such as the European Commission on Human Rights, the European Court of Human Rights, the African Commission on Human and People's Rights and the National Human Rights Commission of Nigeria and the Islamic Human Right System
[75] Davidson, n. 62 at 20
[76] Hegarty, Leonard, n. 71 at 9. On the third-generation human rights reference was substantially made to several paragraphs of part 1 and 2 of the Vienna Declaration 1993

granted and government guaranteed holds, it is then incumbent upon the government of the people to ensure adequate protection of those rights it granted and guaranteed to its citizens. In other words, democratic governance is a system of power sharing between the famous three arms of the government (executive, legislator and judiciary), each of whom has a fundamental constitutional role to play in the area of human rights protection.

Judiciary in the light of the above therefore as an essential arm of government, is a constitutional institution, a creation of law, working machine of which are the courts under the functional attitudes of the managers (judges). Oxford described the word judiciary as an early 19th century word, carved out of the Latin word *judiciarious* from the word *judicium* meaning judgment. It further defines it as the combination of judges of a state or a nation when considered as a group.[77] From a similar perspective, judiciary has been described as judges of the courts with a standardized system of law, a branch of government vested with judicial power.[78] For the sustainability and preservation of both the rule of law and the value of the constitution, among the above mentioned arms of government, judiciary is considered as the sacred cow, for this it has been observed as follows:

> There is no better test of excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice. Law is respected and supported when it is trusted as the shield of innocence and the impartial guardian of every private civil right…if the law be dishonestly administered, the salt has lost its flavor, if it be weakly or fitfully enforced, the guarantees of order fail for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness how great is that darkness[79]

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[77] Oxford, n. 54
[78] Encyclopaedia Britannica, (2009), student and home edition
[79] Reddy, n. 47 at 17, where she quotes James Bryce, in *"Modern Democracy"*(London, 1921), 11, 421

From the constitutional law perspective, democratic governance, segment of which is the judiciary and human rights have gained legitimacy through the constitution world over, as both have been domesticated in the constitutions of various states. In order to uphold the constitutionalism of human rights, judiciary has been placed in a strategic position and vested with a very fundamental role by the constitution especially with a view to protecting those constitutionally guaranteed rights. As a sentinel of fundamental human rights, the constitution in particular and the law in general, judiciary is expected to possess and maintain certain qualities which should neither be overridden by any force nor mortgaged for any reason, namely integrity, personal independence and institutional autonomy.

2.3.1 Integrity and Personal Independence

Integrity simply connotes gaining and maintaining public trust and confidence, this is obtainable through high level of ethical standard, free, fair and transparent decisions. This is expected to be the virtue of the judiciary as an institution in the state and personal quality of the judges of various courts as individuals. This is the ability of a judge to make an impartial judgment at all times without any fear of intimidation, oppression, and without the intent to favour/influence or prejudice to the interest of any of the parties whose their positions in the society notwithstanding.[80] This quality found in the judiciary, re-ensure the hope of common man who ordinarily believes that court is his last hope in seeking redress and protection against oppression. It has been observed that integrity and personal independence of a judge could be

[80] See Irving Kaufman, "Chilling Judicial Independence" (1979) 88 Yale Law Journal 681

maintained vide three factors, namely: security of tenure; good condition of service; and immunity from civil liability in the cause of official duty.[81]

2.3.2 Institutional Autonomy/Independence

The institutional autonomy is derived from the principle of power separation, which is one of the features of democratic governance. Independence in this regard is the freedom of judiciary to organize its own activities and make its decisions in accordance with the provisions of law without interference of any kind actual or apparent,[82] or being politically influenced by any force particularly the other arms of government. This is another crucial yardstick with which expedient discharge of its function is measured. Judiciary is prone to pressures and influence from other arms of government because of its fundamental role in determining the constitutionality or otherwise of some the activities of the executive and the legislature through its judicial power. It is noteworthy that, there is a view to say that there is no absolute independence for the judiciary since the court only makes its judicial pronouncement, while the enforcement of which lies with other branches of government.[83] More so that the executive and the legislature have determining roles to play in the appointment of judges, the budgetary allocation of the judiciary[84] which will

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[81] Sam Rugege, "Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development: Judicial Independence in Rwanda,"(2007) *19 Pacific Mc George Global Business & Development Law Journal* 2

[82] Sir Guy Green, "The Rationale and Some Aspect of Judicial Independence," (1985) *59 Australian Law Journal* 135, Where he defined judicial independence as " the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any person or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control"

[83] Rugege, n. 81 This is meant to express the situation where the judiciary discharges its function by declaring some actions of the government officials unconstitutional, unlawful and by declaring laws passed by the legislature to be unconstitutional and of no binding force whatsoever

[84] Ernest A. Finney, Jr., "Interbranch Accountability in State Governments and the constitutional Requirement of Judicial Independence: Comment," *61 Law and Contemporary Problems,* (1998): 55

consequently have an impact on the resources with which it operates and the financial position of judges in terms of remuneration and other entitlements.[85]

Suffices to say that, one of the great expectations of the people is that judiciary is the custodian of justice and it shall dispense the same without fear or favour, sentiment or ill will, especially in cases involving other arms of government where liberties of the people are in issue. Ensuring that justice is seen done protects the integrity of the judiciary and the same re-enforce the people's hope and assurance of the protection of their rights under the law. The integrity and independence of the judiciary can also be noticeably assured when it exercises its judicial power of adjudication against the government in favour of the people as a group or on individual bases when their rights need being protected. The level of political civilization of a society is determined by extent to which its citizen feel protected and secured from arbitrariness and violation on their rights, judiciary thus plays a vital role in the accomplishment of this notion, this view is apposite to and evident by the position of Henry Sidgwick where he was reported to have said:

> In determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration, as between one private citizen and another and as between private citizen and members of the Government.[86]

2.4 FUNCTIONS AND ROLES OF JUDICIARY

The general functions of the institutions of law, judiciary inclusive is to ensure a stable, peaceful and just society notwithstanding the differences among the citizens. This could be achieved through the effective discharge of their respective functions as

[85] H. Kwasi Prempeh, "Marbury in Africa: judicial Review and the Challenge of Constitutionalism in Contemporary Africa" *80 Tulane Law Review,* (2006):25
[86] Reddy, n. 47 at 30

assigned by the law, the institutions of law under reference at times serve as mechanisms for dispute resolution; they guide in the light of the existing laws towards the appropriate steps to be taken at a particular point in time as the circumstances may demand; they facilitate the enforceability of some undertakings such as the fundamental rights as might have been enshrined in the constitution; and distinguish between good and bad conducts in the society.[87] Judiciary as earlier being described as an institution vested with multifarious functions for the sustenance of constitutional governance and human rights protection is in position to defend safeguard and preserve the value of the constitution in this regard. In view of the above and in the light of the law which vests in it the judicial power, basic functions of the judiciary can be formulated as follows:

2.4.1 Interpretation of Laws and Constitution

Constitutionally, law making power is vested in the legislators through the law making process of bill passing and accent of the presidency.[88] However, interpretation and practical application of any law passed by the legislative body is the duty of the judiciary.[89] In most civilized countries, to determine the intent of the law-maker with regards any legislation, the courts have a vital constitutional role to play, this is not only in the interpretation of the constitution but the general law.[90] Hence any law declared valid by the court assigned with such responsibility becomes a binding law while any law nullified consequently becomes void and inapplicable.[91] Judiciary as the upholder of the constitution and enforcer of constitutional commands, the

[87] Tim Dare, "The Role of Law and the Role of Lawyers" in Tom Campbell, Jeffrey Goldsworthy, *"Judicial Power, Democracy and Legal Positivism"*, (USA: Ashgate, 2002), at 372
[88] See Chapter V, Part I and II of the Constitution of the Federal Republic of Nigeria 1999
[89] Ibid Chapter VII Part I, II, III and IV
[90] Prempeh, n. 85 at 5 and 6
[91] Reddy, n. 47 at 31

interpretation of the constitutional provisions by the court is for the protection of human rights in particular and to safeguard people's liberties. The judicial decisions also serve as practical way of protecting human rights provisions in the constitution.[92] One of the goals to be achieved through this essential duty of the judiciary in the area of application and interpretation of the law is to prevent retrospective legislations which are normally meant to violate people's rights. The judiciary in discharging this enormous function stands as protector of the fundamental rights of the people against infringement.

In addition to the judicial power of interpretation of the constitution and law in general as stated above, the judiciary in some jurisdiction through the mechanism of the court makes law. For example in the Common Law Jurisdiction, the court makes law based on the prior or existing case law especially in the areas of law where the legislature has not made any or sufficient enactment. Good example of this situation is in the area of Law of Tort particularly Tort of Negligence, the development of this area of law is basically and substantially premised on case law and not the statute. In

[92] Ibid., 25 In a contradistinctive manner to the positions of Nigerian and Ghana Supreme courts as stated above, Reddy highlighted the function of court in the interpretation of a provision of the Government of India Act, 1935 or Orders-in-Council made there under, the court in doing this revealed how the law safeguarded the fundamental liberties of the citizens despite the fact that no list of fundamental rights was incorporated into the said law. Example of relevant cases such as *Niharendu Datt Mazumdar v.The King Emperor* (A.I.R. 1942 F.C 22) where the Appellant was convicted for sedition, on Appeal however, the court examining whether the statement of the Appellant amounted to sedition held that the appellant only expressed his opinion about the Government an opinion which was true and that he was entitled to do so in his political capacity and he did not exceed the legal limit by so doing. Also in the case of *Keshav Talpade v. King Emperor* (F.L.J. India, 1937-38, VI, 28), where the court on appeal declared invalid, Rule 26 of the Defence of India Act under which the appellant was detained charged and convicted. In *Emperor v. Benoari Lall Sarma* (F.L.J. India, 1937-8, VI, 79) the summary of this case is that the law ousting the supervisory and appellate jurisdiction of the High court over the so called special magistrate court decision was nullified, ouster which jeopardized the rights of an accused person to appeal against his conviction from the lower court. These decisions and many others were seen as the judicial power of protecting the liberties of the citizens' particularly fundamental rights to fair trial, freedom of speech etc, through the court's role of interpretation of law

some other jurisdiction however, such as the Civil Law Jurisdiction, courts can only interpret the law but not empowered to create law.[93]

2.4.2 Adjudication and Dispute Resolution

In the legal parlance, justice is not only to be done but to be seen done. Justice is a thing every individual yarn for in the society. Thus people will seek the protection of their rights against infringements and redress in respect of breach of duty or obligation in the judiciary. For justice to be seen done therefore, the judiciary provides mechanism for dispute resolution be it between individual and the state or individual citizens among themselves. The court as the judicial mechanism for adjudication, administers laws in different areas of human endeavour. For example where the law is presumed to have been violated, the court administers the criminal law accordingly, while it applies the civil law whenever dispute arises between parties in respect of rights, duties, responsibilities and obligations. Justice is the ultimate expectation of the litigants and the society at large in any dispute resolution process, thus impartial decision of the court in this regard is the only wheel that can drive successfully towards achieving the anticipated justice.[94]

Apart from the above stated basic functions of judiciary, it also performs the monitoring and enlightenment functions. The judicial power of courts through legal proceedings manifests misconducts and alerts people to identify law-breakers. The misbehaviour of government is also noticeable through court's nullification and declaration of some governmental conduct ultravires or unconstitutional.[95]

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[93] Functions of Judiciary: http://en.wikipedia.org/wiki/judiciary (accessed on 4th July, 2009)
[94] Politics: Judicial Branch http://www.answers.com/topic/judiciary-I (accessed on 4th July, 2009)
[95] David S. Law, "A Theory of Judicial Power and Judicial Review" 97 *Georgetown Law Journal* (2009), at 13

2.5 INTERCONNECTEDNESS OF THE TWO CONCEPTS

2.5.1 Law and human Rights

Bearing in mind the evolution and historical development of human right as enumerated above, one of the sections of this chapter, especially the natural law position about the concept,[96] inference could be drawn to the effect that human right was initially a concept without any legal sanctity. The romance of this concept with law could as well be said to have began with the legal flavor it enjoyed when the Magna Carta of England was issued in 1215.[97] Due to civilization and gradual changes in people's perception, the concept of human right no doubt in the present time not only has legal backing but has dully metamorphous into law itself. Of course out of the numerous areas of law, human rights has been distinguished for all intent and purposes as one of the fastest growing and most active area of law world over. This is influenced by the significance role its adequate protection plays in people's life. Its activeness cannot be over emphasized for it's a universally enforceable law for which mechanisms[98]are being put in place and monitoring institutions alike are established by every civilized society for the purpose of ascertaining its protection to a reasonably noticeable extent.[99]

Judiciary on the other hand is a law created institution primary assignment of which is no other thing that dealing with the law. It is created by the law to uphold the rule of law, safeguard and protect the value of the constitution. Giving legal efficacy, constitutionality and enforceability to laws is the major function of the judiciary.[100]

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[96] Power, Allison, n. 61
[97] Reddy, n. 47
[98] This refers to the establishment of various institutions most of which cater for the monitoring, protection and enforcement of human rights such as human rights courts, special tribunals and the like
[99] Davidson, n. 62
[100] Prempeh, n. 85

Pertinently in view of the above, law could be considered to be the first and main connecting factor between human rights as a concept and judiciary.

2.5.2 Justice as Connecting Factor

Justice can simply be referred to as giving every person what is due to him without any hindrance, fear or favour.[101] Human rights from the modern perspective is akin to treatment of persons, hence to a greater extent human rights connote justice. Therefore, if upholding the course of justice, maintaining and protecting the same as well as ensuring that justice is been seen done are fundamental functions of the judiciary, protection of human rights is then undoubtedly a course of justice. Being just is the greatest attribute expected of the judiciary by the populace, while the latter is the last hope of common man. In view of the above therefore, it is not out of context to hold that justice is an essential connecting factor between the two concepts (human rights and judiciary).

In addition, it is noteworthy from the historical background of human rights that, before the concept came to gain the recognition and protection under the law, especially prior to the issuance of the English Magna Carta in 1215, there were acts of oppression tantamount to what is today known as human rights violation. But due to the perception of the people, such acts of oppression were accepted and considered as part of normal life. Neither preventive nor protective measures were thought of, not to talk of putting in place any mechanism to check same. With the trend of civilization and modern exposure, which has tremendously changed the perception of the people,

[101] Francis J Ludes, (ed.), et al. *"Corpus Juris Secundum"*, (St Paul, Minnesota: West Publishing Co., 1965) vol. 30. at 752

awareness about different classes and categories of rights[102] has now pervaded the globe so much that in the nearest future the judiciary would be overwhelmed with numerous categories of rights to be protected it.

2.6 CONCLUSION

The discussion about the concepts of human rights and judiciary in this chapter has been basically viewed from the western perspective. Looking at the voluminous literatures available on this subject and from this direction, one will ordinarily feel that the field is exhaustive much to create the impression that these concepts originated and exist only in the western parlance. This assertion leaves some impressive questions to be answered. For example; does the concept of human right exist under any other culture apart from the western culture? Can human right concept be viewed from the perspective of another culture such as Islam? What is human right from the Islamic point of view? Is there any other viable judicial system aside the conventional one under which human rights can be adequately protected? These and many other similar posers are to be responded to in the next chapter of this work.

[102] Under the umbrella of the classification of rights as incorporated in the two main instruments which are the segments of the UDHR (International Covenant on Civil and Political Rights ICCPR and International Covenant on Economic, Social and Cultural Rights) and other subsequent similar International Instruments, many subsidiary rights have sprang up protection of which the claimers are agitating for. Examples are the agitated third generation rights which were considered as important as other classes of rights especially the rights to development. See Vienna Declaration and Programme of Action UN Doc A/49/668 (1993),Pt 1, paragraph 5, adopted on 25 June 1993

CHAPTER THREE

HUMAN RIGHTS AND JUDICIARY FROM THE ISLAMIC PERSPECTIVE

3.1 INTRODUCTION

In reaction to some fundamental questions that concluded the last chapter of this work, this chapter gives a general insight to the concept of human rights from the Islamic perspective. In order to appreciate the concept under reference which cannot stand in isolation, a brief analysis of its components such as right, duties and freedom is proffered. Furthermore, nature and scope of human rights in Islam is part of the discussion in this chapter with a view to observing the sharp distinctions between the scope and the nature of the human rights under Islam and in the western perspective. This Chapter also enumerates some selected rights as provided for under the Islamic Law, such as right to life; justice and equality; and right to freedom of speech and expression. The chapter makes an overview on the modernisation of human rights in Islam by summarily analysing the main two Islamic human rights instruments (Universal Islamic Declaration of Human Rights and Cairo Declaration on Human Rights in Islam). There is what could be referred to as the second leg of discussion in this chapter that is, the Islamic Judicial System. This Chapter will consider the Islamic Judicial System from the historical purview especially during the period of the Prophet (S.A.W), the four rightly guided Khaliphs as laid down for the later generation. It briefly looks into the qualifications and basic functions of a Muslim judge and instances of how the judiciary protected human rights.

Affirmative evidence from the primary sources of Islamic Law on the topics and sub-topics is outlined, verses from the Holy Qurʿān and authorities from the Sunnah of the Holy Prophet are explained to buttress the discussion on the issues on which this chapter is centred. In addition to the textual authorities provided, references are made to the practices of the early companions of the prophet especially the rightly guided Khaliphs. The Chapter is concluded with noticeable solutions from the Islamic judicial practices to the problems of human rights protection been encountered by the conventional judiciary.

3.2 GENERAL CONCEPT OF HUMAN RIGHTS IN ISLAM

Generally the domination of the concept of human rights discussed by the west which is consequential to the use of the western value has been the yardstick in human Rights standard. Although the impetus for the standardization of international human rights has been credited to the west, and notwithstanding the western propaganda on the negative image of Islam and Islamic Law in the west,[103] Islam has been described as an all encompassing religion (*al-dīn*).[104] It has practically granted man various rights by virtue of being human being over a thousand and four hundred years ago. Hundreds of years before the issuance of Magna Carta of 1215 less talk of various cultural revolutions which influenced the birth of what is today known in the west as the first and mother of all international human rights instruments (UDHR 1948). Recognition, preservation and adequate protection of human dignity and human

[103] Baderin, n.28 at 10

[104] See Qurʿān, Al--imrān :19, also see Shamrahayu A. Aziz, "Muslims' Right to Religious Freedom in Malaysia: Piercing trough the Confusion and Contradictions" (2007) 7 MLJ at cxxxi

welfare have been the concern of Islam through the divine law main sources of which are the Qurʿān and Sunnah.[105]

The cornerstone of human rights therefore is the manifestation and protection of human dignity which the constitutional provisions and content of other human rights instruments have been designed to uphold.[106]

Historically, the concept of human rights in Islam is as aged as Islam itself. The commencement of the revelation of the Holy Qurʿān over a thousand years ago[107] which only lasted for a remarkable period of thirteen years marked the emergence of the recognition of rights of human person and dignity and also the needs for it protection and preservation. In addition, the formation of the state of Madinah around the year 622 C.E by the Holy Prophet (S.A.W) [108] which was the basis for the issuance of the Madinah Charter (*Ṣaḥīfah* of Madinah)[109]which is no doubt the first ever world written constitution. These are evidence of the pioneering status of Islam on the subject of human rights and freedom. This is a state under which rights, duties, interests and obligations of all the inhabitants including those of Non-Muslims and Jews within the Islamic state were spelt out based on mutual agreement of all the concerned parties. The protection of those rights and interests were adequately

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[105] See Qurʿān Al-Isrā :70

[106] Muhammad Hashim Kamali, "*The Dignity of Man: The Islamic Perspective*", (Malaysia: Ilmiah Publishers, 1999), at 1

[107] Here we mean the emergence of the mission of Islam as a religion when the revelation began in Makkah specifically at the cafe of Ḥirā, it was a continuous process in Makkah for a period of ten years before the prophet and his companions migrated to the then Yethrib today known as (Madinah) where the revelation of the Holy Qurʿān continued for another thirteen years

[108] Maimul Ahsan Khan, "Human Rights in the Muslim World: Fundamentalism, Constitutionalism and International Politics" (Dorham, North Carolina: Carolina Academic Press 2003) at 146

[109] Ibid., 149. The Madinah Charter is regarded as the constitution of the city-state of Madinah. This is due to its feature of been the Grand Norm and the supreme law of the state with binding effect on the people of the state. This is a document in which rights, duties and responsibilities were set out, more so it stipulates the structure of government in the state. It is been called treaty due to the fact that it is an outcome of the agreement between different clans of Madinah and the Muslims. It is thus regarded as the legal philosophy of the socio-political and economic system introduced by the Muslims in the city-state of Madinah.

guaranteed in the Charter[110] and this became possible through the guidance of the Holy Qurʿān because as at then Qurʿān had been substantially revealed. This is the channel through which the Islamic civic rule was first introduced by the Holy Prophet (S.A.W) to the Arabian Peninsula. The system has been described thus:

> The state of Madinah was marked by high moral standard. It was the standard-bearer of Muslim behaviour and a model for the implementation of human rights under Muslim religious state authorities. The Muslim statehood established by the Prophet in Madinah was the symbolic representation of the Islamic civilisation and Muslim brotherhood[111]

One of the main objectives of the Madinah Charter was to maintain peace and ensure security of life and properties within the state and among the people of different cultures, ideologies and believes. The mission was corroborated by the *Ḥudaibiyyah* treaty which has been translated to be the extension of the Madinah Charter.[112]

Right in Islam ordinarily means *ḥaqq*. *Ḥaqq* under the Islamic law has a comprehensive connotation as it encompasses both rights and duties or obligations. These are two twin concepts that cannot be divulged from one another, origin of which is the Qurʿān and Sunnah. In many occasions rights are crystallized to duties, this simply indicates that where there is right there is corresponding duty and obligation. In Islam *Ḥaqq* or rights are divided into two main divisions namely; (1) *Ḥuqūq Allah:* Rights of Allah (2) *Ḥuqūq al-insān*: Rights of man otherwise called human right. In Islam this is right of individual which accrued to every person on the basis of being a child of Adam.

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[110] Ibid., 150
[111] Ibid., 167
[112] Ibid., 170

Human rights in Islam therefore are divine in nature; they are not based on human thought like in the western connotation. They are those right granted to mankind by Allah the creator of man Himself and cannot be curtailed by any authority or any man-made laws. The scope of human rights in Islam is wider, certain and specific than in the western parlance, also the western concept of human rights is subject to changes and expansion based on human reasoning. Human right in Islam authority of which is derived from the Qurʿān and Sunnah of the Prophet is however as said earlier divine and thus it is immutable.

Islam makes no formal distinction between other right and fundamental rights as every right granted by Allah the Law-giver is fundamental, hence in the Islamic perspective all rights are fundamental. While discussing human rights, apart from the concept of rights, duties and obligations, freedom in Arabic called *(Ḥuriyyah)* otherwise referred to as personal liberty is another important concept. Muslim jurists have vehemently engaged themselves intellectually with a view to defining the concept based on their understanding of the concept of rights from the Islamic perspective. For example it has been defined as:

> the ability of a person to manage his own affairs free from oppression and interference of others, while enjoying the safety of his person, honour, property, home and all rights that belong to him, provided that the manner of his management does not amount to hostility and prejudice against others[113]

[113] Muhammad Hashim Kamali, *"Freedom, Equality and Justice in Islam"*, (Malaysia and UK: Ilmiah Publishers and The Islamic Foundation, 1999), at 11. Kamali after scrutinizing various definitions of different scholars like Ibn ʻAshur, Mahmassani, Abdal Karim Zaydan, Kamil Laylah and Abu Zahrah to mention but few, he therefore considered in his personal opinion to choose the definition of Abdal-Wahab Khallaf as more comprehensive, all encompassing and preferable approach to personal liberty

Similar to what is obtainable in the western categorization of rights,[114] Muslim jurists have compressed the basic rights and liberties then brought them under three broad categories namely; (1) personal rights and liberties *(al-ḥuqūq wa al-ḥuriyyah al-shakhṣiyyah);* (2) intellectual rights and liberties *(al-ḥuqūq wa al-ḥuriyyah al-maʿnawiyyah)*; and (3) social-economic rights and liberties *(al-ḥuqūq wa al-ḥuriyyah al-iqtiṣādiyyah wa al-ijtimāʿiyyah)*. Since the objective of human rights in Islam is to preserve human dignity, the first division has been considered the most essential and the foundation upon which all other rights are to be built, protection of which if not ensured, that of others is uncertain and unobtainable even unnecessary.[115] The above mentioned rights and liberties containing other segments and sub-divisions of freedom and liberties must not be interfered with in order to uphold the aim of preserving human dignity.

Notwithstanding the importance of the protection of these rights and liberties under the Islamic law, there is no absolute right, freedom and or liberty. Consequently there is certainly limitation to every right and liberty. This is because where one's rights end is where another man's rights begin. Limitation to rights is a common feature in both the Islamic and western human right discus, the latter through the instruments conferring rights on people usually make proviso as to the circumstances under which rights could be curtailed though in accordance with the law.[116] In the former, the law giver, Allah, provides limitation for every right which He divinely

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[114] See the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) As taken care of in the aforementioned famous international human rights documents

[115] Kamali, *Freedom*...,13, where he made particular reference the above classification as laid down by Abdal-Mun'im Ahmad and to complement the importance of the first category as the bedrock of others, he quoted Ahmad saying "For what good it will do to an individual to enjoy the freedom of ownership and work if he is in the meantime denied his freedom and right of movement"

[116] See section 45 (1,2 and 3) under chapter IV of the Constitution of the Federal Republic of Nigeria 1999

granted to mankind. Taking example from the mother of all rights (right to life), He has placed automatic limitation on life by emphatically assuring every soul of the taste of death.[117] Also the use of the creation of death as twin concept along with life,[118] under the Islamic law although it is believed that every human being is granted the right to life but the limitation to the said right comes into play under certain circumstances such as when a person kills another without a just cause. In a similar vein law of *Qadhf* is put in place to limit and checkmate the commission of defamation against other in the name of exercising right to freedom of expression. Likewise, right to personal liberty and security of an individual can be restricted when he has been formally found guilty and convicted of a crime through the due process of law.

3.2.1 Some Selected Rights in Islam

History has made it clear that human right is not a new concept under the Islamic law, the primary sources of Islamic law (Qurʿān and Sunnah) have substantial authorities/affirmative evidence supporting the grant and protection of various basic rights. In the light of the above, therefore, some selected rights like right to life; justice and equality and right to freedom of speech and expression shall be looked into with a view to analysing how these rights were rooted in Islamic law. Also the affirmative evidence in respect of these rights shall be outlined. The selection of the aforementioned few rights among others is premised on the scope of this work as partial dissertation and not total research, thus it does not accommodate or permits the discussion and enumeration of every available right under Islam. Other peculiar

[117] Qurʿān, Al-ʿAnkabūt :57
[118] Qurʿān Al-Mulk :2

reason is that right to life is the foremost and mother of all other rights both in Islam and in the western view, justice is also a general phenomenon across the globe while equality is a specific area of attack on Islam by the west. And freedom of expression is crucial in a civic rule for participation and representation in the decision making process about the welfare of the people.

3.2.1.1 Right to Life (Ḥaqq al-Ḥayāḥ)

Life is sacred,[119] its creation goes beyond human perception hence its protection becomes uncompromised under the Islamic Law. Allah is the sole life-giver,[120] sanctity of life therefore is one of the major tenets of Islamic teachings and this is the manifestation of the Islamic claim of preservation of human dignity.[121] Right to life is the most essential of all other rights in fact it is the *sine qua nun* of all other rights. Provisions of the Holy Qurʿān are numerous and unambiguous on the sanctity and sacredness of life, for instance Allah says:

> We have ordained the children of Israel that if anyone slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole mankind. And if anyone saved a life, it would be as if he saved the life of a whole people.[122]

The last part of the above verse shows how great it is to protect just one life, thus it is the duty of everyone to save others life without sentiment or discrimination of any kind.[123] Human beings are considered equal when it comes to the issue of

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[119] Qurʿān, Al-Isrā : 33
[120] Qurʿān, Al-Mulk :1 & 2
[121] Syed Ahmad S.A.Alsagoff, *"Al-diyah as Compensation for Homicide Wounding in Malaysia"*,(Malaysia: IIUM, 2006) at 9
[122] Qurʿān, Al-Māidah :32
[123] Alsagoff, n. 121 at 15

sanctity, security and protection of life religious differences notwithstanding.[124]Allah further ordered:

> Do not kill a soul which Allah has made sacred except through the due process of law.[125]

The due process of law mentioned in the above verse corroborates the limitations stipulated in the earlier verse to the right in question, which are situations where life is authorised to be taken for instance in cases of *Qiṣāṣ*, punishment of *Zinā* for married persons, apostasy and high-way robbery *(Ḥirāba).* This is to be decided by the government through the legal mechanism and not an individualistic responsibility or duty.[126]

Islamic law protection of life is a strict provision of law. It is not only other people's life should not be taken,[127] no one is allowed to take his own life as well.[128] Apart from the worldly punishment for he who kills intentionally, there is consequential punishment awaiting such person in the hereafter unless he repents before his death.[129]

There are good number of Hadith supporting the position of Qurʿān on right to life, its sanctity and protection.[130] Islam is not particular about Muslims on the

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[124] Kamali, *The Dignity...,* 32. Kamali made particular reference to Al-Ghazzālī to have quoted the above verse from Ḥuqūq al-Insān, p 54, to maintain his position that attack on the personal safety of non-Muslim attracts the same punishment in this world and the Hereafter

[125] Qurʿān, Al-Māidah :32

[126] Maulana Muhammad Razi Khan Afridi, "Hadith on Human Rights" (India: Anmol Publications PVT LTD, 2008) at 141

[127] Alsagoff, n. 121 at 5

[128] See Qurʿān Al-Baqarah: 195 and Al-Nisā::29

[129] See Qurʿān, Al-Nisā :93

[130] Afridi, n. 126 at 7 where the author specifically quoted part of the Prophet's sermon during his last Hajj as follows "O men, listen to my words, I do not know whether I shall ever meet you in this place again after this year. Your blood and your property are sacrosanct until you meet your Lord, as this day and this month are Holy….All bloodshed in the pagan period is to be left unavenged. The first claim on blood is that of b. Rabīʿah b. Hārith. Abdul Muṭṭalib (who was fostered among the b Layth and whom Hudhay killed). It is the first bloodshed in the pagan period which I deal with….Know that every

protection of life for instance the Prophet was reported to have prohibited the killing of certain categories of people even during war such as *Dhimmī* and children polytheists.[131] The Prophet was equally reported to have regarded homicide as the greatest next sin to *Kufr* (polytheism).[132] It is noteworthy that right to life and its protection in Islam does not begin after birth but from pregnancy, this has been determined to be from 120 days after conception.[133] Death also does not terminate preservation human dignity in Islam as mutilation of human body is not allowed even of enemies at war. This is why Islam made adequate provision for the burial right for a dead Muslim within a specified limited period of time.

3.2.1.2 Justice and Equality as Fundamental Rights in Islam

Justice ordinarily means even distribution of things among people with fairness and impartiality. It is a prerequisite for the attainment of peace and harmony in the society hence and it is the ultimate yarning of every human being.[134] Justice has been said to connote giving every person his due unhindered while equality is the practice of possessing the same right, privilege, immunity and being liable to the same duties and obligations[135] without discrimination on the basis of race, colour, language, age or sex.

Muslim is a Muslim's brother, and that the Muslims are brethren. It is only lawful to take from a brother what he gives you willingly, so wrong not yourselves"

[131] Ibid., 143

[132] Ibid., 112, also see Alsagoff, n. 121 at 28-29

[133] Ibid., 145, the author here referred to the hadith of the Prophet where he delayed the sentence and execution of a woman *(Ghāmidiyyah)* who confessed to have committed *Zinā* after it was discovered that she was pregnant. The rationale behind this practice of the Prophet is to the effect that life begins from the womb thus must be protected right from that moment. Otherwise if the punishment was passed immediately, the life of the innocent child in the womb would have been terminated for no offence

[134] Michael Freeman, "Universalism, Particularism and Cosmopolitan Justice" in *International Justice*, Tony Coates (ed.), (Burlington USA: Ashgate Publishing Company, 2002) at 74

[135] Francis J. Ludes (ed.), et al. Corpus Juris Secundum. St. Paul, Minnesota: West Publishing Co., 1965. Vol. 30.at 752

Equality and justice are synonymous,[136]however what constitute just and equal treatment varies from person to person and from society to society.

Justice and equality in Islam are unambiguous twin concepts. Justice known as *ʿadl,* ordinarily signifies fairness, impartiality, even-handedness, honesty and integrity. It has been defined as placing things in their appropriate positions; equal treatment of people and act of maintaining equilibrium in the treatment of issues among people.[137] Allah commands justice, it therefore becomes an obligatory and a sacred duty of every Muslim to do justice[138] and under no circumstances must the door of justice be closed in Islam while for no reason must injustice is allowed as it is a driving wheel to anarchy, unrest and above all destruction.

Equality, on the other hand, is called *Musāwāh,* meaning evenness and equivalence of human nature. Allah made it clearly known that human beings are equally created from one and the same source but one can excel over the other only on ground of piety and devotion.[139] In Islam other exception to this general rule is found under natural differences unavoidably present in human beings. This simply means there is no absolute equality in Islam as there are some differences of inequality in human beings such as talents and skills which are natural endowments from Allah. These differences do not interfere with the ideals of justice and equality and if properly observed, acknowledged, and upheld, would serve the course of justice better.

In addition and in corroboration to various provisions of the Holy Qurʿān, Islam has established the fraternity of man and general equality of all through various

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[136] Dennis Davis, "Equality and Equal Protection" in *Rights and Constitutionalism the New South African Legal Order,* Dawid Van Wyk (ed.), (Kenwyn: Juta & Co. Ltd, 1994), at 197

[137] Kamali, *Freedom....,*140

[138] See Qurʿān, Al-Naḥl :90, Qurʿān, Al-Ḥadīd :25, Qurʿān, Al-Māidah :8

[139] See Qurʿān, Al-Ḥujurāh :13 and Qur'an, Al-Aḥzāb :35

practices of the Holy Prophet (SAW). Islam emancipated women from the barbaric culture of been buried alive, changed their status from been property to be inherited to heirs with allotment of portions in the properties of their deceased parents and relatives, although not on equal ratio due to the gravity of some other socio-economic factor and different responsibilities placed on man and woman respectively especially in the family relationship.[140]

Another important area is the position of Islam on slavery; categorical condemnation of slavery by Islam through the wordings of the Prophet buttressed the Islamic protection of human dignity and freedom. People were made to understand and appreciate the fact that both the slave and the so-called masters are created by one God (Allah) and are on the same footing as servants of Allah. The prophet was reported to have said:

> There are three categories of people against whom I shall myself be a plaintiff on the day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats his money[141]

It was against this background and the then prevailing practice among the Arabs that people were advised to set free their slaves in different ways.[142] The Prophet did not only instruct but practiced the act of setting free some slaves given to him as gifts after his first marriage. Eventually it is in history that some of the close associate of the Prophet were of slave origin.[143] The overall implication and result of this practice is that within the period of thirty to forty years, the problem of slavery in Arabia has been solved.[144]

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[140] See Qurʿān, Al-Nisā :34
[141] Afridi, n.126 at 114
[142] Ibid., 115
[143] Ahsan Khan, n.108 at 219
[144] Afridi, n. 126 at 115 where the author made reference to the estimated number of slaves liberated in Islam as at the period of the Rightly-Guided Khaliphs to the effect that; the Prophet (SAW) alone was reported to have liberated as many as 63 slaves; Aisha freed 67; ʻAbbas librated 70; ʿAbdullah bin

3.2.1.3 Freedom of Speech and Expression

Freedom of expression means the ability of individual or a group of people to express or refuse to express their feelings and ideas without restraint or fair of oppression in so far as the exercise of this right does not invade on other people's right or violate the limit set by the law. This freedom, as recognised and protected under the Islamic law is a tool towards the attainment of justice and respect for human dignity. It is one of the important features of democracy as and means of participating in the decision making by way of representation. Freedom of expression can be exercised through various dimensions such as it encompasses freedom of press, academic freedom, freedom of communicating ideas in other to inform, persuade and convince other people righteously and liberty to reveal the truth in order to discard doubt.

People normally form groups and association to enable them achieve some vital goals in the society and for the society, with the aim to making the collective and individual feeling of the people known through the forum of association. Thus freedom of expression in closely related to freedom of association, assembly and thoughts. Islamic law grants individual the freedom to express himself but with limitation that the expression does not incur blasphemy, insult or incitement to sin.[145] It is on this note that it was observed that the objectives of right to freedom of speech are basically two namely; discovery of truth and upholding human dignity.[146]

Islam as a religion of truth does not compromise in any way the manifestation of truth, same must be upheld by whatever means. Although the Qurʿān placed serious restriction on free speech when it becomes evil, immoral or disgustful, this

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ʿUmar freed 1000; ʿAbdur-Raḥmān personally purchased up to thirty thousand slave and set them free and so was other companions did liberated good numbers of slave most of whom and their descendant became prominent rulers of Muslim states and outstanding scholars in the Islamic history

[145] See Kamali, *The Dignity...,* 48

[146] Ibid., 47

restriction is relaxed if it enables injustice to be detected through the voice of the victims.[147] The importance and finality of truth is also emphasised in the Qurʿān.[148] Furthermore, a good number of Ḥadīth corroborated the position of Islam on discovery of the truth where the Prophet (SAW) has emphatically ordered truth to be said even if it becomes unpleasant and if it be to confront a tyrant ruler.[149] This principle of discovery of the truth was the attitude inculcated in the companions of the prophet and eventually became their notable practices after the passing away of the Prophet so much that the reign of the rightly guided Khaliphs had this doctrine as its bedrock.

Dignity is natural right of every human being according to the Holy Qurʿān:

> We have bestowed dignity on the progeny of Adam...and conferred on them special favours, above a great part of Our creation.[150]

Man therefore feels highly dignified when he is free and autonomous to have entitlement to his conscience and feelings including the decision about faith.[151]

The right to freedom expression can be exercised in a number of ways which has been translated to mean mechanisms for the manifestation of the freedom. This includes *ḥisbah (al-amr bi al-maʿrūf wa al-nahyu ʿan al-munkar)* promotion of good and prevention of evil. This is a practice under Islam which entitled individuals to either speak or act in pursuit of righteousness and discourage evil according to Qurʿān[152]and Sunnah;[153] *Shūrā* conduct of affairs by consultation has been the

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[147] See Qurʿān, Al-Nisā :148

[148] See Qurʿān, Al-ʻAṣr :3 and Qurʿān, Yūnus :32

[149] See Kamali, *Freedom...*, 38

[150] See Qurʿān, Al-Isrā :70

[151] See Kamali, *The Dignity...*, 47

[152] See Qurʿān, Al-ʻImrān :110, 104 and Qurʿān, Al-Ḥaj :41

[153] See Kamali, *Freedom...,* 42 where he quoted the Hadith of the Prophet in support of *ḥiṣbah* as follows:"If any of you sees something evil, he should set it right with his hand; if he is unable to do so,

foundation upon which the Islamic system of administration was built. This ensures the citizen's right of participation in the selection of their leaders. Prophet Muhammad (SAW) the founder of the Islamic state was commanded by Allah to consult his companions[154] who were eventually described with this virtue.[155] Consultation yields the expected fruit only if people are free to participate, this practice was exemplified by the Khaliphs as was manifested in the inaugural speeches of the first and second Khaliphs;[156] *naṣīḥah* known as sincere advise,[157] *ijtihād* personal reasoning and *ḥuriyyah al-muʿāradah* freedom to criticise are other relevant mechanisms through which right to freedom of expression could be exercised in Islam. Human dignity is better preserved if the above institutional instrument are utilised with tolerance open-mindedness and sincerity while participating in the state affairs for the protection of human rights and preservation of human dignity.

3.2.2 An Overview of Modern Islamic Human Rights Documents

For the realisation of the campaign for the universalization of human right at the international level and in order to ensure its protection internationally, in addition to the duty upon states for the accomplishment of this objective, regional mechanisms were established such as the European, Inter-American and African regional human

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then with his tongue, and if he is unable to do even that, then (let him denounce it) in his heart. But this is the weakest form of faith"

[154] See Qurʿān, Al-ʻImrān :159

[155] See Qurʿān, Al-Shūrā :38

[156] See Kamali, *Freedom...,* 40 where reference was made to parts of the inaugural speeches of the two Khaliphs. Abubakar was partly quoted to have said: "O people, I have been entrusted with authority over you, but I am not the best of you. Help me if I am right, and rectify me when I am wrong." While ʿUmar was reported to have said; "rectify my aberration" a statement which prompted a man to rise and said: "if we see deviation on your part, we shall rectify it by our swords". This is a great instance of right to freedom of expression through consultation as the Khalipha did not reprimand this fellow for his comment rather he was said to have graciously praised God for having such courageous person among his people who could stop him from going astray. Also see Afridi n 20 at 162

[157] See Kamali, *The Dignity...,* 50

rights institutions.[158] Furtherance to this and the appreciation of the UN effort in this regard, the Muslim states comprising mostly the North African and Middle East Arab states formed a regional community under the umbrella of the Organization of Islamic Conference (OIC).[159] In its effort as a body and in line with its Charter on commitment of the Muslim communities and Islam to human right protection, came out with the Cairo Declaration on Human Right[160]in addition to the earlier issued Universal Islamic Declaration of Human Rights.

3.2.3 Universal Islamic Declaration of Human Rights

This Declaration came earlier than the Cairo Declaration. It was made in Paris on the 21st Dhūl al- Qaʿdah 1401(19th September, 1981). This Declaration was the second fundamental right document proclaimed by the Islamic Council, the first one was the Universal Islamic Declaration announced in 1980, at the International Conference on the Prophet Muhammad (S.A.W) and his Message held in London. Just like the Cairo Declaration, this Declaration is based on Qurʿān and Sunnah and it is aimed at ensuring and upholding the dignity already conferred on mankind some fourteen centuries ago. It is focused on the same objectives like the Cairo Declaration, especially in the area of protecting men against injustice and oppression, and to serve as a guide to Muslim countries in preserving and ensuring the rights of citizen in all aspect of life.

This document is made up of twenty-three articles under which various rights are guaranteed for the citizens of member states strictly in accordance with Sharīʿah

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[158] See Baderin, n. 28 at 225

[159] Ibid., OIC is a body founded in 1969 by the joint efforts of the Muslims Heads of State and Government vested with the responsibility of consolidating co-operation in the economic, social, cultural, scientific and other essential activities among the Muslim states, more so to foster the regional goal of putting in place the appropriate framework at the regional level for the practical realization of international human rights law across the Muslim world. This body as at 2003 has membership of 57 Muslim states who also doubled as members of the UN

[160] Ibid., 227

Law.[161] The rights contained therein includes, right to life, right to freedom, right to equality and prohibition against discrimination, right to justice, right to fair trial, right to protection against abuse of power and torture. Others are right to asylum, right to freedom of speech, freedom of religion, right to education, social security and protection of property. Also the document provides for rights of minority, right to family life and some basic rights of married women among others.[162]

3.2.4 The Cairo Declaration on Human Rights in Islam

Between the 9th to 14th of Muharram 1411H (31st July to 5th August, 1990),[163] the Nineteenth Islamic Conference of Foreign Ministers was held in the Arab Republic of Cairo, Egypt, where it was agreed upon by the member states in attendance to issue the Cairo Declaration on Human Right in Islam that will serve as a general guide for member states on issues of human rights. The objective of the document is among others to serve as a guide for member states in all aspect of human life. This effort is also seen as a great contribution to the effort of mankind in the agitation for human right, in order to protect man from exploitation, oppression, persecution and injustice, and to ensure man's freedom and right to a dignified life in accordance with the Islamic Law. This is because in Islam, fundamental rights and freedoms are integral part of the religion. These rights are naturally given by Allah, the Creator of man and the law giver of Sharīʿah. As such, they can neither be abolished in any form nor violated by any one in as much as they conform to the divine law. The instrument holds that safeguarding those fundamental rights is an act of ʿIbādah and it is the responsibility of both individuals and the Ummah collectively. The above effort can

[161] See Universal Islamic Declaration of Human Rights
[162] See Articles I to XXXIII of the Universal Islamic Declaration of Human Rights
[163] Baderin, n. 28 at 227

also be regarded as modernization and codification of human rights laws in Islam in order to meet the international demand of human right protection in the Muslim world.

Cairo Declaration on Human Rights in Islam is a document consisting of twenty-five Articles, providing for various rights guaranteed for the citizens of member states.[164] Among those rights provided for in the document under reference are, equality of human race, right to life, preservation of human dignity up till after death, right to family life, right to fair hearing. Others are right of education, right of equality before the law, right of access to justice, right to freedom of expression, right to protection against exploitation and oppression. Also contained therein are some basic rights for women and children etcetera.[165]

3.3 THE JUDICIARY IN ISLAM

Similar to what operates in the western culture, Islam as a unique culture has a universal legal system known as the Islamic law.[166] For the purpose of interpretation and application of this divine law therefore, Islam has put in place from inception and across its developmental ages, a dignified judicial system, under which the law is practically put in motion. Administration of justice in Islam is sensitive so much that it is considered as a devotional act and next to belief in God.[167] The concept of justice itself is sacred in nature as it is a commandment of Allah that justice must be done at all times.[168]

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[164] See The Cairo Declaration on Human Rights in Islam
[165] See specifically Articles 1 to 25 of the Cairo Declaration on Human rights in Islam
[166] See *Alkamawa V. Alhaji Bello* (1998) 6 SCNJ 17 at p. 136
[167] See Anwar Ahmad Qadri, *"Justice in Historical Islam"* (Lahore Pakistan: SH Muhammad Ashraf, 1980) at 3
[168] See Qur'an, An-Nisaa :58

3.3.1 General Principles in Administration of Justice in Islam

Administration of justice is another area where Islamic law as a legal system and Islam as a culture have excelled in the area of human right protection, particularly in the area of equality before the law and access to justice. This position has numerous authorities both in the Qurʿān and Sunnah. It is further corroborated by the practices of the *Ṣaḥābah* after the demise of the Holy Prophet (SAW). Unlike the doctrine of immunity from proceedings[169]as enshrined in most modern constitutions, where it is the common feature to immune certain calibre of people from legal proceeding,[170] based on political status and other ground. Islamic law did not provide immunity of any kind for anyone no matter how highly placed such person is. Both the rulers and the ruled are subjected to legal challenges and proceeding at any time.

Prophet Muhammad (SAW), although a human being like other mankind, he was the best of all mankind. He was a multi-functional leader, not only a political and religious leader, but also a judge who administered the divine law among the people of his time impartially. Administration of justice through the judicial system during

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[169] See Jadesola O. Akande, *"The Constitution of the Federal Republic of Nigeria: with Annotations"*, (Lagos Nigeria: MIJ Publishers, 2000) at 430, where the author quoted the Attorney-General in *Mississippi v. Johnson 71(1867 U.S. 475,484)* "It is not upon any peculiar sanctity belonging to him as an individual , as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United State is above the process of any court or jurisdiction of any court to bring him to account as President…"

[170] See Section 308 of the Constitution of the Federal Republic of Nigeria 1999 which provides thus "subsection (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section. (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office; (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person to whom this section applies, no account shall be taken of his period of office." Subsection (2) the provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such person is only a nominal party. Subsection (3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office. See also Article 32 of the Malaysian Federal Constitution

the period of the Prophet (SAW) was straight forward. This was because all matters were referred to him and he adjudicated and decided them upon the content of the divine revelation and his decisions were final. Stressing the importance of justice, the Prophet (SAW) was reported to have described a just ruler as a shadow of God on earth.[171] When Islam was becoming popular in the Arabian Peninsula, in addition to the appointment of governors and military commanders to various part of the land, the Prophet (SAW) normally appoints a judge who is independent of the other functionaries and has autonomous power to discharge his duty, more so that other functionaries were subjected to his jurisdiction.

The Prophet (SAW) laid down both the system of civil and criminal jurisdictions as well as procedural principles.[172] The famous rule of ijtihad was also laid down by the Prophet (SAW) through his interaction with Mu'adh bn Jabal when the latter was being sent to Yemen as a judge.[173]Also a special department known as *wilāyah al-mazālim* conferred with a special jurisdiction.[174] Judicial proceeding during the time of the Prophet (SAW) was simple as most of the procedural techniques of doing substantial justice for the protection of people's rights was laid down by him,

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[171] See Muslim bn al-ḥajjāj, "*Ṣaḥiḥ Muslim*", (Beirut: Dār al fikr, 2003/1424), Hadīth no.1829/4617 at 930. Also see Qadri, n. 163 at 7, where the author in elucidating the attitude of the Prophet (SAW) toward justice gave the translation of the Hadith as follows: "Abdullah b. 'Umar reported that the Messenger of Allah (S.A.W) said: Behold! Each one of you is a king, and each one of you will be asked about his subjects; a man is a king over the members of his household and he will be asked about his subjects; a woman is a queen over the members of the household of her husband and of his children, and she will be asked about them; a servant of a man is a king over the property of his master, and he will be asked about it. Behold! Each one of you is a king and each one of you will be asked about his subjects"

[172] See Almawardi, Ali bn Muhammad, "*Al-aḥkām al-Ṣulṭāniyyah",* (Dār al-fikr, 1960/1380), at 77. Also see Qadri, n. 163 at 11, reference was made by the author to various Ahadith narrated by different companions on the rules of administration of justice adopted by the Prophet (SAW). For example when 'Ali was sent to Yemen as a judge when he was thought the rule of fair hearing upon of warning not to decide a case on one sided argument until he hears from the other side before arriving at his decisions. Reference is also made to the hadith narrated by 'Aisha on the steadfastness of the Prophet on the issue of justice as illustrated in the popular criminal case of a woman of *Mukhzumiyyah* tribe

[173] See Almawardi, n. 168 at 67

[174] See Qadri, n. 163 at 10

such as the presence of the disputing parties, fair hearing, proof of evidence and the like.

Furthermore, immediately after the demise of the Prophet (SAW), Abūbakar became the first Khalipha; he was the head of government and the judge although he appointed judicial officers for other Islamic states and vested ʿUmar with similar power. Abūbakar handled most of judicial issues. Abūbakar ruled strictly in line with Qurʿān and Sunnah. He ensured that people have access to justice in order to protect their rights as done by the Prophet (SAW) during his time.[175]

When ʿUmar took over the baton as the second Khalipha, his reign experienced a tremendous development in the area of expansion of the Islamic territory and administration of justice. He was the first to directly charge people with judges function by specifically appointing Abu Dardā as a judge with him in Madina; Shurayḥ as a judge in Baṣrah and Abū Mūsā al-Ashʿarī as a judge in Kufah with the introduction of judges salary. During this period, role of judiciary was strengthened in areas of interpretation of the divine law and dispute resolution for the protection of people's rights. Khalipha ʿUmar laid down many important principles in the administration of justice to enable judiciary perform its functions with ease and reasonable level of accuracy. Among his initiatives are the code of conduct for Muslim Judges, the rules of evidence and procedural rules as contained in his letter to Abū Mūsā al-Ashʿarī.[176] It could be deduced from the content of the letter that,

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[175] Ibid., 18

[176] See Almawardi, n. 168 at 71. Also see M.A Ambali, *"The Practice of Family Law in Nigeria"* (Zaria, Nigeria: Tamaza Publishing Company Limited, 2003), at 93 where the author gave the translation of the content of the above referred latter as follows "Administration of justice is essential services and practice of the Prophet which must be followed. So strive to understand reasons put before you because there is no point labouring for truth without enforcing it. Treat all manners of people who

protection of people's right of access to justice and right of equality before the law, are among others things, major functions of the judiciary. Khalipha 'Umar established what could be called the Police department, Public jail, separation of the judicial power from the executive power and constitution of the first Jurist Committee to produce what is akin to rules of practice and procedure for the judges.[177]

In a similar manner, Khalipha ʿUthmān and 'Ali faithfully followed the righteous precedence laid by their predecessors in the area of law and administration of justice. In addition to what was on ground, Khalipha 'Ali was a supporter of law or legal regime, he was said to have propounded during his reign the doctrine of *Awl* in the field of inheritance;[178] individual or personal liability of accused in crime investigation procedure in criminal cases.[179]

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appear before you as equal, showing the equality in your demeanour to the parties, and in the way you dispense justice, so that the noble will not take you for granted and the weak will not despair and be frustrated and doubt your ability to do justice. The onus of proof I on he who makes claim and the oath is on he who denies it. Compromise between warring Muslims is in order, except a reconciliation that makes what is lawful unlawful and makes what is unlawful lawful. Do not allow a decision took in the past and you reflect on it and found better judgment later, enslave you not to go back to the truth. Certainly truth is eternal and reversal to the truth is better than being adamant on falsehood. Ensure clear understanding about a decision you are going to take in which there is no clear cut (nass) Qur'anic injunction or an Hadith and you are not deadly sure of its correctness. Know the examples and similitude and apply the principles of analogy and then rely on the best acceptable to God and the ones that are, in your judgment, closest to justice. Give enough chance for anyone who claims that he has evidence to produce to do so. If he produces the evidence let him have his right, or else give judgment against him as due in a manner that is clear even to the blind and leaves no room for grudging. All Muslims are competent witnesses except those who had lost the attribute as a result of being found guilty of an offence for which they are convicted or found to have given false evidence or people of questionable character. God keeps many things secret from you but leads you to the secret by way of evidence. Caution yourself against being difficult. Impatient and injuring the feelings of the litigants. Anybody whose intention are clear and genuine in dealing with others, even if it is against himself Allah will guarantee and protect him on what is between him and other people. He who shows people false picture of what God knows about him, God will expose him. How do you compare the material reward with God's provision and mercy? Peace be upon you." This is the letter that serves as basis for various important rules in the administration of justice in Islam up till date

[177] See Qadri, n. 163 at 21

[178] Ibid., 26 where references were made to various remarks of the early companions describing him as great jurist and the most learned in law of inheritance. For instance the author quoted Khalipha 'Umar to have remarked thus, "'Ali is the best of us in judicial decision" and that whenever a trustworthy person disclosed to him a judgment of 'Ali, he will not deviate from it. In a similar development, 'Aisha was reported to have said about him, "Verily he is the most learned in the Sunnah."

[179] Ibid., 27

The above is the premise upon which the judicial system in Islam was built which was followed in the later Islamic administration starting from the period of *Umayyad* with circumstantial development and improvement on the system especially during the unequalled reign of ʿUmar bn. ʿAbdul ʿAzīz. It was in view of softening the burden of enormous duties and responsibilities upon the Khalipha that brought about the development in the appointment of offices of the Imām, Muftī and the like as we have in the recent time.[180]

Right from the time of the prophet, the general principle for the appointment of a Muslim judge is that he must be a Muslim, free person, male and *mukallaf* **,** sane, have sound sense of sight, hearing and speech, in addition he must be an upright person of unquestionable character, literate in Qurʿān and sunnah, intelligent to make independent research *(mujtahid)***.** Although some jurists opined as an exception to the general rule that a woman could be appointed as a judge under certain circumstances.[181] Basically during the early period of Islam, the function of a judge was narrowed down to settlement of dispute between litigating parties. It was however expounded later during the Khaliphate period to cover some other vital areas of concern of the Muslims.[182] From the totality of the above therefore, the major function of a judge and judiciary in Islam is to see justice done, that the people have full access to justice and protected same and other rights as their fundamental right without prejudice.

3.3.2 Judiciary and Human Rights in Islam

Protection of human rights is an essential function of judiciary in Islam. Access to justice is no doubt a fundamental right in Islam. On this note therefore, judiciary as an

[180] Ibid., 33
[181] See M.A Ambali, n. 172 at 82
[182] See Qadri, n. 163 at 4

institution in Islam does not compromise its role in this regard, and there are numerous instances of judicial protection of human rights in Islam, right from the period of the Prophet (SAW).

Equality before the law as a right was often protected by the Prophet (SAW) as a judge. The judiciary, like other sector under the Holy Prophet (SAW) treated everyone equally when it comes to legal proceedings. Noble people appeared in court to answer claims from those regarded as ordinary people and judgements were given among them impartially by the Prophet (SAW). The Hadīth of the Holy Prophet (SAW) that exemplified the position of Islam on justice and equality is the popular Hadith of a lady belonging to a noble family who was arrested in connection with the offence of theft. Pleadings were made for her to be spared and or exonerated of the punishment on account of the nobility of her family, but the Prophet (SAW) in protecting people's right of equality before the law, was reported to have reacted thus:

> The nations that lived before you were destroyed by God because they punished the common man for their offences and let their dignitaries go unpunished for their crimes: I swear by Him (God) who holds my life in His hand that even if Fatima, the daughter of Muhammad, had committed this crime, then I would have amputated her hand.[183]

Instances of judicial protection of human rights were found during the reign of the Khaliphs, for instance ʿUmar bn al-Khaṭṭāb was sued before Khalipha Abūbakar in a case of custody of a child and judgement was given against him despite his status and reputation.[184] Also during the period of ʿUmar as Khalipha, in protecting right to dignity of human person, the Khalipha was reported to have ordered an Egyptian to take vengeance by telling him to beat the son of the noble who eventually was

[183] See Muslim, n. 167, Hadith no.1688/4301, at 848
[184] See Ambali, n. 172 at

Muhammad the son of ʿAmr bin al-Āṣ, the then Governor of Egypt and afterward said to the governor:

> O Amr when did you start to enslave the people, though they were born free of their mother?[185]

In a similar development, Abū Mūsā Ashʿarī as a Governor also offered himself to be avenged against in the public as ordered by Khalipha ʿUmar before the wronged person pronounced wholehearted forgiveness to him.[186]

One of the unique features of the Islamic judicial system from inception is equality before the law, as the Prophet himself never claim to be above the law and that any of the Muslim leaders can be brought to court in both his private and official capacities. This principle confirm the independence of judiciary in Islam and its autonomy as well and boost the impression that protection of the people's right is ensured under such system where justice is obtainable without any influence.

Furthermore, the practicability of the above principle was exemplified by the judiciary in the following instances. Khalipha 'Umar was said to have purchased a horse and during the testing course it got injured, he offered to return same while the seller rejected it, dispute arose and the case was referred to a judge who gave impartial judgment for which the Khalipha commended and promoted him. The same Khalipha was said to have caused his drunken son flogged publicly. A similar instance is the dispute between Khalipha 'Ali the then ruler of the Ummah and a Jew over a war gown. The judge, in person of Shurayḥ gave judgment against the Khalipha not because he doubted his truthfulness but because he was unable to satisfy the procedural requirement in respect of his evidence. In fact it was a landmark judgment

[185] See Afridi, n. 126 at 135
[186] Ibid., 149

to which the Jew confessed 'Ali's ownership of the gown and consequently embraced Islam.[187]

3.4 CONCLUSION

A just society is the one in which human right can be best protected. Justice in Islam is an essential instrument for the procurement and maintenance of peace and tranquility in the society. The perspective through which Islam sees administration of justice makes it more different and unique; it is *farḍ kifāyah* on the whole community and *farḍ ʿain* on individual member of the community depending on the circumstances and as the case may be.[188]

More importantly the dispensation of justice been seen as devotional act in which the judge is not answerable to any person but his God.[189] This assures commitment on the part of a judge to ensure that justice is done at all times. A rider to this is the position of Islam on equality before the law and judicial independence as obtainable in Islam. Where a judge is rest assured that he is free of influence and intimidation in the discharge of his duty, even if he gives right and appropriate judgment against the president and head of government, his life and job are protected.[190] If this and other exemplary features of the Islamic judicial system can be incorporated into the conventional judicial system, the judiciary and the judges will have less or no fear in discharging their functions for the maintenance of justice and protection of people's rights.

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[187] See Qadri, n. 163 at 23
[188] See Ambali, n. 172 at 85
[189] See Qadri, n. 163 at 11 while elucidating the nature of the job of a judge as reward able and punishable act by God quote the Prophet to have said "whoso seeks to be a judge among the Muslims till he gets it, and then whose justice prevails over his injustice, there is paradise for him; and whosoever's injustice prevails over his justice, there is fire for him."
[190] Ibid., 23

CHAPTER FOUR

DEVELOPMENT OF HUMAN RIGHTS AND JUDICIARY IN NIGERIA

4.1 INTRODUCTION

Considering the area of focus of this work as contained in the general title, the scope of which is geographically narrowed down to Nigeria. Having succinctly looked into the concept of human rights and judiciary from the general perspective and from the Islamic point of view in the previous chapter, this chapter shall analyse the development of human rights in Nigeria. This includes the analysis on the constitutional protection of human rights vis-a-vis the Nigerian Constitutions of various generations. For the fact that judiciary as an institution for the protection of human rights is the major area of concern of this work, the chapter will briefly examine the evolution and development of judiciary in Nigeria. This study will cover the pre-colonial, during and the post colonial eras. In addition, the present existing courts shall be examined according to their hierarchies and their functions, especially in relation to human rights issue. The chapter will also have a brief insight into the Nigerian legal system, as a commonwealth country with a view to seeing the system of law that operates and the sources of the Nigerian law. This is to enable us appreciate how accommodative is the legal system of Nigeria to the human rights issues. This chapter shall be concluded by enumerating the basic fundamental rights provided for in the 1999 Constitution of the Federal Republic of Nigeria.

4.2 DEVELOPMENT OF HUMAN RIGHTS IN NIGERIA

Undoubtedly, Islam has recognised and protected the rights of man hundreds of years before the Western proposition and agitation for human rights concept and its protection. It is not in controversy that the Islamic administration and judicial system had been in place in Nigeria before the arrival of the British imperialists, especially the establishment of the Khaliphate system of government in the Northern Nigeria sequel to the historical Jihād of Sheikh ʿUthmān bn Fodio.[191]

The history of human right in Nigeria is therefore on this note traceable to the Nigerian pre-colonial era. This is because slavery and slave trade were prevalent in the African continent in general and Nigeria in particular before colonisation. Gross abuse of human rights and degradation of human dignity was common. This is the situation under which tribes waged wars against themselves for the purpose of expounding their territorial boundaries. War captives were made slaves who were due to their status used for all sort of hard labours and inhumanly treated. Human beings were also contracted upon like other commodities and were sold by the Kings and the Masters to the Europeans who also engaged in slave trade then.

Before the constitutional era in Nigeria when human rights protection was gaining popularity in the early 19th century, apart from the economic objectives, protection of human right through the abolition of slavery and slave trade could be

[191] Yusuf Bala Usman, "The Sokoto Caliphate and Nation-Building in the 19th and 20th Century" available on www.dawodu.com/usman2.htm, accessed on 14th November, 2009. The author gave the sketch of the pre-constitutional era of the country. It is on record that Sheikh Uthman bn Fodio was a scholar Jihadist and a reformer, his effort through jihad to spread the teachings of Islam and establishment of Islamic system of governance basically cut across the northern part of Nigeria in the 19th century, after which a system of government based on Islamic culture of Khaliphate was established with the sit of government in then Sokoto town popularly referred to in history as the Sokoto Khaliphate, in the present Sokoto state of Nigeria. The head of government was the Amir now called Emir where heads of Northern cities and towns got their title of "Emir" across the Northern Nigeria equivalent of what their counterpart in the West are being referred to as "King" (Oba). See also "The Sokoto Jihad" Encyclopedia Britanica, available on www.britanica.com/EBchecked/topic/414840/Nigeria/55314/The-Sokoto-Jihad accessed on 14th November,2009

seen as one of the core missions of the colonial masters as reflected in the wordings one of the treaties made in Nigeria.[192] It is noteworthy that despite the above situation in Nigeria at that time, notwithstanding also the acclaimed recognition and respect for human rights concept and its protection as a developing phenomenon in the West around the period under reference. The colonial master's acts were seen as intrusion into the convenient existence of the territory of Nigeria all in the name of colonisation. The act of colonisation itself in the view of some writers and scholars was considered to be tantamount to violation of people's right having in mind the natural school definition of human rights, for instance in the light of the following view:

> The non recognition of some finer points of African Customary Law was based partly on ignorance and partly on the incidents of imperialism...However, the main reason for denying African Customary Law its sanctity and value was colonialism. The policy of colonial rule was based on the theory of the superiority of the imperial race and its culture and laws over the subjugated people and their own culture and law...If the latter were to be allowed to believe in their own culture and value and deem them to be equal with those of their masters, they could challenge the right of the imperialists to govern them.[193]

During the time under reference, human rights and its protection was not institutionalized neither was there any written constitutional guaranteeing human rights. It however existed and enjoyed protection through the traditions and socio-cultural and political practices of the people. Presumed racial superiority was then one

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[192] B.O. Nwabueze, *"A Constitutional History of Nigeria"* at 7 available on http://books.google.com.my/books accessed on 9th August, 2009 where the author quoted partly the Lagos 1861 treaty as follows "In order that the Queen of England may be better enabled to assist, defend and protect the inhabitants of Lagos, and to put an end to the slave trade in this and the neighbouring countries, and to prevent the destructive Wars so frequently undertaken by Dahomey and others for the capture of slaves. I, Decomo, do with the consent and advice of my council, give, transfer, and by these, presents grant and confirm unto the Queen of the Great Britain, her heirs and successors forever, the port and Island of Lagos..."

[193] Hon. Justice S.H Makeri, "*Jurisdictional issues in the Application of Customary Law in Nigeria*" a paper delivered at the 2007 all Nigeria Judges Conference 5th -9th November 2007 available on http://www.nji.gov.ng/index2.php?option=com_docman&task=docviewed&gid=85&itemid=179 accessed on 2nd August 2009. At 25-26. Where His lordship quoted the statement of Hon. Justice (Dr.) G.W. Kanyeihamba of the Supreme Court of Uganda in his lordship's paper titled "Criminal Law Administration-Historical and Institutional Constraints" presented at the Commonwealth Magistrate and Judges Conference, held at Edinburg, Scotland from 10th -15th September, 2000 at page 12-13.

of the justified grounds for the violation of human rights in many places including the then civilized nations. This assertion could be further appreciated through the Donnelly observation:

> Classical Greeks considered themselves inherently superior to barbarian (Non-Greeks), who were not entitled to the same treatment as the Greeks. The American notion of manifest destiny or the British Colonial ideology of the white man's burden justified barbarous treatment of non white people on grounds of the superior virtue or moral development of Americans and Englishmen. Nazi Germans provides an even more extreme version of the denial of rights to "inferior races" on ground of moral and political superiority.[194]

The use of force and military might to occupy some provinces especially in places where serious oppositions and resistance were encountered by the British as it was in the Northern Nigeria.[195] This was also seen as human rights violation on the part of the colonial masters who were presumed to be concerned about its protection rather than violation. This was the skeletal perception of the doctrine of human right in Nigeria before the Nigerian independence in 1960.

4.2.1 Human Rights and Nigerian Constitutions

The constitutional era of human rights protection in Nigeria got its first boost and became institutionalized around 1960 when specific bill of rights was incorporated into the Nigerian Independence constitution of that year. This development was

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[194] E. Ike Udogu, "Human Rights and the New Globalisation in Africa" in *Africa and the New Globalisation,* (ed.), Klay Kieh, Jr.(USA: Ashgate) at 54 available on http://books.google.com.my/books accessed on 9th August, 2009

[195]Nwabueze, n. 191 at 10 the author gave example as in the Northern Nigeria were the people vehemently rejected the white men with their rules as found in a letter written by the then Sultan of Sokoto to the High Commissioner of Northern Nigeria in the following words "From us to you, I do not consent that anyone should dwell with us. I will never agree with you. I will have nothing ever to do with you." Between us and you there are no dealings except as between Mussulmans and Unbelievers-War as God Almighty has enjoined on us. There is no power or strength save in God on High" This eventually led to the use of military and maximum force by the colonial masters before the Islamic community of Northern Nigeria was overpowered and invaded.

said to be the first in the British Commonwealth[196]. The Nigerian Independence seems to have settled only the issue of "home rule" but left behind the issue of who shall rule. To avoid domination by the majority ethnic groups (Hausa, Yoruba and Ibo), and to allay the fear of marginalisation and protect the rights of the minorities, the minority agitation was led by the British Government for the establishment of a special Minority Commission in 1958 which recommended the inclusion of a bill of rights in the independence constitution in order to ensure protection of series of rights applicable to all Nigerians in the 1960 constitution. This is contained in Chapter IV of the independence constitution which was substantially drawn from the European Convention on Human Rights and Freedoms.[197]

This is the constitutional protection of human right in Nigeria as contained in the Nigerian Independence Constitution which came into force on 1st October, 1960. The provision remained substantially the same in the subsequent constitutions of Nigeria, the 1963 Republican Constitution inclusive, but subject to some minor alterations in the arrangement, nomenclature, and amplifications here and there.[198]

Particularly the 1999 Constitution did not only set forth the political structure for the country but conspicuously made blanket provisions for the protection of some basic fundamental rights under chapter IV. The constitution also

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[196] Claude E. Welch, Jr. *"Protecting Human Rights in Africa: Strategies and Rules of Non-Governmental Organisations"*,(Philadelphia: University of Pennsylvania Press) at 26 available on http://books.google.com.my/books accessed on 9th August, 2009.

[197] Ibid

[198] Ibid, at 20 The prominent among various Nigerian Constitutions for the protection of human rights is the 1979 Constitution. Provisions of which was substantially cut and pasted in the presently operational 1999 Constitution of the Federal Republic of Nigeria which came into force on the 29th May 1999. Similar was the feature of the 1989 Constitution which never saw the light of the day, likewise the 1995 draft Constitution of late General Sanni Abacha's self succession mission. In the above referred constitution both civil and political rights and fundamental principles of state policy were entrenched, economic and social development inclusive as contained in Chapter II of both the 1979 and 1999 Constitutions.

established the Judiciary and vested it with the power to defend and protect the constitution as whole and fundamental rights provisions therein contained in particular. The whole of chapter IV of the Nigerian 1999 Constitution form section 33 to section 46 is dedicated for issues relating to fundamental rights and the procedure for the protection of the rights contained therein.

These constitutional provisions on human rights were suppressed, made ineffectual, ignored, neglected, overridden and undermined by the successive and prolonged military rules in Nigeria. The judiciary was equally handicapped in the area of constitutional values and human rights protection through the ouster clause. The Nigerian Military lacked respect for the rule of law and human right. This was a great obstacle for the judiciary to discharge its constitutional duty to protect human rights.[199] The nascent democracy of Nigeria has been the carry-over of the prolonged military rule especially in the first eight-year of president Obasanjo whose reign was characterised by corruptions of various standards, lack of respect for the rule of law and gross abuse of human rights of different categories. It was however the positive attitude of the judiciary that saved the country from the elongation of Obasanjo's tenure beyond the two terms of four-years each provided for in the constitution, the move which might have led to the collapse of the democratic rule.

[199] Ibid at 27

4.3 THE GROWTH OF JUDICIARY IN NIGERIA

Nigeria, like many other countries in the world, is a multi-cultural nation having three major tribes as the majority (Yoruba, Hausa and Ibo).[200] The three languages of the three aforementioned majorities are constitutionally recognised alongside English[201] as official languages with which even the business of the National Assembly shall be conducted. Although there are other minority tribes spread all over the geographical location of these three majority tribes based on their cultural affinities and affiliations with each of these major tribes. It is a country made up of thirty six states and a federal capital territory, three hundred and sixty-eight local government areas and six area councils.[202] Nigeria is an Anglophone country being colonised by the British Imperialist. In the light of the above therefore, judicial system in Nigeria can be viewed right from the pre-colonial, during and post colonial perspectives.

The cultural set up of Nigeria as stated above makes it undisputable that there had been in place a judicial system before the invasion of the country by the colonial masters. This was the method of dispute settlement and observation of the existing norms among the people. It was a customary and Islamic judicial systems and courts of adjudication although not statutorily established but based on customary and Islamic laws.[203]

The traditional machinery for the administration of justice in the present Eastern part of the country which at that time partly constituted the Southern states among the Ibos was according to their custom. It was based on the authority of the

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[200] Nigeria is a West African country in fact one of the largest countries in the whole of Africa. It has the population of over one hundred and twenty million, it is politically segmented into six Geo-political zones for easier political representation, but culturally it is ordinarily divided into three regions that is the Western part for the Yoruba, the eastern part for the Ibo and the Northern part where the Hausa cultural tribes are pre-dominant.

[201] See section 56 of the Constitution of the federal republic of Nigeria 1999

[202] Ibid See section 3 sub-section 1-6

[203] A.O. Obilade, *"The Nigerian Legal System"*, (Nigeria: Spectrum Books Limited, 2007), at 17

council formed by male representatives or heads of families and other elders from every clan of the community. This is due to the fact that there used to be no single or overall ruler or head authority of whom to which the community will be subject. Another authority that exercised this council of elder's function was the cults or secret societies usually constituted by the influential personalities of the community.[204] It was at the council level that cases were resolved; penalties were imposed for crimes and enforcement power of which was also exercised by them. But in cases of heinous crime, the secret society take over sometime to invoke supernatural forces to settle dispute, punish criminals and to identify offender in ambiguous situations.

In the present Western part of the country which was the other constituting part of the then Southern states among the Yoruba speaking people, like their counterpart in the east it was also the customary system of adjudication but here with some differences. There existed the chieftaincy system that is, the Yoruba community there is a King as the head with his subordinate chiefs in big towns. While in other localities there were chiefs as no community existed without an overall head or chief to exercise the administrative and judicial functions. Cultism was also prominent in the Yoruba land, the famous of which is known as the "Ogboni" which generally served as organ for check over the authority of the King with power to make and repeal laws and also to up torn the any decision of the King that seems to be unjust or arbitrary.[205]

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[204] I.A. Bappah "Historical Evolution of Customary Courts in Nigeria" in N.M. Jamo and A.M. Madaki (ed.), *Legal Easy in Honour of Hon. Justice Moses A.D. Bello*, (Zaria Nigeria: Private Law Department ABU, 2009), at 63

[205] Ibid at 62 where author also made reference to the view of Johnson where the latter was quoted as follows "Among the Egbas and Ijebus, the Ogbonis are the Chief Executive, they have the power of life and death and power to enact and repeal laws: but in the Oyo province the Ogbonis have no such power, they are rather consultative and advisory body, the King or Bale being supreme, and only matters involving bloodshed are handed over to the Ogbonis for judgment or for execution as the king sees fit." See Johnson, *"History of the Yorubas"* quoted in Okany, M.C *"The Role of Customary Courts in Nigeria"* (Enugu, Nigeria: Fourth Dimension Publishers, 1984) at 253.

The system of executive and judicial administrations in the Northern part of the country was however more unique, advanced and standardized compared to what operates in both the West and the Eastern part of the country. The standardized system of Islamic governance and administration of justice or judicial system established by the Prophet (S.A.W) and developed by the early Sahabah over a thousand years ago, became well rooted in the North after the 19th century Jihad of Sheikh Uthman bn Fodio through the establishment of Khaliphate system of government.[206] The head of state and head of government called the Emir also exercises judicial power in some vital cases but due to the administrative bottleneck, there were professional judges called Alkali manning the Native courts to administer justice in accordance with Islamic law of Maliki School.[207] The courts well organised were vested with both civil and criminal jurisdictions. The above is the brief enumeration of the original traditional and administrative and judicial system in Nigeria prior to the occupation and introduction of the English rule in the country by the British colonialists in 1861.

The existence of customary and Islamic laws and judicial system can further be evidenced by its acknowledgement in the wordings of the Charter of the Royal Niger Company which states thus:

> "In the administration of justice by the company to the people of its territory, or to any of its inhabitant thereof, careful regard shall be had to the custom and laws of the class, or tribe or nation to which the parties respectively belong."[208]

When the British colonial masters entered the territory of Nigeria through trading activities vide the cost in1862, Lagos was first annexed as colony and

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[206] See Nwabueze, n. 191 The Islamic government and judicial system established in the Khaliphate was so strong much that it occasioned serious resistance to the incoming of the British rule into the province. This consequently prevented the white men from been able to rule the Northern Nigeria Directly as easily done in other provinces, hence the proposition of the doctrine of "indirect rule" in the Northern part of the country during the colonial rule.
[207] Bappah, n. 204 at 61
[208] See Article 8 of the Charter of the Royal Niger Company LTD of July 10, 1886

gradually the whole of Southern and Northern provinces were overtaken and later amalgamated into what is today known as Nigeria in the year 1914.[209] Although there were in existence, the customary and native courts, the British rule was introduced into the colony hence the introduction of English law and the first Supreme Court was established[210] by the Supreme Court ordinance of 1863.[211] Within the period of 1863 and 1913 the Southern and the Northern protectorates were established for the administration of all the protectorates by the British rulers and various courts were established within the trend of these years for the implementation of the English rule, this includes the establishment of another Supreme Court[212]and Native Courts[213] across the protectorates.

In the year 1900 the colonial legal system operated concurrently with pre-existing native law and custom and Islamic law, while the latter ware subjected to validity tests before they were considered applicable.[214] The colonial masters not satisfied with the existing courts and with a view to reviewing the existing native courts, brought them under their statutory supervision by virtue of the Native Courts Proclamation of 1906 both in the Lagos colony and the Northern provinces.

Another development in the Nigerian judicial system came forth after the 1914 amalgamation of the Southern and Northern protectorates. Several ordinances were promulgated for the establishment of courts and restructuring of the existing ones. For

[209] A.O. Oguno, "Turning back the Hands of Time: The Liability of Present Governments for Human Rights Violation of Previous Government in Nigeria" in Yerokun (ed.), et, *The Jurist* (Nigeria:Law Student Society, Unilorin,2007) Vol. 12 at 253
[210] See Obilade, n. 203 at 18
[211] See Ordinance No 11 of 1863
[212] Supreme Court proclamation No 6 of 1900
[213] Native Courts Proclamation No. 25 of 1901, No.9 of 1900, No 7 of 1906, and No.5 of 1900
[214] Hon Justice Makeri, n. 193 at 3

example in 1954 Nigeria was segmented into a federation of three regions.[215] Federal Supreme court was established for the whole nation and a High court for each region including Lagos which was the federal territory.[216] Moreover, about 600 native courts were established in the North having both civil and criminal jurisdiction[217] vide the Native Courts law of 1956.[218] It was the 1960 that marked the emergence of Magistrate and District courts for the application of the Criminal Procedure Code of that year and the Penal Code of 1959.[219] In the year 1967 however, Area courts were established to replace the native courts in the North, also the known native courts metamorphosed into what is today called the Customary Courts both in the Western[220] and the Eastern[221] part of the country. Whereas in some parts of the Northern of Nigeria native courts equally later transformed into Customary Court, for instance Law No. 9 and 14, Laws of Kaduna State 2001, which established Customary Courts and Customary Court of Appeal respectively in the state.[222]

This above was the influence of the colonial masters and their rule on the judicial structure of Nigeria not until the coming into force of the 1979 Constitution of the Federal Republic of Nigeria, before which all the superior courts of Nigeria were of English type and culture.[223] In this constitution and in addition to the existing superior courts, two other superior courts were established namely; the Sharia Court of

[215] See Obilade, n. 203 at 33 Nigerian became a Federation of three regions Northern, Western and Eastern Region and Lagos as the federal territory by virtue of the Federal Constitution Order in Council of 1954 with effect from 1st October of that year.
[216] Ibid
[217] Ibid at 4
[218] Native Courts Law N.R No. 6 of 1956
[219] Ibid
[220] Customary Courts Law of 1957 (Cap 31) Laws of Western Nigeria
[221] Customary Courts Law (Eastern Region No.21 of 1958)
[222] Hon Justice Makeri, n. 193 at 5
[223] Ibid at 12

Appeal and the Customary Court of Appeal.[224] This development simply signified more recognition for the application and development of Islamic and Customary judicial systems in Nigeria.

4.3.1 The Structure of Nigerian Courts

Judiciary being the main institution and an important organ of the government constitutionally vested with the judicial power in the Nigerian Constitution.[225] Courts were created as machineries for the discharge of this enormous constitutional obligation.[226] As a commonwealth country where common law applies, the principle of judicial precedent and hierarchy of court form the integral part of its legal system. It is against this background and for the purpose of observing the aforementioned doctrine of stare *decisis* (binding precedent) that the Nigerian Courts are broadly categorised into two main classes namely; the Higher or Superior Courts of Record[227]and the Lower courts.[228] Other supporting machineries like tribunals are provided to be established by the law ranging from the Election Tribunal.[229]This discussion is necessitated by the constitutional provision on the jurisdiction of court for the protection of human rights contained in the constitution. Examining the classification of court through their structure will enable us identify those courts having ordinary jurisdiction and those with special jurisdiction on human rights issues.

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[224] See the Constitution of the Federal republic of Nigeria 1979 the same wordings incorporated in the 1999 Constitution in sections 275 and 280 respectively.
[225] See Sections 6 Sub-section 1-6 of the Constitution of the Federal Republic of Nigeria 1999
[226] See Sections 230- 284 of the 1999 Constitution
[227] See Section 6 Sub-section 5 (a-i) under which the superior courts are listed as; the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital territory, Abuja; a High Court of a State; the Sharia Court of Appeal of the Federal capital Territory, Abuja; a Sharīʿah Court of a State; the Customary Court of Appeal of the Federal Capital Territory, Abuja; and a Customary Court of a State.
[228] Ibid Sub-section 5 (j and k)
[229] See Section 285 of the 1999 Constitution

4.3.1.1 Superior Courts of Record

In the hierarchy of Nigerian courts, the Supreme Court of Nigeria is the apex court of the land. It situates at the Federal Capital Territory, Abuja. It is headed by the Chief Justice of Nigeria who doubles as the overall administrative head of judiciary and such other number of Justices of the court, not exceeding twenty-one as may be prescribed by the law.[230] The Supreme Court has exclusive original jurisdiction[231] and appellate jurisdiction as well.[232] The constitution of the court in its ordinary business shall not be less than five Justices except in cases of constitutional interpretation on the protection of human rights, for this purpose therefore, the court shall be constituted with not less than seven Justices.[233] As the most superior court of the land, its decision is the final[234] in the real sense of finality cannot be appealed against in any way and same is binding on other courts in Nigeria.

Next to the Supreme Court is the Court of Appeal having a President and such other number of justices as specified by the constitution.[235] It has divisions spread all over the country for administrative convenience. Despite the name of this court it also has exclusive original jurisdiction in petition on the election of the President and Vice-President. It also has exclusive appellate jurisdiction to entertain appeal from all other superior court of record bellow it as arranged under section 6 sub-section 5(c-i) of the Nigerian Constitution 1999. It also entertains appeals from other Tribunals as may be prescribed by the law. It is noteworthy here that this is the only court through which application multiple legal system is recognised in Nigeria. This is premised on the fact

[230] See Section 230 Sub-sections 1 and 2 (a & b)
[231] See Section 232 of the 1999 Constitution
[232] See Section 233 of the 1999 Constitution
[233] Ibid Section 234
[234] Ibid Section 235
[235] Ibid Section 237

that certain number of persons to be appointed as Justices of the court must be learned in Islamic personal law and customary law respectively.[236]

At the base of this is the Federal High Court which is only one for the whole of Nigeria but has divisions more widely spread across various states of the country like the Court of Appeal for administrative convenience. However, more power could be conferred upon it by law for more effective exercise of its jurisdiction. The Federal High Court is headed by a Chief Judge and such other number of judges as may be prescribed by the Act of National Assembly.[237] The Federal High Court has no Appellate jurisdiction but limited exclusive jurisdiction in criminal and civil matters[238]and dully constituted for its business with a sole judge sitting.[239]

The High court of the Federal Capital Territory[240] and other states High Courts[241] are of concurrent jurisdiction, each is headed by a Chief Judge and such other number of Judges as may be prescribed by the Act of the National Assembly for the FCT High Court and the State Houses of Assembly for the State High Courts. These courts are constituted with a sole judge sitting they have appellate, original and supervisory jurisdiction in criminal and civil matters.[242] This is the category of court considered to have the widest jurisdiction in the country to the exception of matters within the exclusive jurisdiction of other courts as defined under the law. This is also the court to which appeals lie from almost all the lower courts ranging from the Magistrate Courts in criminal cases, District Courts in civil matters, Area Courts and Upper Area Courts in some jurisdictions. A High Court either of a state or of the FCT

[236] Ibid Section 237 sub-section 2 (b)
[237] Ibid Section 249
[238] Ibid Section 251
[239] Ibid Section 253
[240] Ibid Section 255
[241] Ibid Section 270
[242] Ibid Sections 257 and 272

is well constituted with a sole judge while exercising its original jurisdiction[243] and with not less than three Judges while entertaining Appeals from the lower courts.

Equally in the hierarchy of the Nigerian superior courts, other courts which are of equal status with the High Courts are the Sharia Court of Appeal and Customary Court of Appeal. There is one each of these courts for the Federal Capital Territory Abuja[244] and each for any state of the Federation that requires it. The Sharia Court of appeal is led by the Grand Kadi and such other number of Kadis as may be prescribed by the enabling law and Customary Court of Appeal is headed by the President of the Customary Court of Appeal and other number of judges prescribed by law. These two courts have appellate an supervisory jurisdiction in matters of civil proceeding involving questions of Islamic Personal Law and Customary Law respectively.[245] These courts in determining matters within their jurisdictions are constituted with not less than three Kadis in the case of Sharia Court of Appeal and three Judges in the case of Customary Court of Appeal. It is noteworthy here that appeals lie from these two courts strait to the Court of Appeal, hence the essence of the requirement for the appointment of Court of Appeal Judges under Section 237 Sub-section 2 (b).

4.3.1.2 Lower Courts

Lower courts in the Nigerian Context are court though not created by the constitution but other state enactments, they include; Magistrate Courts of various grades uniformly available all over the country, vested with both civil and criminal jurisdictions, value and limitation of which varies from state to state. It wears the garment of District Court in the Northern part of the country while adjudicating on

[243] Ibid Sections 258 and 273
[244] Ibid Sections 260, 265, 275 and 280
[245] Ibid Sections 262, 267, 277 and 282

civil matters. We also have Customary Courts applying customary law of the predominant mainly in the West, South and partly in the North. In the North however, there are mainly Area Courts of various grades applying the Islamic law and other native law and custom of its area of jurisdiction based on the limitation and restriction of the value of their jurisdictions.[246] For further development and expansion of the application of Islamic law in the North, in the recent time most of the states constituting the North in the adoption their newly enacted Sharia Code, they have in addition to the existing Area courts established courts called Sharia Courts and Lower Sharia Courts, these are mainly court of first instance on Sharia matters be it criminal or civil.

Other machineries that form part of the instrument of judicial system in Nigeria are various Tribunals, either established by the Act of the National Assembly or that of the State House of Assembly.[247] It is noteworthy here that those tribunals established by the Nigerian Laws do not have jurisdiction either directly or impliedly on issues of human rights. It is also important to note that the jurisdiction on questions of human rights protection is exclusively for the regular court of law. In is only incumbent upon every tribunal to protect every party's fundamental right to fair hearing by strictly observing the rules of fair hearing as stipulated by the constitution in handling matters before them. Failure of any tribunal to observe the rule of fair hearing renders the proceedings a nullity as held in *Bamgboye v. University of Ilorin.*[248] Also it was re-echoed in *Ziideeh v. Rivers* State as follows:

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[246]See Ambali, n. 172 at 79

[247] See for instance Section 285 of the Constitution which provides for the establishment and jurisdiction of one or more election Tribunals for the Federation at all levels, for the determination of questions relating to elections into various political offices be it National, State or at the Local Government levels. Another example of these tribunals are various Rent Tribunals in some states to adjudicate on Tenancy matters. There are also Juvenile Courts, Coroners Court and Military tribunals and courts.

[248] (1999) 6 SCNJ 295 at 305

> The respondent which is a domestic tribunal with quasi judicial jurisdiction, is bound to observe the rules of natural justice enshrined in section 33(1) of the 1979 Constitution[249]

The court further stated that:

> It is also well settled that the consequence of breach of the rules of natural justice as contained in section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria is that the decision reached thereby is a nullity and liable to be set aside"

The general function of the judiciary vide the judicial power as vested on it by the constitution is to uphold justice for peace and tranquillity in the society. Specifically, by virtue of the constitutional power of the court for the interpretation of the constitution (under Sections 232 and 233 (2) (b and c) vis-a-vis the determination whether any of the fundamental human rights guaranteed by the same constitution has been, is being or likely to be violated or contravened, and to determine the appropriate redress if any of those right is discovered to have been unlawfully infringed. This is a clear picture of the duty of the judiciary in the area of human right protection. The judiciary holds a preventive duty in respect of the enforcement of human right, this flow from the use of the phrase "likely to be contravened." This adds more value to the function the judiciary to the effect that, the court is not to sit by and look at any of the provisions of the constitution under Chapter IV to be contravened before it acts in a preventive and protective manner on any similar question before it. The attitude of Nigerian Court towards the discharge of this function shall be discussed in the next chapter where references shall be made to cases on questions of human rights in the Nigerian Courts.

[249] (2007) 1 SCNJ 299 at 300-301

4.3.2 An Insight into the Sources of Nigerian Law

Sources of law is a multi-dimensional terminology but for the purpose of this work, it could be said to connote the totality of the means through which the rules forming the body of law or legal system is derived or originated.[250] The discussion about the sources of Nigerian law is important to this research work because, it leads to the understanding of the root of the Nigerian legal framework and mechanisms. It links the emanation of Nigerian law and its development to the development of human rights and protection in the Nigerian law. For instance, the Nigerian Constitution is a product of common law. It has been explained earlier in this chapter that the British Government was influential to the inclusion of a bill of rights in the Nigerian Independence Constitution in order to allay the fear of marginalisation of the minority and to protect their rights. In addition, for the protection of peoples' religious and cultural rights in Nigeria, it is important to summarily explain other sources of Nigerian law such as Islamic and Customary laws. On this note therefore, sources of Nigerian Law are as follows:

4.3.2.1 Nigerian Legislation

This is basically in two forms namely; the statutes and the subsidiary legislations, the latter are the creations of the former which is otherwise called the enabling law. The statutes therefore are the enactment of the legislature at various levels of government by the legislative arm, this includes; Ordinances; acts; Laws; Decrees and Edicts.[251]

[250] See Obilade, n. 203 at 55
[251] Ibid., 64

4.3.2.2 Received English Law

Nigeria been a colony of the British has a common law background, common law thus is the historical source of English law. Therefore English law is a source and forms an integral part of the Nigerian legal system. This consists of the common law, doctrine of equity, statutes of general application in force in England on January 1, 1900. It is been referred to as received English law because it was introduced to Nigeria law by the order of Ordinance No 3 of 1863.[252]

4.3.2.3 Customary Law

Customs have been described as undeniable source of law; customary law has therefore been defined by writers[253] and judges for instance Obaseki JSC was quoted to have defined customary law in the case of *Oyewumi v Ogunsesan*[254] as follows:

> "The organic or living law of the indigenous people of Nigeria regulating their lives and transactions, it is organic in that it is static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that the customary law goes further and imports justice to the lives of all those subject to it."[255]

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[252] Ibid., 69 where the author gave example of Section 2 of the Law (Miscellaneous Provisions) Law, Lagos Laws 1973, Cap. 65 which provide thus "2(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal or State enactment, the common law of England and the doctrine of equity, together with the statute of general application that were in force in England on the first day of January, 1900, shall be in force in the Lagos State. (2) The statute of general application referred to in subsection (1) together with any other Act of Parliament with respect to a matter within the legislative competence of the Lagos State shall be in force so far only as the limits of local jurisdiction and local circumstances shall permit and subject to any Federal or State law. (3) For the purpose of facilitating the application of the said imperial laws, they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances. "

[253] See T.O. Elias, *"The Nature of African Customary Law"* (Manchester: Manchester University Press, 1962), at 55

[254] (1990) 3 NWLR (pt. 137), 182 at 207

[255] Makeri, n. 193 at 6 other writers also gave opinion on definition of customary law for further reference see Dias, R.W.M. *"Dias on Jurisprudence"* 5th Ed. (Butterworth, 1985), at 188, also *Salmond on Jurisprudence* 12th Ed. (sweet & Maxwell) at 31 and C.K. Allen *"Law on Making"* 7th Ed. (Charendon Press) at 67

The term customary law in the Nigerian context in used as a blanket description of very many customs, as there is no single uniform set of customs in Africa as a whole and in Nigeria in particular. It thus varies from one ethnic group to the other. In Nigeria, Islamic law has been classified as a form of customary law of the Northern people, although distinctions have been drawn between the ethnic customary law[256] and Islamic law, based on their features[257], nature[258] and characteristics.[259]

As the local law of the people, one of the measures taking by the white men to subjugate customary and Islamic laws was to subject the application and enforceability of these laws to what they referred to as validity tests, broadly classified into three namely; the repugnancy test;[260] incompatibility test;[261] and public policy test.[262] It was through the provision of various indigenous statutes that the rules of customary law were subjected to the above mentioned tests; hence none was enforceable unless it passes the above tests.[263]

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[256] Allot, A. *"Essays in Africa Law"* (London: Butterworth, 1960) at 61 where the author on the feature of ethnic customary law observed thus "first the law is unwritten, there is no written memory of the edict and decision of the past legislators and judges, they exist only in the mind of those who administer, and those who are subject to customary law"

[257] T.O. Elias,*"The Nigerian Legal System"* (London: Routledge & Kegan Paul Ltd, 1963), at 375. Also on features of customary law see the cases of *Owonyin v Omotosho* (1961)1 All NLR, 304 at 309, *Lewis v Bankole* (1908) 1 NLR 81.

[258] One of the essential differences of the ethnic customary law and Islamic law is that the former is unwritten and uncertain while the latter is certain and based on divine law sources (the Qur'an and Hadith) which are obviously in written forms.

[259] On nature and characteristics if Islamic law See Schacht, J. *"An Introduction to Islamic Law"* (Oxford, 1964) at 1 See also Muslehuddin, M. *"Philosophy of Islamic Law and the Orientalists"* (New Delhi, 1986) at 271 also relevant is Gibb, H. A. R. *"Constitutional Organisation in Khaddar and Lieberny, Law in the Middle East"* (Washington, 1955) at 3

[260] See the Supreme Court Ordinance No. 4 of 1876 which provides thus, "Nothing of this ordinance shall deprive the Supreme Court of the right to observe and enforce the observation or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction such law and custom not repugnant to natural justice, equity and good conscience or incompatible either directly or by necessary implication with any enactment of the colony" this provision was given practical effect in cases of *Eshugbayi Eleko v Officer Administering the Gov. of Nigeria* (1931) AC 662 at 673, *Laoye v Oyetunde* (1944) AC 170

[261] See Epiphany Azinge, *"Codification of Customary Law: A Mission Impossible"* in Towards A Restatement of Customary Law (ed.), Osibanjo & Kalu Vol. 10, (Nigeria: Federal Ministry of Justice, Lagos, 1991), at 279 also see the case of *Adesunbokun v Yunusa* (1971) N.N.L.R 77

[262] See Section 14 (3) Evidence Act cap 112, LFN 1990

[263] See Obilade, n. 203 at 100

4.3.2.4 Judicial Precedent

As a common law country, Judicial Precedent in other words called case law forms part of the sources of Nigerian law. This is to the effect that the decision of a Higher Court binds the lower court while deciding on the same of similar point of law. The court in arriving at its decision may have some observation or side comment known as *obiter dictum*; this has no binding effect and does not form part of the judgment. But the principle in relation to the fact of a given case upon which the judicial pronouncement was based otherwise known as *ratio decidendi* must be followed by the court below and the same may also be followed by courts above in a similar case (as a persuasive authority). The doctrine of judicial precedent is effective through adequate law reporting system.[264]

4.3.2.5 Rights Provided for in the Nigerian 1999 Constitution

The Constitution of the federal Republic of Nigeria 1999 is the latest and operating grand norm in the country. It is the law upon which the present civil rule is premised. Chapter IV of the Constitution from section 33 to 46 guarantees twelve (12) basic and fundamental rights for the citizen. They are; the right to life,[265]right to dignity of human person,[266]right to personal liberty,[267]right to fair hearing,[268]right to private family life,[269]right to freedom of thought, conscience and religion.[270] Others are; right to freedom of expression and the press,[271]right to peaceful assembly and

[264] Ibid., 101
[265] See section 33
[266] See section 34
[267] See section 35
[268] See section 36
[269] See section 37
[270] See section 38
[271] See section 39

association,[272]right to freedom of movement,[273]right to freedom from discrimination[274]right to acquire and own immovable property anywhere in Nigeria,[275]compulsory acquisition of property.[276] Due to the fact that there is no absolute right as there are limitation to almost all rights both in the western and Islamic perspective. The constitution stipulates legally justifiable ground and circumstances under which some of these rights may be restricted and derogated from either in the interest if individual or the state as a whole.[277]More so for the judicial protection of these rights and redress, the constitution conferred special jurisdiction on the High Court.[278]

4.4 CONCLUSION

The Nigerian legal framework in the protection of human right through the Federal Constitution has improved within the last two decades. The machineries put in place by the constitution for this purpose, vide the judicial power of the judiciary is also plausible. Nigerian legal system has encouragingly accommodated the mission of human rights protection. The judiciary as the centralised institution for this assignment is confronted with a big challenge in the discharge of its functions in the area of human rights protection. It is a thing to theoretically protect human rights while it is another to practically enforce the existing human rights law for the security of people's lives and properties. Assessment of the attitudes of the judiciary in the area of human rights protection is vital in other to ascertain its effectiveness or otherwise, this can be

[272] See section 40
[273] See section 41
[274] See section 42
[275] See section 43
[276] See section 44
[277] See section 45
[278] See section 46

done with references to various cases having questions of human rights violation or protection to be answered by the court as shall be seen in the next chapter.

CHAPTER FIVE

JUDICIAL POWERS AND ATTITUDE IN THE PROTECTION OF HUMAN RIGHTS

5.1 INTRODUCTION

Having examined in the immediate chapter, the structure of Nigerian courts and the constitutional power conferred on the judiciary as an institution for the protection of the constitutionally guaranteed rights in the constitution. Courts must be independent of influences and interference in the discharge of the constitutional obligation of human rights protection. In order to ascertain to what extent the judiciary has judiciously or otherwise protected human rights, judicial powers and jurisdiction of courts for the protection of human rights shall be examined. Also the attitude of courts towards human rights protection is to be examined. This is done through the examination of some judicial decisions with regards to human right cases before the Nigerian courts. In view of this fact, this chapter focuses on the examination of some selected rights in the Nigerian constitution namely; Rights to Dignity of Human Person, Right to Personal Liberty, Right to fair hearing, Right to Freedom of expression and the press and Right to peaceful Assembly and Association. While this chapter looks at these rights from the constitutional provision perspective, some relevant cases are cited with a view to examining the conduct of the court in deciding those cases in the protection of the fundamental rights involved.

The selection of the above rights out of the total twelve (12) basic rights provided for in the Nigerian constitution is based on two reasons, general and specific. The general reason is the consideration of the scope of this research as partial

research, as such may not be able to accommodate all the rights provided for in the Nigerian constitution. The specific reason is the fact that those selected rights are the most attractive in Nigeria upon which violation and attempt to violate are rampart. After looking at both the success and failure of judiciary in the protection of these rights, this chapter is concluded by examining the challenges facing the judiciary in the discharge of this constitutional obligation of human rights protection.

5.2 GENERAL OVERVIEW OF JUDICIAL POWERS AND COURT JURISDICTION REGARDING HUMAN RIGHTS

Judicial power has been described as power of court to decide, pronounce judgement and give effect to the same in cases between litigating parties. Jurisdiction although often used interchangeable with judicial power, is said to be the authority of courts to exercise judicial power in a particular case under a specific circumstance. Jurisdiction therefore has been considered as a pre-requisite for the exercise of judicial power.[279] Section 6 (1) of the constitution vested the Federation judicial powers in the constitutionally established courts (superior court of record) listed in section 6 (5) and other courts as may be established by either the National or State Assemblies (lower courts).[280] The overview of the above referred provisions formed part of the earlier discussion about the structure of Nigerian Courts under chapter four of this research. Furtherance to the exercise of judicial power, the constitution vests in these courts extensive jurisdiction to entertain all actions and proceedings including questions of fundamental rights contained in chapter IV, as to civil rights and obligations between persons, or between government, individual and other authorities in Nigeria.[281] A proviso to the above jurisdiction is contained in section 6 (6) (c & d) regarding issues

[279] See Akande, n. 169 at 32
[280] See Section 6 (4) (a)
[281] See Section 6 (6) (a & b)

pertaining to the Fundamental Objective and Directive Principle of State Policy set out in Chapter II of the constitution.

For the exercise of judicial power in the discharge of its function of interpretation of law generally and the constitution in particular, its application, and to determine whether any of the provisions of Chapter IV has been violated, the Court of Appeal is empowered by the constitution under section 241 (1) (c & d) to hear and determine appeal as of right from the Federal High Court or a High Court. Furthermore, from the Court of Appeal, appeal lies to the Supreme Court in the same manner as provided under section 233 (2) as follows "An appeal shall lie from the decisions of the Court of Appeal to the Supreme court as of right in the following cases". Sub-section 2 (b) provides "decisions in any civil or criminal proceedings on questions as to the interpretation or application of the constitution" and (c) provides "decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or likely to be, contravened in relation to any person." Above is the constitutionally granted judicial power and jurisdiction of Nigerian Courts for the protection of human rights.

An instance of the general power given to the Nigerian Court to defend the provisions of the constitution from being infracted is seen in the Supreme Court of Nigeria position in the following case. *Gov. Kwara State v. Ojibara.*[282] In this, case the executive governor of the state unconstitutionally removed the respondents form office, an act which was declared to be gross violation of sections 199 and 201 of the 1999 Constitution. Oguntade JSC maintained that the court is a defender of the constitution where he says: "It is important to bear in mind that we are here concerned

[282] (2007) S.C.E.R 11

with the infraction of a constitutional provision."[283] This pronouncement ensures the unfettered power of the court to defend the Constitutional provisions in general and human rights provisions contained therein in particular.

In a related development, the Supreme Court of Nigeria has exercised its judicial power in the defending the constitution and declared that, the President had no power under the constitution or any other law to declare the office of the Vice president vacant. Thus the President's action in this case amount to infraction of the provision of the Constitution.[284]

The power of the Nigerian Courts is specifically to protect human rights guaranteed in the Nigerian constitution under the judicial power confer on it both at the national and state levels by the constitution.[285] In addition to the general judicial power stated above, courts are given specific jurisdiction for the enforcement and to uphold of the values of these rights. This is enabled by the provision of the Fundamental Rights (Enforcement Procedure) Rules[286] where it provides:

> Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the court in the state where the infringement occurs or is likely to occur for redress[287]

Among the positive measures taken by the judiciary as an institution for the protection of human rights is the issuance of the 1979 Fundamental Rights (Enforcement Procedure) Rule. This was born out of the power conferred upon the

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[283] Ibid
[284] See *A-G Federation v. Atiku Abubakar* (2007) S.C.E.R at 128, see also *A.C v. INEC* (2007) S.C.E.R 58
[285] See section 6 of the Constitution of the Federal Republic of Nigeria 1999. See also section 233 (2) (c) of the constitution
[286] The rule is cited as Fundamental Rights (Enforcement Procedure) Rules 1979 which came into force on 1st January, 1980. The rule was made pursuant to section 46 (3) of the 199 Constitution
[287] See Order 1 rule 2 (1) of the F.R.E.P.R 1979 a derivative of sub section 2 of section 46 of the Constitution

Chief Justice by the constitution[288] to make such rules for the practicability of the jurisdiction conferred on the High court by the constitution. This is mainly aimed to re-enforce the practical role the judiciary in the protection of human rights. The power confer on the judiciary herein with particular reference to protection of fundamental rights is not limited to the infringement form the government and its organs alone but abuse of those rights from any quarter.

Due to the judicial power and jurisdictional protection given to the judiciary for the effective discharge of its constitutional obligation of protecting human rights as enshrined in the Nigerian Constitution. The following questions may be asked: 1) has the Nigerian judiciary lived up to expectation in the discharge of its duty in the protection of the peoples' rights as required by the constitution? 2) To what extent have Nigerian courts satisfied the need to protect the peoples' rights? Answers to these questions will give insight into the judicial attitude toward protection of human rights. This is done through the evaluation of some relevant cases with regards to some rights under the following headings in this chapter.

5.2.1 Rights to Dignity of Human Person

Section 34 of the constitution is explicit on the right of individuals to dignity of human person. This provision gives rise to the right of every person to be protected against torture, assault, molestation brutal or violent attack, inhuman and all sort of degrading treatment to human person. The constitutional protection of this right covers slavery and forced labour[289] subject to the exceptions contained in the proviso therein.[290] The right to dignity of human person is one of the most violated rights in

[288] See section 46 (3) of the 1999 Constitution
[289] See section 34 (1) (a, b and c)
[290] See section 34 (2) (a, b, c, d and e)

Nigeria especially at the grass-root level. The violation of this right is rampart from the actions of the law enforcement/security agents, especially the brutality of the Nigerian Police. The major hindrance for the protection and redress of this right is that few cases bothering on the violation are brought to the court. This is due to ignorance of people about their rights and procedure for its protection and enforcement.

The Nigerian Courts have however judiciously attended to few of this cases that were brought before them. For instance the case of *Agbakoba v. Director of SSS*[291] and *Abacha v. Abiola*[292] where the court held once there is a violation of any provision of the Constitution, the state cannot escape liability by claiming that its officers or agents acted outside the scope of his authorities. In a related case where a lawyer was beaten up by the Police, the court has held that assault constitutes the deprivation of the applicants dignity, as assault on the applicant is within the scope of rights to dignity of human person as protected under section 34 (1) of the Constitution.[293]

This extent of protection of this right by the court can also be seen in the decision in the recent case of *Barrister Ibrahim Zakariya Olanrewaju v Commissioner of Police & another.*[294] In this case the Applicant a legal practitioner was reported to have been grossly assaulted, molested, brutally attacked and dehumanised by six drunken Police men who assaulted him to a state of coma. The applicant was consequently hospitalised. The applicant filed a direct criminal complaint at the magistrate court against the second respondent for assault, criminal force, causing grievous hurt contrary to provisions of the Penal Code.[295] The proceedings at the

[291] (1999) 3 S.C. 59
[292] (1998) 1 HRLRA 485
[293] See *Isenalhumhe v. Joyce Amadin* (2001) 1 CHR 458 at 467
[294] Unreported case. Suit No. FHC/IL/CS/11/2009
[295] Unreported case No. MCO/29C/2009 *Between Z.O Ibrahim Esq v. ASP Konofo*

magistrate court was frustrated by the influence of the then state Chief Judge, this development influenced the applicant's decision to file this application. The court held in this case that the respondent's action amounted to violation of the applicant's right guaranteed under section 34 (1) of the 1999 Constitution. It consequently ordered the respondents to write a letter of apology in addition to the exemplary damages of Five hundred thousand naira only (N500, 000) against the respondents jointly and severally. The court in the instances cases upheld the human right as it suppose to be, this is evident by the declaration of the court in the former two cases that the state is bound by the act of human rights violation done by its agents. In the same vein in the latter case, the court granted monetary damages serving as redress and compensation for the violation of human rights of individual against the state through its agents.

5.2.2 Right to Personal Liberty

Liberty encompasses many things. It is a kind of freedom that gives chance for many other things do be done by a person. It suffices therefore to say that any person whose liberty is curtailed definitely has his other rights denied such as, right to private life, freedom of expression, right to peaceful assembly and association, and of course freedom of movement.[296] Right to personal liberty is protected in section 35(1) of the constitution and same has limitation by way of exception in the name of lawful arrest or execution of court order.[297] Lawful arrest is no doubt one of the circumstances of the limitation to this right,[298] upon this a writer observes thus:

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[296] T.O. Ifaturoti, "The Challenges of Nigerian Prisoners in the Light of the Human Rights Campaign" in M. Cherif Bassiouni and Ziyad Motala, *Protection of Human Rights in African Criminal Proceedings,* (The Netherland: Martinus Nijhoff Publishers, 1995) at 159

[297] See section 35 (1) (a-f) and sub-section (2-7)

[298] See CPA 1990, LFN Cap. 80 Vol. V. Also CPC 1990, LFN Cap. 81 Vol. V and Police Act, Cap.359 1990 LFN Vol. X

> The Constitution guarantees no man (sic) against arrest. It only guarantees Fair Hearing and Impartial trial. It provides him with an appellate Court to correct error of the inferior court and with this, he must be content[299]

The judiciary in post-1979 was considered judicious in the protection of human rights through its liberal interpretation of the constitution and other legal provisions enabling it to give reality to the theoretical rights. This was expected to be improved upon in the Third Republic before same was truncated by the military in1984.[300] This right has been frequently abused since the era of the military when courts were incapacitated by the military Decree of ouster clause.

Several abuses were perpetrated by the government through its agent, to the extent that the military gave the members of armed forces authority to arrest under Decree 2 of 1984. This Decree could be said to have been mainly enacted as a legal mechanism for the violation the people's right contained in the constitution. It was the same Decree that ousted the court's jurisdiction to entertain any matter in the Decree. It suspended the whole Chapter Four of the Constitution, the Chapter housing the Bill of Rights in the constitution.[301]

Under this situation, many Nigerians were arbitrarily or unlawfully arrested without charging them before any court for any offence. Despite all this odds and military oppression and suppression of the judiciary, majority of the said detainees eventually secured their freedom through the court's intervention. Examples are cases of *Tewogbade & Sons v. Oyo State Government*[302]and *Governor of Lagos State v.*

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[299] Bamgbose, n. 37 quoting from Alexandra C. "The Law of Arrest in Criminal Proceedings", (Buffalo, Dennis, 1949) at 304

[300] M.A. Owoade, Human Rights and Criminal Justice in Nigeria, in M. Cherif Bassiouni and Ziyad Motala, *Protection of Human Rights in African Criminal Proceedings,* (The Netherland: Martinus Nijhoff Publishers, 1995) at 186

[301] Section 4 of Decree No. 2 of 1984, Note that section 2 of this Decree specifically abrogated the provision of right to liberty in the constitution.

[302] (1991) 2 NWLR (pt. 171) 56

Ojukwu.[303] In these cases, the court reacted by seriously condemning the government for its refusal to pay compensations ordered to be paid for the unlawfully detained persons after their order of release. Similarly, in *Noah & 7 Others v. A-G of the Federation*, the court ordered the release of the detainees and awarded damages of Forty thousand, five hundred Naira only (N40.000), but they were only released a month after the court order and the government refused to pay the damages awarded.[304] Through the positive reaction of the judiciary towards the protection of human rights, others who secured their freedom through the intervention of the court are Joseph *Odogu*[305]after nine years in custody between 1979 and 1988. Also *Maxwell Okudoh v. Commissioner of Police Lagos*[306]and *Tai Solarin v. IGP,*[307] it is noteworthy that protection of human rights is tantamount to justice to humanity and preservation of human dignity. Thus the role of judiciary during this military dictatorial era in Nigeria is commendable by doing all within its restricted jurisdiction to protect people's rights; this is in consonant with the observation of Lord Denning where he says:

> If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid the rule or even to change it- so as to do justice in the instance case before him.[308]

5.2.3 Right to Fair Hearing

Fair hearing they say is the bedrock of justice. If justice is to be seen done, courts must strictly adhere to the observance of the rule of fair hearing in determining the

[303] (1998) 1 NWLR (pt. 18) 621
[304] Bamgbose, n. 37 at 154
[305] Unreported suit No M/698/87
[306] Unreported suit No M/32/84
[307] Unreported case No M/55/84
[308] See Bamgbose, n. 37 at 154

rights of parties before them. Fair hearing can simply be construed to mean, giving every party to a legal proceeding equal opportunities to be properly heard without an iota of imbalance or partiality. The Supreme Court of Nigeria has in numerous cases emphasised the obligation of the observation of the rule of fair hearing in all ramifications. For example Nnamani, JSC observed:

> The right to be heard is so fundamental a principle of our adjudicatory process that it cannot be compromised on any ground[309]

On what really amount to denial of fair hearing, Obaseki, J.S.C has this to say:

> A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given opportunity to be heard, the hearing cannot qualify as fair hearing. Without fair hearing the principles of natural justice are abandoned.[310]

In addition, fair hearing has been described as one of the indivisible twin pillars of natural justice i.e *audi alteram partem* (hear the other side) and *Nemo judex in causa sua* (no one should be a judge in his own case) effect of failure to observe it renders proceedings a nullity[311] if bias is proved and it occasioned miscarriage of justice[312] on this Nnaemeka-Agu J.C.A says:

> The rule of *audi alteram partem* postulates that the court or other tribunals must hear both sides at every material stage of the proceedings before handing down a decision on that stage. It is a rule of fairness. A court cannot be fair unless it considers both sides of the case as may be presented by both sides.[313]

The chances utilised by the Nigerian courts to make the above enumerated judicial pronouncement on right of fair hearing is due to the legal efficacy and protection given to it by the Nigerian Constitution. Section 36 of the 1999

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[309] See *Nwokoro & Ors v Onuma & Anor*. (1999) 3 N.W.L.R (pt 136) at 35
[310] See *Otapo & Ors v. Sunmonu & Ors.* (1987) 5 S.C.N.J. 56 at 75
[311] See *Adigun v A-G of Oyo State* (1987)1 N.W.L.R (pt 53) 678
[312] See *Bamgboye v University of Ilorin* (1999) 6 S.C.N.J. 305 at 308
[313] See *Ekuma v. Silver Eagle Shipping Agencies Ltd* (1987) 4 N.W.L.R. (pt. 65) 472 at 486

Constitution provides for the protection of right to fair hearing both in civil[314] and criminal[315] proceedings.

Courts in civil cases have protected this right to the extent of holding wrongful exclusion of evidence as violation of right to fair hearing. This is the position of the Supreme Court in the case of *Agbahomovo v. Eduyegbe.*[316] In this case, the trial court did not use the statement of defence of the respondents herein as the basis of his judgement. The learned trial judge also restrained the respondents from asking questions at the crucial stage of the proceedings. The respondents were also precluded by the trial judge from giving evidence relating to exhibits already admitted before the court and the judge went ahead to expunge their evidence from the record. The Supreme Court in this case declared all this as denial of fair hearing and same is violation of section 36 of the constitution. In protecting the respondents' rights of fair hearing in the instant case, the court in dismissing this appeal, upheld the decision of the Court of Appeal which allowed the respondents appeal on that ground by setting aside the judgement and orders of the trial court.

Right to fair hearing in criminal case is more elaborated under the Nigerian Constitution.[317] In other words, any person charged with criminal offence has a wider scope of protection of his right to fair hearing. Right to fair hearing of an accused person starts from his right to be arraigned in court within a specified period of time by the law.[318] In complimentary provision is found in criminal procedure law specifying 24 hours within which an accused person must be taken before a magistrate

[314] See section 36 (1,2 & 3)
[315] See section 36 (4-12)
[316] (1999) 2 S.C.N.J 100
[317] See sub-sections 4 to 12 of section 36
[318] See section 35 (4 & 5)

if there is charge against him.[319]For proper understanding of this position, section 36 is read together with section 35 of the constitution. In a criminal charge, an accused person has the fundamental right to be presumed innocent, this is one of the grounds for the consideration his entitlement to be admitted to bail pending trial as a constitutional right.[320] The constitution stipulates specific procedural rights of an accused which altogether constitute right to fair hearing.[321] Some of which are right to be presumed innocent until the contrary is proved.

The court especially magistrate court is mostly the proper court in position to protect people's right to fair hearing in criminal case. This is because it is the busiest court in the hierarchy of the Nigerian courts. A greater number of criminal cases are commenced at the magistrate courts as courts of first instance and grass-root court. But practically speaking, this right is often jeopardised because in most cases magistrates do not see issue of bail as a matter of discretion empowered by the law for instance:

> where a person is charged with any felony other than a felony punishable with death, the Court May, if it thinks fit, admit him to bail[322]

This was complimented by the court in *Bamaiyi v. State*,[323] where the court held that the discretion has to be judiciously exercised. Usually in practice, most magistrates consider bail merely on the content of the unsubstantiated F.I.R (First Information Report). The court at this level in most cases failed to simply protect this right and consequently leaving many people serving jail terms without conviction. This attitude led to the government of the Federal Republic of Nigeria to take step in

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[319] See C.P.A 1945, section 9
[320] See *Ani v. State* (2000)1 N.W.L.R (pt.747) 217 at 230, also see *Abiola v. Federal Republic of Nigeria* (1995)1 N.W.L.R (pt 370) 155
[321] See section 36 (5 & 6) (a, b, c, d and e)
[322] See section 118 (2), C.P.A Cap. 80, LFN
[323] (2001) 8 N.W.L.R (pt. 761) 670

2007 for instituting a scheme for the decongestion of Nigerian Prisons through the office of the Attorney-General of the Federation.

Within the same constitution an accused in entitled to a legal practitioner of his choice and other facilities for his defence.[324] This right to legal practitioner was denied in the case of *Awolowo v. Minister of Internal Affairs*.[325] In this case, the accused employed the service of a foreign legal practitioner who was denied entry into the country by the Immigration. The court in interpreting the choice restricted it to mean only a legal practitioner who is enrolled to practice in the country. However there is earlier decision of court that trial in unconstitutional where an accused is not afforded time to secure the attendance of his counsel.[326] There is also the right to remain silent[327] without giving evidence,[328] which was decided to be part of due process of law.

5.2.4 Right to Freedom of Expression and the Press

Right to freedom of expression and the press is provided for under section 39 (1, 2 and 3) of 1999 Constitution. This right is to be enjoyed by every individual citizen of Nigeria, by the wordings of the constitution in the above referred section it includes freedom to hold opinions, to receive and impart ideas and information without obstruction. This right also includes right to own, establish and operate media for the purpose of dissemination of information, opinion and ideas. In fact the scope of this right has been interpreted to include schools.[329] The impact of this right on the society

[324] See section 36 (6) (b & c)
[325] (1962) L.L.R 177
[326] See *Gokpa v. Police* (1961) 1 All N.L.R 423, the decision in this case was followed in the later case of *Okon v. State* (1999) 1 N.W.L.R (pt 372) S.C
[327] See *Lekwot v. Judicial Tribunal* (1993) 2 N.W.L.R (pt. 276) 410 C.A
[328] See *Garba v. State* (1997) 3 N.W.L.R (pt. 492) 144 S.C
[329] See *Okogie v Attorney-General of Lagos State* (1981)

is great as it is a means by which individual personality is identified i.e. self fulfilment[330] as observed in, it also serves the purpose of pursuing, discovering and attaining the truth in the society.[331] Unhindered freedom of expression fosters understanding, respect, submissiveness, and confidence between the rulers and the ruled and among the citizens as well. This consequently builds the participatory enthusiasm in the people for the smooth running of the state affairs. This is in line with the position of the U.S. Supreme Court where it supported the right under reference by observing that public issue should be left open for public debate without hindrance of any kind.[332]

Nigerian courts have protected this right in a number of cases either by of given protective interpretation to the constitutional provision in the definition of this right, as the case in *Adewole v Alhaji Jakande & Ors*.[333] The main area of controversy is whether this protection covers the press. Like other developed nations like the US, things are easier said than done. The American Constitution expressly prohibited making law against the freedom of press. But the US Supreme court has validated law restricting freedom of speech.[334] In Nigeria laws of Defamation, Sedition and Libel prosecution are been employed to censor the press especially to suppress criticism of government and its officials whether the information is true of false is immaterial.

This is the position the Nigerian Supreme Court in *Chike Obi v DPP*,[335] in this case, the petitioner, as at that time is a legislator in the parliament of the Federal Republic of Nigeria. He circulated a pamphlet titled "The people: Facts you must

[330] See *Ford v Quebec* (1988) 2 S.C.R 712
[331] See *Irwin Toy Ltd v Quebec*(1989) 1 S.C.R 927 also see *Bridges v California* (1941) 314 U.S.252 at 291-293
[332] See *New York Times v Sullivan* 376 U.S. 254, 270
[333] (1981) NCLR 262
[334] See Akande, n. 165 at 94
[335] (1961) 1 All N.L.R 186 at 197-198

know." It contention therein was that ministers were pursuing their personal interest and not the national interest in the discharge of their duties. The petitioner on this account was charged for sedition. The Supreme Court decided the case in favour of the then Federal government against the protection of the right of the petitioner to freedom of expression and press.

The court was also confronted with the issue whether a reporter can be protected from disclosing his source of information under the right to freedom of expression conferred on the press. In other word, have journalists' immunity from being compelled to disclose his source? Answer to his question is not farfetched, to is a general rule and exception. At common law, a reporter has no such privilege or protection not to disclose his source. This question has also been partially answered by the supreme court of Nigeria in the case of *Tony Momoh v Senate*[336] where the court in protecting the right of freedom of expression and the press held that a journalist is neither under any legal obligation nor can be compelled to disclose his source of information before the Senate Committee of Inquiry. The pronouncement of the court in this case "before the senate Committee of Inquiry" is restrictive and it gives birth to another insinuation whether the same immunity applies to a journalist in a proceeding before a court of law, this has not been clarified by the court. Limitation to this immunity is where the information is relevant to violation of law or commission of a crime, a reporter can be compelled to disclose such information if there are no other ways getting same.[337]

[336] (1982) NCLR 105
[337] See *Branzburg v Hayes* 408 U.S. 655 (1972)

5.2.5 Rights to Peaceful Assembly and Association

Freedom of peaceful assembly and association hypothesizes the Civil and Political Rights necessary for participatory right in the political structure of a state. Human rights protection is assured under a well structured and constitutional based state politics premised on rules of law. This position and the essential inalienable nature of the rights to peaceful assembly and association have been explained by Alexis de Tocqueville as a pre-condition for civilisation in the following words:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society[338]

This right is provided for under Section 40 of the Nigerian Constitution. The tone of the constitution in the protection of this right construed voluntariness of individual to freely assemble and/or associate and not to with other persons i.e. in the name of political party, trade union and other association for the protection of his interest. Light was shed on the rationale behind this assertion in *Mensima & Others v. Attorney-General*[339] Justice Acquah of Ghana Supreme Court observed:

> the essence of freedom of association is the liberty or lack of compulsion on the individual to form or to join an association.

His lordship emphasised the meaning of this to include the right dissociate or not to associate at all with whom a person does not like to associate with other wise freedom of association would be held to be synonymous to cultism.

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[338] Peter Atudiwe Atupare, "Judicial Review and the Enforcement of Human Rights: The Red and Blue Light of the Judiciary of Ghana," (Master of laws thesis, Queen's University Kingston, Ontario, Canada, 2008), at 105 where the researcher quoting from De Tocqueville *Democracy in America* (1954), cited in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (1989) at 235

[339] (1996-97) SCGLR 676 also see *New Patriotic Party v. Attorney-General* (1996-97) SCGLR 929

The spirit of the protection of this right in the Nigerian Constitution is in general term but also specific in terms of joining political parties and trade unions. This is considered alongside other subsidiary legislations such as the Electoral Act 2006 and other regulations of trade unions. The psychology of the Nigerian Courts in the protection of this right is theoretically and practically positive. It has been held by the Supreme Court that it is optional for every individual to freely assemble, join association of his choice and not to join as of right.[340]

The position of the Supreme Court of Nigeria in the plethora of cases of the immediate past Vice President of Nigeria Clearly evident the judicial protection of this right. In *A.C v. INEC*[341] in this case the immediate past Nigerian Vice President after eight years in office contested in 2007 for the office of the President under the platform of the Action Congress, a party other than the one through which he secured the Vice President Ticket in1999. The Electoral Body (INEC) disqualified him from contesting the election but the Supreme Court held that INEC has no power under the constitution or any other provision to disqualify any candidate (including the 2nd Appellant) presented to it by an accredited political party i.e. the 1st Appellant (Action Congress).

The relevance of the above cited case shall be appreciated through the facts and holding in *A.G of the Federation v. Abubakar.*[342] The 1st respondent herein was the Vice President of Nigeria for two consecutive terms, from 1999 to 2007. Conflict of ideology erupted between him and the President when the latter moved for the amendment of the constitution to extend his term for the third term, a move which was vehemently opposed by the Vice President (the 1st respondent) due to his own

[340] See *Fawehinmi v NBA* (No.2) (1989) 2 NWLR (pt. 108) 558 S.C.
[341] (2007) S.C.E.R. 58
[342] (2007) S.C.E.R. 129

ambition to succeed the President come the General Election in 2007. The respondent was denied the ticket at the party level and he consequently deflected from PDP (Peoples' Democratic Party) to AC (Action Congress) where he was nominated and sponsored to contest for the office of the President at the General Election scheduled for April, 2007. Upon his deflection to the AC, the Presidency declared his sit vacant, withdrawn all his rights benefits immunities and privileges as the Vice President and ordered his arrest whenever he returns from the United States of America where he has being to on annual leave.

The 1st respondent commenced an action at the court of Appeal for the nullification of the declaration of his sit as Vice President vacant and other reliefs. The Court of Appeal resolved in favour of the respondent. The appellant herein dissatisfied and appealed to the Supreme Court. Among the contention of the appellant is that the 1st respondent was no mere loyal to the President and his disloyalty to the President by extension amount to disloyalty to the Federal Republic of Nigeria.[343] The ground upon which the appellant's case is based can be inferred from the appellant's 4th relief which reads:

> Declaration that the dumping of a sponsoring party for any other party by a sitting Vice President coupled with condemnation of the President and the Government by a sitting Vice President is a breach of one mindedness, loyalty, trust and confidence expected of the Vice President and therefore constitutes constructive resignation and/or abandonment of the office of the Vice President.[344]

Although rights to peaceful assembly and association is not directly in issue in this case, but the Supreme Court in protecting the 1st respondent's right to freedom of

[343] Ibid., 124
[344] Ibid., 4

association which he exercised by joining a party of his choice (AC) as guaranteed in the constitution[345]held that:

> It may be said that the act or conduct of the Vice President in defecting to the Action Congress after he has won the ticket on the platform of the P.D.P for that position is morally reprehensible. But until the law (in this case, the Constitution) declares the defection unlawful and prescribes in clear language, punishment for such and act, there is nothing anybody can do. The remedy if there is one, lies in the hands of the legislators.[346] It must always be noted that what is morally reprehensible may not be legally punishable.[347]

The court further maintained that unlike the Senators and Member of the House of Representatives,[348] removal of either the President or the Vice President by declaring vacant their sits on ground of deflection to another party is not contained in the constitution. More so, the Vice President is not subordinate to the president they are only to be associates for the election period, and once they won both is at liberty to map out their independent fortunes, as was held in *P.D.P v. INEC* where Ayoola JSC observed as follows:

> .. the office of the Deputy Governor is not an appendage to that of the Governor. Once elected even though on the same ticket as the Governor-elect, the Deputy-Governor-elect becomes *sui generis.*[349]

5.3 CHALLENGES FOR THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS

In the discharge of its constitutional obligation of human rights protection, the judiciary through the machinery of Courts had positively strived and stood to the challenges vide various judicial decisions in cases of human rights questions and failed in some cases. Nevertheless the judiciary would have performed better than it has done

[345] See section 40 0f the Constitution
[346] See section 143 (1) of the Constitution
[347] *A.G Federation v. Abubakar* supra at 119
[348] See section 68 (1) (g) and section 109 (1) (g) of the Constitution
[349] (1999) 11 NWLR (pt. 625) 200

if not for some factors negatively affecting the judiciary in the performance of its functions especially in the area of human rights protection. For the purpose of this work the challenge adversely affecting the judiciary are categorized into two namely; external and internal challenges.

5.3.1 External Challenge

Talking about the external challenge affecting the effectiveness of judiciary in the area of human rights protection, the political instability of Nigeria which ensued short after its independence in 1960 and lasted till 1999[350] is a major factor and played the centre role in this regard. The prolonged Military Rules and epileptic democratic rules experienced by Nigeria is the focus in the discus of political instability as a mitigating factor against the positive attitude of the judiciary in the protection of human rights. During the military rules in Nigeria, degradation of the constitution,[351] manipulation of judicial processes, and gross abuse of collective and individual rights of the citizens were prevalent. For instance silencing, incarceration and incapacitation of the judiciary by usurping the judicial power conferred upon it by the constitution is traditionally the military ruler's first office assignment.[352]

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[350] Oguno, n. 209 at 257 where the author gave account of various military coups in Nigeria first which occurred on the 29th of January 1966 which led to the assassination of the founding fathers of the Nigerian Political system and prominent leaders who agitated and fought for Nigerian independence, such as Sir Ahmadu Bello and Tafawa Balewa. This was followed by the 1975, 1976, 1983, the successful and failed coups 1985 and 1990. Also the 1993 coup which was elongated till 1999 before the present democratic rule was ushered in.

[351] The military junta usually justifies first the uncivilized process of coming into power, by doing this they suspend the constitution either in part or in whole with various decrees. Example is Decree No 1 of 1984 which was passed to suspend an important part of the constitution in the area of right to personal liberty.

[352] Ouster clause, with which the judiciary was rendered inactive in protecting people's fundamental right through the judicial proceedings. Section 4 (2) Decree No 2 of 1984 suspended the whole of chapter IV of the 1979 Constitution in which the bill of rights was enshrined consequently rendered same unenforceable in any court of law. In addition to this the same section of the decree ousted the jurisdiction of courts from hearing any suit relating to matters in the Decree. That is matter of fundamental human rights contained in chapter IV of the 1979 constitution.

Although Nigeria could be said to have overcome the military dictatorial rule in the main time, the present civilian administrators equally have no adequate respect for the rule of law, hence they undermine the Constitution that brought them to office in many occasions and the judiciary and its power. The politicians often attempt to influence the judicial processes; this is encouraged due to the concentration of more power in the executive arm of the government.[353] The legal structure of the power of other two arms of government (executive and legislators) does not give the judiciary the required independence to effectively discharge its functions especially in protecting people's rights against the government.

As discussed earlier in chapter two of this work, institutional independence of judiciary, its integrity and personal independence of individual judges are neither guaranteed nor assured in Nigeria because, the executive in collaboration with the legislature sees itself as the authority that can hire and fire judges at will. This is exactly what happened in the case of *Hon. Justice Raliat Elelu-Habeeb v. National Judicial Council and Others.*[354] Consequently therefore, lack of security of tenure of office, life and economy securities make it difficult for the judiciary through its machineries of courts, been administered by judges to take an independent decision without the interference of other arms especially where any of the constitutional guaranteed rights has been or about to be violated by the government and its agencies.

Due to the above enumerated factors i.e. the executive unnecessary interference in the activities of the judiciary and fair of arbitrary dismissal, it was the believe of the majority of Nigerians that the court was influenced in its decision for upholding the election of the incumbent president of Nigerian in the decided case of

[353] See Akande, n. 165 at 25-26
[354] Suit No. FHC/IL/CS/13/09 (Unreported)

Abubakar v. Yar'adua.[355] It was generally believed that judgement will definitely be premised on certain ground. In the instant case however, one of the general pointer to necessitate the nullification of the election is the statement of the President contained in his inaugural speech of 29th May, 2007 where he said:

> We acknowledge that our elections had some shortcomings. Thankfully, we have well-established legal avenues of redress, and I urge anyone aggrieved to pursue them. I also believe that our experiences represent an opportunity to learn from our mistakes. Accordingly, I will set up a panel to examine the entire electoral process with a view to ensuring that we raise the quality and standard of our general elections, and thereby deepen our democracy.[356]

This has been construed by the majority to mean open admission of malpractices in the said election. Corroborating this is the dissenting judgement of Oguntade JSC in the matter where he says:

> "I hold that the petitioners/applicants by a preponderance of evidence established that the 1st petitioner/appellant, a candidate validly nominated, was unlawfully excluded from the election. I therefore order that the presidential elections held in Nigeria on 21st April, 2007 be annulled and a new election be conducted within 90 days from today"

On another ground His Lordship further observed:

> "Let me also observe that if I had to decide this case on the ground of non-compliance with section 45(2) of the Electoral Act, 2006, I would make the same order as I have made in Appeal No. SC.51/2008 that the election be annulled. I would do so because there is abundant evidence including the sworn deposition filed by the Chairman of INEC in answer to the interrogatories served to him that the ballot papers used for the April 21st presidential elections were not serialised and bound in booklets as required under section 45(2) of the Electoral Act 2006."[357]

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[355] (2008) 12 SCNJ 217

[356] Yar'Adua's Inaugural Speech, **"**The Challenge is Great; The Goal is Clear" *Inaugural Address of Umaru Musa Yar'adua, President of the Federal Republic of Nigeria and Commander-In-Chief of The Armed Forces, May 29, 2007*, Posted in May 30, 2007 ¬ 11:12 amh.loomnie14 Comments » http://loomnie.com/2007/05/30/yaraduas-inaugural-speech/ accessed on 28th September 2009

[357] See *Abubakar v. Yar'adua* supra at 379-380

The above justifies the thinking of the people that the judiciary had been influenced in the majority decision of this case and consequently the nation has been denied the right to elect a leader of their choice.

5.3.2 Internal Challenge

Internal bureaucracy is another important factor affecting productivity within the judiciary. This is where judges of higher courts particularly the Chief Judge and administrative head of judiciary exercise undue influences on other judges especially the lower courts with regards to their decisions. An instance of this scenario was found in the case of *Z.O. Ibrahim Esq v. ASP Konofo.*[358]In this case, the Complainant a legal Practitioner filed a Criminal Direct Complaint against a Police officer before a Chief Magistrate Court. During the course of the proceedings, the accused person jump bail and refused to further appear in court for his trial. On the application of the prosecuting counsel, the court issued a bench warrant to compel the appearance of the accused for his trial. Upon acknowledgement of the order of warrant, the accused Police Officer on the order of the State Commissioner of Police went with others to castigate the Magistrate in the Open Court for daring to issue a warrant against a Police officer. In addition, upon the complaint of the Police to the Chief Judge, The Kwara State Chief Judge without prior investigation frustrated the proceedings by issuing a query to the said Chief Magistrate for granting order of warrant against the Police. The C.J further transferred the Chief Magistrate to a very remote area of the state.[359]

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[358] Case No. MCO/29c/2009

[359] See Text of the Press Conference by the Nigerian Bar Association, Ilorin Branch on the Abuse of administrative power by Hon. Justice Raliat Elelu-Habeeb, Chief Judge of Kwara State, held at the Bar Centre, Ilorin, Kwara State of Nigeria on 28th April, 2009. It is contained in the press release that the NBA took up the matter by pleading to the CJ to reverse the decision of penalizing the Magistrate who

This is the kind of undue influence that affect the independence of individual judicial officers in their decision on cases before them. It was the frustration of this case that necessitated the filling of the case of *Barrister Ibrahim Zakariya Olanrewaju v Commissioner of Police & another*[360] earlier referred to in this chapter. Another factor is lack of adequate funding of judiciary, the act withholding judge's incentive and other entitlements are other factors which consequently lead to corrupt practices such as bribery within the judiciary, this is the situation under which people's access to justice is not assured, as justice is for the highest bidder on individual bases. While government interests are protected at the expense of people's constitutionally guaranteed rights at governmental level.

5.4 CONCLUSION

The judiciary in the last three decades has undergone tough situations which hindered wholly and partially its ability to perform its functions to protect human rights. In several occasion however, it has favourably protected people's rights. In reality the element of influence on the decision of courts still persists especially from the executive arm of government. The fair of arbitrary removal also impairs the independence of the judiciary as a whole and individual judge in particular. It has become the slogan among the lower court magistrates that grant bail and get dismissed especially in cases with political flavour.

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has judiciously discharged his duty but the CJ remain adamant. It was serious that the NBA of the State after exhausted all means of dialogue embarked on a three-day boycott of all courts under the State Judiciary. In fact this case is one of the grounds stipulated by the State Government for the removal of the aid Chief Judge from office. This is contained in the judgment of the case cited in note 75 above at page 9 of the copy of the judgment. The researcher at this juncture wishes to express gratitude to Barr. Abdul-Ganiyy Bello, the immediate past Gen. Sec. of NBA, Ilorin Branch, Kwara state, Nigeria and Dr. I. A. Abikan, the Sub-Deen of law University of Ilorin, Ilorin, Nigeria, for making this material and other cases materials available for this research from Nigeria.

[360] See n. 294

CHAPTER SIX

CONCLUSION

Nigeria is one of the countries that recognized human rights as an essential concept for the development of socio-political development of the society. This recognition influenced the need for the protection of those recognized and guaranteed fundamental rights of individuals in the country. The effort of Nigeria as a nation for the protection the rights of her citizens got its first boost in 1960 when the independence constitution of that year incorporated a bill of rights in which some basic rights were guaranteed for Nigerians. This legal framework has been enhanced in subsequent constitutions up to the presently operating one i.e. the constitution of the Federal Republic of Nigeria 1999. In this constitution, the whole of Chapter IV is dedicated for the protection of fundamental rights of the citizens by guaranteeing twelve basic rights in its provisions from section 33 to section 44 of the constitution.

In order to give practical effect to the values of the above constitutional provisions of human rights, the constitution has put in place the appropriate machinery, hence, the establishment of the judiciary. In addition to its status as an important arm of government, it is stands as the defender of the constitution and the protector of human rights provisions vide the judicial power conferred upon it under section 6 of the constitution. By this provision, the judiciary as an institution has been shouldered with the general responsibility of defending the constitution and the special duty of protection of human rights provisions contained in the constitution.

This research shows that the legal framework for the protection of human rights in Nigeria is to a reasonable extent adequate. The constitution as the grand norm

of the country on its part did not only theoretically protect twelve different rights, but also for practicability conferred special jurisdiction on the High Courts in the country, to stop any attempt to violate any of the guaranteed rights by way of injunction, to protect and redress abuses and unlawful infringements of those rights. It further stipulates lawful circumstances under which any of the rights could be derogated from in either in the interest of the nation as a whole, in the protection of other people's rights and in the interest of an individual.

It has been shown in this research that, the judiciary in demonstrating its commitment towards its constitutional function of human rights protection, had risen to the challenges posed by the inherent habitual and prevailing arbitrary violation of human rights in Nigeria. This is done through the machinery of the court in the determination of cases having questions of human rights as facts in issue. This research also shows that the efforts of the Nigerian Courts in this regard have yielded positive result as seen in the case of *Barrister Ibrahim Zakariya Olanrewaju v Commissioner of Police & another*[361] Negative results were also recorded such as in the case of *Awolowo v. Minister of Internal Affairs*[362] as earlier explained in the analysis of the above referred cases in Chapter Five of this work. This failure is not unconnected with some identified factors from within and outside the judiciary.

It has been submitted in this research that among other things needed by the judiciary to enable it function effectively and efficiently in the discharge of its general and specific functions are, institutional independence and personal independence and integrity of judges. These two types of independence are not assured for the Nigerian Courts and judges. This is due to the intervention of the executive in the judicial processes. Also arbitrary dismissal of judges by the executive serves as a big threat to

[361] See n. 360
[362] See n. 325

the anticipated independence. Happily few of those dismissal that were challenged in court were upturned and nullified as shown earlier in the case of *Hon. Justice Raliat Elelu-Habeeb v. National Judicial Council and Other.*[363]

This research has also shown that apart from the jurisdiction conferred upon the Superior Courts of Record i.e. the High Court for the protection of human rights, the Inferior Courts of Record i.e. the Lower Courts including other quasi-judicial tribunals have the obligation of protecting particularly the right of fair hearing of every party before them. Specifically, it has been submitted that the Magistrate Courts have the duty of protecting the fundamental rights of all accused persons arraigned before it in respect of any criminal charge as guaranteed under section 35 of the constitution. The independence of the Magistrates is often threatened by the executive of the state and the administrative heads of the judiciary as elucidated in the case of *Z.O. Ibrahim Esq v. ASP Konofo.*[364]

In order to curb the executive intervention in the judicial processes and arbitrary dismissal of judicial officer, to ensure judicial independence, in addition to the constitutional provision on the appointment and removal of judicial officers particularly the High Court Judges under sections 250 (1&2) and 271(1&2). It is hereby suggested that the law should be improved by introducing some punitive measures on the perpetrators of unjust removal of judicial officers.

It has been argued that most Magistrates do not see the issue of bail as constitutional right of the accused person. Neither have they seen bail as a matter of discretion which is to be judicially and judiciously exercised. The rule of presumption of innocence has often been ignored. Consequently they have ignorantly refused bails and unnecessarily remanded people in prison custody. This is due to lack of practical

[363] See n. 354
[364] See n. 358

experience before their appointment as Magistrates. It is against this backdrop that I hereby suggest that experienced legal practitioners should be appointed instead of newly graduated lawyers who have no experience of legal practice. In other words certain year of practice should be made a pre-condition for the appointment of Magistrate. This will also put an end to practice of drawing cooperate lawyer from the bank and other cooperate bodies to the bench.

Lastly, it is believed that protection of human right is a yardstick for the determination of societal extent of civilisation. Since judiciary at the centre stage in the fulfilment of this great mission, necessary measures are to be taken to ensure efficient judiciary to enable it function effectively in the discharge of its obligation of human rights protection. This is because human rights must always be protected.

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