HANDBOOK ON Human Rights

- United Nations on Human Rights
- Universal Declaration of Human Rights
- African Charter of Human and Peoples's Rights
- Right of Women (Beijing Declarati[illegible]
- The Rights of the Child (United Nat[illegible]
- Rights and Welfare of the Child (Afric[illegible]nion)
- Fundamental Rights under the 1999 Constitution (Nigeria)
- Fundamental Rights (Enforcement Procedure) Rules 2009
- Cases
- Experiential Questions

2nd Edition
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ABUJA, NIGERIA
Panaf House
Plots 196/197
Dawaki Rockville
Behind News Engineering Company
Gwarinpa, Abuja.
☎ 08023400164, 08022239114

LAGOS,NIGERIA
29 Isaac John Street
Igbobi College Area
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☎ 01-8152706,
08023244739,
08055270900

ISBN: 978-978-48743-8-0

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Printed and bound by:
Panaf Press
Panaf House
Plots 196/197
Dawaki Rockville
Behind News Engineering Company
Gwarinpa, Abuja.
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PREFACE

Critical comments and request for landmark cases necessitated this second edition. This we have attempted to achieve in this edition. Even though there are many celebrated cases under this topic, the need to concentrate on the locus classicus and control the size became strategic.

With this additional cases plus the inclusion of the Fundamental Right (Enforcement Procedure) Rules, 2009 users will derive maximum benefit. Our experiential questions will also assist students and practitioners to test their knowledge and refresh their thinking of human right as a subject.

We must thank those readers who regularly suggest those areas of our law that require materials from us.

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ABBREVIATIONS: LAW REPORTS

A.C	*Appeal Cases*
All ER	*All England Report*
All NLR	*All Nigeria Law Reports*
CCHCJ	*Cyclostyled Copies of High Court Judgements*
C.L.R	*Commonwealth Law Reports*
COX	*Cox's Equity*
Cr. App. R.	*Criminal Appeal Reports*
East, P.L.C	*East Term's Reports, Privy Council*
ECSLR	*East Central State Law Reports*
ENLR	*Eastern Nigerian Law Reports*
ERNLR	*Eastern Region of Nigeria Law Reports*
FNR	*Federation of Nigeria Reports*
FRCR	*Federal Revenue Court Reports*
FSC	*Federal Supreme Court*
K.B	*King's Bench*
L.L.R	*Lagos Law Reports*
LRN	*Law Reports of Nigeria*
LR, PC	*Law Reports, Privy Council Appeals*
MJSC	*Monthly Judgement of the Supreme Court of Nigeria*
MNLR	*Mid-Western Nigeria Law Reports*
NCLR	*Nigeria Constitutional Law Reports*
NCR	*Nigeria Criminal Reports*
NLR	*Nigeria Law Reports*
NMLR	*Nigeria Monthly Law Reports*
NNLR	*Northern Nigeria Law Reports*
NRNLR	*Northern Region of Nigeria Law Reports*
NWLR	*Nigeria Weekly Law Reports*
Q.B	*Queen's Bench*
QBD	*Queens Bench Division*
SC	*Supreme Court*
SCNJ	*Supreme Court of Nigeria Judgements*
SCNLR	*Supreme Court of Nigeria Laws Reports.*
TLR	*Times Law Reports*
Vict. LR	*Victoria Law Reports*
WACA	*West African Court of Appeal*
WLR	*Weekly Law Reports*
WLRN	*Weekly Law Report of Nigeria*
WN	*Weekly Notes*
WNLR	*Western Nigerian Law Reports*
WRNLR	*Western Region of Nigeria Law Reports*

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CONCERN OF THE UNITED NATIONS WITH HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

CHAPTER 1

CONCERN OF THE UNITED NATIONS WITH HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The concern of the United Nations with the promotion and protection of universal respect for, and observance of, human rights and fundamental freedoms is an expression of the ever-increasing interest of the international community in ensuring that these rights and freedoms shall be enjoyed by all human beings, everywhere.

The roots of concern may be traced to the humanist traditions of the renaissance, to the struggle for self-determination, independence and equality that has taken place, and is still proceeding, in many parts of the world; to the philosophical concept of such men as John Locke of England, Jean Jacques Rousseau of France, Thomas Jefferson of the United States of America, Kari Marx of Germany and V. I. Lenin of Russia; and to the impact of such events as the issuance of the Magna Carta by King John of England in 1215, the adoption of the Declaration of Independence by representatives of the 13 North American colonies in 1776, the adoption of the declaration of the Rights of Man and of the Citizen by the National Assembly of France in 1798, and the publication of the Communist Manifesto in 1848.

In the first half of the twentieth century, at the close of the First World War, international concern with human rights found expression in certain provisions of the covenant of the League of Nations. States members of the League accepted the obligation to endeavour to secure and maintain fair and humane conditions of labour for men, women and children, and also to ensure the just treatment of the indigenous inhabitants of their colonies.

Under the mandates system, established by the Covenant, certain Powers accepted as a sacred trust responsibility for the well-being and development of the peoples placed under their mandate. In addition, some of the post-1919 peace treaties and a number of "minorities treaties" and declarations created a system for the protection of linguistic, racial and religious minorities under the guarantee of the League of Nations.

Source: *The United Nations and Human Rights. Office of Public Information United Nations. New York, 1978.*

And the International Labour Organization was established in 1919 as an autonomous organization, associated with the League of Nations, in the realization that universal peace could be established only if it were based upon social justice.

The inclusion among the purposes of the United Nations of the achievement of international co-operation "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" was due above all to events which occurred immediately before, and during, the Second World War. This and other human rights clause in the United Nations Charter reflect the reaction of the international community to the horrors of that war and the bestiality of the regimes which unleashed it. The Second World War demonstrated clearly the close relationship existing between outrageous behavior by the government of a Nation towards its own citizens and the aggression against other nations, between respect for human rights and the maintenance of international peace and security.

The experience of that war resulted in the widespread conviction that effective international protection of human rights was one of the essential conditions of international peace and progress, and this conviction was set out in a number of statements, declarations and proposals made while the war was still being fought. For example, in the Atlantic Charter of 14 august 1941, which was later subscribed to and endorsed by 47 nations, the President of the United States and the Prime Minister of the United kingdom expressed the hope "to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want". In the declaration by United Nations, signed on 1st January, 1942 by 26 nations then at war, and subsequently adhered to by 21 other nations, the signatory government expressed their conviction "that complete victory over the enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands".

The Dumbarton Oaks proposal, drawn up in 1944, contemplated the establishment of a general international organization under the title *The United Nations*, which would, among other things, "facilitate solutions of international economic, social and other humanitarian problem". The proposal also contemplated that responsibility for the discharge of this function should be vested in a General Assembly and, under its authority,

in an Economic and Social Council to be empowered to make recommendation with respect to international economic, social and other humanitarian matters.

The Dumbarton Oaks proposal were the basis of the work of the United Nations Conference on International Organization, which met in San Francisco in 1945 and prepared and opened for signature and ratification the Charter of the United Nations.

The conference in drafting the Charter, greatly enlarged and broadened the objectives of the United Nations as a whole by including among its purposes the phrase; " and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religious". It increased the originally contemplated function and powers of the General Assembly by adding a similar phrase: "and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". It also increased those of the Economic and Social Council by assigning it an added responsibility: to make recommendations "for the purpose of promoting respect for and observance of, human rights and fundamental freedoms for all"

Clauses concerning human rights in the United Nations Charter

As unanimously approved by the San Francisco Conference on 25th June 1945, the United Nations Charter makes reference to human rights and fundamental freedoms in a number of clauses. In the preamble, the peoples of the United Nations express their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". The words, "promoting and encouraging respect for human rights and fundamental freedoms" and" assisting in the realization of human rights and fundamental freedoms" appear, with slight variations, in article 1, on the purposes and principle of the United Nations; article 13, on the function and powers of the General Assembly; article 62, on the function and powers of the Economic and Social Council; and article 76, on the basic objective of the International Trusteeship System. Article 8 provides that "the United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs" in article 56, all members of the United Nations pledge themselves to the take joint and separate action in co-operation with the Organization for the achievement of certain purposes, enumerated

in article 55, which include the promotion of" universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religions". In article 68 the Economic and Social council is empowered to set up commissions "in the economic and social fields and for the promotion of human rights".

INTERNATIONAL BILL OF HUMAN RIGHTS

At the San Francisco Conference, which completed the drafting of the United Nations charter and opened it for signature and ratification in 1945, a proposal to embody a declaration on the Essential Rights of Man was put forward but was not examined because it required more detailed consideration than was possible at that time. The idea of promulgating an "international bill of rights" was, however, considered by many as implicit in the Charter.

The Preparatory Commission of the United Nations, which met immediately after the closing session of the conference, recommended that the Economic and Social Council should, at its first session, establish a commission on human rights as envisaged in article 68 of the Charter. The Council established the Commission on Human Rights early in 1946.

At the first part of its session, held in London in January 1946, the General Assembly considered a draft Declaration of Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council "for reference to the Commission on Human Rights in its preparation of an international bill of rights". The commission at its firstly session, early in 1947 authorized its officers to formulate what it termed "a preliminary draft international bill of human rights". Later the work was taken over by a formal drafting committee.

In the beginning, different views were expressed about the form the bill of rights should take. The Commission decided, late in 1947, to apply the term "International Bill of Human Rights" to a declaration of human rights, a convention "The Covenant on Human Right". That formula led to the adoption and proclamation of the Universal Declaration of Human Rights in 1948 as the first of these projected instruments. Much later, in 1966, two Covenants on Human Rights were complete (instead of the one originally envisaged): the International Covenant on Economic, Social and Cultural Rights and the international covenant civil and political Rights. Each contains measures for international supervision of the rights which it sets out and for the settlement of complaints by states that another state is not giving

effect to its provision. In addition, the Optional Protocol to the International Covenant on Civil and Political Rights provides international machinery for dealing with communications from individuals claiming to be victims of violations of any of the rights set forth in that Covenant.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on 10th December 1984, "as a common standard of achievement for all peoples and all nation, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction".

The Declaration consists of a Preamble and 30 articles, setting forth the human rights and fundamental freedoms to which all men and women, everywhere in the world, are entitled, without any discrimination. Article 1, which lays down the philosophy upon which the declaration is based, reads: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood". Article 2 which sets out the basic principle of equality and non-discrimination as regards the enjoyment of human rights and fundamental freedoms forbids "distinction of any kind, such as race, colour, sex, language, religions, political or other opinion, national or social origin, property, birth or other status".

Article 3, a cornerstone of the Declaration, proclaims the rights to life, liberty and security of person: rights which are essential to the enjoyment of all other rights. It introduces the series of article (article 4 to 21) in which the human rights of every individual are elaborated further.

The civil and political rights recognized in articles 3 to 21 of the Declaration include: the rights to life, liberty and security of person; freedom from slavery and servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment; the rights to recognition everywhere as a person before the law; the rights to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the rights to a fair and public hearing by an independent and impartial tribunal; the rights to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and

residence; the rights of asylum; the rights to a nationality; the rights to marry and to found a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the rights to peaceful assembly and association; the rights of everyone to take part in the government of his country.

Article 22, the second cornerstone of the Declaration, introduces article 23 to 27, in which economic, social and culture rights – the rights to which everyone is entitled "as a member of society - are set out. The article characterizes these rights as indispensable for human dignity and the free development of personality, and indicates that they are to be realized "through national effort and international co-operation" at the time it points out the limitations of realization, the extent of which depends upon the resources of each state and of international community.

The economic, social and culture rights recognized in article 22 to 27 include the rights to social security, the rights to work, the right to equal pay for equal work, the rights to rest and leisure, the rights to a standard of living adequate for health and well-being, the rights to education, and the rights to participate in the cultural life of the community.

The concluding article, article 28 to 30, recognize that everyone is entitled to a social and international order in which all human rights and fundamental freedoms may be fully realized, and stress the duties and responsibilities which each individual owes to his community. Article 30 warns that no state, group or person may claim the rights, under the declaration, "to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Declaration.

Importance and influence of the declaration

Since its proclamation in 1948, the Universal Declaration of Human Rights has become one of the best-known and most influential documents of all times. It has exercised a powerful influence throughout the world, both internationally and nationally. Its provisions have been cited as justification for actions taken by the United Nations and many other international organizations, and have inspired the preparation of international human rights instruments both within and outside the United Nations system. They have also been incorporated, or cited, in national constitutions, municipal legislation, and court decisions. There are also many instance of citation of the Declaration, or certain of its clauses, as a standard of conduct or as a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards.

On a number of occasions, the General Assembly has referred has to the declaration as a "common standard of achievement" and as a basis for decision calling upon Governments to take the necessary measures to promote respect for, and observance of, human rights and fundamental freedoms. In one of the earliest of these decisions, a resolution entitled "Essential of Peace" adopted in 1949, the Assembly called upon every nation "to promote, in recognition of the paramount importance of preserving the dignity and worth of the human person, full freedom for the peaceful expression of political opposition, full opportunity for the exercise of religious freedom and full respect for all the other fundamental rights expressed in the Universal Declaration of Human Rights..."

In a resolution adopted in 1952, the Assembly emphasized "that the full application and implementation of the principle of non-discrimination recommended in the United Nations Charter and the Universal Declaration of Human Rights are matters of supreme importance, and should constitute the primary objective in the work of all United Nations organs and institutions". In one adopted in 1965, it invited all governments to include in their plans for economic and social development "Measures directed towards the achievement of further progress in the implementation of the Human Rights and Fundamental freedoms proclaimed in the Universal Declaration of Human Rights". In a third, adopted in 1966, it called upon all state "to strengthen their effort to promote the full observance of human rights and the rights to self-determination in accordance with the Charter of the United Nations, and to attain the standards established by the Universal Declaration of Human Rights". On many occasions the Assembly has reaffirmed the historic significance of the Declaration and restated its adherence to the principle, values and ideas set out therein.

The Security Council also invoked the Universal Declaration of Human Rights in its decisions, particularly those relating to the situation in southern Africa. In 1963 the Council requested the government of South Africa "to cease forthwith its continued imposition of discriminatory and repressive measure, which are contrary to the principle and purposes of the Charter and which are in violation of its obligations as a member of the United Nation and of the provision of the Universal Declaration of Human Rights". In 1972 it condemned repressive measures which had been taken against Africa laborers in Namibia and called upon the Government of South Africa "to end immediately these repressive measures and to abolish any labour system which may be in conflict with the basic provision of the Universal Declaration of Human Rights". In the same resolution the Council called

upon all States whose nationals corporations were operating in Zambia "to use all available means to ensure that such nationals and corporations conform, in their policies of hiring Namibian workers, to the basic provisions of the Universal Declaration of Human Rights".

In the proclamation of Tehran, adopted by the International Conference of Human Rights in 1968, the conference solemnly proclaimed that "the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community". The Conference affirmed its faith in the principle set forth in the Declaration, and urged all peoples and governments "to dedicate themselves to those principles and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare".

In more recent years there has been a growing tendency for United Nations organs, in their resolutions and on human rights matters, to refer not only the Universal Declaration of Human Rights but also to other parts of the International Bill of Human Rights: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. This is the case, for example, in resolutions adopted in 1972 on the employment of women in senior and other professional positions by the secretariats of organizations of the United Nations system, in 1973 on the education and responsibilities of youth, in the Declaration on the protection of women and children, proclaimed in 1974; and in the Declaration on the Use of Scientific and Technological Progress in the Interests of peace and for the Benefit of Mankind, promulgated in 1975.

Influence of the Declaration on international conventions

The International covenant on Human Rights, adopted and opened for signature and ratification or accession by the General Assembly on 16th December 1966, define in precise legal term many of the human rights and fundamental freedoms set out Universal Declaration of Human Rights, and the permissible limitation restrictions on the exercise of those rights and freedoms, and provide measures designed to ensure their implementation. In addition, many of the principles in the Declaration have been elaborated and clarified in multilateral conventions which, citing the Declaration as their inspiration, deal with one or more particular aspects of human rights. For example, the right to equality and non-discrimination on the ground of

race is ensured by the International Convention on the Elimination of all forms of Racial Discrimination, based on article 2 of the Declaration; while the right to be free slavery and servitude is ensured by the Supplementary Convention on the Abolition Slavery, the Slave Trade, and Institutions and Practices similar to slavery, based on article 4.

Furthermore, regional conventions have been prepared to promote and protect the enjoyment of human rights and fundamental freedoms by all individuals living in particular parts of the world. The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4th November 1950, is such an instrument. It refers to the Universal Declaration of Human Rights in the opening paragraph of its preamble and sets out in its fourth preambular paragraph the resolution of "the Governments of European countries which are like-minded and have a common heritage of political tradition, ideals, freedoms and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". It contains detailed provisions concerning most of the civil and political rights set out the Declaration as well as provisions establishing, "to ensure the observance of the engagements undertaken by the High Contracting Parties", a European Commission on Human Rights and a European Court of Human Rights.

Another such instrument is the American Convention of Human Rights, signed at the Inter-American Specialized Conference on Human Rights at San Jose, Casta Rica, 22nd November 1969. The Convention reiterates the General Assembly's view that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights; and sets out detailed provisions concerning all those rights and the means of guaranteeing their enjoyment by the peoples of American continent. It recognizes two regional organs as being competent to deal with matters relating to the fulfillment of the commitment undertaken by the States Parties: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Several instruments applying to particular countries or territories, or to a region, also stem form the Universal Declaration of Human Rights. For example, the final act of the Conference on security and co-operation in Europe, held at Helsinki in 1975, provides that "in the field of human rights and fundamental freedoms, the participating States will act in conformity with the purpose and principles of the Charter of the United Nations and

with the Universal Declaration of Human Rights". Other example include the Trusteeship Agreement with Italy concerning Somaliland under Italian Administration of 1950, the Peace Treaty with Japan of 1951, the Special Statute Concerning Trieste of 1954, and the Charter of the organization of African Unity of 1963.

Influence of the Declaration on national constitutions, municipal legislation and court decisions

The influence of the Universal Declaration of Human Rights is also apparent in a number of national constitutions enacted since 1948, in municipal legislation, and in decision of national and international courts.

For example, in their Constitutions the Peoples of Guinea (1958), Madagascar (1959) Ivory Coast, Mali and Niger (1960) Gabon and Mauritania (1961), Burundi (1962), Algeria, Republic of the Congo, Senegal and Togo (1963), Zaire (1967), Dahomey and Upper Volta (1970) and Cameroon (1972), solemnly affirmed their devotion and adherence to the principle set out in the Declaration. The constitution of Somalia of 1960 provides that that Republic shall comply, in so far as applicable, with the Universal Declaration of Human Rights. The Constitution of Rwanda of 1962 states that fundamental freedoms, as set forth in the Universal Declaration of Human Rights, shall be guaranteed to all citizens. The Constitution of Equatorial Africa of 1968 provides that the state shall recognize and guarantee the human rights and freedoms set forth in the Universal Declaration of Human Rights and shall proclaim that the freedoms of conscience and religion, association, assembly, speech, residence and domicile, and the right to property, education and decent working conditions are to be respected.

A number of municipal laws and decrees promulgated in recent years for the purpose of eliminating discrimination refer to the principle of equality and non-discrimination set in the Universal Declaration of Human Rights. Among these are a series of anti-discrimination statutes enacted in various provinces of Bolivia, a legislative decrees issued in 1955 to establish a national system of education reaffirms its preamble the principle of equality of opportunity for all Bolivians, without discrimination, and declares that national education shall be inspired by the Universal Declaration of Human Rights. In Panama a law enacted in 1956 to prohibit discrimination provides that discrimination on account of colour or race is "a flagrant violation" of the National Constitution "and of the Universal Declaration of Human Rights...".

The Declaration as a whole, or one or more of its provisions, has also been invoked in judicial proceedings and cited in decision and opinions of many national tribunals. Moreover, on several occasions, the International Court of Justice has taken judicial notice of the Declaration in its advisory opinions and other decisions.

Observance of anniversaries of the Declaration

Every year since 1950, the United Nations and interested States, organizations and individual have observed the anniversary of the Universal Declaration of Human Rights on 10th December – designed by the General Assembly as Human Rights Day. The Secretary-General usually issues a special message concerning human rights on that day, and on several occasions the General Assembly has held commemorative meetings. Elaborate arrangements were made to celebrate the tenth, fifteenth, twentieth, twenty-fifth and thirtieth anniversaries, in 1958, 1963, 1968, 1973 and 1978 respectively. The twentieth anniversary, 1968, was designated by the General Assembly as International Year for Human Rigths; its main feature was the International Conference on Human Rights held at Teheran.

Since 1968, prizes have been awarded at five-year intervals for outstanding achievements in the field of human rights. Prize-winners are selected by a committee composed of the Presidents of the General Assembly and of the Economic and Social Council and the presiding officers of the Commission on Human Rights, the Commission on the Status of Women and the sub-Commission on Prevention of Discrimination and Protection of Minorities.

International Covenants on Human Rights

The instrument which, together with the Universal Declaration of Human Rights, make up the International Bill of Human Rights, the International Covenant on Economic, Social and Culture Rights, the International Covenant on Civil and Political Rights.

Both Covenants, and the Optional protocol, were adopted and opened for signature and ratification or accession by the General Assembly on 19th December 1966. The International Covenant on Economic, Social and Culture Rights entered into force on 3RD January 1976. The International Covenant on Civil and Political Rights, and the Optional Protocol thereto, entered into force simultaneously on 23rd March 1976. As of 1st January 1978, the International Covenant on Economic, Social and Culture Rights had been ratified or acceded to by 46 states, the International Covenant on Civil and Political Rights by 44 states and the Optional Protocol by 16 states.

The preambles, and articles 1, 3 and 5 of the two Covenants are almost identical. The preamble of each Covenants recalls the obligation of States under the United Nations Charter to promote human rights, reminds the individual of his responsibility to strive for the promotion and observance of those rights, and recognizes that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights".

Article, 1 of each Covenant states that the right to self-determination is universal, and calls upon states to promote the realization of, and to respect, that right. Article 3, in both cases, reaffirms the equal right of men and women to the enjoyment of all human rights, and enjoins states to make that principle a reality. Article 5, in both cases, provides safeguards against the destruction or undue limitation of any human right or fundamental freedom, and against interpretation of any provision of the covenant as a means of justifying infringement of a right or freedom.

Article 6 to 15 of the International Covenant on Economic, Social and Cultural Rights recognize the right to work (article 6); the right to the enjoyment of just and favorable conditions of work (article 7); the right to form and join trade unions (article 8); the right to social security, including social insurance (article 9); the right to the family, mothers children, and young persons to the widest possible protection and assistance (article 10); the right to an adequate standard of living (article 11); the right to the enjoyment of the highest attainable standard of physical and mental health (article 12); the right to an education (article 13 and 14); and the right to take part in cultural life (article 15).

Article 6 to 27 of the International Covenant on Civil and Political Rights provide for protection of the right to life (article 6); and lay down that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7); that no one should be held in slavery; that slavery and the slave trade should be prohibited; and the that no one should be held in servitude or required to perform forced or compulsory labour (article 8); that no one should be subjected to arbitrary arrest or detention (article 9); that all persons deprived of their liberty should be treated with humanity (article 10); and that no one should be imprisoned merely on the ground of inability to fulfill a contractural obligation (article 11).

They further provide for liberty of movement and freedom to choose a residence (article 12; and for limitations to be placed upon the expulsion of aliens lawfully in the territory of a state party (article 13); they make provision for the equality of all persons before the courts and tribunals, and for guarantees in criminal and civil procedures (article 14). They also prohibit retroactive criminal legislation (article 15); lay down the right of everyone to recognition everywhere as a person before the law (article16); and call for the prohibition of arbitrary or unlawful interference with an individual's privacy, family, home or correspondent (article 17).

In addition, they provide for protection of the right to freedom of thought, conscience and religious (article 18), and to freedom of expression (article 19). They call for the prohibition by law of any propaganda for war and of any advocacy of national, racial or religious hatred that constitutes an incitement it discrimination, hostility or violence (article 20). They recognize the right of peaceful assembly (article 21) and the right to freedom of association (article 22). They lay down recognize the right of men and women of marriageable age to marry and to found a family, and the principle of equality of rights and responsibility of spouses as to marriage, during marriage and at it dissolution (article 23). They lay down measures to protect the right of children (article 24), and recognize the right of every citizen to take part in the conduct of public affairs, to vote and be elected, and have access, on general term of equality, to public service in his country (article 25). They provide that all persons are equal before the law and are entitled to equal protection of the law (article 26). And finally, they provide measures for the protection of such ethnic, religious or linguistic minorities as may exist in States Parties to the Covenants (article 27).

The rights and freedoms set out in the International Covenant on Human Rights are not absolute and in each case subject to limitations. The Covenant on Civil and Political Rights, in particular, defines the legitimate restriction on the right which it set forth by limiting them to those which are provided by law, are necessary to protect national security, public order (*ordre public),* public health or morals, or the rights and freedom of others.

The Economic and Social Council is responsible for implementation of the International Covenant on Economic, Social and Culture Rights. As indicated above, the States Parties to the International Covenant on Civil and Political Rights have established the Human Rights Committee to supervise the implementation of that instrument and of its Optional Protocol.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

CHAPTER 2

UNIVERSAL DECLARATION OF HUMAN RIGHTS

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories."

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people;

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Whereas it is essential to promote the development of friendly relations between nations;

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom;

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms;

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge;

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article II

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article III

Everyone has the right to life, liberty and security of person.

Article IV

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article V

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article VI

Everyone has the right to recognition everywhere as a person before the law.

Article VII

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article VIII
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article IX
No one shall be subjected to arbitrary arrest, detention or exile.

Article X
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article XI
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article XII
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article XIII
1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article XIV
1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles for the United Nations.

Article XV

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article XVI

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article XVII

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article XVIII

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article XIX

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article XX

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article XXI

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which

shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article XXII

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article XXIII

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article XXIV

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article XXV

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article XXVI

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be

made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article XXVII

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article XXVIII

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article XXIX

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article XXX

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS

CHAPTER 3

AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS

Human and Peoples' Rights by the eighteenth Conference of State and Government of the OAU June 1981. Nairobi, Kenya.

PREAMBLE

The African States members of the Organization of African Unity, parties to the present convention entitled African Charter on Human and Peoples' Rights.

Recalling Decision 116 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' right;

Considering the Charter of the Organization of African Unity, which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declarations of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

Part 1

RIGHTS AND DUTIES

Chapter I

Human and Peoples' Rights

ARTICLE I

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

ARTICLE II

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in tile present Charter without distinction of any

kind such as race, ethnic group/colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

ARTICLE III

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

ARTICLE IV

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

ARTICLE V

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of particularly slavery, slave trade, torture, cruel, inhuman or punishment and treatment shall be prohibited.

ARTICLE VI

Every individual have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular; no one may be arbitrarily arrested or defamed.

ARTICLE VII

1. Every individual shall have the right to have his cause heard. This comprises;
   (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   (c) the right to defence, including the right to be defended by counsel of his choice;
   (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ARTICLE VIII

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

ARTICLE IX

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

ARTICLE X

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

ARTICLE XI

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

ARTICLE XII

1. Every individual shall have the right to freedom of movement and residence within the boarders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international convections.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited Mass expulsion shall be that which is aimed at national, racial, ethical or religious groups.

ARTICLE XIII

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

ARTICLE XIV

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

ARTICLE XV

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

ARTICLE XVI

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

ARTICLE XVII

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

ARTICLE XVIII

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

ARTICLE XIX

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

ARTICLE XX

1. All peoples shall have the right to existence. They shall have unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

ARTICLE XXI

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

ARTICLE XXII

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

ARTICLE XXIII

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations. States parties to the present Charter shall ensure that:
   (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
   (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

ARTICLE XXIV

All peoples shall have the right to a general satisfactory environment favourable to their development.

ARTICLE XXV

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

ARTICLE XXVI

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II

DUTIES

ARTICLE XXVII

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall with due regard to the rights of others, collective security, morality and common interest.

ARTICLE XXVIII

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relation aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ARTICLE XXIX

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

Part II

MEASURES OF SAFEGUARD

Chapter 1

Establishment and Organization of the African Commission on Human and Peoples' Rights

ARTICLE XXX

An African Commission on Human and Peoples' Rights, hereinafter called (the Commission), shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

ARTICLE XXXI

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

ARTICLE XXXII

The Commission shall not include more than one national of the same State.

ARTICLE XXXIII

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

ARTICLE XXXIV

Each state party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

ARTICLE XXXV

1. The Secretary-General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;

2. The Secretary-General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

ARTICLE XXXVI

The members of the Commission shall be elected for six-year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

ARTICLE XXXVII

Immediately after the first election, the Chairman of the Assembly of Heads of States and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

ARTICLE XXXVIII

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

ARTICLE XXXIX

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary-General of the Organization of African Unity, who shall declare the seat vacant from the date of death on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary-General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

ARTICLE XL

Every member of the Commission shall be in office until the date his successor assumes office.

ARTICLE XLI
The Secretary-General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the cost of the staff and services.

ARTICLE XLII
1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary-General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

ARTICLE XLIII
In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

ARTICLE XLIV
Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II

MANDATE OF THE COMMISSION

ARTICLE XLV
The functions of the Commission shall be:

1. To promote Human and Peoples Rights and in particular:
   (a) To collect documents. Undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

(b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.

(c) Co-operate with other African and international matitutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III

PROCEDURE OF THE COMMISSION

ARTICLE XLVI

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organisation of African Unity or any other person capable of enlightening it.

Communication from States

ARTICLE XLVII

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of the State to the matter. This communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication the State to which the communication is addressed shall give the enquiring State written explanation or statement elucidating the matter. This sound include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

ARTICLE XLVIII
If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

ARTICLE XLIX
Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary-General of the Organization of African Unity and the concerned.

ARTICLE L
The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

ARTICLE LI
1. The Commission may ask the States concerned to provide it withal relevant information.
2. When the Commission is considering the matter. States concerned may be represented before it and submit written or oral representations.

ARTICLE LII
After having obtaining from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

ARTICLE LIII
While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

ARTICLE LIV

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other Communications

ARTICLE LV

1. Before each session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

ARTICLE LVI

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter requeat anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a period the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

ARTICLE LVII

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

ARTICLE LVIII

1. When it appears after deliberation of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

ARTICLE LIX

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV

APPLICABLE PRINCIPLES

ARTICLE LX

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

ARTICLE LXI

The Commission shall also take into consideration as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

ARTICLE LXII

Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

ARTICLE LXIII

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organization of African Unity
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the secretary-general of instrument of ratification or adherence of a simple majority of the Member States of the Organization of African Unity.

Part III

GENERAL PROVISIONS

ARTICLE LXIV

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

ARTICLE LXV
For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

ARTICLE LXVI
Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

ARTICLE LXVII
The Secretary-General inform member States of the Organization of African Unity shall of the Organization of the deposit of each instrument of ratification or adherence.

ARTICLE LXVIII
The present Charter may be amended if a State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have teen duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of the acceptance.

BEIJING DECLARATION: FOURTH WORLD CONFERENCE ON WOMEN

CHAPTER 4

BEIJING DECLARATION:

FOURTH WORLD CONFERENCE ON WOMEN

Declaration

1. We, the Governments participating in the Fourth World Conference on Women;
2. Gathered here in Beijing in September 1995, the year of the fiftieth anniversary of the founding of the United Nations;
3. Determined to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity;
4. Acknowledging the voices of all women everywhere and taking note of the diversity of women and their roles and circumstances, honoring the women who paved the way and inspired by the hope present in the world's youth;
5. Recognize that the status of women has advanced in some important respects in the past decade but that progress has been uneven, inequalities between women and men have persisted and major obstacles remain, with serious consequences for the well-being of all people;
6. Also recognize that this situation is exacerbated by the increasing poverty that is affecting the lives of the majority of the world's people, in particular women and children, with origins in both the national and international domains;
7. Dedicate ourselves unreservedly to addressing these constraints and obstacles and thus enhancing further the advancement and empowerment of women all over the world, and agree that this requires urgent action in the spirit of determination, hope, cooperation and solidarity, now and to carry us forward into the next century.

We reaffirm our commitment to:

8. The equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United

Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as the Declaration on the Elimination of Violence against Women and the Declaration on the Right to Development;

9. Ensure the full implementation of the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms;

10. Build on consensus and progress made at previous United Nations conferences and summits - on women in Nairobi in 1985, on children in New York in 1990, on environment and development in Rio de Janeiro in 1992, on human rights in Vienna in 1993, on population and development in Cairo in 1994 and on social development in Copenhagen in 1995 with the objective of achieving equality, development and peace;

11. Achieve the full and effective implementation of the Nairobi Forward-looking Strategies for the Advancement of Women;

12. The empowerment and advancement of women, including the right to freedom of thought, conscience, religion and belief, thus contributing to the moral,ethical, spiritual and intellectual needs of women and men, individually or in community with others and thereby guaranteeing them the possibility of realizing their full potential in society and shaping their lives in accordance with their own aspirations.

We are convinced that:

13. Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace;

14. Women's rights are human rights;

15. Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy;

16. Eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equa

opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development;

17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

18. Local, national, regional and global peace is attainable and is inextricably linked with the advancement of women, who are a fundamental force for leadership, conflict resolution and the promotion of lasting peace at all levels;

19. It is essential to design, implement and monitor, with the full participation of women, effective, efficient and mutually reinforcing gender-sensitive policies and programmes, including development policies and programmes, at all levels that will foster the empowerment and advancement of women;

20. The participation and contribution of all actors of civil society, particularly women's groups and networks and other non-governmental organizations and community-based organizations, with full respect for their autonomy, in cooperation with Governments, are important to the effective implementation and follow-up of the Platform for Action;

21. The implementation of the Platform for Action requires commitment from Governments and the international community. By making national and international commitments for action, including those made at the Conference, Governments and the international community recognize the need to take priority action for the empowerment and advancement of women.

We are determined to:

22. Intensify efforts and actions to achieve the goals of the Nairobi Forward-looking Strategies for the Advancement of Women by the end of this century;

23. Ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms;

24. Take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;

25. Encourage men to participate fully in all actions towards equality;

26. Promote women's economic independence, including employment, and eradicate the persistent and increasing burden of poverty on women by addressing the structural causes of poverty through changes uneconomic, ensuring equal access for all women, including those in rural areas, as vital development agents, to productive resources, opportunities and public services;

27. Promote people-centred sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women;

28. Take positive steps to ensure peace for the advancement of women and, recognizing the leading role that women have played in the peace movement, work actively towards general and complete disarmament under strict and effective international control, and support negotiations on the conclusion, without delay, of a universal and multilaterally and effectively verifiable comprehensive nuclear-test-ban treaty which contributes to nuclear disarmament and the prevention of the proliferation of nuclear weapons in all its aspects;

29. Prevent and eliminate all forms of violence against women and girls;

30. Ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education;

31. Promote and protect all human rights of women and girls;

32. Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people;

33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;

34. Develop the fullest potential of girls and women of all ages, ensure their full and equal participation in building a better world for all and enhance their role in the development process.

We are determined to:

35. Ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these resources, interalia, by means of international cooperation;

36. Ensure the success of the Platform for Action, which will require a strong commitment on the part of Governments, international organizations and institutions at all levels. We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people. Equitable social development that recognizes empowering the poor, particularly women living in poverty, to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice. The success of the Platform for Action will also require adequate mobilization of resources at the national and international levels as well as new and additional resources to the developing countries from all available funding mechanisms, including multilateral, bilateral and private sources for the advancement of women; financial resources to strengthen the capacity of national, sub regional, regional and international institutions; a commitment to equal rights, equal responsibilities and equal opportunities and to the equal participation of women and men in all national, regional and international bodies and policy-making processes; and the establishment or strengthening of mechanisms at all levels for accountability to the world's women;

37. Ensure also the success of the Platform for Action in countries with economies in transition, which will require continued international cooperation and assistance;

38. We hereby adopt and commit ourselves as Governments to implement the following Platform for Action, ensuring that a gender perspectives reflected in all our policies and programmes. We urge the United

Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well asnon-governmental organizations, with full respect for their autonomy, and all sectors of civil society, in cooperation with Governments, to fully commit themselves and contribute to the implementation of this Platform for Action.

THE RIGHTS OF THE CHILD

CHAPTER 5

INSTRUMENT OF RATIFICATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Whereas the United Nations Convention on the Rights of the Child was adopted in Geneva at the Forty Fourth Session of the United Nations General Assembly on the 20th day of November, 1989 and was open for Signature by all States;

And whereas the Federal Republic of Nigeria as a Member State of the United Nations is a signatory to the aforesaid Convention;

And whereas it is provided in Article 47 of the aforesaid Convention that the Convention is subject to ratification and that Instruments of Ratification shall be deposited with the Secretary-General of the United Nations;

And whereas the Federal Military Government of the Federal Republic of Nigeria has by a decision duly reached in accordance with its constitutional processes, agreed to ratify the aforesaid Convention;

How therefore, I, GENERAL IBRAHIM BADAMASI BABANGIDA, President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, on behalf of the Federal Military Government of the Federal Republic of Nigeria do hereby ratify the aforesaid United Nations Convention on the Rights of the Child, the text of which was adopted on the 20th day of November, 1989.

In witness whereof, I have hereunto set my hand and caused the Seal of the Federal Republic of Nigeria to be affixed to these presents.

Done at Lagos this 21st day of March in the year One thousand, nine hundred and ninety-one.

GENERAL IBRAHIM BADAMASI BABANGIDA.
President, Commander-in-Chief of the Armed Forces
Federal Republic of Nigeria.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

PREAMBLE

The States Parties to the present Convention,

Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Bearing in mind that the people of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom;

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants of Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance;

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community;

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding;

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity;

Bearing in mind that the need for extending particular care to the child has been stated in the Geneva Declaration on the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the United Nations in 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in its article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children;

Bearing in mind that, as indicated in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1959, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth;"

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85 of 3 December (1986); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules") (General Assembly Resolution 40/33 of 29 November 1985); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (General Assembly Resolution 3318 (XXIX) of 14 December 1974);

Recognizing that in all countries in the world there are children living in exceptionally difficult conditions, and that such children need special consideration;

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child;

Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries;

Have agreed as follows:

PART I

ARTICLE I

For the purposes of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

ARTICLE II

1. The States Parties to the present Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

ARTICLE III

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

ARTICLE IV

States Parties shall undertake all appropriate legislative, administrative, and other measures, for the implementation of the rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

ARTICLE V

States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

ARTICLE VI

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

ARTICLE VII

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

ARTICLE VIII

1. States Parties undertake to respect the right of the child to preserve his or her identify, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

ARTICLE IX

1. State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parties on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation of death (including death arising from any cause while the person is in the custody of the State) of one or both parents of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. State Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

ARTICLE X

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. State Parties ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular bases save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

ARTICLE XI

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

ARTICLE XII

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

ARTICLE XIII

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) for respect of the rights or reputations of others; or
   (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

ARTICLE XIV

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

ARTICLE XV

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*order public*), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE XVI

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

ARTICLE XVII

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being bearing in mind the provisions of articles 13 and 18.

ARTICLE XVIII

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their concern.
2. For the purpose of guaranteeing and promoting the rights set forth in this Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from childcare services and facilities for which they are eligible.

ARTICLE XIX

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

ARTICLE XX

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care should include, *inter alia,* foster placement, Kafala of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children. When considering solutions, due

regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

ARTICLE XXI

States Parties which recognize and / or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) ensure that the adoption of a child is authorized only be competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child concerned by intercountry adoption enjoys safe guards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;

(e) promote, where appropriate, the objectives of this article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

ARTICLE XXII

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

ARTICLE XXIII

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 shall be provided free of charge, whenever possible, taking into account the financial resources of the parents of others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote in the spirit of international co-operation the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in

these areas. In this regard, particular account shall be taken to the needs of developing countries.

ARTICLE XXIV

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

   (a) to diminish infant and child morality,
   (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care,
   (c) to combat disease and malnutrition including within the framework of primary health care, through *inter alia* the application of readily available technology and through the provisions of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution,
   (d) to ensure appropriate pre and post-natal health care for mothers,
   (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of, basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents,
   (f) to develop preventive health care, guidance for parents, and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in this article. In this regard, particular account shall be taken of the needs of developing countries.

ARTICLE XXV

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

ARTICLE XXVI

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

ARTICLE XXVII

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements as well as the making of other appropriate arrangements.

ARTICLE XXVIII

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equa opportunity, they shall, in particular.

   (a) make primary education compulsory and available free to all;
   (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
   (c) make higher education accessible to all on the basis of capacity by every appropriate means;
   (d) make educational and vocational information and guidance available and accessible to all children;
   (e) take measures to encourage regular attendance at school and the reduction of drop-out rates.

   States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

   States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of development countries.

ARTICLE XXIX

1. States Parties agree that the education of the child shall be directed to:

   (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
   (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
   (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) the development of respect for the natural environment.

2. No part of this article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

ARTICLE XXX

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

ARTICLE XXXI

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

ARTICLE XXXII

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of this article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) provide for a minimum age or minimum ages for admissions to employment;
(b) provide for appropriate regulation of the hours and conditions of employment; and
(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

ARTICLE XXXIII

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

ARTICLE XXXIV

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;
(b) the exploitative use of children in prostitution or other unlawful sexual practices;
(c) the exploitative use of children in pornographic performances and materials.

ARTICLE XXXV

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form.

ARTICLE XXXVI

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

ARTICLE XXXVII

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstance;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

ARTICLE XXXVIII

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

ARTICLE XXXIX

States Parties shall take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel,

inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child.

ARTICLE XL

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's re-integration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

   (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions which were not prohibited by national or international law at the time they were committed;

   (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

      (i) to be presumed innocent until proven guilty according to law;

      (ii) to be informed promptly and directly of the charges against him or her, and if appropriate through his or her parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

      (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

      (iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) to have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

ARTICLE XLI

Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

(a) the law of a State Party; or
(b) international law in force for that State.

PART II

ARTICLE XLII

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

ARTICLE XLIII

1. For the purpose of examining the progress made by States Parties achieving the realization of the obligations undertaken in the prese Convention, there shall be established a Committee on the Rights the Child, which shall carry out the functions hereinafter provided

2. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field covered by this Conventio The members of the Committee shall be selected by States Parti from among their nationals and shall serve in their present capacit consideration being given to equitable geographical distribution a well as the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each States Par may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the presen Convention and thereafter every second year. At least four month before the date of each election, the Secretary-General of the Unite Nations shall address a letter to States Parties inviting them t submit their nominations within two months. The Secretary-Genera shall subsequently prepare a list in alphabetical order of all person thus nominated, indicating States Parties which have nominated them and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two-thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall

appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at the United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. *bis.* The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. (With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from the United Nations resources on such terms and conditions as the Assembly may decide.)
or
(States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.)

13. (States Parties shall be responsible for expenses incurred in connection with the holding of meetings of State Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as a cost of staff and facilities, incurred by the United Nations pursuant to paragraph 10 *bis* of this article.)

ARTICLE XLIV

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

   (a) within two years of the entry into force of the convention for the State Party concerned,
   (b) thereafter every five years.

2. Reports made under this article shall indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not in its subsequent reports submitted in accordance with paragraph 1 (b) repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly of the United Nations through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

ARTICLE XLV

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, UNICEF and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, UNICEF and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, UNICEF and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, UNICEF and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance along with the Committee's observations and suggestions, if any, on these requests or indications.

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertaken on its behalf studies on specific issues relating to the rights of the child.

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of this Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

ARTICLE XLVI

The present Convention shall be open for signature by all States.

ARTICLE XLVII

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE XLVIII

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XLIX

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification of accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification of accession.

ARTICLE L

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one-third of the States Parties favour

such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment adopted in accordance with paragraph (1) of this article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

ARTICLE LI

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

ARTICLE LII

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

ARTICLE LIII

The Secretary-General of the United Nations is designated as the depository of the present Convention.

ARTICLE LIV

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

OAU CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

CHAPTER 6

OAU CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

PREAMBLE

The African Member States of the Organization of African Unity, Parties to the present Charter entitled "African Charter on the Rights and Welfare of the Child";

Considering that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev. 1) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Sessions in Monrovia, Liberia, from 17 to 20 July, 1979 recognized the need to take all appropriate measures to promote and protect the rights and welfare of the African Child;

Nothing with concern that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care;

Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding;

Recognizing that the child, due to the needs of his physical and mental development requires particular care with regard to health, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security;

Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child;

Considering that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

Reaffirming adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child,

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER ONE

RIGHTS AND WELFARE OF THE CHILD

ARTICLE I: OBLIGATION OF STATES PARTIES

1. The Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conductive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that state.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

ARTICLE II: DEFINITION OF A CHILD
For the purposes of this Charter, a child means every human being below the age of 18 years.

ARTICLE III: NON-DISCRIMINATION
Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

ARTICLE IV: BEST INTERESTS OF THE CHILD
1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

ARTICLES V: SURVIVAL AND DEVELOPMENT
1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

ARTICLE VI: NAME AND NATIONALITY
1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

ARTICLE VII: FREEDOM OF EXPRESSION

Every child who is capable of communicating his or her own views shall b assured the rights to express his opinions freely in all matters and t disseminate his opinions subject to such restrictions as are prescribed b laws.

ARTICLE VIII: FREEDOM OF ASSOCIATION

Every child shall have the right to free association and freedom of peaceft assembly in conformity with the law.

ARTICLE IX: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGIOI

1. Every child shall have the right to freedom of thought, conscience and religion.
2. Parents, and where applicable, legal guardians shall have a duty t provide guidance and direction in the exercise of these rights havin regard to the evolving capacities, and best interests of the child.
3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in th enjoyment of these rights subject to the national laws and policies

ARTICLE X: PROTECTION OF PRIVACY

No child shall be subject to arbitrary or unlawful interference with hi privacy, family, home or correspondence, or to the attacks upon his honou or reputation, provided that parents or legal guardians shall have the righ to exercise reasonable supervision over the conduct of their children. Th child has the right to the protection of the law against such interference o attacks.

ARTICLE XI: EDUCATION

1. Every child shall have the right to education.
2. The education of the child shall be directed to:
   (a) the promotion and development of the child's personality, talent and mental and physical abilities to their fullest potentials;
   (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions o various African instruments on human and peoples' rights an international human rights declarations and convention;
   (c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all people ethnic, tribal and religious groups;
(e) the preservation of national independence and territorial integrity;
(f) the promotion and achievements of African Unity and Solidarity;
(g) the development of respect for the environment and natural resources;
(h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(a) provide free and compulsory basic education:
(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
(c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
(d) take measures to encourage regular attendance at schools and the reduction of drop-out rate;
(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all section of the community.

4. State Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standards may be approved by the state, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.

5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before

completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in Paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the states.

ARTICLE XII: LEISURE, RECREATION AND CULTURAL ACTIVITIES

1. State Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

ARTICLE XIII: HANDICAPPED CHILDREN

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.
2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

ARTICLE XIV: HEALTH AND HEALTH SERVICES

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

   (a) to reduce infant and child morality rate;
   (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
   (c) to ensure the provision of adequate nutrition and safe drinking water;
   (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
   (e) to ensure appropriate health care for expectant and nursing mothers;
   (f) to develop preventive health care and family life education and provision of service;
   (g) to integrate basic health service programmes in national development plans;
   (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
   (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of basic service programme for children;
   (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

ARTICLE XV: CHILD LABOUR

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

2. States Parties to the present Charter shall take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and

informal sectors of employment and having regard to the relevar provisions of the International Labour Organization's instrument relating to children, States Parties shall in particular:

(a) provide through legislation, minimum ages for admission to every employment;
(b) provide for appropriate regulation of hours and conditions of employment;
(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
(d) promote the dissemination of information on the hazards of chil labour to all sectors of the community.

ARTICLE XVI: PROTECTION AGAINST CHILD ABUSE AND TORTUR

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the chil from all forms of torture, inhuman or degrading treatment an especially physical or mental injury or abuse, neglect o maltreatment including sexual abuse, while in the care of a parent legal guardian or school authority or any other person who has th care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units t provide necessary support for the child and for those who have th care of the child, as well as other forms of prevention and fo identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

ARTICLE XVII: ADMINISTRATION OF JUVENILE JUSTICE

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;
(b) ensure that children are separated from adults in their place of detention or imprisonment;
(c) ensure that every child accused of infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;
(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
(v) shall not be compelled to give testimony or confess guilt.

(d) prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

ARTICLE XVIII: PROTECTION OF THE FAMILY

1. The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.

2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of the child.

3. No child shall be deprived of maintenance by reference to the parents' marital status.

ARTICLE XIV: PARENTAL CARE AND PROTECTION

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.

2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basic.

3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

ARTICLE XX: PARENTAL RESPONSIBILITIES

1. Parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:
   (a) to ensure that the best interests of the child are their basic concern at all times;
   (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
   (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measure;
   (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
   (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
   (c) to ensure that the children of working parents are provided with care services and facilities.

ARTICLE XXI: PROTECTION AGAINST HARMFUL SOCIAL AND CULTURAL PRACTICES

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

   (a) those customs and practices prejudicial to the health or life of the child; and

   (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory.

ARTICLE XXII: ARMED CONFLICTS

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situation of internal armed conflicts, tension and strife.

ARTICLE XXIII: REFUGEE CHILDREN

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human right and humanitarian instruments to which the States are parties.

2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relations of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

4. The provisions of this Article apply *Mutatis Mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

ARTICLE XXIV: ADOPTION

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

ARTICLE XXV: SEPARATION FROM PARENTS

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

2. States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. Where considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's up-bringing and to the child's ethnic, religious or linguistic background.

ARTICLE XXVI: PROTECTION AGAINST APARTHEID AND DISCRIMINATION

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under *Apartheid* and in States subject to military destabilization by the *Apartheid* regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practicing racial, ethnic,

religious or other forms of discrimination as well as in States subject to military destabilization.

3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and *Apartheid* on the African Continent.

ARTICLE XXVII: SEXUAL EXPLOITATION

1. State Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent;
   (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
   (b) the use of children in prostitution or other sexual practices;
   (c) the use of children in pornographic activities, performances and materials.

ARTICLE XXVIII: DRUG ABUSE

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances

ARTICLES XXIX: SALES, TRAFFICKING AND ABDUCTION

States Parties to the present Charter shall take appropriate measures to prevent:

(a) the abduction, the sales of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
(b) the use of children in all forms of begging.

ARTICLE XXX: CHILDREN OF IMPRISONED MOTHERS

States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

(a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
(b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;

(c) establish special alternative institutions for holding such mothers;
(d) ensure that a mother shall not be imprisoned with her child;
(e) ensure that a death sentence shall not be imposed on such mother;
(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

ARTICLE XXXI: RESPONSIBILITIES OF THE CHILD

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
(b) to serve his national community by placing his physical and intellectual abilities at its service;
(c) to preserve and strengthen social ad national solidarity;
(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
(e) to preserve and strengthen the independence and the integrity of his country;
(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

PART II

CHAPTER TWO

ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD

ARTICLE XXXII: THE COMMITTEE

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called "the Committee" shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

ARTICLE XXXIII: COMPOSITION

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
2. The members of the Committee shall serve in their personal capacity.
3. The Committee shall not include more than one national of the same State.

ARTICLE XXXIV: ELECTION

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

ARTICLE XXXV: CANDIDATES

Each States Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the State Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

ARTICLE XXXVI

1. The Secretary-General of the Organization of African unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

ARTICLE XXXVII: TERM OF OFFICE

1. The members of the Committee shall be elected for a term of five years and may not be re-elected, however, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.
2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to insub-paragraph 1 of this Article.

3. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

ARTICLE XXXVIII: BUREAU

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

ARTICLE XXXIX: VACANCY

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term-subject to the approval of the Assembly.

ARTICLE XL: SECRETARIAT

Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

ARTICLE XLI: PRIVILEGES AND IMMUNITIES

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

CHAPTER THREE

MANDATE AND PROCEDURE OF THE COMMITTEE

ARTICLE XLII: MANDATE

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize

meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting and rights and welfare of children in Africa;

(iii) cooperate with other African, International and Regional Institutions and Organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity, or any State Party.

(d) Perform such other tasks as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU, or the United Nations.

ARTICLE XLIII: REPORTING PROCEDURE

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which given effect to the provisions of this Charter and on the progress made in the enjoyment of these rights.

   (a) within two years of the entry into force of the Charter for the State Party concerned; and

   (b) thereafter, every three years.

2. Every report made under this Article shall:

   (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and

   (b) shall indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (a) of this Article, repeat the basic information previously provided.

ARTICLE XLIV: COMMUNICATIONS

1. The Community may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.
2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

ARTICLE XLV: INVESTIGATIONS BY THE COMMITTEES

1. The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures a State Party has adopted to implement the Charter.
2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made Article 46 of this Chapter.
3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.
4. States Parties shall make the Committee's reports widely available to the public in their own countries.

CHAPTER FOUR

MISCELLANEOUS PROVISIONS

ARTICLE XLVI: SOURCES OF INSPIRATION

The Committee shall draw inspiration from International Law on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

ARTICLE XLVII: SIGNATURE, RATIFICATION OR ADHERENCE

1. The present Charter shall be open to signature by all Member State of the Organization of African Unity.
2. The present Charter shall be subject to ratification or adherence b Member States of the Organization of African Unity. The instrument of ratification or adherence to the present Charter shall be deposite with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force 30 days after the receptio by the Secretary-General of the Organization of African Unity of th instruments of ratification or adherence of 15 Member States of th Organization of African Unity.

ARTICLE XLVIII: AMENDMENT AND REVISION OF THE CHARTER

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General o the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simply majority of the States Parties.

FUNDAMENTAL RIGHTS UNDER THE 1999 CONSTITUTION (NIGERIA)

CHAPTER 7

1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

CHAPTER IV: FUNDAMENTAL RIGHTS

Right to life.

33.-(1) Every person has a right to life, and no one shall be deprive intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary -

(a) for the defence of any person from unlawful violence or for the defence of property;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
(c) for the purpose of suppressing a riot, insurrection or mutiny.

Right to dignity of human person.

34.-(1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subjected to torture or to inhuman or degrading treatment;
(b) no person shall be held in slavery or servitude; and
(c) no person shall be required to perform forced or compulsory labour.

(2) For the purposes of subsection (1) (c) of this section, "forced or compulsory labour" does not include -

(a) any labour required in consequence of the sentence or order of a court;
(b) any labour required of members of the armed forces of the Federation or the Nigeria Police Force in Pursuance of their duties as such;

(c) in the case of persons who have conscientious objections to service in the armed forces of the Federation, any labour required instead of such service;
(d) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or
(e) any labour or service that forms part of -
  (i) normal communal or other civic obligations for the well-being of the community,
  (ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly, or
  (iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

Right to personal liberty.

35.-(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law -

(a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
(b) by reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law;
(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
(d) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or the lawful removal from Nigeria of any person or the taking of proceedings relating thereto;

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

(2) Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.

(3) Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.

(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -

(a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
(b) three months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section, the expression "a reasonable time" means -

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and
(b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

(6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.

(7) Nothing in this section shall be construed -

(a) in relation to subsection (4) of this section, as applying the case of a person arrested or detained upo reasonable suspicion of having committed a capi offence; and

(b) as invalidating any law by reason only that it authoris the detention for a period not exceeding three months a member of the armed forces of the Federation or member of the Nigeria Police Force in execution of a sentence imposed by an officer of the armed forces the Federation or of the Nigeria Police Force, in respe of an offence punishable by such detention of whic he has been found guilty.

Right to fair hearing.

36.-(1) In the determination of his civil rights and obligations including any question or determination by or against an government or authority, a person shall be entitled to a fair hearin within a reasonable time by a court or other tribunal established b law and constituted in such manner as to secure its independenc and impartiality.

(2) Without prejudice to the foregoing provisions of thi section, a law shall not be invalidated by reason only that it confer on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law -

(a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

(b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal:

Provided that -

(a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

(6) Every person who is charged with a criminal offence shall be entitled to -

(a) be informed promptly in the language that he understands and in detail of the nature of the offence;

(b) be given adequate time and facilities for the preparation of his defence;

(c) defend himself in person or by, legal practitioners of his own choice;

(d) examine, in person or by his legal practitioners, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution; and

(e) have, without payment, the assistance of an interpreter if he can not understand the language used at the trial of the offence.

(7) When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any person authorised by him in that behalf shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case.

(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

(9) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.

(10) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.

(11) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

Right to private and family life.

37. The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

Right to freedom of thought, conscience and religion.

38.-(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction,

ceremony or observance relates to a religion other than his own or a religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society

Right to freedom of expression and the press.

39.-(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information ideas and opinions:

Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) for the purpose of preventing the disclosure, of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

(b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

Right to peaceful assembly and association.

40. Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:

Provided that the provisions of this section shall not derogat from the powers conferred by this Constitution on th Independent National Electoral Commission with respect t political parties to which that Commission does not accor recognition.

Right to freedom of movement.

41.- (1) Every citizen of Nigeria is entitled to move freel throughout Nigeria and to reside in any part thereof, and n citizen of Nigeria shall be expelled from Nigeria or refused entr thereto or exit therefrom.

(2) Nothing in subsection (1) of this section sha invalidate any law that is reasonably justifiable in a democrati society -

(a) imposing restrictions on the residence or movemen of any person who has committed or is reasonabl suspected to have committed a criminal offence i order to prevent him from leaving Nigeria; or

(b) providing for the removal of any person from Nigeri to any other country to -

(i) be tried outside Nigeria for any criminal offence or

(ii) undergo imprisonment outside Nigeria in execution of the sentence of a court of law i respect of a criminal offence of which he ha been found guilty:

Provided that there is reciprocal agreement between Nigeri and such other country in relation to such matter.

Right to freedom from discrimination.

42.-(1) A citizen of Nigeria of a particular community, ethni group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person -

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or an executive or administrative action of the government to disabilities or restrictions to which citizen o Nigeria of other communities, ethnic groups places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizen Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.

Right to acquire and own immovable property anywhere in Nigeria.

43. Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

Compulsory acquisition of property.

44.-(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefor; and

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

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law -

(a) for the imposition or enforcement of any tax, rate or duty;

(b) for the imposition of penalties or forfeitures for the breach of any law, whether under civil process or after conviction for an offence;

(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;

(d) relating to the vesting and administration of the property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporate bodies in the course of being wound-up;

(e) relating to the execution of judgments or orders of court;

(f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;

(g) relating to enemy property;

(h) relating to trusts and trustees;

(i) relating to limitation of actions;

(j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;

(k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;

(l) providing for the carrying out of work on land for the purpose of soil-conservation; or

(m) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

(3) Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Restriction on and derogation from fundamental rights.

45.-(1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society -

(a) in the interest of defence, public safety, public order public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons.

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such Act during any periods of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36(8) of this Constitution.

(3) In this section, a "period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President in exercise of the power conferred on him under section 305 of this Constitution.

Special jurisdiction of High Court and legal aid.

46.- (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any right to which the person who makes the application may be entitled under this Chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.

(4) The National Assembly -

(a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and

(b) shall make provisions -

(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

FUNDAMENTAL RIGHTS

(ENFORCEMENT PROCEDURE)

RULES, 2009

FUNDAMENTAL RIGHTS

(ENFORCEMENT PROCEDURE)

RULES, 2009

CHAPTER 8

THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999

FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES, 2009

UNDER CHAPTER IV OF THE CONSTITUTION

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CHAPTER 8

THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999

FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES, 2009

Commencement.

Under Chapter IV of the Constitution

[*1st December, 2009*]

In exercise of the powers conferred on me by section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 and all other powers enabling me in that behalf, I, IDRIS LEGBO KUTIGI, GCON, Chief Justice of Nigeria, hereby make the following Rules:

PREAMBLE

1. The Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it exercises any power given it by these Rules or any other law and whenever it applies or interprets any rule.

2. Parties and their legal representatives shall help the Court to further the overriding objectives of these Rules.

3. The overriding objectives of these Rules are as follows:

(a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.

(b) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether

these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include:

(i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.

(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system,

(c) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court may make consequential orders as may be just and expedient.

(d) The Court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.

(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) Anyone acting in his own interest;
(ii) Anyone acting on behalf of another person;
(iii) Anyone acting as a member of, or in the interest of a group or class of persons;
(iv) Anyone acting in the public interest, and
(v) Association acting in the interest of its members or other individuals or groups.

(f) The Court shall in a manner calculated to advance Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights.

(g) Human rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency.

ORDER I – APPLICATION AND INTERPRETATION

Citation.

1. These Rules may be cited as the Fundamental Rights (Enforcement Procedure) Rules, 2009.

Interpretation.

2. In these Rules –

"*African Charter*" means the African Charter on Human and Peoples' Rights;

"*Applicant*" means a party who files an application or on whose behalf an application is filed under these Rules;

"*Application*" means an application brought pursuant to these Rules by or on behalf of any person to enforce or secure the enforcement of his fundamental rights;

"*Constitution*" means the Constitution of the Federal Republic of Nigeria, 1999;

"*Court*" means the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja.

"*Defend*" includes react to;

"*Fundamental Right*" means any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act;

"*Human Rights*" includes fundamental rights;

"*Judge*" means a Judge of the Court;

"*Legal Representative*" means a legal practitioner within the meaning of the Legal Practitioners' Act.

"*Notarised*" means endorsed (with signature and stamp or seal) by a legal practitioner appointed as a Notary Public under Notaries Public Act.

"*Originating Application*" means every application other than an application in a pending cause or matter;

"*Public Interest*" includes the interest of Nigerian society or any segment of it in promoting human rights and advancing human rights law;

"Prison Superintendent" means the person, whatever his official title, in charge of the prison or any other place in which the applicant is restrained or confined;

"Registrar" means the Registrar of the Court hearing the application or of any Court to which an order is directed;

"Respondent" means a party against whom a human rights case has been instituted under these Rules;

"Rules" means Fundamental Rights (Enforcement Procedure) Rules and any amendments to them;

"State" means any of the component parts of the Federal Republic of Nigeria, and includes the Federal Capital Territory, and the Government of a State or Administration of Federal Capital Territory where the context allows.

ORDER II – COMMENCEMENT OF ACTION

Cause of Action.

1. Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 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:

Provided that where the infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the State shall have jurisdiction. Form No. 1 in the *Appendix* may be used as appropriate.

Mode of Commencement.

2. An application for the enforcement of the Fundamental Right may be made by any originating process accepted by the Court which shall, subject to the provisions of these Rules, lie without leave of Court.

3. An application shall be supported by a Statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought, and supported by an affidavit setting out the facts upon which the application is made.

4. The affidavit shall be made by the Applicant, but where the applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the Applicant, stating that the Applicant is unable to depose personally to the affidavit.

Applicant's Written Address.

5. Every application shall be accompanied by a Written Address which shall be succinct argument in support of the grounds of the application.

Respondent's Written Address.

6. Where the respondent intends to oppose the application, he shall file his written address within 5 days of the service on him of such application and may accompany it with a counter affidavit.

Applicant's Address on Points of Law.

7. The applicant may on being served with the Respondent's Written Address, file and serve an address on points of law within 5 days of being served, and may accompany it with a further affidavit.

ORDER III – LIMITATION OF ACTION

1. An Application for the enforcement of Fundamental Right shall not be affected by any limitation Statute whatsoever.

ORDER IV – GENERAL CONDUCT OF PROCEEDINGS

Date for Hearing.

1. The application shall be fixed for hearing within 7 days from the day the application was filed.

Adjournments

2. The hearing of the application may from time to time be adjourned where extremely expedient, depending on the circumstances of each case or upon such terms as the Court may deem fit to make, provided the Court shall always be guided by the urgent nature of applications under these Rules.

***Ex parte* Application.**

3. The Court may, if satisfied that exceptional hardship may be caused to the Applicant before the service of the application especially when the life or liberty of the applicant is involved, hear the applicant *ex parte* upon such interim reliefs as the justice of the application may demand.

4. (a) The application *ex parte* under this Order shall be supported by affidavit which shall state sufficient grounds why delay in hearing the application would cause exceptional hardship;

(b) A party moving the Court *ex parte* may support the application by argument addressed to the Court on the facts put in evidence;

(c) Where the application is made *ex parte* for interim reliefs, the Court may make the following orders:

(i) Grant bail or order release of the Applicant forthwith from detention pending the determination of the application;

(ii) Order that the Respondent against whom the order for the release of the applicant is sought be put on notice and abridge the time for hearing the application;

(iii) Order the production of the Applicant on the date the matter is fixed for hearing if the Applicant alleges wrongful or unlawful detention;

(iv) Grant Injunction restraining the Respondent from taking further steps in connection with the matter or maintaining *status quo* or staying all actions pending the determination of the application;

(v) Any other order as the Court may deem fit to make as the justice of the case may demand.

Production of Applicant.

5. The order for the production of the applicant detained must state the Court or Judge before whom, and the date on which the applicant detained is to be brought. Form Nos. 2 and 3 in the *Appendix* may be used as appropriate.

Discharge of ***ex parte*** *Orders.*

6. Where an order is made on a motion *ex parte*, a party affected by it may within seven days after service of the order, or within such further time as a Court may allow, apply to the Court by motion to vary or discharge it; and the Court may, on notice to the party obtaining the order, either refuse to vary or discharge it with or without imposing terms as to costs or security, or, as may seem just.

ORDER V – SERVICE OF COURT PROCESS

By whom Service is to be effected.

1. Service of the originating application or order of Court shall be done by a Sheriff, Deputy Sheriff, Bailiff or other office of the Court.

Service of Process: How effected.

2. The application must be served on all parties directly, so long as a service duly effected on the Respondent's agent will amount to personal service on the Respondent.

Service of Order for Production of Applicant.

3. Where an order is made by the Court for the production of the Applicant restrained, such order must be served personally on the party to whom it is directed or an officer in his office.

Service of Order for Production to More than one party.

4. If the order is made against more than one party, the order must be served personally on each of the parties the order is directed to in the same manner or on any officer in their offices.

Service to Police Officer or Prison Superintendent

5. If it is not possible to serve such an order personally, or if it is directed to a Police Officer, or a Prison Superintendent or other Public Official, it may be served by leaving it with any other officer working in the office of the Police Officer, or office of the Prison Superintendent or of the office of the Public Officer to whom the order is directed.

6. Such order shall be a sufficient warrant to any Superintendent of a Prison, Police Officer in charge of a police station, Police Officer or Constable in charge of the applicant or any other person responsible for his detention, for the production in Court of the applicant under restraint.

Substituted Service.

7. Where it appears to the Court, either after or without an attempt at personal service of the Court processes that for any reason personal service cannot be conveniently effected, the Court may order that service be effected either –

(a) By delivery of the document to an adult person at the usual or last known place of abode or business of the party to be served; or

(b) By delivery of the document to some person being an agent of the party to be served, or to some other person, on it being proved that there is reasonable

probability that the document would in the ordinary course, through that agent or the person, come to the knowledge of the party to be served; or

(c) By delivery of the document to any senior officer of any Government agency that has office both in the State where the breach occurred and head office either in the Federal Capital Territory or elsewhere; a service on the agency through its office in any state where the breach occurred will be considered as sufficient service; or

(d) By advertisement in the Federal Government *Official Gazette,* or in some newspapers circulating within the jurisdiction; or

(e) By notice put up at the principal Court House of, or some other place of public resort in the Judicial Division where the proceedings in respect of which the service is made is instituted, or at the usual or last known place of abode, or business, of the party to be served.

Service on an Employee of Government.

8. When a party to be served is in the service of any Ministry or Extra Ministerial Department of Government or of a Local Government, the Court may transmit the document to be served and a copy thereof to any senior officer of the Department of Government in the Judicial Division or place where the party to be served works or resides or of the Local Government in whose service the party to be served is, and such senior Officer or Local Government shall cause the same to be served on the proper party accordingly.

9. If on the hearing of the application the Court is of the opinion that any person who ought to have been served with the application has not been served, whether or not the person is one who ought to have been served, the Court may adjourn the hearing on such terms, if any, as it may direct in order that the application may be served on that person.

10. Service of the application and other processes, notices, summons, orders and documents whatever shall be effected between the hours of six in the morning and six in the evening.

11. Save in exceptional circumstances and as may be authorized by a Court, service shall not be effected on Sunday or public holiday.

ORDER VI – AMENDMENT OF STATEMENT AND AFFIDAVITS

Hearing of Application.

1. No grounds shall be relied upon or any relief sought at the hearing of the application except the grounds and the reliefs are set out in the statement.

2. The Court may, on the hearing of the application allow the statement to be amended and may allow further affidavits to be used if they deal with new matters arising from the counter affidavit of any party to the application.

3. The application for amendment shall be supported by an exhibit of the proposed application to be amended and may be allowed by the Court upon such terms or otherwise as may be just.

Non Compliance

4. Where a party who obtained an order to amend fails to comply with the order within the time allowed by the order of Court, such party shall be deemed to have abandoned the amendment unless he obtains an order of Court for extension of time to file the same.

Notice of Application

5. Where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he must put the other party or parties on notice of his intention to amend.

ORDER VII – CONSOLIDATION OF SEVERAL APPLICATIONS RELATING TO THE SAME INFRINGEMENT.

Order for Consolidation

1. The Judge may on application of the Applicant consolidate several applications relating to the infringement of a particular Fundamental Right pending against several parties in respect of the same matter, and on the same grounds.

Application for Re-Assignment

2. Where applications are pending before different Judges, the Applicant shall first apply to the Chief Judge of the Court for re-assignment of the matter to a Judge before whom one or more of the matters are pending.

Application for Consolidation.

3. The Applicant must show that the issues are th same in all the matters before the application for consolidatio may be granted by the Court.

ORDER VIII – NOTICE OF PRELIMINARY OBJECTION DISPUTING THE COURT'S JURISDICTION

Applicaiton to Set Aside Proceeding.

1. Where the Respondent is challenging the Court jurisdiction to hear the application, he may apply to the Cou for an order striking out the suit or setting aside th proceedings.

Respondent's Notice of Preliminary Objection.

2. The Respondent's Notice of Preliminary Objectio must be filed along with the counter affidavit to the mai application.

Counter Affidavit.

3. Where the Respondent elects, not to file a counte affidavit to the main application, the Court shall presume tha the Respondent has accepted the facts as presented by th Applicant.

Hearing.

4. On the date of hearing, the preliminary objection shall be heard along with the substantive application.

Orders.

5. The Court after hearing the application may make any of the following orders:

(a) Striking out the application for want of jurisdiction; or

(b) Setting aside the service of the originating application.

6. Where the Court does not decline jurisdiction, the Court shall go ahead to give its Ruling on the substantive application.

ORDER IX – EFFECT OF NON COMPLIANCE

1. Where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to -

(i) Mode of commencement of the application;
(ii) The subject matter is not within Chapter IV of the Constitution or the African Charter on Human and People's Rights (Ratification and Enforcement) Act.

ORDER X – APPLICATION TO QUASH ANY PROCEEDINGS

How to Commence.

1. In the case of any application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record *unless* before the hearing of the application he has served a certified copy thereof together with a copy of the application on the Attorney-General of the Federation or of the State in which the application is being heard as the case may be, or accounts for his failure to do so to the satisfaction of the Court hearing the application.

Orders.

2. Where an order to remove any proceedings for the purpose of their being quashed is made, in any such case, the order shall direct that the proceedings shall be quashed forthwith upon their removal into the Court which heard the application.

ORDER XI – ORDER WHICH THE COURT MAY MAKE

At the hearing of any application, under these Rules, the Court may make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution or African Charter on Human and People's Rights (Ratification and Enforcement) Act to which the applicant may be entitled.

ORDER XII – HEARING OF THE APPLICATION

Written Address.

1. Hearing of the application shall be on the parties' written addresses.

Oral Argument.

2. Oral argument of not more than twenty minutes shall be allowed from each party by the Court on matters not contained in their written addresses provided such matters came to the knowledge of the party after he had filed his written address.

Adoption of Address

3. When all the parties' written addresses have been file and come up for adoption and either of the parties is absent, th court shall either on its own motion or upon oral application b the Counsel for the party present, order that the addresses b deemed adopted if the Court is satisfied that all the parties ha notice of the date for adoption and a party shall be deemed t have notice of the date for adoption if on the previous date la given, the party or his Counsel was present in Court.

Content of Address.

4. The written address shall contain –

(a) The application on which the address is based;
(b) A brief statement of facts with reference to exhibits (if any) attached to the application;
(c) Issue arising for determination and
(d) A succinct statement of argument on each issue incorporating the purport of the authorities referre to, together with full citation of each such authority

Lists of Authorities

5. All written addresses shall be concluded with numbered summary of the points raised and the party's prayi A list of all the authorities referred to shall be submitted with th addresses. Where any unreported judgment is relied upon th certified true copy shall be submitted along with the writt address.

ORDER XIII – RIGHT OF ANY OTHER PERSON OR BODY TO BE HEARD

Right of Any Other Person to be Heard.

1. Any person or body who desires to be heard in respe of any Human Rights Application and who appears to the Co to be a proper party to be heard, may be heard whether or n the party has been served with any of the relevant processe and whether or not the party has any interest in the matter.

Amici Curiae.

2. *Amici curiae* may be encouraged in human righ applications and may be heard at any time if the Court's busine allows it.

ORDER XIV – COMMITTAL FOR CONTEMPT

Nothing in these Rules shall affect the power of Court punish for contempt. Form No. 4 in the Appendix may be used appropriate.

ORDER IV – TRANSITIONAL PROVISIONS

Abrogation of 1979 Rules.

1. The Fundamental Rights (Enforcement Procedure) Rules 1979 are hereby abrogated.

Commencement.

2. From the commencement of these Rules, pending Human Rights applications commenced under the 1979 Rules shall not be defeated in whole or in part, or suffer any judicial censure, or be struck out or prejudiced, or be adjourned or dismissed, for failure to comply with these Rules provided the applications are in substantial compliance with the Rules.

Pending Application under 1979 Rules.

3. Such pending Human Rights application may continued to be heard and determined as though they have been brought under these Rules.

Instances not Covered by these Rules.

4. Where in the course of any Human Rights proceedings, any situation arises for which there is or appears to be no adequate provision in these Rules, the Civil Procedure Rules of the Court for the time being in force shall apply.

APPENDIX

A. SCHEDULE OF FEES

FILING FEE IN FUNDAMENTAL RIGHTS APPLICATIONS

The Filing Fees for application for enforcement of Fundamental Rights shall be Five Hundred Naira (N500.00);

For a motion, it shall be One Hundred Naira (N100.00);

For an Affidavit, it shall be Fifty Naira (N50.00);

For a written address, it shall be One Hundred Naira (N100,00); and

For any other process, it shall be One Hundred Naira (N100.00).

B. FORMS

FORM NO. 1

NOTICE OF APPLICATION FOR ORDER ENFORCING A FUNDAMENTAL RIGHT (ORDER 2 RULE 1)

Suit No.....

In the Federal High Court/High Court of ..... State.

In the matter of an application by ..... for an order fo the enforcement of a Fundamental Right.

and

In the matter of ..... Applicant.

TAKE NOTICE that the Federal High Court/High Court o ..... State will be moved on the ..... day of ..... 20..... or so soon thereafter as Counsel ca be heard on behalf of ..... (for an order tha .....) ..... in terms of the relief sought in th statement accompanying the affidavit in support of the application.

And take notice that on the hearing of this application the sa ..... will use the affidavit of ..... and the exhibits there referred to.

DATED the ..... day of ..... 20.....

(Signed)

Applicant or his Legal representative

To:

Respondent or his Legal representative

Note: Delete the High court which is *not* applicable.

FORM NO. 2

ORDER FOR PRODUCTION OF PERSON DETAINED (ORDER 4 RULE 5; ORDER 5 RULES 3, 4, 5 & 6)

Suit No.....

In the matter of enforcement of a Fundamental Right.

In the matter of detention .....
..... Applicant ..... Prison or to the Superintendent of ..... at .....

We command you that you produce in the Federal High Court at ...../or in the High Court of ..... State at ..... on the day and at the time the body of ..... being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, that our Court (or Judge) may then and there examine and determine whether such case is legal, and have you there *and* then this Order.

Witness this ..... day of ..... 20.....

.....
Judge

Note: Delete the High Court which is not applicable

To:

.....
The officer or person against whom Order is sought.

FORM NO. 3

NOTICE TO BE SERVED WITH THE ORDER FOR PRODUCTION OF PERSON DETAINED (ORDER 4 RULE 5; ORDER 5 RULES 3, 4, 5 AND 6)

Suit No.....

In the Federal High Court at ...../or the High Court o
..... state at .....
In the matter of the application of .....
(If in a cause already begun, here insert the title, not otherwise).

WHEREAS this Court (or the Honourable Justice .....) ha
made an order directed ..... (or other person havin
the custody of ..... if so) command him to have the bod
..... before the said Court ..... a
..... on the day and at the time specified in the orde
together with the day and cause of his being taken and detained.

TAKE NOTICE that you are required by the said order to have the body o
the said ..... before this Court (or before the Judg
aforesaid) on ..... day of .....
20..... at ..... O'clock and make a return to the said Orde
In default thereof the said Court will then, or so soon thereafter as Counse
can be heard, be moved to commit you to prison for your contempt in no
obeying the said Order (or if in vacation application will then be made t
one of the Judges of the said Court for a warrant for your arrest in orde
that you may be held to answer for your contempt in not obeying the sai
order).

DATED the ..... day of ..... 20.....

(*Signed*)
Applicant or his Legal representative

Note: Delete High Court which is not applicable.

FORM NO. 4

ORDER OF COMMITTAL
(ORDER 14)
(HEADING AS IN THE COMMENCEMENT OF APPLICATION)

Suit No.....

Upon Application this day made unto this Court by Counsel for the Applicant and upon reading (an affidavit) of ..... filed the ..... day of ..... 20..... for service on the Respondent ..... a copy of the order of Court dated the ..... day of ..... 20..... and notice of this motion).

And it appearing to the satisfaction of the Court that the Respondent ..... has been guilty of contempt of Court in (state the contempt).

It is ordered that for his said contempt the Respondent do stand committed to prison to be there imprisoned (until further order).

It is further ordered that this order shall not be executed if the Respondent ..... complies with the following terms, namely, ...

DATED the ..... day of ..... 20.....

.....
Judge

MADE at Abuja this 11th day of November, 2009.

IDRIS LEGBO KUTIGI, GCON
Chief Justice of Nigeria

EXPLANATORY NOTE

(*This note does not form part of the above Rules but is intended to explain their purport*).

These Rules provide for the rules of procedure to be followed in th Court in applications for the enforcement or securing the enforcement Fundamental Rights under Chapter IV of the 1999 Constitution and th African Charter on Human and Peoples Right (Ratification and Enforcemen Act.

FORM NO. 4

ORDER OF COMMITTAL
(ORDER 14)
(HEADING AS IN THE COMMENCEMENT OF APPLICATION)

Suit No.....

Upon Application this day made unto this Court by Counsel for the Applicant and upon reading (an affidavit) of ..... filed the ..... day of ..... 20..... for service on the Respondent ..... a copy of the order of Court dated the ..... day of ..... 20..... and notice of this motion).

And it appearing to the satisfaction of the Court that the Respondent ..... has been guilty of contempt of Court in (state the contempt).

It is ordered that for his said contempt the Respondent do stand committed to prison to be there imprisoned (until further order).

It is further ordered that this order shall not be executed if the Respondent ..... complies with the following terms, namely, ...

DATED the ..... day of ..... 20.....

.....
Judge

MADE at Abuja this 11th day of November, 2009.

IDRIS LEGBO KUTIGI, GCON
Chief Justice of Nigeria

EXPLANATORY NOTE

(*This note does not form part of the above Rules but is intended to explain their purport*).

These Rules provide for the rules of procedure to be followed in the Court in applications for the enforcement or securing the enforcement of Fundamental Rights under Chapter IV of the 1999 Constitution and the African Charter on Human and Peoples Right (Ratification and Enforcement) Act.

CASES

CHIEF GANI FAWEHINMI ..... APPLICANT

V.

1. **INSPECTOR-GENERAL OF POLICE**
2. **COMMISSIONER OF POLICE, LAGOS STATE**
3. **POLICE SERVICE COMMISSION**
4. **MR. P. S. EFANGA (ACTING DIRECTOR OF CUSTOMS AND EXCISE)**
5. **BOARD OF CUSTOMS AND EXCISE**
6. **ATTORNEY-GENERAL, FEDERATION**

} **RESPONDENTS**

HIGH COURT OF LAGOS STATE NIGERIA

CITATION
SUIT NO. M/440/88

JUSTICE M. A. OPE-AGBE (JUDGE)

FRIDAY 14TH OCTOBER, 1988

Cited Cases:

Adesanya v. The President (1981) A ALL NLR Part 1 at page 41.
Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Part 53) page 678 at pages 708 and 721.
Arec Ltd v. Amaye (1986) 3 NWLR (Part 31) page 653 at page 664.
Attorney-General v. Guardian Newspaper Ltd. (1987) 1 WLR 1248 – 1321.
Basil Ukaegbu v. Attorney-General of Imo State (1983) 1 FNR 149 at Page 167.
Chief Authur Nwankwo v. The State (1985) 6 NCLR 228 at pages 252 – 253.
Chief Gani Fawehinmi v. (1) Col. Halilu Akilu (2) Lt. Col. A. K. Togun.
Commissioner for Works Benue State v. Devcom Development Consultants Ltd. (1985) 3 NWLR (Part 83) pages 407 – 408.
Din v. Attorney-General of the Federation Suit No. SC/40/86.
Erisi v. Idika (1987) 4 NWLR (Part 66) page 503 at pages 518 – 519.
Federal Minister of Internal Affairs v. Shugaba (1982) 3 NCLR 915.
Garba v. Federal Civil Service Commission (1988) 1 NWLR (Part 71) page 449 at page 465.
Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Part 18) page 621 at page 638.
Ifie v. Attorney-General of the Bendel State (1987) 4 NWLR (Part 67) page 972 at page 994.
Iyorliam v. The State (1973) 12 SC. 1 page 7 – 8.
John Holt Nig. Ltd. v. Holts African Workers Union (1963) 1 All NLR 379 at pages 383 – 384.
Kalu v. Mbuko (1988) 3 NWLR (Part 80) page 86 at page 105.
Mustapha v. Governor of Lagos State (1987) 2 NWLR (Part 58) page 539 at page 585.
Obikoya & Sons Ltd v. Governor of Lagos State (1987) 1 NWLR (Part 50) page 385 at page 400.
Ojukwu v. Governor of Lagos State (1986) 2 SC 271.

Re: J. A. Oduneye D.P.P. Lagos State SC. 43/87.
Saidu Garba v. Federal Civil Service Commission and Anor (1988) 1 NWLR (Part 71) Pa
449 at pages 477 – 478.
Shugaba Abdulraman Darman v. The Federal Minister of Internal Affairs (1982) 3 NC
915.
Sonar Ltd v. Nordwind (1987) 4 NWLR (Part 66) page 520 at page 535.
The Nigeria Union of Journalists v. Attorney-General (1986) Law Report of the Commo
Wealth Constitution page 1 at pages 9 – 11.
The peoples Star Press Ltd v. Brigadier R. A. Adebayo (1971) 1 UILR 269 at pages 273
274.
The State v. The Ivory Trumpet Publishing Co. Ltd. (1984) 5 NCLR 736 at page 756.

RULING

Chief Gani Fawehinmi, a Legal Practitioner and author (hereinafte
referred to as the applicant) brought an application by way of an expar
Motion under Order 1 Rule 2 (2) and (3): Order 2 Rule 1 (i) of th
Fundamental Rights (Enforcement Procedure) Rules, 1979: Section 42 (1
of the Constitution of the Federal Republic of Nigeria, 1979 hereinafte
referred to as the Constitution and the Inherent Jurisdiction of the Cou
for an order granting him leave to apply for the reliefs set out in th
application to enforce his fundamental rights which he alleged had bee
was being or about to be breached by each of the respondents namely:

(1) The Inspector-General of Police.
(2) The Commissioner of Police (Lagos State Command)
(3) The Police Service Commission
(4) Mr. P. S. Efanga (Acting Director of Customs and Excise)
(5) The Board of Customs & Excise
(6) The Attorney-General of the Federation

The reliefs are as follows:

(1) A DECLARATION that the seizure of 496 copies of the book title
"MURDER OF DELE GIWA, THE RIGHT OF A PRIVATE
PROSECUTOR" BELONGING TO THE APPLICANT which seizure
was carried out by the officers, servants and/or agents and o
the authority of the 1st and 2nd respondents on Friday the 10
day of June 1988 at the Applicant's Chambers at 28 Sabiu Ajose
Crescent, Surulere, Lagos is illegal, unconstitutional, null and
void.
(2) A DECLARATION that the directive given by the 4th Responden
to all zonal co-ordinators and area administrators of the
department of Customs and Excise "to seize the book titled

"Murder of Dele Giwa, The Right of a Private Prosecutor" written by Chief Gani Fawehinmi if found imported through any of our ports, Airports and customs stations" and published on page 13 of the DAILY TIMES Newspaper of Wednesday July 20, 1988 is illegal, unconstitutional, null and void.

(3) N1 million being damages against the 1st, 2nd and 3rd Respondents jointly and severally for the aforesaid illegal and unconstitutional seizure and continued detention of the said 496 copies of the book titled "MURDER OF DELE GIWA, THE RIGHT OF A PRIVATE PROSECUTOR" belonging to the Applicant.

(4) AN ORDER releasing or directing the 1st and 2nd respondents jointly and severally whether by themselves, their servants, agents and or officers to release to the Applicant the said 496 copies of the book titled "MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR" seized from the Applicant.

(5) A PERPETUAL INJUNCTION restraining the 1st and 2nd Respondents whether by themselves, their officers, servants, agents and or the Nigeria Police Force from further seizing or intermeddling with the distribution of the book titled "MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR".

(6) A PERPETUAL INJUNCTION restraining the 4th and 5th Respondents whether by themselves, their servants, agents, and or officers from giving effect to or otherwise executing the aforesaid directive that the book "MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR" be seized by officers of the department of Customs and Excise.

GROUNDS ON WHICH THE RELIEFS ARE SOUGHT

(1) The seizure and continued detention of 496 copies of the book titled "MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR" belonging to the Applicant by the officers, servants and or agents of and on the authority of the 1st and 2nd Respondents on 10th June, 1988 without first hearing the Applicant is a violation of the Fundamental Right of the Applicant under section 33 (1) of the Constitution.

(2) The seizure of the said books edited by the Applicant is a violation of the Applicant's right under section 36 of the Constitution.

(3) The seizure and continued detention of the said books is also a violation of the Applicant's right under section 40 of the Constitution.

(4) The directive of the 4th Respondent that the said books be seized by officers of the Department of Customs and Excise given without first hearing the Applicant is a violation of the Applicant's Fundamental Right under the Constitution.
(5) The said directive for the seizure of the said book is also a violation of the Applicant's rights under sections 36 and 40 of the Constitution.
(6) The Applicant is entitled to damages for the violation of his fundamental rights by the Respondents.

The applicant swore to a 5 paragraph affidavit of urgency and a 22 paragraph affidavit in support of the *exparte* motion.
There is also a statement pursuant to Order 1 Rule 2 (3) of the Fundamental Rights (Enforcement Procedure) Rules, 1979 setting out the name and description of the applicant, the reliefs sought and the grounds on which the reliefs are sought.

On the 14th day of September 1988, I granted leave to the applicant to pursue the enforcement of his Constitutional Rights against each of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents hereinafter referred to as the Respondents.
That exercise is no doubt in line with the requirements of Chapter IV of the Constitution which makes provision for Fundamental Rights particularly Section 42 which makes provision for the special jurisdiction of the High Court in matters of this nature. The section reads as follows: -

"42(1) Subject to the provisions of this Constitution, as amended, modified or otherwise affected by the Constitution (Suspension and Modification) Decree, 1984 or any other Decree, any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any rights to which the person who makes the application may be entitled under this chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purpose of this section.

More relevant in this application is section 36 of the 1979 Constitution which states as follow: -

"36 (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:
Provided that no person, other than the government of the Federation or of a State or any other person or body authorized by the Supreme Military Council, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

(a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films: or

(b) imposing restrictions upon persons holding office under the government of the federation or of a state, members of the armed forces of the Federation or members of the Nigeria police force".

Following the leave granted, the applicant commenced this action against the respondents by way of Motion on Notice filed on the 19th September, 1988 praying for the same reliefs claimed in the exparte motion. The affidavit in support of the application and the statement pursuant to order 1 Rule 2 (3) of the fundamental Rights (Enforcement Procedure) Rules, 1979 are in *pari materia* with the processes in support of the exparte motion.

The application was fixed for hearing on the 28th September 1988.

However the Director of Civil Litigation, Federal Ministry of justice, Lagos filed a motion on Notice on the 21st September, 1988 under Order 1 Rule 2 (1) and (2); Order 6 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 1979; section 42(1) of the Constitution and the Inherent Jurisdiction of the court for an order discharging the Exparte Order made on the 14th day of September, 1988 and for such further or other order or orders as this Honourable Court may deem fit to make in the circumstances.

The grounds of the said application are as follows: -

(i) that the plaintiff failed to disclose all relevant facts to this Honourable Court at the hearing of the application;
(ii) that this Honourable Court now has an opportunity to consider new and other relevant matters material to a proper determination of the application;
(iii) that the application was not brought promptly;
(iv) that there was no urgency;
(v) that seizure of the book was pursuant to a criminal investigation of sedition against the plaintiff;
(vi) that ownership in a literary work is not a Fundamental Human Right as enumerated in Cap IV of the Constitution of the Federal Republic of Nigeria, 1979;
(vii) that the actions of the defendant/applicants complained of had already been completed by June 10th, 1988.

A state counsel in the civil litigation and public law division of the office of the Attorney-General of the Federation and Minister of Justice, one Ijeoma Juliet Uche Okoro swore to a 12 paragraph affidavit in support of the motion.

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 read as follows: -

"Para 1. That I am a state counsel in the civil litigation and public law division of the office of the Attorney-General of the federation and minister of justice, and I have the authority and consent of all the defendants to swear to this affidavit.

2. That I am familiar with the facts of this case and the facts herein deposed to, the said facts having come to my personal knowledge in the ordinary course of my duties in the Attorney-General's chambers.

3. That I have seen, read and understood a 21 paragraph affidavit sworn to by the plaintiff in support of his application.

4. That the facts deposed to in paragraphs 16, 17, 18, 19 and 20 are not true.
5. That the books, the subject matter of this action, were seized by the federal military government on the ground of public safety.
6. That the circulation of the books were meant to bring about disaffection and ill will against the federal military government.
7. That furthermore, the circulation of the said books was meant to create disorder, tumult, insurrection and matters of that kind.
8. That the said books are subject of an investigation of criminal offence/offences against the plaintiff and the investigation is not yet completed.
9. That in the event of a decision to prosecute the plaintiff for the offence/offences being investigated the said books would be needed as a Exhibits in the criminal proceedings.
10. That the books, the subject matter of this action were seized by June 10th, 1988.
11. That the plaintiff filed this present action on the 5th September, 1988.
12. That I swear to this affidavit in good faith".

It is pertinent to mention that the said book was not annexed as an exhibit to the affidavit of Juliet Uche Okoro; However in his counter-affidavit the applicant averred in paragraphs 1, 2, 3, 4, 5 and 6 as follows: -

"Para 1. That I have read the affidavit of the representative of the federal government, Ijeoma Juliet Uche Okoro,
2. That it is not true as claimed by the Federal Government that the book titled "Murder of Dele Giwa; the Right of a Private Prosecutor" was against public order and public safety.
3. That it is not true as sworn to by the representative of the Federal Government that the circulation of the book was meant to bring about disaffection and ill-will against the federal government or that the circulation of the book was meant to create disorder, tumult, insurrection.
4. That I attach and mark as exhibit "DG" a copy of the book; "Murder of Dele Giwa; the right of a private prosecutor".

5. That out of the 2000 (two thousand) copies legitimately imported into the country, I have given out more than 400 (four hundred) complimentary copies, 496 (four hundred and ninety-six) copies were wrongly seized by the police and more than 500 (five hundred) copies have been sold to the public.
6. That I swear to this affidavit in good faith".
The book was annexed as exhibit "DG" to the counter-affidavit."

When both applications came up for hearing on the 28th September, 1988 it was agreed by both counsel that the applicant should move his application and in the process deal with the motion to discharge the expert order brought by the respondents and in like manner learned counsel for the respondents while replying to the application of the applicant would deal with respondents' motion and so the stage was set for the submissions of both learned counsel.

The main thrust of the applicant's case is as contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of his affidavit. They read as follows: -

"Para 1. That I am a legal practitioner having an office at 28, Sabiu Ajose Crescent, Surulere, Lagos.

2. That on the 19th day of October, 1986, Mr. Dele Giwa the Editor-in-Chief of NEWSWATCH was killed by a parcel bomb at his residence at 12, Talabi Crescent, Ikeja, Lagos State.

"Para 3. That following private investigations conducted by me I prepared an information charging COLONEL HALILU AKILU (The Director of Military Intelligence) and Lt. Col. A.K. TOGUN (Deputy Director of State Security Service) with Conspiracy to Murder and murder of the said Mr. Dele Giwa and submitted same to the then Director of Public Prosecutions of Lagos State (Mr. J. A. Oduneye) pursuant to Section 342 of the Criminal Procedure Law of Lagos State with a request that he endorse a Certificate thereon whether or not be would prosecute the two men for the alleged offences and if he declined to prosecute at public instance, to endorse the information accordingly.

4. That when the said Director of Public Prosecutions refused to exercise his discretion as aforesaid I commenced a civil action in the High Court of Lagos State Judicial Division with suit No. M/513/86 for an order of Mandamus compelling the D.P.P. to exercise his discretion accordingly.
5. That the said suit proceeded to the Court of Appeal and the Supreme Court of Nigeria whereupon the Supreme Court on 18th day of December, 1987 granted me leave to apply for the said Order of Mandamus in SC/43/87.
6. That pursuant to the Judgment of the Supreme Court I applied for the Order of Mandamus against the said D.P.P. and on 21st day of January, 1988 the Honourable Justice Olusola Thomas granted the order of Mandamus against the D.P.P
7. That meanwhile, various Newspapers and Magazines in the Country ran commentaries on the historic judgment of the Supreme Court particularly:

   (1) *The Punch*
   (2) *The Republic*
   (3) *Nigerian Tribune*
   (4) *The Guardian* and
   (5) *The Nigerian Economist*

8. That the Judgment of the Supreme Court has been reported and published in the Nigeria Weekly Law Reports with the following references: (1987) 4 N.W.L.R. (pt.67) page 797.
9. That because of the epochal and historic nature of the Judgment of the Supreme Court of Nigeria and the order of the Honourable Justice Olusola Thomas, I decided to produce a book containing the judgment of the Supreme Court, the Ruling of Honourable Justice Olusola Thomas and relevant commentaries of notable Newspapers and Magazines thereon.
10. That further to paragraph 9 above, a book titled "MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR" was edited by me and published by the Nigerian Law Publication Limited.
11. That the said book has 193 (one hundred and ninety three) pages containing the said judgment of the Supreme Court,

Pictures of the Justices of the Supreme Court that sat in the appeal SC/43/87 and extracts of notable pronouncements made by their Lordships in their decisions, the Ruling of Honourable Justice Olusola Thomas in suit No. M/513/86, the photograph of his Lordship, commentaries of the Newspapers and Magazines and of Dr. OLU ONAGORUWA and then photographs of the dead body of MR. DELE GIWA.

"Para 12. That on Friday 10th June, 1988, three lorry loads of armed Policemen invaded the Office of the Nigerian Law Publications Ltd. at 90 Lewis Street, Lagos, my chambers at 35 Adeniran Ajao Road, Ajao Estate Anthony Village Lagos and my Office at 28 Sabiu Ajose Crescent, Surulere, Lagos purportedly looking for copies of the said book.

13. That further to paragraph 12 above, at 28 Sabiu Ajose Crescent, Surulere, Lagos all the 496 copies of the book titled "MURDER OF DELE GIWA: The Right of a Private Prosecutor" belonging to me personally were seized by the Policemen pursuant to a Search Warrant shown to me by the leader of the team.

14. That the leader (whose name I cannot presently remember) of the team of Policeman that came to seize the book upon enquiry told me they were acting pursuant to the instructions of the 1st and 2nd Respondents.

15. That on Wednesday, July 20, 1988, I read in the 'DAILY TIMES' of that date that the 4th Respondent who is the Acting Director of Customs and Excise had given a directive to Zonal Co-ordinators and Area Administrators of the Department of Customs and Excise "to seize the book titled "MURDER OF DELE GIWA: The Right of a Private Prosecutor" written by Chief Gani Fawehinmi if found imported through any of our Ports, Airports and Customs Stations". A copy of page 13 of the Newspaper containing the Directive is annexed hereto as Exhibit GF.

16. That there is nothing in the book to warrant its seizure on one hand and the directive of the 4th Respondent as aforesaid on the other hand.

17. That the 496 copies seized from me were meant for my Library and to be given to eminent Nigerians all over the Federation as Complimentary copies.

18. That 2,000 (two thousand) copies were produced and the earmarked selling price of each copy is N50.00 (Fifty Naira).
19. That I was never invited by the Respondents to make any representation or given any hearing as to the propriety or otherwise of the seizure of the book and the directive of the 4th Respondent before the seizure was carried out and directive given.
20. That I verily believe that the seizure of the book by the Respondents was meant to prevent Members of the public from knowing the hard truth about the death of MR. DELE GIWA who was my friend and client before his untimely death.
21. That up to day the 496 copies of the book have not been released to me.
22. That I swear to this affidavit in good faith."

The publication in the Daily Times issues of Wednesday July 20, 1988 page 13 reads as follows:

> "GANI'S BOOK TO BE IMPOUNDED" Copies of the book "MURDER OF DELE GIWA, THE RIGHT OF A PRIVATE PROSECUTOR" written by Chief Gani Fawehinmi are to be impounded by the Department of Customs and Excise if found to have been imported into the country. A directive to this effect was given by the Acting Director of Customs and Excise, Mr. P. E. Efanga to all Zonal Coordinators and Area Administrators of the department. The directive reads, "You are directed to seize the book titled MURDER OF DELE GIWA: THE RIGHT TO A PRIVATE PROSECUTOR" written by Chief Gani Fawehinmi if found imported through any of our Ports, Airports and Customs Stations. "Immediate report of the seizure should be made to the Director by the fastest means available."

In his oral submissions in Court amplified by a written summary of his submissions, the applicant narrated the events that led to this application. These facts are contained in the affidavit in support of the Motion. He stated that all he did in the book was to make a compilation and documentation of all that transpired in the event as to the rights of a private prosecutor. The applicant stated that in producing the book he went about it legally and legitimately. He went through FEM, a letter of credit was issued and a Government agency examined the books abroad and gave him a clean sheet. There was nothing surreptitious or underhand about the way the books were imported and it was the Customs who released

the books to him with all supporting documents. Learned Counsel then classified the issues for determination under five heads namely:

"1. Whether under the laws of Nigeria, the police has power to seize copies of a book personally belonging to a citizen on the ground that a charge of sedition is intended to be brought against the citizen in future.

2. Whether the continued detention of 496 copies of the book titled: "Murder of Dele Giwa: The Right of a Private Prosecutor" belonging to the Applicant by the Officers, servants and or agents of the 1st and 2nd Respondents on 10th June, 1988 without first hearing the Applicant is not a violation of the Applicant's Fundamental rights under section 33 (1) and 40 of the Constitution.

3. Whether the seizure and continued detention of the said books and also the directive of the 4th Respondent that the books be seized do not violate the Applicant's right under section 36 of the constitution.

4. Whether the Applicant's applications was brought within the time allowed by the fundamental Rights (Enforcement Procedure) Rules, 1979 for the bringing of such applications.

5. Whether the Applicant is entitled to Injunction and Damages against the Respondents.

The applicant went through the contents of the book and urged the court to go through the book in order to consider whether it is such that will create a situation averred to by the Government. Everything stated in the book according to the applicant is factual and known to everybody in this country and it is legitimate. There is no deposition as to the ground which the Government has against any chapter, page, line or word in the book. The applicant asks: - Were there no Courts decisions? Were there no allegations of murder? Are the pictures in pages 1 and 2 forged? Is there any complaint about the dedication of the book to Nigerians? The applicant stated that the Supreme Court Judgment on page 31 of the book has been reported in (1987) a NWLR Part 67 page 799.

On issue 1 the applicant referred to paragraph 5, 6 and 7 of the affidavit of Ijeoma Juliet Uche Okoro the contents of which I have already reproduced in the cause of this ruling and submitted that it is not the function of government to determine whether the publication is capable of causing disaffection, insurrection, ill-will, disorder and tumult. That is the function of the courts.

In support of this proposition, the applicant relied on the case of *Garba v. Federal Civil Service Commission* (1988) 1 NWLR (Part 71) page 449 at page 465 on the question raised by his Lordship Eso, J.S.C. on the issue who has the duty of determining what is "peace" "order" and "good government". The applicant then submitted that if the government must also interpret the laws it has made then we are in for anarchy.

Still on this issue, the applicant submitted that the courts should not be involved with what is or is not public policy but with the analysis of public policy. The applicant referred to the restrictive clause in section 41 of the constitution which relates to the confines of a law that has been made and the case of *Sonar Ltd v. Nordwind* (1987) 4 NWLR (Part 66) page 520 at page 535 and submitted there is no law or orders banning this book as at today; applicant therefore submitted that it is this Court that has jurisdiction to determine the unconstitutionality of the seizure of the books and he relied on the case of *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Part 18) page 621 at page 638 (per Obaseki J.S.C.). The applicant stated that respondents justified the seizure in paragraph 5 of the affidavit of Ijeoma Juliet Uche Okoro and asks whether there is such law that justifies such action? Police he stated is a creation of the Constitution as per Section 194 of the Constitution and an organization that owes its existence to the law cannot act contrary to the law. The applicant referred to Section 24 (1) of the Police Act and submitted that a fundamental condition precedent that the goods must have been stolen was not satisfied in this case. The applicant also referred to Section 107, 264 and 266 of the Criminal Procedure Act and submitted that the affidavit of Ijeoma Juliet Uche Okoro does not show that a crime was committed and he was taken before a Magistrate in respect of the books.

The power to seize the property of a citizen for the purpose of preferring a criminal charge against the citizen in future the applicant submitted is as stated in the case of the *Attorney-General v. Guardian Newspaper Ltd.* (1987) 1 WLR 1248 – 1321 and *The Criminal Law and Procedure of the Southern States of Nigeria,* 3rd Edition by Akintola Aguda. On the defence of the respondents that the books were seized because they were subject of criminal investigations of the offence of sedition being conducted against (him) the applicant, he submitted that the books were seized in June and four months later he has not been charged with any offence and in any case there is no law of sedition in Nigeria in that the Court of Appeal in two cases has declared Section 51 of the Criminal Code void. He referred to the cases of *Chief Arthur Nwankwo v. The State* (1985)

6 NCLR 228 at pages 252 – 253 and *The State v. The Ivory Trumpet Publishing Co. Ltd.* (1984) 5 NCLR 736 at page 756.

On the contention of the learned Director of Civil Litigation that the copyright in a book does not vest fundamental right, the applicant submitted that the right to property is a civil right, under the Constitution and protected by the constitution and to seize and acquire such property the respondents have to comply with Sections 33(1) and 40(1) of the Constitution. He referred to the case of *Obikoya & Sons Ltd v. Governor of Lagos State* (1987) 1 NWLR (Part 50) page 385 at page 400; and Blacks Law Dictionary 5th Edition Page 1095 on the definition of property. APPLICANT also referred to the case of *Iyorliam v. The State* (1973) 12 SC 1 where the Supreme Court had occasion to consider the meaning of property at page 7 – 8 and submitted that copyright is an intangible property, an intellectual property. He referred to the case of *Din v. Attorney-General of the Federation* Suit No. SC/40/86 delivered on Friday the 23rd September, 1988.

On the seizure itself, the applicant submitted that the property was taken away from him without giving him the opportunity of being heard – the act of the police amounts to compulsory acquisition of the property. He referred to the case of *Ifie v. Attorney-General of Bendel State* (1987) 4 NWLR (Part 67) page 972 at page 994 and urged that the seizure be declared illegal. He stated further that the seizure offends against section 36 (1) of the constitution and he referred to the case of *The Peoples Star Press Ltd v. Brigadier R. A. Adebayo* (1971) 1 UILR 269 at pages 273 – 274.

On issue No. 4, the applicant submitted that under Section 40 of the Constitution, the Chief Justice of Nigeria is empowered to make Rules for the enforcement of Fundamental Rights and the Chief Justice promptly made the Rules. The books were seized on the 10th June, 1988 and this application was filed in September, 1988; he referred to Order 1 Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 and submitted that bringing this application within 3 months of the seizure when the Rules provides for 12 months is within time.

On issues 5 i.e. whether the Court can grant injunction and damages against the respondents, the applicant submitted that the Supreme Court settled the issue in the case of *Commissioner for Works Benue State v. Devcom Development Consultants Ltd.* (1985) 3 NWLR (Part 83) pages 407 – 408. In order to retrieve the books the applicant stated that this Court can make an order to restrain the respondents from seizing the others and he referred to the case of *Erisi v. Idika* (1987) 4 NWLR (Part 66) page 503 at pages 518 – 519.

have direct application to member states; (2) that community law shall prevail in case of conflict or inconsistency between that law and the internal law of one of the member states, whether passed before or after joining the Community. The British Parliament by S. 3(1) of the European Communities Act 1972 enacted that the United Kingdom should abide by those principles laid down by the European Court: See *Shields v. E. Coomes Holdings Ltd* (1979) 1 All ER 460-461.

In our case what is enacted under s. 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act-now in Cap.10 Laws of the Federation of Nigeria 1990 is that the provisions of the Charter shall "have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria." This no doubt is a command similar to that of s.3(1) of The European Communities Act 1972[42]. To reinforce the continued applicability of Cap. 10, the Constitution (Suspension and Modification) Decree No.107 of 1993, ss.16(1) and 17 preserved it. It is pertinent to refer particularly to s. 17 which provided that:

> "17. All laws (other than any law to which Section 16 of this Decree applies) which, whether being a rule of law or a provision of an Act, a Decree, an Edict or a By-Law or any other enactment or instrument whatsoever, was in force immediately before the commencement of this Decree or made before that date but comes into force on or after commencement of this Decree shall until that law is altered by an authority having power to so, continue to have effect as if made in exercise of the power conferred by or derived under this Decree."
>
> (Emphasis by me)

It is the nuances with which to place Nigeria vis-à-vis Britain comparatively in the way their circumstances should be related in these matters having regard to prevailing legal and political systems at the time that could be an issue. But the call to judicial duty in both remains, and we must make the very best of our situation[43].

Therefore I proceed on the basis and upon the understanding that at the time the cross-appellant was arrested, the appellants recognised and acknowledged that the African Charter, adopted by Cap. 10 of the Laws of the Federation of Nigeria, and affirmed by Decree No. 107 of 1993, was in full force. From the principles and the Laws already discussed above the following basic concepts ought to be established, namely (a) the African

Charter is a special genus of law in the Nigerian legal and political system; (b) the Charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law; (c) the effect of the Charter in Nigeria may be completely obliterated by an express repeal of the African Charter on human and People's Rights (Ratification and Enforcement) Act. I do not think to pay due regard to the African Charter, even though it is now part of our municipal law, will be in conflict with the decision of this court in *Labiyi v. Anretiola* (1992) 8NWLR (pt.258) 139. Obviously the African Charter now falls within the category of Laws made by the National Assembly. But like the experience under the European Communities Act, 1972 in regard to the policy towards the European Economic Communities Treaty, by comparison, the African Charter cannot also be submitted, as I hope I have shown, to the sheer vagaries of any other municipal or domestic law. We cannot be so different from other countries in this matter[44].

It follows that when the cross-appellant was arrested and later detained in the manner he was, at about 6 a.m. on 30 January, 1996, he was entitled to have recourse to the guarantee offered him by Article 6 of the African Charter which, to repeat, provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously of laid down by law. In particular, no one may be arbitrarily arrested or detained."

The fact that the arrest and detention happened in this particular case during a military regime will not, in my respectful opinion, come into consideration. I think only a state of war have made a difference when the issue is that of the security of the state. The issues must be whether the right of the cross-appellant to be told promptly of the reasons for his arrest was violated. If it was because he was not told why he was being arrested, he was as a human being made violable when by Article 4 of the Charter this must not be so since:

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right,"

The same goes for his detention and the manner of it.

It is not for this court to go into any detail as to whether the cross-appellant can or cannot prove a case for redress. That is for the trial Court

Commenting on the book Exhibit "DG" learned Counsel submitted that the mutilated body of the deceased shown in about three places is in bad taste and it is very inflammatory and very inciting.
Counsel submitted that irrespective of Section 6 (5) of the Constitution when a criminal matter is being investigated and a Civil matter is instituted in respect of the same matter the civil court will not interfere with the criminal process going on. Counsel referred to page 470 of Smith's Judicial Review (supra).

Learned counsel urged that the application be dismissed.

A convenient point to start the consideration of the different issues raised is to take a look at Sections 6 (6); 33 (1), 42 (1) and 236 (1) of the constitution. By the provisions of above sections of the Constitution the doors of the Courts are thrown wide open and accessible to all who care to make use of their processes.

In some cases however as rightly submitted by the learned Director of Civil Litigation and conceded to by the applicant, the jurisdiction of the courts have been curtailed or even ousted.
I must state that any Decree which tends to take away the citizens rights and the jurisdiction of the Courts must be construed strictly and narrowly. See the case of *Saidu Garba v. Federal Civil Service Commission and Anor* (1988) 1 NWLR (Part 71) page 449 at pages 477 – 478 as per Nnaemeka-Agu, J.S.C.

In his lecture titled "*The Place of the Courts, the Rule of Law and Fundamental Human Rights in the Living Culture of Nigeria* delivered by Obaseki, J.S.C. on the 5th March, 1988, His Lordship stated as follows at pages 29 – 30.

> "It is a cardinal requirement of the Rule of Law that executive acts of government must be authorized by law, in so far at any rate, as they affect private rights, and must keep strictly within the four corners of the authorizing law. Without specific authorization by law, an executive act which interferes with the liberty or property of any person is unlawful. But the application of the Rule of Law to the executive is subject to serious limitations imposed upon it by the courts themselves. It is the view of the courts that intervention is proper only for the purpose of testing the legality of executive acts in a formal sense, so that if an act is within the formal limits of the power granted by law, the court cannot enquire further. It has been argued by some scholars that the conception of the Rule of Law adopted by the court is

too narrow and formalistic. However, the concepts of the purpose of statutory power enables the courts to control administrative acts motivated by bad faith or by extraneous considerations or which are arrived without regard to relevant factors. The rule however is that the reasonableness or fairness of administrative act done within power is outside the court's concern and the rules of natural justice which the courts apply are limited to the procedural and not substantive as they do not go beyond the rules that no one should be condemned unheard and that no one should be judge in his own cause.

Causes such as perversion or arbitrariness which may not easily be dissipated by anything an aggrieved person may say in his own defence are yet to become part of the concern of the courts. The core of the Rules of Law is respect of the courts. The core of the Rules of Law is respect for fundamental human rights by government and hence the intention to consider the constitutional provisions for securing such respect along with the 'courts' and the 'Rules of Law' in our surviving culture.

See also the case of *Basil Ukaegbu v. Attorney-General of Imo State* (1983) 1 FNR 149 at page 167 as per Eso, J.S.C.:

> "...the rights guaranteed the individual under section 36 (2) of the Constitution to own, establish and operate any medium for the dissemination of information, ideas and opinions" and which must necessarily include ...etc are uninhibited and unrestricted. Indeed where there is need to limit or restrict this right, any law passed to restrict and derogate therefrom could only be valid if it is reasonably justifiable in a democratic society – in the interest of defence, public order, public morality or public health or for the purpose of protecting the right and freedom of other persons (Section 41 (1) of the Constitution).

I respectfully would like to adopt the above pronouncements of their Lordships and hold that when the Court is exercising its function of adjudication as in the present case it should not be viewed as sabotage of one arm of Government against the other as the submissions of the learned Counsel for the respondents would seem to suggest in a veiled manner. It is a sacred duty the court owed the citizens of this country.

I am however in total agreement with the submissions of learned Counsel for the respondents that the 1979 Constitution does not guarantee the right of property, its acquisition, use and disposition. What is guaranteed is that property once lawfully acquired cannot be confiscated by government. See Section 40 of the Constitution.
Also guaranteed under the Fundamental Human Rights for our purpose are:

(1) The Right to Fair hearing – Section 33;
(2) The Right to Freedom of Thought etc. Section 35; and
(3) The Right to Freedom of Expression and the press - Section 36.

There can be no doubt that the 496 books in the custody of the police come within the definition of property. See *Blacks Law Dictionary* 5th Edition page 1095 and the case of *Iyorliam v. The State* (1973) 12 SC 1 at pages 7 - 8.

It is also not in dispute that the applicant lawfully acquired the books and that 2000 of the books were imported into this Country or that on its arrival the books and all supporting documents were handed over to the applicant by the Customs and organ of Government.

In considering whether the books were seized or acquired one has to examine the reasons for the seizure whether such reasons could be justified in law. So far no law has been made under Section 41 (1) of the Constitution. The reason given is that the books were seized pursuant to a criminal investigation of sedition against the applicant.

Under the Police Act the powers of the Police in respect of the investigation of criminal offences are very wide. If the Police believes that a crime has been committed there is a right to enter any house and search the premises for any article material to a criminal charge and the seizure of articles in possession or control of the owner of the premises if he is the accused is excused if later they are evidence of a crime committed by him or someone in the premises. In carrying out this duty, the Police is bound to comply with or observe the law of the land in particular the provisions of the Constitution itself being a creation of the said Constitution.

The law on Sedition since the 1979 Constitution is that Section 51 (1) of the Criminal Code is inconsistent with Sections 36 (1) and 41 (1) of the Constitution. In the case of *Chief Arthur Nwankwo v. The State* (1985) 6 NCLR 228 at pages 252 – 253 – Olatawura, J.C.A. stated as follows: -

> "..... It is my view that the law of sedition which has derogated from the freedom of speech guaranteed under this Constitution is inconsistent with the 1979 Constitution more so when this

cannot lead to a public disorder as envisaged under s.41 (a) of the 1979 Constitution. We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. The whole of Cap. XXXIII which deals with Defamation is sufficient guarantee against defamatory libel. The safeguard provided under S.56 (2) is inadequate more so where the truth of what is published is no defence. To retain S.51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our constitution will be a deadly weapon and to be used at will by a corrupt government or a tyrant. I hereby express my doubt about its retention in our criminal code more so, and as said earlier, there is adequate provision in the same criminal code for criminal libel. Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purposes. The decision of the founding fathers of this present constitution which guarantees freedom of speech which must include freedom to criticize should be praised and any attempt to derogate from it except as provided by the constitution must be resisted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must by necessity put his character and reputation in issue. Criticism is indispensable in a free society." See the *State v. The Ivory Trumpet Publishing Co. Ltd.* (1984) 5 NCLR 736 at page 756.

It would appear from above pronouncements of the Court of Appeal that sedition is no longer an offence and that being the case the reason for the seizure is untenable.

Apart from this fact, the affidavit of Ijeoma Juliet Uche Okoro is silent as to which portions of the book are seditious. It should have been the duty of the respondents who alleged that the book contains seditious matters to have exhibited the book and refer to the portions containing the sedition, this they have failed to do. I feel inclined as submitted by the applicant to invoke section 148 (d) of the Evidence Law Cap. 39, Laws of Lagos State 1973 against the Respondents.

The applicant however exhibited the book as Exhibit "DG". The cover title reads "Murder of Dele Giwa – The Right of a Private Prosecutor – *Chief Gani Fawehinmi v. (1) Col. Halilu Akilu (2) Lt. Col. A. K. Togun* In Re: *J. A.*

Oduneye D.P.P. Lagos State SC 43/87. Supreme Court (1987) and High Court (1988) Decisions.

On page 1 is the naked mutilated lower part body of the late Dele Giwa with the words "See what the parcel bomb has done to the life of Dele Giwa. A Nigerian, a Journalist, a father and above all a human being. Date of the barbaric callousness: Sunday 19th October, 1986 when God's creation was devilishly, illegally, and unconstitutionally destroyed and wasted.

On page 2 is the handsome smiling Dele Giwa in bow tie and full of life. Underneath the picture are the words "His last picture before he was bombed."

Page 3 is the dedication to Nigerians and Page 4 is the title of the book; page 6 is the name of the publisher while page 7 is the table of contents. The contents are picture of the Supreme Court building; pictures of the Honourable the Chief Justice of Nigeria and Honourable Justices Kayode Eso J.S.C., Augustine Nnamani, J.S.C.; Muhammadu Uwais, J.S.C., Bashir Wali, J.S.C.; Ebenezer Babasanya Craig, J.S.C., and the Bio-data of their Lordships.

Picture of Chief Gani Fawehinmi; the Supreme Court Judgment. The editorial commence of the *Punch;* the *Republic;* the *Nigerian Tribune* and the *Guardian;* the *Nigerian Economist* Report. The comment of Dr. Olu Onagoruwa; the final Order of the Lagos State High Court. The Picture of Hon. Justice Olusola Thomas of the Lagos State High Court; the High Court final Judgment and the action of the Lagos State Government and its decision to prosecute the two officers.

The contents of the book are matters of public knowledge. The picture of their Lordships of the Supreme Court and their bio-data could be found in who is who in the Judiciary published by the Executive Office of the President, Department of Information, Domestic Publicity Ikoyi, Lagos. The Judgments of the Supreme Court and the High Court of Lagos State are public documents that anybody interested in could apply to the Chief Registrars of those Courts for certified true copies. The editorial comments of the different newspapers are public documents for which any interested person could apply to the National Library for authenticated copies.

The contents are as stated by the applicant a compilation and documentation of the events and dramatis personae in his application to prosecute those whom he suspects of the crime. The books are his personal property and when one considers that a lot of industry and expense went into its production there can be no doubt that each of the seized books has values. I have held that the reason for the seizure has no basis in law and

is misconceived. I hold that this is a proper case in which the applicant can pursue the infringement of his fundamental rights as it relates to Sections 33, 36 and 40 of the constitution.

I hold also that the time to apply for leave in an application for the enforcement of a fundamental right is regulated by Order 1 Rule 3 (1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979.

It reads as follows: -

> "Leave shall not be granted for an order under these Rules unless the application is made within twelve months from the date of the happening of the event, matters, or act complained of or such other period as may be prescribed by any enactment or except where the delay, is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made."

It is not disputed that on Friday 10th June 1988 the books 496 copies were seized by the Police at No. 28, Sabiu Ajose Crescent, Surulere the office of the applicant. I will agree with the submissions of the applicant that the cause of action arose as from that date.

The applicant filed his application on the 5th September, 1988 a period within the 12 month period allowed by the Rules. I hold that the application was brought within time.

There are limitations to Sections 34, 35, 36 and 38 of the Constitution. See Section 41 of the Constitution. It provides that nothing in those Sections shall invalidate any law that is reasonably justifiable in a democratic society -

> (a) in the interest of defence, public safety, public order, public morality or public health or
> (b) for the purpose of protecting the rights and freedom of other persons."

Idigbe, J.S.C. puts it thus in the case of *Ukaegbu v. Attorney-General of Imo State* (supra): -

> "Every member of this community has a right to ..... a right to freedom from unsavoury and diabolical instructions and teachings, a right to freedom from dissemination of information that could lead to public disorder, or that are publicly morally wrong. A law which seeks directly to protect these rights or indirectly to prevent infraction of these rights undoubtedly will be justified under Section 41 (b)."

The applicant himself concedes that Government could promulgate a law banning the books from circulation or the Government could file an action in Court for interim injunction restraining the applicant from circulating the books as was the position in the *Spycatcher's* case in England but no law has been passed banning the books and no injunction has been obtained against its circulation.

The Police in utter disregard of lawful procedures for making such seizure went ahead and seized the books. As earlier stated, the affidavit on behalf of the respondents is silent on what portion of the book is capable of creating disorder, tumult, insurrection, disaffection an ill-will against the Federal Military Government. Ijeoma Juliet Uche Okoro who averred in the affidavit that she has the authority and consent of all the defendants to swear to the affidavit did not state what portion of the book the respondents informed her could lead to disaffection and ill-will against the Federal Military Government but the reasons could be gathered from the submissions of learned Counsel for the respondents when he referred to the mutilated picture of the body of the late Dele Giwa appearing in about three places in the book and submitted that it is in bad taste and very inflammatory and inciting. Since this reason is not contained in the affidavit of the respondents it is difficult to know whether this reason represents the views of the respondents or it is merely the personal views of learned Counsel.

I would readily agree with the Learned Counsel, for the respondents that any average, simple, ordinary Nigerian seeing the mutilated body of the late Dele Giwa side by side with his lively handsome smiling face of a young man and reading the epitaph underneath the pictures would not help but be filled with a violent revulsion against whoever is responsible for that dastardly act.

I am sure this ordinary Nigerian would ask himself the simple question but who is responsible? Who is the killer? It is a question that has plagued many people particularly Nigerians.

As a citizen of this Country and one who is ordinarily resident in Lagos at the time of the incident and by virtue of Section 72 of the Evidence Law Cap.39 Laws of Lagos State 1973. I take Judicial notice of the fact that after the murder of Dele Giwa there were a number of suspects

(1) the day guard in his residence became a suspect
(2) some Multi-national companies were suspects
(3) some Government parastatals were suspects
(4) a group filed an action against the business colleagues of the late Dele Giwa who was with him when the bomb went off. He was a suspect and

(5) The two army officers accused by the applicant are suspects.

I also take judicial notice of the fact that a National Newspaper with wide circulation throughout the country carried a passport size photograph of Dele Giwa in a conspicuous place of the newspaper both front and back underneath which the question is asked "Who killed Dele Giwa?"
This continued daily until the first anniversary of the death of Dele Giwa when there was an avalanche of comments and write-ups on the event leading to his death of course the mutilated photograph of the deceased, his study where the bomb went off and other photographs appeared.

I also take judicial notice of the fact that at his burial the spirit of the dead Dele Giwa was invoked to haunt down his killer or killers. This ritual is widely believed to be very effective in exposing murderers in the southern part of this country. The point to be made out of all this is that at the end of it all, the question "Who killed Dele Giwa?" still remains unanswered. All the known suspects are still around and kicking. So far there is no proof that anybody has been haunted to death by the spirit of the deceased. The Police say they have pursued all the leads they were given in the investigation of the case and on each occasion they came to a dead end. All these are matters of common knowledge in this country. The fact that the murder has not been resolved should not be taken as an indictment of the Nigeria Police.
Even in the more advanced countries that are many years ahead of us technologically and that possess modern gadgets for crime detection they still have many unsolved murders in their case files. A case in point on similar line is the Great Train Robbery that took place in the sixties in Great Britain, the last of the robbers has just been arrested some twenty years later. The Police should also take consolation in the fact that the spirits invoked with their quality of omnipotence and omniscience could also not detect the murderer or murderers. To the simple hearted, this might be interpreted to mean that all those suspected have nothing to do with the crime because the invocation of the spirit of the dead is a belief highly held in the rural areas. To others it might afford an opportunity to question that belief because it is a fact that Dele Giwa was killed by a bomb but in the eyes of the law the principle is that suspicion however strong does not amount to proof or that the suspect is guilty of the offence.

In the two examples given i.e. the National Newspaper asking the question: Who killed Dele Giwa? For almost a year and the invocation of the spirits the Police did not step in to stop either act and consequently no accusing fingers were pointed at the Police. I am therefore at a loss to

understand why the Police should step in after the Customs have delivered 2000 of the books to only seize 496 copies and in the process draw the search light on itself or why the Acting Director of Customs and Excise should give that directive. The Police gave no reasons for the seizure but if the reasons given by the respondents counsel is anything to go by, the answer to that is that disaffection, ill-will and tumult can only be against the killer or killers of late Dele Giwa who up till now still remain elusive and unknown and not the Government because the Government was never known to be amongst the suspects nor do I believe I should equate the two army officers with the Government.

On the issue of damages, I think one should draw a distinction between the award made in the case of *Shugaba Abdulraman Darman v. The Federal Minister of Internal Affairs* (1982) 3 NCLR 915 and the facts of the present application. In the *Shugaba's* case (supra) the injury done to Shugaba was irreparable hence the substantial damages awarded in that case. In the instance application, even though there has been an infringement of the fundamental rights of the applicant I would like to limit my consideration of the issue of damages to Section 40 of the Constitution i.e. that the books were compulsorily taken possession of since the reasons given for their seizure are untenable in law. The applicant gave the price of each book as N50.00. the total price of the 496 books at N50.00 per copy is N24,800.00. I will order the production of the books in this Court within 7 days failing which an amount of N24,800.00 compensation should be paid to the applicant.

Finally the learned Counsel for the respondents submitted that an injunction cannot be granted for an action that has been completed. This might very well be so; but each case has to be considered on its facts. In the present application, the act complained of is a continuing act. The books are still with the Police. I hold that the facts of the *John Holt Nig. Ltd. v. Holts African Workers Union* (supra) are inapplicable in this application.

In the result and taking into consideration all that has been said I believe the applicant is entitled to the grant of the declaratory and injunctive reliefs he seeks for in this application. I therefore grant the following reliefs in favour of the applicant against each and everyone of the respondents:

(a) a declaration that the seizure of 496 copies of the book titled "Murder of Dele Giwa, The Right of a Private Prosecutor" belonging to the applicant which seizure was carried out by the officers, servants and or agents of and on the authority of the 1st

and 2nd Respondents on Friday the 10th day of June, 1988 at the applicants Chambers at 28, Sabiu Ajose Crescent, Surulere, Lagos is illegal, unconstitutional, null and void.

(b) a declaration that the directive given by the 4th Respondent to all Zonal Co-ordinators of the Department of Customs and Excise to seize the book titled "Murder of Dele Giwa, the Right of a Private Prosecutor" written by Chief Gani Fawehinmi if found imported through any of our Ports, Airports and Customs stations and published on page 13 of the Daily Times Newspaper of Wednesday July 20, 1988, is illegal, unconstitutional, null and void.

(c) an order directing the 1st and 2nd Respondents jointly and severally whether by themselves, their servants, agents and or officers to release to the applicant the said 496 copies of the book titled "Murder of Dele Giwa, The rights of a Private Prosecutor" seized from the applicant by depositing them with the Court Registrar of Court No.18 High Court of Lagos State within 7 days from today i.e. on or before 20th day of October, 1988 failing which and in the alternative an amount of N24,800.00 being compensation for the said books be deposited in Court latest on the 20th day of October, 1988 by the 1st and 2nd Respondents.

(d) an order of perpetual injunction restraining the 1st and 2nd Respondents whether by themselves, their officers, servants, agents and or the Nigeria Police Force from further seizing or intermeddling with the distributions of the book titled "Murder of Dele Giwa: The Right of a Private Prosector."

(e) an order of perpetual injunction restraining the 4th and 5th Respondents whether by themselves, their servants, agents and or officers from giving effect to or otherwise executing the aforesaid directive that the book "Murder of Dele Giwa: The Right of a Private Prosecutor" be seized by officers of the Department of Customs and Excise.

(f) application for an order discharging the exparte order made on the 14th September 1988 is hereby dismissed.

And this shall be the Judgment of this Court on this application.

OLISA AGBAKOBA ..... **APPLICANT**

V

1. THE DIRECTOR, STATE SECURITY SERVICES
2. THE ATTORNEY-GENERAL OF THE FEDERATION } **RESPONDENTS**

COURT OF APPEAL
(LAGOS DIVISION)

CITATION
CA/L/225/92

UMARU ATU KALGO, J.C.A. (Presided)
SAMSON ODEMWINGIE UWAIFO, J.C.A.
EMMANUEL OLAYINKA AYOOLA, J.C.A. *(Read the Leading Judgment)*

WEDNESDAY, 6TH JULY, 1994

Cited Cases:

Herbert Antheker & Ors v. Secretary of State (1964) 12 L.ED 2d. 992.
Ozowula v. Ezeiheshie (1991) 1 NWLR (pt.170) 699.
R. v. Secretary of State, exparte Evere (1989) 1 All ER 655, 650.
Rockwell Kent v. Dullea (1958) 2 L ED. 2d 1204.
Satwant Singh Sawhney v. Assistant Passport Officer & Ors (1967) CR.525.
Staub v. Barley 2 L.ED. 2nd 302 (1958).
Wallerstainer v. Moir (1979) 3 all E.R. 217, 251.

Counsel:

Tunde Fagbohunlu (with him, C. Obiagwu) - *for the Appellant*
Respondent unrepresented.

AYOOLA, J.C.A. (*Delivering the Leading Judgment*): The appellant, a Nigerian Legal Practitioner is the President of a non-governmental human rights body based in Nigeria called Civil Liberties Organization (C.L.O.). He claimed relief under the Constitution of Federal Republic of Nigeria 1979 (the constitution) asserting that there has been a breach in several respects of his fundamental rights particularly, to personal liberty, freedom of thought, freedom of expression and freedom of movement guaranteed respectively under sections 32, 35, 36 and 38 of the Constitution.

The fundamental rights provisions are contained Chapter IV of the Constitution; section 42(1) of which provided that:

> "Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that state for redress."

Section 42(3) empowers the Chief Justice of Nigeria to "make rules with respect to the practice and procedure of a High Court for the purposes of this section." Pursuant to that power, the Chief Justice of Nigeria made the Fundamental Rights (Enforcement Procedure) Rules 1979 (the Rules). It was pursuant to section 42(1) of the Constitution and these Rules that the appellant applied to the High Court of Lagos State for redress.

The incident that led to the appellant's application in brief is that sometimes in March, 1992, the appellant was invited by a body in the Netherlands to participate in a human rights conference to take place in The Hague, the Netherlands from 22nd to 25th April 1992. On April 21, 1992, he proceeded to the Muritala Mohammed International Airport (the Airport) evidently with a view of traveling to The Hague. At the Airport an officer of the "Nigerian Security Services" (the Organisation) impounded his passport without giving any reasons therefor, and directed that the appellant should report at the Headquarters of the Organisation on the following day. The appellant was thus precluded from embarking on his journey to The Hague. Between April 22, 1992 and April 29, 1992 by personal visits to the office of the organization and letters and pleas to the Attorney-General of the Federation, he made several efforts to have his passport released to him, but to no avail. On 16th July 1992, he swore to an affidavit deposing to these facts which has not been controverted and filed his application on the same day.

The reliefs which the appellant sought by his application are as follows:-

"1. A *declaration* that the forceful seizure of the applicants passport No. A654141 by agents of the State Security Services is in violation of the applicant's rights to personal liberty, freedom of thought, freedom of expression and freedom of movement respectively guaranteed under Sections 32, 35, 36 and 38 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended) and is accordingly unconstitutional, and illegal.

2. *An order of mandatory injunction* directing the respondents to release the applicant's passport No. A654141 to him forth-with.

3. *An order of perpetual injunction* restraining the respondents from seizing the applicant's passport without cause, or in any other way violating the applicant's rights to personal liberty, freedom of thought, expression, and freedom of movement as guaranteed by the provisions of the 1979 Constitution aforementioned.

4. *And* for such further consequential order(s) as this Honorable Court may consider appropriate in the circumstances",

The grounds upon which the reliefs are sought are as follows:

"1. The forceful seizure of the applicant's passport is a gross violation of his rights to move freely into and out of Nigeria, which right is guaranteed under section 38(1) of the Constitution of the Federal Republic of Nigeria, (1979).
2. The forceful seizure of the applicant's passport as aforesaid is a gross violation of his right to receive and impart ideas and information without interference, which right is guaranteed under section 36(1) of the Constitution of the Federal Republic of Nigeria (1979)."

By a notice of motion the appellant applied to the High Court of Lagos State claiming the reliefs earlier stated. The motion on notice was duly served on the respondents represented on the return date for the hearing of the motion by a Senior State Counsel who applied for an adjournment which was granted by the learned Judge, Akinboboye, J. On the date to which the matter was adjourned, i.e. 29th July, 1992 the respondents were represented by another State Counsel who sought a further adjournment to file a counter-affidavit and "in order to make a return to the writ. Despite opposition by counsel for the appellant, the learned Judge granted the adjournment sought and adjourned the matter to 30th July, 1992. On that day the respondents and their counsel were absent. The respondents filed no counter-affidavit. Counsel for the appellant then moved his motion relying on the affidavit in support of the motion, and the provisions of section 38 of the Constitution among other enactments. He argued that the seizure of the appellant's passport had not been attributed to any law which permits any seizure or to any other law whatsoever and urged the High Court to grant his application as prayed, as there was no counter affidavit, "in default of defence."

On 31st July 1992, the learned Judge gave a ruling dismissing the application. She accepted that pursuant to section 38 of the Constitution the appellant has a right to move freely throughout Nigeria and he should not be refused entry thereto or exit therefrom. She held that although "freedom of movement in and out of one's country presumes that one would possess a valid traveling certificate or passport, nowhere in section 38 of the Constitution nor Article 12(2) of the African Charter on Human and Peoples Right, was the issuance to or possession of a passport declared as part of the constitutional right of any Nigerian Citizen or individual." She reinforced her view by the statement on the passport that it is the property

of the Nigerian Government and came to a conclusion that "it is only a privilege and not a right to be in possession of a passport." She held the view that notwithstanding that the application was not defended, the applicant still had to satisfy the court that he was entitled to the declaratory relief he sought and this he had failed to do, on the view she held that the passport was not his personal property. For the same reason she refused to grant the injunctions sought as in her view the applicant had not shown that he had a legal right to the passport which bore the statement that it is the property of the Federal Government of Nigeria and that it can be withdrawn at any time.

On this appeal from that judgment, counsel for the appellant argued that the right to travel abroad confers on the appellant, by necessary implication, a constitutional right to hold a Nigerian passport which, it is further argued, is essential to international travel. It is submitted that the right to hold a Nigerian Passport, subject to reasonable regulation, is a necessary condition for the effective enjoyment of the right to travel abroad guaranteed by section 38 of the Constitution, and, that is so, notwithstanding the Statement in the Passport that it is the property of the Federal Government.

Finally, learned counsel for the appellant submitted that the principle that a declaration of rights cannot be made on admission, or in default of pleadings which the learned Judge relied on is entirely inapplicable to the circumstances of this case in which affidavit evidence had been led and the application has been made by special procedure sanctioned by the Rules and the case was not of judgment in default of pleadings.

Counsel for the respondent submits that the freedom guaranteed by section 38 is freedom of movement within Nigeria and freedom of exit from Nigeria. It is further submitted on behalf of the respondents that the appellant was only a bearer and not an owner of the passport which is as stated in the passport the property of the Government. Finally it was submitted that the appellant failed to adduce enough evidence to merit the declaratory relief sought by him.

Although by his notice of motion, the appellant alleged a violation of his rights to personal liberty, freedom of thought and freedom of movement, it is evident that at the High Court and on this appeal the allegation that is pressed is of contravention of his right of movement guaranteed by section 38(1) of the Constitution which provides as follows:

"38(1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.

(2) Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society:

(a) Imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria.

(b) providing for the removal of any person from Nigeria to any other country:

(i) to be tried outside Nigeria for any criminal offence, or

(ii) to undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty;

Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter."

The circumstances in which a person may be deprived of the freedom of movement within Nigeria or of exit from Nigeria are very narrowly defined by section 38 but it goes without saying that a person who is lawfully deprived of his liberty in circumstances permitted by section 32(1) of the Constitution, cannot allege a contravention of section 38. Also the Constitution permits derogation from the rights guaranteed by section 38 among other sections, when it provided in section 41(1) that:

"41(1) Nothing in sections 34, 35, 36, 37 and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society:

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons."

However, in this case, the respondents have not relied, and learned Judge had not based her judgment on any circumstance of derogation for

the seizure of the appellant's passport. The issue formulated by the appellant in his brief as the second issue for determination whether the seizure of the appellant's passport can be justified in the circumstances of the case does not arise. Where the constitution gives a right, and facts have been proved which *prima facie* show an infringement, it is for the person alleged to have infringed that right to justify the infringement and not for the person whose right has been infringed to exclude all circumstances of justification.

To my mind only one issue really arises in this appeal. It is the substantive issue which as formulated by the appellant is:

> "Whether the right to travel out of Nigeria (as guaranteed under section 38 of the Constitution of the Federal Republic of Nigeria, 1979) carries with it a right of every Nigerian citizen to hold a passport."

A procedural question is formulated as the third issue by the appellant thus:

> "Was the trial Judge right to have refused the declaratory and other reliefs sought by the appellant on the ground that such reliefs cannot be granted upon a "default of pleadings".

Although that issue will be considered as well, I am of the view that on a proper reading of the judgment appealed from, that question does not arise. The respondents have formulated issues for determination in different terms but it is evident that, in substance, the parties have addressed the same substantive issues as formulated by the appellant.

Properly at the threshold of this appeal is a consideration of the nature and legal incidents of the passport as an essential document of foreign travel. Although at common law a passport is not legally necessary in order to go abroad, there cannot be any gainsaying the fact that in modern time in most, if not all, countries passport serve as documents of identity and *prima facie* of nationality. Several law dictionaries by their description of "passport" bring out this significance of passports.
In Jowitt's Dictionary of English Law "passport" is described as:

> "a licence for the safe passage of anyone from one place to another, or from one country to another."

In Black's Law Dictionary, it is variously described as:

> "A document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and pass freely and safely."

and as

> "Evidence of permission from sovereign to its citizens to travel to foreign countries and to return to land of his allegiance, as well as request to foreign powers that such citizen be allowed to pass freely and safely."

In so far as a passport is a certificate of identity and nationality and at the same time a request from one state to another to grant entry to the bearer, it stands to reason that a passport is normally an essential document in the exercise of the discretion by a foreign state, which at international law it has, in the reception of aliens into its territory. To that extent a passport is normally an essential document for entry into foreign countries.

Counsel for the appellant has cited pronouncements in other common law jurisdictions, namely: the United Kingdom, India and America to buttress the submission pressed on us that a passport is a *sine qua non* of international travel without which a Nigerian citizen cannot exercise his constitutionally guaranteed right of exit from or entry into Nigeria. Such pronouncements are contained in *R. v. Secretary of State, exparte Evere* (1989) 1 All ER 655, 650 where Taylor L.J. said that.

> "the grant or refusal of a passport ..... (affects) the rights of individuals and their freedom of travel."

Satwant Singh Sawhney v. Assistant Passport Officer & Ors (1967) 335 CR. 525 where Subba Rao C.J. held that "possession of passport is a necessary condition of travel in the international community."

The respondents have not tried to, and no one can reasonably, deny that these pronouncements represent the modern opinion on the legal nature and incidents of the passport. As further argued, presumably for the sake of completeness, in the appellant's brief, immigration laws and practice in Nigeria show that without a passport a Nigerian cannot normally go out of the country. Various sections of the Immigration Act such as section 4(1) (a) which provides that a Nigerian citizen wishing to travel abroad must possess a "valid travel document, and produce on request an embarkation card, which in its present form contains a column for information as to the traveller's passport, show the appellant's argument to be meritorious in this regard. Section 6 of the Passport (miscellaneous Provisions) Act Cap. 343, Laws of the Federation of Nigeria 1990 which defines the passport as "a document of protection" as well as an "authority to travel" puts the legal

incident of a passport beyond peradventure as far as Nigerian Law is concerned.

The conclusion is therefore evident, as I so hold, that possession of a passport in modern times makes exit out of Nigeria possible. The respondents, I do observe, have not contended anything to the contrary. The issue that follows from this conclusion is whether the possession of a passport or its withdrawal has any relevance to the constitutionally guaranteed freedom of movement, including the right of exit from Nigeria with which this case is directly concerned.

As has been stated earlier, the human rights provisions of our constitution contained *inter alia* a guarantee to any citizen of Nigeria of a right not to be refused entry to or exit from Nigeria (see section 38). Also the African Charter on Human and Peoples Rights (the African Charter) which have force of law in Nigeria by virtue of section 1 of the African Charter on Human and Peoples Rights (Ratification & Enforcement) Act Cap. 10 guarantees the right of every individuals "to leave any country including his own and to return to his country." (See Art. 12(2). Earlier, the human right of the citizen to travel abroad, had been recognised in Article 13(2) of the Universal Declaration of Human Rights. The argument by the respondent that section 38(1) of the Constitution guarantees only freedom of movement within Nigeria but only freedom of exit from Nigeria is an incomprehensible distinction in the context of the issues in this case. Freedom of movement consists of freedom of movement within Nigeria of citizens of Nigeria and of exit from the country. The real question is whether there is a concomitant right vested in every Nigeria to hold a passport and not to have his passport withdrawn. Admittedly, freedom of movement is not absolute. There may be circumstances of derogation. But as this case is not concerned with any circumstance of derogation, the question posed will be addressed without consideration of the nature and scope of any restriction to the freedom of movement or to any concomitant right where there are circumstances of derogation. It suffices to state that the right to a passport, if it is a concomitant of the right not to be refused exit from the country, cannot be made subject to any limitation not sanctioned by the derogation clause of the Constitution even though issuance of passports may be subject to reasonable regulations sanctioned by law.

The legal nature and incidents of the passport had been noted. Without it the citizen will normally not be able to leave the country and is subjected to enormous handicap such as would effectively make foreign travel impossible. He would be deprived of an internationally accepted document

evidencing his nationality and identity with the consequence that he would normally be refused entry into other countries. He would be denied the assurance while abroad, of the protection of his state as a citizen of Nigeria. It can thus be seen that while the seizure of a passport by a Government agency such as the 1st respondent can be interpreted as a direct expression of refusal of exit to the citizen, it is also a potent curb on the desire of the citizen to travel abroad and an evident clog on the exercise of his right of freedom of movement. Rights to be meaningful must be effective. The right of free movement, particularly not to be refused entry to or exit from Nigeria, will be empty without a concomitant right not to be deprived of the document which makes such movement possible.

However, the respondents argued in line with the learned Judge, that no such concomitant right exits. The learned Judge held, as has been earlier recounted, that holding a Nigeria passport is only a privilege and not a right. To reinforce this opinion, she took judicial notice of the contents of every Nigerian passport which contained the statement that.

> "This passport remains the property of the Government of the Federal Republic of Nigeria and may be withdrawn at any time."

Counsel for the respondent has argued on this appeal that the above statement shows that the Nigerian citizen is a bearer and not the owner of a passport issued to him.

On the other hand, it was submitted by counsel on behalf of the appellant that it is possible to conceive of the passport as the property of the Government and yet maintain that every Nigerian citizen has the right to hold a Nigerian passport.

The notion that a passport is a property of the Government, which can at its discretion grant, refuse to issue, impound and revoke it, is one which finds its origin in the prerogative power which the English Crown claims in the conduct of foreign affairs. That prerogative power in relation to passports has been described by English constitutional lawyers as an "objectionable arbitrary power" of highly doubtful" legal justification. B. Schwarts and HWR Wade described the alleged prerogative power as:

> "The only really objectionable arbitrary power which the Crown still claims. Its legal justification is highly doubtful."

The learned authors went further to recognise the backwardness of English Law in regard to rights of the British citizen to a passport when they said:

> "A lesson needs to be learned from the statutes and decisions which have established the right to a passport in the United States and elsewhere." (See: Schwarz and Wade: Legal Control of Government page 63).

Learned counsel for the appellant, in his commendable research, has cited a few of the decisions in the United States and India which establish the right of the citizens of those countries to a passport. I shall content myself with relying on the passages quoted from those decisions in the appellant's brief of argument. In *Rockwell Kent v. Dullea* (1958) 2 L Ed. 2d 1204 where the petitioners had challenged the refusal of the Secretary of State to issue them with passports, the Supreme Court of the United State said:-

> "In part, of course, the issuance of the passport carries same implication of intention to extend the bearers diplomatic protection, though it does no more than 'request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection' to this citizen of the United States. But that function of the passport is subordinate. *Its crucial function today is the control over exit.* And, as we have seen, *the right to exit is a personal right included in the word 'liberty' as used in the fifth Amendment.* If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." (Italics mine)

Also, in *Herbert Antheker & Ors v. Secretary of State* (1964) 12. L.ED. 2d 992 the U.S. Supreme Court held at p. 998 that:-

> "The denial of a passport, given existing domestic and foreign laws is a severe restriction upon, and in effect a prohibition against world-wide foreign travel."

The Indian Supreme Court has followed the United States decisions in *Satuant Singh v. Passport Officer* (1967) 3 SCR 524, 535 when it held:-

> "The want of a passport in effect prevents a person leaving India. Whether we look at it as a facility given to a person to travel abroad or as a request to a foreign country to give the holder diplomatic protection, it cannot be denied that the Indian Government by refusing a permit to a person residing in India completely prevents him from traveling abroad. If a person living in India, whether he is a citizen or not, has a right to travel

abroad, the Government by withholding the passport, can deprive him of his right."

Both the United States and India do not have such express provisions as we have in our Constitution guaranteeing as part of freedom of movement the freedom of exit from the country. Notwithstanding that fact, the United States Supreme Court has interpreted and applied the due process clause of the fifth Amendment in order to provide a constitutional guarantee of the freedom to travel abroad and the Indian Supreme Court has inferred freedom of exit from Article 21 of the Constitution of India which guarantees the right to life and personal liberty. It will be an affront to all known Human rights norms were the right to freedom of exit specifically guaranteed by our Constitution to be drained of all effect by arrogating to the Government a discretionary and almost arbitrary power to withhold, withdraw, or revoke a passport.

There is no conflict in the statement that the passport remains the property of the Government of the Federal Republic of Nigeria and the right which accrues to every citizen to hold such a passport. The consequence of a passport being the property of the Government is that the holder cannot deal with it as he pleases. He cannot transfer, sell or otherwise dispose of it. If for instance, he ceases to be a citizen of Nigeria he has an obligation, if requested, to return it to the "owner" and the Nigerian Government as the owner of the passport has a right to recover the passport from anyone else who is not entitled to hold it. All these consequences of ownership have nothing to do with the right which a citizen has to be a *holder* of a Nigeria passport or a right not to have one issued to him impounded other than as provided under a law which meets the standard set by the Constitution. If the right to hold a passport and not to have one held by the citizen arbitrarily impounded is a concomitant of the freedom of exit guaranteed by the Constitution, that right cannot be whittled down or abrogated by such statement as is contained in the passport that the passport "may be withdrawn at any time." Where a statement in any document issued by the Government is in conflict with a clear and Unambiguous provision of the Constitution or of any statement is of no consequence and cannot define, delimit or abrogate the right of the citizen.

While the rest of the civilised world is expanding the boundaries of freedom and reaping the consequence of such expansion in stability and economic and social development, it will be sad were we in this jurisdiction to define the boundaries of freedom so narrowly as to become meaningless.

Though she might not have intended it, that would be the result of the view expressed by the learned Judge when she held that possession of a passport is a privilege and not a right.

In my judgment any interpretation of section 38(1) of our Constitution and Art 12(2) of the African Charter which would reduce, in effect, the freedom of exit to one that can be removed or obstructed at the discretion of the Government or arbitrarily would offend against the spirit of the constitution and the fundamental rights and freedoms guaranteed by it. I feel no hesitation, therefore, in coming to the conclusion that the right not to have a passport impounded, which is the right with which this case is directly concerned, is a necessary concomitant of the freedom of exit which is guaranteed by section 38(1) of the Constitution and Art 12(2) of the African Charter. I also hold that the statement on the Nigerian Passport that "a passport may be withdrawn at any time" is neither in accord with the Constitution nor with any law applicable in Nigeria. It is inconsistent with the Constitution of Nigeria and the passport (Miscellaneous Provisions) Act Cap. 343 Laws of the Federation of Nigeria. Such a statement which does not now represent the law should now be modified to reflect the true state of the law. I am of the clear view that the learned Judge was in error in the view she took that a citizen of Nigeria has no Constitutional right to possession of a passport.

The error which the learned Judge fell into, is probably in not releasing that the Constitution cannot condescend to details in its description of the fundamental rights and freedoms it guarantees. The Constitution is an organic document which must be treated as speaking from time to time. It can therefore only describe the fundamental rights and freedoms it guarantees in broad terms. It is for the courts to fill the fundamental rights provisions with contents such as would fulfill their purpose and infuse them with life. A narrow and literal construction of the human rights provisions in our Constitution can only make the constitution arid in the sphere of human rights. Such approach will retard the realisation, enjoyment and protection of those rights and freedoms, and is unacceptable.

It is argued by counsel for the appellant that the learned Judge proceeded further to refuse the appellant's application on the procedural point that the declaration he seeks cannot be granted in default of "pleadings from the respondents," when she mentioned in her judgment the case of *Ozowula v. Ezeiheshie* (1991) 1 NWLR (Pt.170) 699 where this court (per Uwaifo, J.C.A.) relying on *Wallerstainer v. Moir* (1974) 3 All ER. 217, 251 said:-

> "But where a declaration of right is invalid, it is inappropriate to come by way of motion, since a Declaration of right cannot be made on admission or in default of pleading."

Since I hold the view that the principle in *Wallerstainer v. Maoir (supra)* does not apply in this case and that the issue raised by the appellant in regard thereto does not arise in the instant appeal, it is not necessary to consider the rational basis of the principle which may throw some light on the proper boundaries of the principle.

It suffices to note that for enforcement of fundamental rights special procedure has been established by law as prescribed by the Fundamental Rights (Enforcement Procedure) Rules 1979 ("the Rules"). The process of enforcement of Fundamental Rights is commenced by an application made to the court; first, for leave; and, upon leave granted, by notice of motion or by originating summons for redress. The application is heard on the affidavit in support of the application and the affidavits which every party to the application proposes to use at the hearing. The Rules enjoin parties to serve such affidavit on the other parties O. 6r. (1) provides that:

> "At the hearing of any application, motion or summons under these Rules, the Court or Judge concerned may make such orders, issue such writs, and give such directions as it or he may consider just or appropriate for the purpose of enforcing or requiring the enforcement of any of the Fundamental Rights provided for in the Constitution to which the complainant may be entitled."

The end purpose of the Rules is to ensure, where infringement of fundamental rights has been complained of or threatened, a speedy enforcement of such rights and simplification of procedure for dealing with such complaints.

In these circumstances, it is difficult to comprehend the question of the special procedure with the normal procedure in actions tried on the pleadings and to which rules of pleadings apply. In the procedure under the Rules, the affidavits constitute the evidence. If the only affidavit evidence before the court or Judge is that of the complainant that is the material he should consider in order to determine the entitlement of the complainant. The other party to the application is not under any compulsion to file an affidavit. Notwithstanding that he has not filed any affidavit, he can still be heard on the application to contend that the facts disclosed by the

complainant's affidavit do not point to the existence of a right or of an infringement of any right. It will work injustice and defeat the whole purpose of enforcement of fundamental rights were a complainant to be deprived of a declaration of infringement of his right merely by reason of the fact that the other parties to the proceedings failed, despite all opportunities given them, to offer either affidavit or any evidence or appear to be heard on the application. The true law, in my judgment, is that the court will not declare a right to be infringed merely because the other party to the application has neither filed an affidavit nor come forward to be heard on the application if the affidavit and materials placed before him in support of the application show that the right claimed does not exist or, if it exists, has not been infringed.

The principle in *Wallerstainer v. Moir (supra)* does not apply in this case because this is not a case on which the court has been asked to make a declaration on addition or in default of pleading or without evidence. Besides, it is recognized in *Walterstainer's* case that the power of the court to give declaratory relief on a default of pleading exists. What is cautioned against is exercising that power freely and when it will accession injustice to the defendant. It has always been accepted that where a refusal to exercise such power would cause injustice to the plaintiff, the power should be exercised Scarman L.J. in *Wailerstainer v. Moir* (supra) at p. 253:' said:-

> "The power of the Court to give declaration relief on a default of pleading, of course, exists, but for the reason crystalised by Morace in those four words of his (i.e. *nescit voxmisserevorti*) Should be exercised only in cases in which to deny it would be to impose injustice on the claimant."

In the result, even if, by any stretch of imagination, the instant case can be described as a case of default of pleading to deny the appellant the declaratory relief to which he is entitled would be unjust.

It is because of the ambiguity introduced by the learned Judge into her judgment by her reference to the principle in *Wallerstainer v. Moir (supra)* that the procedural question formulated by the appellant is considered at all. On a careful reading of the judgment appealed from, the learned Judge did not refuse the declaratory and other reliefs sought by the applicant "on the ground that such reliefs cannot be granted upon a default of pleadings," but on the ground that the appellant has failed to satisfy the court of his legal right. She said:

> "This is an undefended case however and applicant never established by his affidavit evidence that he has a legal right to the passport asked to be released by the respondent."

I am of the view that the learned Judge was right in considering whether the affidavit evidence in support of the application supports the legal right which the appellant claimed, but I feel no hesitation in holding that she was wrong in coming to the conclusion that he had no legal right to the passport impounded.

In the final analysis, what is at issue in this appeal is whether the Judge was right in the main reason she gave for refusing the application; namely, that the appellant has no legal right to the passport. It has, I venture to think, been sufficiently demonstrated that she was in error in holding that a citizen of Nigeria has no legal right to a passport and in effect, that if he has been issued one it could be withdrawn, impounded or revoked at will by the Government. To agree with that view would have been tantamount to removing, in one fell swoop, the guarantee of freedom of exit from our Constitution. That should not be.

To sum up, I accept the submission of the appellant that the freedom of exit guaranteed by our Constitution cannot be exercised without a passport and that that freedom enshrined in section 38(1) of the Constitution carries with it a concomitant right of every citizen of Nigerian to a passport. I also accept the submission and hold that the seizure of the appellant's passport amounts to a violation of his right to travel abroad guaranteed by section 38(1) of the Constitution. It is now left to consider what reliefs the appellant should have been granted.

I am of the view that in slightly modified terms the appellant is entitled to the declaratory relief he claimed and I would grant it. He is also entitled to the injunction he seeks directing the respondent to release his passport. The injunction sought to restrain the respondents from seizing the applicant's passport without cause is not only too wide in its terms but also is unsupported with any fact to show that there is any threat that in future his passport will be seized without cause or at all. I would refuse that injunction sought.

In the result, this appeal succeeds, and it is allowed. I would set aside the judgment of the High Court of Lagos State (Akinboboye J.) dismissing the appellant's application. I would grant the application and grant the declaration sought in the following terms:

It is hereby declared that the seizure of the applicant's passport No. A654141 by agents of the State Security Services (1st respondent herein) on April, 21, 1992 is a violation of the applicant's rights to freedom of movement guaranteed by section 38 of the Constitution of the Federal Republic of Nigeria 1979 (as amended) and is accordingly unconstitutional.

I would also order an injunction in the following terms:

The respondents are hereby ordered to release to the applicant forthwith his passport No. A65414.

The applicant is entitled to the costs of the application and of this appeal which I assess at N1,000 and N1,500 respectively. The respondents shall therefore pay a total cost of N2,500 to the appellant.

KALGO, J.C.A.: I have had a preview of the judgment just delivered by my learned brother Ayoola, J.C.A. and I agree with him that there is merit in the appeal. I therefore allow the appeal and adopt as mine all the consequential orders made in the lead judgment including the orders as to costs.

UWAIFO, J.C.A.: I read in advance the judgment of my learned brother, Ayoola J.C.A. just delivered. I agree with him that the appeal succeeds.

I must comment that the brief of argument prepared by the appellant for this appeal bears testimony to industry beyond which I consider it unnecessary to make further research to decide this appeal.

The appellant is a civil liberty and human rights lawyer of note in this country. He was on his way to answer an invitation to present a paper at a conference on human rights at the Hague when, at the International Airport, Lagos, his passport was impounded by a security operative. No reason was given for this. This happened on 21 April, 1992. He was unable to attend the conference. All his efforts thereafter to retrieve his passport failed. He had to seek relief under the Fundamental Rights procedure. His action was dismissed on the ground that the passport is the property of the Nigerian Government.

The Constitution guarantees every Nigerian citizen the freedom to travel out of and come into Nigeria: See section 38. He will normally require a passport to be able to enjoy that freedom. The information

contained in every Nigerian passport that the passport remains the property of the Government of the Federal Republic of Nigeria and may be withdrawn at *any* time must, in my view, be read subordinated to the constitutional right of freedom of movement enshrined in section 38(1) unless where it is shown that the curtailment of that freedom is in pursuance of a valid law reasonably justifiable for the regulation of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons: See section 41(1).

In my opinion a passport cannot lawfully be impounded simply on the basis that it is the property of the Federal Government. Not even an atmosphere of a *police state* can justify that. If it becomes necessary to impound a passport in circumstances falling under section 41(1), due process of law demands that not only that a relevant law must exist, any one of the situations specified under section 41(1) must be present and, in addition, the holder of the passport must be informed promptly what he has done to warrant the impoundment of his passport in order to curtail his freedom of movement. The words 'any time' in the information contained in the passport ought, in my view, to be controlled by circumstances in section 41(1) presenting themselves at any time to justify the withdrawal of a passport. That will be a method whereby to eschew arbitrariness and to uphold the rule of law as a civilised way of treating a citizen.

The Action was not defended in the court below. The facts as stated by the appellant remained uncontroverted. In a nut shell, those facts establish that the appellant was simply travelling to attend a conference on Human Rights, Democratisation and Development at The Hague. He was on invitation to take part. He did nothing wrong and was not so accused.

Before this Court, the respondents filed a brief of argument. Their central argument in addition to the effect of the inscription on a passport that it is the property of the Government of the Federal Republic (a point already dealt with) is based on section 5(1) of the Passport (Miscellaneous Provisions) Act (Cap. 343) Vol. 19, Laws of the Federal Republic of Nigeria, 1990 which reads:-

"5(1) The Minister may at any time, cancel or withdraw any passport issued to any person if:

(a) the passport is obtained by fraud;
(b) the passport has expired
(c) a person unlawfully holds more than one passport at the same time;
(d) It is in the public interest so to do."

There is no suggestion that the passport was seized (or cancelled or withdrawn) under any of sub-subsections (a), (b), and (c). As regards (d) it is provided that the Minister may, at anytime, cancel or withdraw any passport issued to any person if it is in the public interest so to do. This provision must, in my view, be read along with section 41(1) of the 1979 Constitution which I consider I should now reproduce:-

"41(1) Nothing in sections 34, 35, 36, 37 and 38 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society:-

(a) in the interest of defence, public safety, public order, public morality or public health, or

(b) for the purpose of protecting the rights and freedom of other persons."

I do not think any argument can properly be advanced that the 'public interest' envisaged by section 5 (1) (d) of the Passport Act can be other than in regard to defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedom of other persons. The Minister (or any person acting on his behalf) cannot simply cancel or withdraw the passport of any person upon the elusive term, 'public interest'. That will make it for the Minister to 'invent' a ground of public interest not contemplated by the constitution or make him unamendable to any restraint in acting against a citizen. That is an alarming prospect.

Perhaps I should illustrate the unconstitutionality of such exercise of power by the Minister under section 5 (1) (d), as I have shown above he cannot do, by reference to the case of *Staub v. Baxley* 2 L. Ed. 2nd 302 (1958) decided by the United State Supreme Court. A labour union organiser was convicted in the Mayor's Court of the City of Baxley, Georgia, of violating a municipal ordinance providing that persons seeking to solicit members for any organisation requiring payment of dues shall first apply to the mayor and city council for a permit, and authorising the mayor and city council to refuse to grant the permit if they do not approve of the applicant or of the organization or of the organisation's effect on the general welfare of the citizens of the city. *The constitutionality of the statute to the extent that made the enjoyment of the freedom of speech contingent upon the will of municipal authorities* was pronounced upon by the United States Supreme Court. The opinion of the Court as delivered by Mr. Justice Whittaker at page 311 is as follows:

"Appellant's first contention in this Court is that the ordinance is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor and Council of the City and thereby constitutes a prior restraint upon and abridges, that freedom. Believing that appellant is right in that contention and that the judgment must be reversed for that reason, we confine our considerations to that particular question and do not reach other questions presented.

It will be noted that appellant was not accused of any act against the peace, good order or dignity of the community, nor for any particular thing she said in soliciting employees of the manufacturing company to join the union. She was simply charged and convicted for 'soliciting members for an organization without a Permit.' This solicitation, as shown by the evidence, consisted solely of speaking to those employees in their private homes about joining the union. It will also be noted that the permit is not to be issued as a matter of course, but only upon the affirmative action of the Mayor and Council of the City. They are expressly authorised to refuse to grant the permit if they do not approve of the applicant or of the union or of the union's effect upon the general welfare of citizens of the City of Baxley." *These criteria are without semblance of definite standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit ..... It is thus plain that they are in this respect in their uncontrolled discretion.*

It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official - as by requiring a permit or license which may be granted or withheld in the discretion of such official - is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms. *(Italics mine)*

Inspired by the views in the above-quoted passage, I am bound to say that the Minister cannot constitutionally impound a citizen's passport on the bare provision 5 (1) (d) of the Passport Act that 'it is in the public interest so to do in defiance of the right to freedom of movement provision

in section 38 of the 1979 Constitution, restricted only to the extent provided for by section 41(1). The Minister has neither power nor justification to impliedly declare any citizen a *public enemy* by the way he exercises his office under section 5 (1) (d) of the Passport (Miscellaneous Provisions) Act. He does not have uncontrolled discretion in regard to that provision; and will not be permitted by law to do as he likes without any semblance of definitive standards or other controlling guides governing what is in the public interest. Once he does that, he acts unconstitutionally to curtail a fundamental right. What may not be in the public interest to support taking steps to cancel or withdraw (or impound) a citizen's passport so as to reasonably justify the curtailment of his right to freedom of movement must fall strictly within the restrictive and derogative circumstances provided in section 41(1) of the 1979 Constitution.

It is not permissible to undermine the provisions of the Constitution and consequently violate the rights of an individual, in this case the right of the appellant, to travel out of the country. It is disheartening still to have left him utterly helpless in immediately getting those concerned to show respect for the law and the sanctity of his fundamental right, as was allowed to happen in the present case.

I too allow the appeal and make the same orders, including order for costs, as in the leading judgment.

Appeal allowed

FEMI FALANA

V

THE ATTORNEY-GENERAL OF THE FEDERATION AND 2 OTHERS

HIGH COURT OF LAGOS STATE

CITATION
SUIT NO. M/288/92

JUSTICE A. A. AKA

8TH JUNE, 1992

RULING

On the 26th May, 1992 the Applicant came to this Court for Leave to apply for the Enforcement of his Fundamental Rights and pursuant to Section 42(3) of 1979 Constitution. I made an Order that the Respondents be put on Notice and that the Applicant be produced in this Court on 4/6/92 and that the Respondents should swear to a Counter-Affidavit why the Applicant should not be granted bail or released forthwith.

There is an Affidavit of Service in the file. There is no Counter-Affidavit from the Respondents. This Court has no choice but to believe all the averments contained in the affidavit in support of this application. The reliefs being sought are:

1. A DECLARATION that the arrest of FEMI FALANA at his Chambers at Obafemi Awolowo House, Obafemi Awolowo Way, Ikeja – Lagos on Tuesday 19th May, 1992 by Armed Officers of the State Security Service (SSS) is illegal and unconstitutional in that the arrest violated his fundamental rights.
2. A DECLARATION that the detention of FEMI FALANA after the arrest on Tuesday 19th May, 1992 is unlawful and unconstitutional in that it violated his fundamental rights.
3. N5 million damages for unlawful and unconstitutional arrest of the Applicant.
4. N10 million damages for unlawful and unconstitutional detention of the Applicant.
5. AN ORDER releasing the Applicant.
6. AND for such further or other Orders as the Honourable Court may deem fit to make in the circumstances.

There is an Affidavit of five (5) paragraphs sworn to by Chief Gani Fewehinmi. There is also an Affidavit of Urgency of seven (7) paragraph sworn to by the wife of the Applicant Mrs. Olufunmilayo Falana. It was alleged the Applicant is one of the Leaders of Campaign for Democracy in Nigeria (CD) and the President of the National Association of Democratic Lawyers (NADL) and a Human Rights Activist and a Legal Practitioner. That at the first National Convention held on 2/5/92 in Jos after the Campaign on 19/5/92, the Applicant was arrested by the State Security Service men in a 504 Peugeot Car No. LA 2262 MF and taken to an unknown destination where he is now being detained. That the Applicant had not committed an offence either nationally or internationally against any Law. That the SSS men did not bring any warrant and that they did not produce any Detention Order for his arrest and detention. The Applicant had languished in detention since 19th May, 1992.

> "I made an Order that the Applicant be produced in Court on 4/6/92 and that the Respondents should not be granted bail or released forthwith. Here we are, the Respondents had failed to carry out the Court's Order... In pursuant to Order 2, 3, 4 and 6 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 and having fulfilled all condition i.e. affidavit in support, statement showing the reliefs sought and the grounds upon which they are sought, service of the application was duly effected on the Respondents but none of them filed a Counter Affidavit and none has appeared in Court either personally or by Counsel to oppose the application. Since the facts contained in the affidavit in support of the application are not contradicted, I accept them as true.

I have said earlier on that the Respondents have not appeared in Court and have filed no Counter Affidavit. It is safe in view of their silence to presume that they have no reason at all for holding the Applicant in custody. Fortunately Section 32 (1) and (2) and Section 33 of the 1979 Constitution are still intact. They are not suspended. An accused or an offender is entitled to his personal liberty except in the cases listed in Section 32(1). He is also presumed innocent until proved guilty by Section 33(5) of the same Constitution. An Offender is also entitled to fair hearing within a reasonable time-Section 33(1) of the Constitution.

Detention of the Applicant without any known cause or trial is a wanton abuse of the executive power. I find it difficult to believe that the Respondents could disregard the Court's Order to produce the Applicant in Court and to show cause. The Applicants should not be kept in custody at the pleasure of anyone in authority. I am satisfied the Applicant is entitled to the Declaration sought and to his freedom."
It is hereby DECLARED that:

1. The arrest of FEMI FALANA at his Chambers, at Obafemi Awolowo House, Obafemi Awolowo Way, Ikeja – Lagos on Tuesday 19th May, 1992 by armed officers of the State Security Service (SSS) is illegal and unconstitutional in that arrest violated his fundamental rights.
2. The Detention of FEMI FALANA after the arrest on Tuesday 19th May, 1992 is unlawful and unconstitutional in that it violated his fundamental rights.
3. N2,000 (Two Thousand Naira) damages for the unlawful and unconstitutional arrest of the Applicant is awarded.
4. N2,000 (Two Thousand Naira) damages for unlawful and unconstitutional detention of the Applicant is hereby awarded.
5. It is therefore ORDERED that the Applicant be RELEASED FORTHWITH.

It is this Court's view that the right to life, right to personal liberty, right to freedom of expression, thought, conscience and religion, right to lawful and peaceful assembly and association which are vital to the human existence and democracy in this nation cannot be compromised. On the other hand chaos and unruly behavior should be stamped out. It is not an instrument of civilization and the Rule of Law. No nation can thrive and progress without peace. All we do must be in moderation and the Orders of the Court must be obeyed. It is good for everybody and a pride to the executive, the governed and the Judiciary.

A copy of this Order shall be served on each of the Respondents.

PETER NEMI & ORS.

V

THE STATE

IN THE SUPREME COURT OF NIGERIA

CITATION
SC. 303/1990

MOHAMMED BELLO (CJN)
MUHAMMADU LAWAL UWAIS, JSC
SALIHU MODIBBO ALFA BELGORE
ABUBAKAR BASHIR WALI
MICHAEL EKUNDAYO OGUNDARE
EMMANUEL OBIOMA OGWUEGBU
YEKINI OLAYIWOLA ADIO

FRIDAY, 14TH OCTOBER 1994

Cited Cases:

Abbot v. Attorney-General of Trinidad (9) 1 N.L.R. 1342.
Adeyemi v. The State (1991) 6 NWLR (pt. 195) 1.
Alabi v. The State (1993) 7 NWLR (pt. 307) 511.
Attorney-General Anambra State v. Attorney-General of the Federation (1993) 6 NWLR (pt.302) 692.
Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 10 S.C. 1.
Attorney-General of Lagos State v. Dosumu (1989) 3 N.W.L.R. (pt. 777) 552.
Attorney-General of the Federation & Ors v. Sode & Ors (1990) 7.
Bello v. Attorney-General of Oyo State (1986) 5 NWLR (pt. 45) 828.
Bello v. Oyo State (1986) 2 NSCC 1257.
Catholic Commission for Justice and peace in Zimbabwe v. Attorney-General (unreported) No. S.C. 73/1993.
Commonwealth v. O'neal mass, 339 N.E. 2nd 676.
Dhlamini v. Carter (1968) (1) R.L.R. 136 (AD).
District Attorney v. Natson Mass, 411 NE 2nd 1274.
Josiah v. The State (1985) 1 NWLR (pt.1) 125.
Legal Practitioners Disciplinary Committee v. Fawehinmi (1985) 2 NELL 998.
Madukolu v. Nkemdilim (1962) 1 ALL NLR 587.
Mulin v. Administration, Union Territory of Delhi, Air (1993) S.C. 746.
Okoro v. The State (1988) 5 NWLR (pt.94) 255.
Onyema & Ors v. Oputa & Ors (1987) 2 N.S.C.C. 900.
People v. Anderson 439 p 2nd 880.
People v. Chessman 341 p 2nd 679.
Pratt v. Attorney-General for Jamaica (1993) 3 NLR 995.
Rajendra Prasad v. State of Uttar Predresh (1979) 3 SCR 78.
Riley v. Attorney-General of Jamaica (1993) I.A.C. 719.
Senator Adesanya v. President of the Federal Republic of Nigeria (1981) 5 S.C. 112.

Shed Singh v. State of Punjab (1983) 2 SCR 583, 582.
Smt Treveniben v. State of Gujarat (1989) 1 SC. J 383.
Sode v. Attorney-General of the Federation (1990) 1 NWLR (pt.128) 500.
Trevor Walker v. The Queen (1993) 3 N.L.R. 101 7.
Tukur v. Govt of Gongola State (1989) 3 NSSC 225.
Udo v. The State (1988) 3 NWLR (pt.82) 316.
Vattieeswaran v. State Tamil Nadu (1983) 2 S.C. 348.
Walker v. The Queen (1993) 3 NLR 1017.

Counsel:
Olisa Agbakoba for Appellants

MOHAMMED BELLO, (C.J.N): A very far-reaching constitutional question has been raised in the appeal. It is: having stayed in prison confinement under a sentence of death for such an unreasonable length of time, from 28th February, 1986 to date, it would amount to inhuman and degrading treatment contrary to section 31(1) (a) of the Constitution of the Federal Republic of Nigeria, 1979 to uphold and execute the sentence of death passed on the 3rd Appellant.

The facts relevant to the question may be summarized. The 3rd Appellant with four other persons were convicted of conspiracy to commit armed robbery and of armed robbery and sentenced to death on 28th February 1986. His appeal and the appeals of the three others were dismissed by the Court of Appeal on 29th March 1990. Further appeals to this court were filed on 26th April 1990. They have been in custody since their arrest on 9th September 1982. The delay in their trial, determination of their appeals and their non-execution were entirely caused by the due process of law and the Appellants have not in any manner whatsoever contributed to the delay other than by the exercise of their rights to invoke judicial process.

Because of the importance of the question raised as it relates to the constitutional right to life, the court invited all the Attorneys-General in the Federation, other than the Attorney-General of Lagos State, who is for the Respondent, and three learned counsel as *amici-curiae* to assist the court on the question. Eleven Attorneys-General and the three learned counsel responded to the invitation by filing briefs. However, due to the transport problem brought about by the strike of the Union of Petroleum and National Gas Workers, some of the Attorneys-General were unable to attend the Court at the hearing. We are indeed grateful to the learned *amici-curiae* of both the official and private Bars for the useful assistance they rendered to the Court in the briefs and oral submissions.

It is pertinent to state that the constitutional question had not been taken in the lower courts. It was raised for the first time here with the leave of the Court. In view of the circumstances, some of the *amici-curiae* have invited the Court to consider two preliminary issues. Firstly, whether the Court has jurisdiction to determine the question and secondly, whether the question is premature. Since the issue of jurisdiction has been raised, it is essential to deal with it first before any other issues on the constitutional question may be considered as any decision reached on the question without jurisdiction or in excess of jurisdiction would be abortive, null and void: *Onyema & ors v. Oputa & ors* (1987) 2 N.S.C.C. 900; *Attorney-General of the Federation & ors. v. Sode & ors.* (1990) 1 N.S.C.C 271; *Attorney-General of Lagos State v. Dosumu* (1989) 3 N.W.L.R. (Part 111) 552.

The submission of Chief Williams, SAN, covered both jurisdiction and prematurity. He posed the question: "Whether, in proceedings on appeal from a conviction for a criminal offence involving the death penalty or from a sentence of death, the Supreme Court has jurisdiction to entertain a complaint that it would be unlawful or unconstitutional to carry out the execution of the sentence on the ground of inordinate or inexcusable delay in doing so." After having reminded the court that it had in many cases held that in dealing with matters affecting fundamental rights, the Court would been over backwards to avoid technicalities and to decide question which were raised on the merit, he contended that it was important in this appeal to consider if the appellant relying on section 31 (1) (a) of the 1979 Constitution could properly raise the constitutional issue as a ground of appeal. The learned Senior Advocate answered this question in the negative. He contended that a complaint of inordinate or inexcusable delay in carrying out a sentence of death was no concerned with the exercise of judicial powers or jurisdiction of the court in respect of the charge of criminal offence against the convicted prisoner but it was only concerned with the alleged contravention of the constitutional or common law right of the convicted prisoners to a fair and humane treatment from the State. Relying on the judgement of Gubbay, C.J., in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General* (unreported) No. S.C. 73/1993 delivered on 24th June 1993, he submitted that the breach of the said legal right could not be a proper basis for a ground of appeal the conviction or sentence of the prisoner. It might, however, from the foundation of appropriate proceedings in a court of competent jurisdiction to stop or commute the execution of the sentence. He pointed out that jurisdiction to entertain complaints based upon a contravention of section 31(1) (a) is vested in the High Court pursuant to the provision of section 42 of the 1979

Constitution and this Court has no original jurisdiction to do so. He relied on *Pratt v. Attorney-General for Jamaica* (1993) 3 W.L.R. 995 and *Trevor Walker v. The Queen* (1993) 3 W.L.R. 1017 to show that most of the cases on matters of this nature in other common law jurisdictions arose in proceedings specially instituted for the purpose and not on appeals against conviction or sentence. He stated that the Appellant had jumped the gun and that the constitutional issue would arise after the appeal process had been completed.

Mr Sofola, S.A.N., did not deal with the jurisdiction and prematurity. His submission was confined to the constitutional question, the provisions of the Constitutions of some of the common law countries relevant to it and the several approaches of their courts in the determination of the question. He particularly referred to *Pratt v. Attorney-General for Jamaica* (supra); *Catholic Commission v. Attorney-General* (supra); *Riley v. Attorney-General of Jamaica* (1993) 1 A.C. 719; *Abbott v. Attorney-General of Trinidad* (9) 1 W.L.R 1342; *Dhlamini v. Carter* (1968) (1) R.L.R. 136 (AD); *Shed Singh v. State of Punjab* (1983) 2 SCR 583 and *Rajendra Prasad v. State of Uttar Predesh* (1979) 3 SCR 78. He urged the Court, in the event of upholding the conviction and sentence, to stay the sentence and to recommend that the Executive should review all cases of the prisoners awaiting execution with a view to commuting the death sentence or to carry out the execution where there has not been any appreciable delay. He also suggested that Criminal Procedure Act and Codes should be reviewed to make provisions for expeditious trials and appeals in capital offences.

In her brief, Mrs. Goje, the Attorney-General of Adamawa State, submitted that the Court was not competent to entertain the complaint of the infringement of section 31 (1) (a) of the 1979 Constitution and that a High Court was the proper forum for the determination of such complaint in accordance with the provision of section 42 of the 1979 Constitution and the Fundamental Rights (Enforcement Procedure) Rules 1979. She referred to *Pratt v. Attorney-General of Jamaica* (supra) where the proceedings commenced in the Supreme Court, which is equivalent to our High Court, under section 25 of the Jamaican constitution which is similar to our section 42. In the case of *Catholic Commission v. Attorney-General* (supra), the learned Attorney-General pointed out that section 24 of the constitution of Zimbabwe conferred original jurisdiction on their Supreme Court, unlike our Court, to entertain application relating to the infringement of fundamental right.

The Attorney-General of Anambra State was *ad idem* with his colleague of Adamawa State in distinguishing the *Jamaican* and Zimbabwe situations

from our own and in his submission that the proper approach to the constitutional question was for the Appellant to institute an application for the enforcement of his fundamental right before a High Court under section 42 of the Constitution.

Mr. Uzoukwu, the Attorney-General of Imo State, took a different approach in his Brief. Referring to section 6 (6) (a) and 213 (2) (c) of the 1979 Constitution; section 26 and 30 (2) of the Supreme Court Act and *Bello v. Attorney-General of Oyo State* (1986) 5 N.W.L.R. (Part 45) 828 he contended that the court has the power to commute the sentence of death on appeal if it found the constitutional right of the Appellant under section 31 (1) (a) had been infringed. He further contended that even if there was no express provision enabling the Court to commute the death sentence, the Court should invoke the doctrine of *"ubi jus ibi remedium"* to exercise its inherent power to assume jurisdiction for commutation.

In his Brief and Oral submissions, Mr. Esan, the Attorney-General of Ondo State referred the Court to sections 212, 213 of the 1979 Constitution and the decision in *Attorney-General of Anambra State v. Attorney-General of the Federation* (1993) 6 NWLR (Part 302); 692; *Madukolu v. Nkemdilim* (1962) 1 All NLR 587 and submitted that the Court has no original jurisdiction to determine the constitutional question and it could not properly do so on appeal when the matter had not been canvassed in the lower courts. He pointed out that unlike our Courts, the Supreme Court of Zimbabwe has original jurisdiction to entertain contravention of fundamental human rights and on that ground it decided the *Catholic Commission* case and the same consideration applied to *Pratt's* case.

The learned Attorneys-General of Bauchi, Kwara and Oyo State Mrs. Laweji, Sanni and Akande respectively rested their submissions on the immaturity of the constitutional question. They argued that where an Appellant, by his choice resorted to appeal, he could not complain of delay in his execution before the appeal was disposed of. They drew the attention of the Court to the fact that the issue relating to delay in both *Pratt* case and *Catholic Commission* case was taken in the Court having original jurisdiction on the issue after the convicts had exhausted their rights of appeal. Concluding, the learned Attorneys-General urged the Court to hold that the constitutional question in his appeal was premature.

Mrs. Wilson, Solicitor-General of Edo State expatiated the Brief of her Attorney-General that the issue in *Pratt* case was first heard by the Supreme Court of Jamaica in exercise of its original jurisdiction under section 25 of the Jamaica Constitution before the case went on appeal to the Privy Council. On the contrary, our Supreme Court has no original jurisdiction on

the question which section 42 of our Constitution vested in the High Court. She further contended that the constitutional question was premature since the Appellant has not exhausted the avenue of appeal and the sentence could not be lawfully carried out: *Bello v. Oyo State* (1986) 2 NSCC 1257. Mr. Aaghar, the Director of Public Prosecutions of Benue State supported the submission on the prematurity of the question and absence of the court's jurisdiction. Mr. Mahmoud filed a very impressive Brief on the constitutional question but did not touch the issue of jurisdiction. He urged the Court to commute the sentence to life imprisonment thereby implying the Court has jurisdiction.

In his Reply Brief to the submission of *amici curiae* on the issue of jurisdiction, Mr. Agbakoba based his contention on the proposition that inordinate delay in carrying out the execution of a death sentence constitutes inhuman and degrading treatment within the purview of section 31 (1) (a) of the constitution and that this Court can entertain a complaint concerning such proposition and give relic therefore in the course of an appeal against conviction and sentence though no such complaint was made in the lower courts. Learned counsel submitted that the Court was conferred with such jurisdiction by the 1979 Constitution and the African Charter on Human and People's Rights.

Mr. Agbakoba pointed out that in the exercise of its appellate jurisdiction under section 213 (2) (c) of the Constitution, this Court has always entertained and given relief for complaints of violations of fundamental rights enshrined in our Constitution raised for the first time in the court on appeal in criminal matters where the violation arose from or was constituted by the conduct of the proceedings in the lower courts or arose therein as a collateral issue. He cited *Alabi v. The State* (1993) 7 NWLR (Part 307) 511; *Adeyemi v. The State* (1991) 6 NWLR (Pt. 195) 1 and *Okoro v. The State* (1988) 5 NWLR (Pt. 94) 255 on the presumption of innocence guaranteed by section 33 (5); also *Josiah v. The State* (1985) 1 NWLR (Pt. 1) 125 and *Udo v. The State* (1988) 3 NWLR (Pt. 82) 316 relating to the right to counsel to buttress his argument. He indicated a common feature to all these cases, namely the fundamental rights violations were *intrinsic* to the proceedings of every case and could therefore properly form the basis of *appeal* from those proceeding. He distinguished these cases with common *intrinsic* feature from *Trevor Walker v. The Queen* (supra) wherein, he contended, the human rights violation complained of was *extrinsic* to the adjudication before the Jamaican Court of Appeal as the complaint was based on a delay occurring after the decision of that court on the conviction. He submitted that the human rights violation complained

of by the Appellant herein was *intrinsic* to the adjudication in the Court of Appeal and could therefore be raised for the time in a criminal appeal against such adjudication to this Court. Since the inhuman and degrading treatment in the instant case arose from and was constituted by the inordinate delay in the conduct of the proceedings in the Court of Appeal, contended learned counsel, it could legitimately form the basic of an appeal to this Court. He surmised that section 213 (2) (c) of the Constitution has vested on the Court appellate jurisdiction against violation of all fundamental rights including section 31 (1) (a) guaranteed in Chapter (IV) of the Constitution.

In the alternative, Mr. Agbakoba also submitted that the Court could assume jurisdiction to determine the complaints of "cruel, inhuman or degrading punishment and treatment" contrary to Article 5 of the *African Charter* On *Human And Peoples* Rights which forms part of our domestic law by the African Charter On Human and People Rights (Ratification and Enforcement) Act, Cap 10 of the Law of the Federation of Nigeria 1990. He argued that the human rights guaranteed by the Charter were independent of the fundamental rights enshrined in our Constitution to which the submissions of *amici curiae* relating to the enforcement procedure provided by section 42 of the 1979 constitution were restricted. He stated that although section 1 of the Act required "all authorities and persons exercising legislative, executive or judicial powers" to give the Charter recognition and effect, neither the Act nor the Charter made any provision for the enforcement of the rights by our domestic courts. He argued that like any other domestic law, the rights under the Charter might be enforced by other judicial process and that the procedure for the enforcement of fundamental rights prescribed by section 42 was only permissible and it did not exclude the prerogative remedies of *habeas corpus; mandamus, certiorari* and prohibition.

In conclusion, he submitted that the Court should fill the gap created by the absence of enforcement process in the African Charter in favour of the 3rd Appellant by assuming jurisdiction; that ambiguities and lacunae in penal and fundamental rights provision were usually interpreted to save jurisdiction which the court guarded jealously and would only decline where there was express denial of jurisdiction; *Sode v. Attorney-General of the Federation* (1990) 1 NWLR (Pt 128) 500.

I am inclined to agree with Mr. Agbakoba that the provision of section 42 of the Constitution for the enforcement of the fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights. The object

of the section is to provide a simple and effective judicial process for the enforcement fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the Fundamental Rights (Enforcement Procedure) Rules, 1979. It must be emphasized that the section does not exclude the application of the other means of their enforcement under the common law or statutes of rules of courts. There are contained in the several Laws of our High Courts, for example section 18, 19 and 20 of the High Court of Lagos State relating to *mandamus, prohibition, certiorari,* injunction and action for damages. A person whose fundamental right is being or likely to be contravened may resort to any of these remedies for redress.

However, I am unable to agree with Mr. Agbakoba that because neither the *African Charter* nor its Ratification and Enforcement Act has made a special provision like section 42 of the Constitution for the enforcement of its human and peoples rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitutional and all other laws relating thereto. The following may particularly be mentioned:

(1) "(6) The judicial powers vested in accordance with the foregoing provision of the section –

(a) X X X

(b) Shall extended to all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;"

section 6 of the Constitution.

(2) Section 236 of the Constitution also provides:

"236 (1) Subject to the provisions of the Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty

liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person."

(3) Section 230 of the Constitution as modified buy the Constitution (Suspension and Modification) Decree, 1993, the Federal High Court has exclusive jurisdiction in Civil cases or matters arising from, *inter-alia*:-

"(r) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies; and

(s) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

Provided that nothing in the provisions of paragraphs (q), (r) and (s) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."

It is apparent from the foregoing that the human and people rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court. However, the question whether this court has jurisdiction to entertain for the first time on appeal the complaint of the 3rd Appellant that the delay in the execution contravened his right not to be subjected to cruel and degrading punishment or treatment under Article 5 of the African Charter remains to be answered. I shall do so in due course.

It has long been the cardinal principle of our constitutional law that on account of the unique character and diversity of our Constitution, the courts should always endeavour to find solutions to constitutional question within the Constitution through its interpretation but the courts may seek guidance as persuasive authorities from the decision of the courts of other common law jurisdictions on the interpretation and construction of the provisions of their Constitutions which are *in pari materia* with the relevant provisions of our Constitution: *Senator Adesanya v. President of the Federal*

Republic of Nigeria (1981) 5 S.C. 112 and *Attorney-General of Bendel State v. Attorney-General of the Federation* (1981) 10 S.C. 1.

There is almost a general consensus by the *amici curiae* that the Court lacks jurisdiction to determine the constitutional question on the ground that it is not a matter within the appellate jurisdiction of the court when it was not canvassed and decided by the lower courts and the appellate process which the Appellants invoked has not been completed.

It appears to me that upon careful examination of the fundamental rights in Chapter IV of the Constitution, they may be classified into two categories for the purpose of their observance and enforcement. Firstly, there are the right which must be observed whenever the occasion for their observation has arisen. Endorsing the submissions of Mr. Agbakoba, they are *intrinsic* to the *occasion* and cannot be divorced from the *occasion.* They are generally procedure rights and are embodiment of a fair trial in courts and tribunals of a democratic society. Thus the right to fair trial and the right of the accused to defend himself under section 33 of the Constitution are *intrinsic* to the *trial* and failure to observe such right is a valid ground of appeal: *Jossiah v. The State* (supra), *Udo v. The State* (supra) and *Legal Practitioners Disciplinary Committee v. Fawehinmi* (1985) 2 NSCC 998.

The second category of the fundamental rights comprise of those rights that are enforceable by the High Courts under section 42 of the Constitution. Because the Constitution expressly confers original jurisdiction for their enforcement on High Court, this Court has no jurisdiction as a court of first instance over them; see *Tukur v. Government of Gongola State* (1989) 3 NSCC 225 for alleged contravention of the rights of fair hearing, freedom of movement and wrongful detention guaranteed by section 33 (1), 32 (1) and 38 (1) of the constitution.

Now, to which of the two categories does the right not to be subjected to inhuman or degrading treatment under section 31 (1) (a), the subject matter of the constitutional question, belong? I think it is germane to the issue to examine the cases on subjection to inhumanity decided by the courts of the common law countries cited by learned counsel and to see the process for their adjudication.

Section 24 of the Constitution of Zimbabwe vests original jurisdiction on the Supreme Courts of that country as a court of first instance to determine breaches of human rights. In *Catholic Commission v. Attorney-General* (supra), the complaint of inordinate delay in the execution of the death sentence contravening section 15 (1), which is *in pari materia* with our section 31 (1) (a), was made in that court as a court of first instance

after it had dismissed the appeals of the appellants against conviction. The appellants there invoked the original jurisdiction of the court after they had exhausted their rights of appeal.

The proceedings in the case of *Riley v. Attorney-General of Jamaica* (1993) 1 A.C. 719 and *Pratt & ors. v. Attorney-General of Jamaica* originated in the Supreme Court of the country, which is equivalent to our High Courts. The convicts has formerly appealed against their convictions by the Courts to the Court of Appeal and later to the Privy Council. After the Privy Council had dismissed their appeals, they instituted fresh proceedings in the Supreme Court under section 25 of their constitution complaining of the inordinate delay constituting the subjection to inhumanity contrary to section 17 (1) of their constitution which is similar to our section 31 (1) (a). The decision of the Supreme Court on the fresh proceedings went on appeal to the Court of Appeal of Jamaica and thereafter to the Privy Council. In the same vein, *Abbott v. Attorney-General of Triniad* (supra) followed the same process.

It is worthy to note that a short-cut was taken in *Walker v. The Queen* (1993) 3 WLR 1017 where in an appeal against conviction from Jamaica the constitutional issue was raised for the first time. The Privy Council held it has no jurisdiction to entertain it.

The Constitution of India does not contain inhumanity provision at all but the Supreme Court has incorporated it into Article 21 which guaranteed right to life: *Mulin v. Administration, Union Territory of Delhi, Air* (1993) S.C. 746. In India, death penalty is not mandatory and the courts have discretion to pass it or a sentence of imprisonment and may take into account delay when deciding whether death sentence should be imposed. For this reason, the constitutional issue relating to delay may be raised for this first time in the Supreme Court on appeal against conviction and sentence: see *Vatheeswaran v. State Tamil Nadu* (1983) 2 S.C. 348. However, while an appellant has exhausted his right of appeal and the apex Court has confirmed the death sentence, he still has the right to apply to the Supreme Court by petition to stop the execution of the death sentence on the ground of delay occurring after its confirmation: *Smt Treveniben v. State of Gujarat* (1989) 1 SC.J 383 and *Sher Singh v. State of Punjab* (1983) 22 SC. R. 582. The Supreme Court of India has jurisdiction as a court of first instance to decide such petitions.

Perhaps the Supreme Court of the United States of America did not have the opportunity to decide the relevant inhuman constitutional issue because no decision of that Court has been referred to us. The decision of

the courts of the two States referred to us are not strictly relevant to the issue. In *People v. Chessman* 341 P 2nd 679, the convict was sentenced to death for first degree robbery by the Los Angeles County Court and the Supreme Court of California affirmed the conviction and sentence. Thereafter the United States Supreme Court on *certiorari* remitted the case to the State Supreme Court for review upon properly settled records. The note in the report shows that before the hearing of the review, the convict applied by motion to the Federal District Court for his discharge from custody on the ground that his confinement for eleven years pending execution of his death sentence was *"cruel"* and *"unusual treatment"* prohibited by Article 1 Section 6 of the Californian Constitution. The motion was denied and the denial was confirmed by the Californian Supreme Court in its judgment for review. It may be observed that constitutionality of capital punishment was not challenged in that case but it was subsequently challenged in *People v. Anderson* 439 P 2nd 880 wherein the Californian Supreme Court declared capital punishment cruel and unusual *punishment* contravening the said Article 1 section 6.

As is the case in India, the jury has discretion in Massachusetts State to impose death sentence or imprisonment for life depending on the circumstances of each case and their decision is appealable to the Supreme Court of Massachusetts. *District Attorney v. Watson Mass.,* 411 NE 2nd 1274 on appeal and *Commonwealth v. O'neal Mass.,* 339 N.E. 2nd 676 in advisory opinion where that Court held death penalty was cruel and unusual punishment contrary to Article 26 of the Massachusetts Constitution.

The afore-considered cases, except in a country where there is a right of appeal against death sentence, show that in those common law countries the issue similar to the constitutional question in our present appeal was taken in a court vested with original jurisdiction to adjudicate on the matter after the convict, where he had exercised his rights or appeal against conviction, and exhausted the rights. Where the court vested with the original jurisdiction is not the Apex Court, such adjudication would only come to it by way of appeal from the lower court.

Now, at present this court has no original jurisdiction at all. The sentence of death for the offence of armed robbery contrary to section 402 (2) (a) of the Criminal Code (Amendment No. 1) Law 1980 of which the Appellants were convicted is mandatory. Section 30 of the Constitution authorizes imposition of death sentence by a court of competent jurisdiction and, unlike India, the appellate jurisdiction of this court under section 213 of the constitution does not include appeal against sentence of death. Like

the Privy Council in *Walker v. The Queen* (supra), this Court is not vested with original jurisdiction to stop the Executive from carrying out the execution of a sentence of death. I hold that the question of whether or not execution of the Appellant would infringe their constitutional rights is a matter for determination by the High courts upon which section 42 of the Constitution confers jurisdiction.

Accordingly, the jurisdiction of this Court to determine the constitutional question will only arise on appeal after a High Court has considered and adjudicated on the issue and the Court of Appeal confirmed or reversed the decision of the High Court. It will be unconstitutional for this Court to assume jurisdiction and decide the question as contended by Mr. Agbakoba.

I should like to reiterate our gratitude to the learned *amici curiae* for the research, industry and learning in their submissions on the constitutional question. Although it has turned out that the Court cannot in this appeal determine the question, nevertheless their effort has not been in vain. They have alerted the court to appreciate the gravity and constitutional importance of the question. It is anticipated that the occasion for its determination is likely to be presented soon. Inspite of the importance of the constitutional question, it is surprising that Dr. Onagoruwa, the then Attorney-General of the Federation and Minister of Justice did not respond to the Court's invitation to him to file a brief on it and appear as an *amicus curiae*.

1. **PUNCH NIGERIA LIMITED**
2. **BOLA BOLAWOLE (Editor, Punch Newspaper)** } **APPLICANTS**

V

1. **ATTORNEY-GENERAL OF THE FEDERATION**
2. **INSPECTOR-GENERAL OF POLICE**
3. **COMMISSIONER OF POLICE (LAGOS STATE COMMAND)** **RESPONDENTS**
4. **STATE SECURITY SERVICE**
5. **CHIEF OF ARMY STAFF**

FEDERAL HIGH COURT, NIGERIA

CITATION

SUIT NO. FHC/L/CS/601/94

T. A. ODUNOWO, J.

FRIDAY 29TH JULY, 1994

Cited Cases:

Bedding Holdings Ltd v. N.E.C. (1992) 8 NWLR (Pt.260) 428 at pg 436 paras E to F.
Ceekay Tradens Ltd v. G.M. Co. Ltd. (1992) 2 NWLR (pt. 222) 132.
Dr Olu Onagoruwa v. IGP (1991) 5 NWLR (pt. 193) 593 at pg 650 paras B to E.
Eleso v. Govt of Ogun State (1990) 2 NWLR (pt. 133) 420 at pgs 437 and 443.
Eseigbe v. Agholo (1993) 9 NWLR (Pt.316) 128 at page 158 paras B to D.
Govt. of Lagos State v. Ojukwu (1986) 1 NWLR (Pt.18) 621 at pg 627, 647.
Kalu v. Mbuko (1988) 3 NWLR (pt.80) 86 at page 105 paragraph G.
Liversidge v. Anderson (1942) A. G. 206 at page 244.
Nwankwo v. The State reported on page C138 of The Nigerian Law of the press under the Constitution and the Criminal Law (1988).
Odogwu v. Odogwu (1992) 7 NWLR (pt.253) 344 at pg 355 paras G to H.
Olisa Agbakoba v. Director, State Security Services & Anor CA/L/225/92.
Onagoruwa v. I.G.P. (1991) 5 NWLR (pt.133) 593 at pg 647 paras E to G and pgs 650 to 651 paras A to F.
Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt.184) 157 at pg 202 paras D to G.
Ransome-Kuti v. A.G. Federation (1985) 2 NWLR (pt.6) 211.
Rookes v. Barnard (1964) 1 ALL E.R. 367 at pg 410.
The Federal Minister of International Affairs & ors v. Shugaba Abdurrahman (1982) 3 NCLR 915 at pg 928.
Tukur v. Government of Gongola State (1989) 4 N.W.L.R (pt. 117) pg 592.
Uzokwu v. Igwe Ezeonu (1991) 6 NWLR (pt 200) 700 at pg 753 paras C to D.

Counsel: Chief Gani Fawehinmi for Applicants

JUDGEMENT

This is one of the civil right cases that have been trickling into this Court since the advent of the present military administration. Present trends indicate that the trickle may soon develop into a flood unless serious attention

is paid to due process of law. Be that as it may, on 14 June, 1994 the applicants – *Punch* Nigeria Limited and its editor, Mr. Bola Bolawole – were granted leave to enforce their fundamental rights pursuant to sections 42 (1) and (2) of the 1979 Constitution as amended by Decree No. 107 of 1993; Order 1 rule 2 (1) (3) and (6) and Order 4 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 and under the inherent jurisdiction of the court as preserved by section 6 (6) of the 1979 Constitution as amended by Decree No. 107 of 1993. Leave was also granted for all the processes meant for service on the Inspector-General of Police, Commissioner of Police (Lagos State Command), State Security Service and Chief of Army Staff, who respectively are 2nd, 3rd, 4th and 5th respondents, to be served on the office of the Honourable Attorney-General of the Federation, the 1st respondent herein. In addition, the respondents, their officers, agents, servants privies or otherwise howsoever were directed to produce the 2nd applicant before this court on 20 June, 1994 and show cause why he should not be released. The exparte motion was supported by a Statement pursuant to Order 1 rule 2 (3) of the Fundamental Right (Enforcement Procedure) Rules, 1979 containing the names, address and description of the applicants, the reliefs sought by the applicants and the six grounds upon which the reliefs are sought, namely:

(i) That the applicants under the constitution and laws of Nigeria are entitled to own property and impart and disseminate news, information and ideas to the general public.

(ii) That the interference by the respondents with the applicants rights to publish information amounts to an infringement of their constitutional rights under section 36 of the 1979 Constitution and Articles 1 & 9 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990.

(iii) That the interference by the respondents with the 1st applicant's exercise of its right of ownership of property amounts to an infringement of their Constitutional rights under section 40 of the 1979 Constitution and Articles 1 & 14 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990.

(iv) The detention or confinement of the 2nd applicant within the premises of the 1st applicant or any other place is a violation of his constitutional rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 5, 6, 9 and 12 of the African Charter on Human and People's Rights (Ratification and

Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990.

(v) The applicants are entitled to remedy of injunction restraining the respondents either jointly or severally from the unlawful violations of their constitutional and legal rights.

(vi) The applicants are entitled to remedy by way of damages against the respondents for the unlawful violations of their constitutional and legal rights which have resulted in serious injury and will result in more injuries to the applicants. The Statement is supported by a verifying affidavit which was deposed to by Mr. Ademola Osinubi, Editor-in-Chief. The essential facts of the said affidavit may be distilled as follows.

The 1st applicant is a publisher of various newspapers including *Daily Punch, Sunday Punch, Saturday Punch and Top Life Magazine.* At about 3 a.m. in the early hours of Saturday 11 June 1994 twenty (20) State Security Service (SSS) operators accompanied by eighteen (18) fully armed mobile policemen invaded and sealed up the entire premises of the 1st applicant while they were in the process of completing the production of the 11 June edition of the Saturday Punch. All the workers were rudely interrupted by the SSS operators and mobile policemen and immediately put an end to all their operations. They did not stop there. They ordered all the staff to stand still and not to move out of the premises. Between 3 a.m. and 11 a.m. the entire staff were forcefully and apparently unlawfully detained there. By 11 a.m. all the staff except the 2nd applicant were allowed to leave; he was compelled against his wish to remain in his office under the vigilant guard of over fifty (50) fully armed policemen and plainclothes security operatives. Up to that time no reason whatsoever was proffered for this invasion, the siege and the closure of the 1st applicant's premises. What is more, no search warrant was shown to the applicants

As a result they have not been able to pursue their legitimate publishing business. Meanwhile, their machines and other equipment have remained idle while advertisement fees worth millions of naira already collected from various persons under contract could not be executed. All these events are happening in twentieth century Nigeria that is assumed to be forging a democratic ethos for the past decade. Satisfied with the compelling facts contained in the verifying affidavit, I was obliged to grant the applicants leave to enforce their fundamental rights in terms of Order 2 rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979

and I also directed that all the papers be served on all the respondents through the Honourable Attorney-General. The application was therefore postponed to 20 June, 1994 for service of all necessary papers and to enable the respondents furnish any defence they wish to put forward. By the motion on notice which was filed in the Registry of this court on 16 June, 1994, the applicants are now seeking the following reliefs, and I quote:

1. A DECLARATION that the invasion, search, without a warrant, sealing-up, seizure and/or occupation or the 1st Applicant's business premises located at No. 1 Kudeti Street, Onipetesi, Ikeja Lagos State and the consequent stoppage of the Applicant's lawful business by the Respondents, their officers, agents servants and/or privies or otherwise howsoever constitute a gross violation of the Applicants' Fundamental Rights guaranteed by sections 36 and 40 of the 1979 Constitution and Articles 9 and 14 of the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of Federation of Nigeria 1990.
2. A DECLARATION that the continued sealing-up, seizure and/ occupation of the 1st Applicant's business premises located at No. 1 Kudeti Street, Onipetesi, Ikeja, Lagos State and the consequent stoppage of the Applicants' lawful business by the Respondents, their officers, agents, servants and/or privies or otherwise howsoever constitute a violation of the Applicants right guaranteed by sections 36 and 40 of the 1979 Constitution and Articles 9 and 14 of the African Charter on Human & Peoples Rights (Ratification and Enforcement) Act, Cap. 10 Laws of Federation of Nigeria 1990.
3. A DECLARATION that the forceful detention and/or confinement of the 2nd Applicant within the premises of the 1st Applicant at No. 1 Kudeti Street, Onipetesi, Ikeja, Lagos State or any other place he may be subsequently taken to by the Respondents their officers, servants, agents, privies or otherwise howsoever constitute a gross violation of the 2nd Applicant's rights guaranteed under Sections 31, 32, and 38 of the 1979 Constitution and Articles 5, 6, 9 and 12 of the African Charter on Human & Peoples Right (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria 1990.

4. A MANDATORY ORDER compelling the Respondents, whether themselves or their officers, agents, servants, privies or otherwise howsoever to forthwith vacate the business premises of the 1st Applicant.
5. A MANDATORY ORDER compelling the Respondents, whether themselves or their officers, agents, servants, privies or otherwise howsoever to forthwith release the 2nd Applicant.
6. AN INJUNCTION restraining the Respondents their officers, agents, servants, privies or otherwise howsoever from continuing to seal-up and occupy the business premises of the Applicants or in any other manner preventing the Applicants from carrying out their lawful business.
7. N500,000,000.00 (Five hundred Million Naira) being damages against the respondents for the illegal and unconstitutional sealing-up, invasion and subsequent stoppage and/or disruption of lawful activities of the 1st Applicant.
8. N5,000,000.00 (Five Million Naira) being damages for unlawful detention of the 2nd Applicant.
9. SUCH further order or other orders as this Honourable Court may deem fit to make in the circumstances of this. The learned counsel for the applicants concluded his prayer by saying that "ALSO TAKE NOTICE that the said Hon. Justice Odunowo has ordered the Respondents, their officers, agents, servants, privies or otherwise, howsoever to forthwith vacate the business premises of the 1st Applicant ..... Pending the hearing and final determination of the motion on Notice." When I drew Chief Fawehinmi's attention to this portion of his application, he admitted that it was an error for which he readily offered his apology. Although I was satisfied with his explanations I thought attention should be drawn to this lapse so as to preserve the accuracy of the record. When the court reconvened for trial of the action on 20 June, 1994 the defendants were all absent but there was no doubt the necessary papers had been served on them through the 1st respondent, the Honourable Attorney-General of the Federation. I came to this conclusion because his representative, one E. O. Omonowa, addressed a letter to this court and I quote:

"The Registrar Court 2
Federal High Court,
Lagos.

Ref. No. MJ/CIV/242/94/11
Date: 17th June, 1994.

RE. SUIT NO FHC/L/CS/601/94

PUNCH NIGERIA LIMITED AND OTHER
AND
ATTORNEY-GENERAL OF THE FEDERATION AND 4 OTHERS

This office represents the Attorney-General of the Federation and I am the State Counsel assigned to handle this matter which is coming up before your Lordship on 20th June, 1994.

Unfortunately, on that date, I have definite hearing before your learned brother in Court 5, Lagos High Court in suit No. LD/155/92, between Adelani Adenuga and others against the Attorney-General of the Federation.

The said definite hearing is for arguments on the Enforcement of the Applicants fundament Right and address on the committal proceeding against the Honourable attorney-general of the Federation, in the same suit.

In the circumstance, may I humbly ask for a short adjournment to enable me appear for the Hon. Attorney-General of the Federation. Subject to the convenience of this Honourable Court, may I suggest any of the following dates: 30/6/94, 5/7/94 or 7/7/94.

Thanks for your usual cooperation.

E. O. OMONOWA
For: Hon. Attorney-General of the Federation and Minister of Justice"

When that letter was read in open court, Chief Gani Fawehinmi strenuously opposed the application for an adjournment, although he expressed his delight that the 2nd applicant had been released from illegal detention. I shall have more to say about this letter in due course. He then proceeded to adduce some weighty reasons why he opposed to the application for adjournment. The letter itself was written by a state Counsel, and not by the Director of Civil Litigation Mr. Ayoade. The Attorney-General's

Chambers have the largest array of legal practitioners in this country; in fact they have more than 100 lawyers and Chief Fawehinmi has only 24 legal practitioners in his chambers. He characterized the reason given for the adjournment as stereotyped, puerile and flimsy because the writer has not told the court no other lawyer is available to handle the matter. It is trite law that the Hon. Attorney-General has the authority to brief counsel to appear on his behalf. He directed my attention to the recognition of this practice by the Supreme Court as fortified by the case of *Tukur v. Government of Gongola State* (1989) 4 N.W.L.R. (Part 117) page 592. Chief Fawehinmi further argued that the dates suggested show the callous contempt of the Hon. Attorney-General to further punish the newspaper because the three dates suggested are too far away, especially as the paper is losing about N5 million every week. In any event, order 2 rule 2 shows that the motion must be heard within 14 days. There is no counter-affidavit to the application which would show seriousness of the Honourable Attorney-General. They have not said they were not served in time and no reasons have been given for the closure of the publishing house. Hence Chief Fawehinmi urged me to reject the application for adjournment because it was not brought in good faith. Finally, he asked for costs of N7,000 if the court was inclined to accede to the respondents' request.

It must be recalled that the grant of an adjournment is in the discretion of the court. Nevertheless such discretion must be exercised judiciously and judicially in the interest of all parties as we were recently reminded by the Supreme Court in the case of *Ceekay Traders Ltd. v. G. M. Co. Ltd* (1992) 2 NWLR (part 222) 132. Consequently I was convinced that the respondents should be given ample opportunity, within the law, to put forward any defence they may wish to rely upon in opposing the present application. I did not stop there. In addition I directed the Registrar of this Court, Mr. Kalu I. Obasi, to advise the Attorney-General's Chambers that the hearing of the application shall commence on 28th, June 1994 so as to ensure that the Rules governing this application are faithfully complied with, and I also made an order that cost shall be in the cause. By a letter dated 21st June, 1994 the Registrar addressed a letter to the respondents as directed, and I quote the relevant and sole paragraph thereof.

> "With reference to your letter of June 1994, requesting for an adjournment in the above named suit, I am directed to inform you that the case has been adjourned to 28th day of June, 1994 for the commencement of the application.

I am
Yours Faithfully,
KALU I. OBASI
REGISTRAR"

Surprisingly when the court reconvened on 28th June 1994 both the respondents and their counsel were absent. In the result, this court was left with no alternative but to allow the learned counsel for the applicants to proceed with his application. In moving the application, Chief Fawehinmi submitted that the invasion and the sealing up of the 1st applicant's premises on 11 June 1994 was a violation of the fundamental rights of the 1st applicant which is contrary to section 36 of the 1979 Constitution as restored by the present administration in Decree No. 107 of 1993. It also violates Articles 9 and 14 of the African Charter on Human and People Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990.

The second declaration is that the continuing presence of armed policemen preventing the 1st applicant from carrying out or carrying on its constitutional duties also violates the provisions of these laws. Furthermore, the detention of the 2nd applicant amounts to a violation of his fundamental rights under sections 31, 32 and 38 of the 1979 Constitution. The applicants are also seeking a mandatory order compelling the armed policemen to leave the premises, and also an injunction restraining the respondents, their servants, agents and privies from further sealing up or any way howsoever from preventing the applicants from performing their rights to inform the public under section 36 of the 1979 Constitution. In addition, the applicants are asking for N500 million as damages in respect of the 1st applicant and N5 million in respect of the 2nd applicant for these unjustified and unjustifiable violations of their fundamental rights.

Chief Fawehinmi emphasized the fact that there is a 13 paragraph affidavit in support of the application and it was deposed to by Mr. Ademola Osinubi, Editor-in-Chief, on 13 June 1994. There is no counter-affidavit controverting any of the assertions deposed to therein. He therefore urged me to rely on the 13 paragraphs of the affidavit of Mr. Ademola Osinubi as uncontroverted and reliable. He buttressed this submission with these cases. (1) *Bedding Holdings Ltd v. N. E. C.* (1992) 8 NWLR (Part 260) 428 at page 436 paragraphs E to F. (2) *Odogwu v. Odogwu* (1992) 7 NWLR (Part 253) 344 at page 355 paragraphs G to H and (3) *Uzokwu v. Igwe Ezeonu* (1991) 6 NWLR (Part 200) 700 at page 753 paragraphs C to D.

In elaborating his submission, Chief Fawehinmi pointed out the implications of the present application: The sealing up and occupation of

the premises and business of the 1st applicant are not justified by any law. There is no offence adverted to by the respondents to have been committed by both the 1st and the 2nd applicants. There is no Decree proscribing the 1st applicant or any of its newspaper or magazines. What took place on 11 June, 1994, and what is still taking place, in the premises of the 1st applicant are outside the confines of the law and are therefore lawless acts. Consequently it is the duty of the third arm of government, pursuant to its constitutional authorities under section 6 (6) of the 1979 Constitution to call the Executive to order by invoking its authority under section 42 (2) of the 1979 Constitution. The efficacy it deserves is contained under section 251 (3) thereof. The decision of this court in this matter will be enforced because the constitution says so. He referred to three important authorities of the Supreme Court in this regard: (1) *Eleso v. Govt. of Ogun State* (1990) 2 NWLR (Part 133) 420 at pages 437 and 443. He observed that the police and SSS operatives who are occupying the premises are functionaries of the Executive; they can only do so armed with the law of the land. Otherwise they will be acting outside the law. A situation must not be created where an ordinary citizen of this country will resolutely believe in the chaotic maxim that in a state of lawlessness it is illegal to be law abiding. That is the road to an uncontrollable instability and a total breakdown of law and order.

That was why Olatawura, JSC (as he then was) sounded a note of warning in the case of (2) *Osho v. Foreign Finance Corporation* (1991) 4 NWLR (Part 184) 157 at page 202 paragraphs D to G. It is the taxpayer that bears the burden of government recklessness. Therefore, no judicial language will be too strong to condemn this act of executive barbarism, and he cited the case of (3) *Govt. of Lagos State v. Ojukwu* (1986) 1 NWLR (Part 18) 621 at page 627. Chief Fawehinmi placed considerable emphasis on the words "crooked cord of executive discretion" – as used in that judgment in the relevant passage which he read aloud in open court. He reiterated the view that this case shows how dangerous, painful and unacceptable for a notion to be ruled by whims and caprices instead of by the rule of law. The rationable is that everyone will order his activities within the certainty of the recognized norms of the society thereby engendering peace, order and good government.

He pointed out that the press has a special provision within section 36 if one looks at the marginal note. Chief Fawehinmi made it quite clear that it is not part of his submission that the press must operate outside the law. His contention is that the press operates within the law and in this particular case *The Punch* has done so. As he saw the situation, it is those

who are averse to the fundamental right accorded *The Punch* under section 36 of the 1979 Constitution that have taken the law into their own hands by invading the place so that they may not hear the truth. He submitted that the approach taken by the respondents is against the principles laid down by the Court of Appeal in the case of *Nwankwo v. The State* which is reported on page C138 of his book, *The Nigerian Law of the Press under the Constitution and the Criminal Law* (1988). Furthermore, I was referred to the epochal and monumental statement of Niki Tobi, JCA in the significant case of *Dr. Olu Onagoruwa v. IGP* (1991) 5 NWLR (Part 193) 593 at page 650 paragraphs B to E, a pronouncement which he commended on me for adoption. In conclusion, Chief Fawehinmi urged me to grant the reliefs sought and award such damages that will deter the Executive from further embarking on what he described as this heinous, Hitlerite, despotic, totalitarian and lawless venture.

Soon after he concluded his address, Chief Fawehinmi expressed his desire to call one or two witnesses on the issue of damages. I acceded to this request conscious of the fact that such evidence would be of assistance to the court. In the end he called only one witness, Mr. Ademola Osinubi who described himself as the General Manager and Editor-in-Chief of *Punch* group of newspapers. He earns a gross annual salary of N320,000. In his capacity as General Manager, he is involved with the activities of the 1st applicant who are the publisher as four titles: *The Punch, Saturday Punch, Sunday Punch and the Top Life Magazine* which is a weekly. The 1st applicant's gross income of the four publications per week is in the neighbourhood of N2.4 million and their labour force consists of about 412 employees who receive in the aggregate a salary of about N1.8 million per month. So that every month the 1st applicant's gross income is about N9.6 million. The witness also testified that from 11 June, 1994 up till the time he gave evidence, they have not been allowed to earn a kobo. If the place is opened, they are bound to pay staff salaries for the period when the company was not allowed to operate. Because of the General Manager's evidence Chief Fawehinmi submitted that this court should take account of the value of our currency which continues to depreciate daily. He drew my attention to pages 650 and 651 paragraphs A to F of *Onagoruwa's* case which he had earlier cited to me. He pointed out that at the time of the invasion of the 1st applicant's premises, the amount was N9.6 million. As at the time he gave his address it could be something in the neighbourhood of N12 million. In the end he urged me to award an amount that will both reflect the real economic situation and also deter future occurrence.

Then on 15 July 1994 Chief Gani Fawehinmi sent me through the Deputy Chief Registrar of this Court, Mr. S. J. Adah, an additional list of authorities on behalf of the applicants. Which includes the very recent but yet unreported decision of the Court of Appeal in the case of *Olisa Agbakoba v. Director, State Security Services & Another* CA/L/225/92 which was handed down on 6 July, 1992 where E. O. Ayoola J.C.A. held on page 8 as follows:

> "Where the Constitution gives a right, and facts have been proved which *prima facie* show an infringement, it is for the person alleged to have infringed that right to justify the infringement and not for the person whose right has been infringed to exclude all circumstances of justification".

Incidentally this particular case had a few days before been published in *The Guardian* newspaper of 10 July 1994. Conscious of the fact that such a source cannot be regarded as authoritative I was just pondering over how to secure a certified copy from the court of Appeal when the copy from Chief Fawehinmi was delivered in my chambers. That is why I must commend him for his foresight and constructive initiative in this regard. The other five cases relate to the issue of exemplary damages. They are: (1) The celebrated decision of the House of Lords in *Rookes v. Barnard* (1964) 1 All E.R. 367 at page 410. (2) *The Federal Minister of International Affairs & Other v. Shugaba Abdurrahaman Darman* (1982) 3 NCLR 915 at page 928 (3) *Onagoruwa v. I.G.P.* (1991) 5 NWLR (Part 133) 593 at page 647 paragraphs E to G and pages 650 to 651 paragraphs F to A. (4) *Eseigbe v. Agholo* (1993) 9 NWLR (Part 316) 128 at page 158 paragraphs B to D and *Kalu v. Mbuko* (1988) 3 NWLR (Part 80) 86 at page 105 paragraph G. I only need to add that I have perused all these authorities to my grateful benefit.

The foregoing account represents the totality of the evidence adduced together with the submissions of the learned counsel for the applicants. The burden of the next few pages is to briefly evaluate the available evidence so as to determine the merit of the applicants' complaints. Before doing so, however, it is necessary to advert to some preliminary issues. First, the special procedure provided under the Fundamental Rights (Enforcement Procedure) Rules 1979 is that evidence should normally be by affidavit as was done in this case. This point was recognized by the Court of Appeal in the *Agbokoba* case as was explained by Ayoola, JCA, when he said at page 20 of the lead judgment, and I quote:

> "In the procedure under the Rules, the affidavits constitute the evidence. If the only affidavit evidence before the court or Judge is that of the complainant that is the material he should consider in order to determine the entitlement of the complainant. The other party to the application is not under any compulsion to file an affidavit ..... It will work injustice and defeat the whole purpose of enforcement of fundamental rights were a complainant to be deprived of a declaration of infringement of his right merely by reason of the fact that the other parties to the proceedings failed, despite all opportunities given them, to offer either affidavit or any evidence or appear to be heard on the application".....

Secondly, the essence of the present procedure is to afford any applicant a fast, cheap and less cumbersome remedy in an application of this nature. Thirdly, as the respondents have failed to file any counter-affidavit within the law, it follows that all the averments contained in the supporting affidavit must be taken as true. The invasion, search without a warrant, forcible seizure and occupation of the 1st applicant's business premises have been shown to be unlawful. The uncontradicted evidence is that these unlawful acts still persists. As far as I am aware, a state of emergency has not been declared in this country to warrant the seizure and occupation of the 1st applicant's business premises. Nothing has been put forward to justify the detention of the 2nd applicant. It has not been suggested that the 1st applicant committed any crime as to warrant the invasion of the fundamental rights to lawfully pursue their business as part of the fourth estate of the realm. Even if an offence was committed by them, the Government have a panoply of sanctions that could be inflicted on the company under the civil, and criminal laws of libel, obscenity, sedition etc. That such a course was not adopted against the applicants is a clear indication that there was no legal authority for the respondents' actions. In these days of massive unemployment and grave recession, it is unconscionable for any Government to adopt any action that is likely to disturb the economy well-being of over four hundred (400) of the citizens as happened in this case. For instance, one wonders why the Government did not take advantage of the remedies available under the Nigeria Press Council (NPC) which was recently set up by the military regime. Judging by the proceedings of the NPC under the very able chairmanship of the renowned journalist, Alhaji Alade Odunewu, as recently reported in the popular press, any reasonable observer will be highly impressed by the quality and effectiveness of its deliberations.

These violations cannot be justified on any of the grounds that the invasion of their rights was done in the interest of security, public safety, public order or public morality. Even if a state of emergency was declared, it is still incumbent on the government to pay due regard to the rule of law which implies that every person, including Ministers, Judges and other officials, is subject to the ordinary laws of the land. Be it recalled that at the height of the Hitlerite menace during the Second World War, Lord Atkin, after deprecating the attitude of some of his judicial brethren for being more executive minded that the executive, had this to say, and I quote:

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law". See *Liversidge v. Anderson* (1942) A. C. 206 at page 244. So important are these human right provisions that they are now part of our laws since Nigeria ratified the African Charter on Human and Peoples' Rights on 17 March 1983. Such fundamental rights stand above the ordinary laws of the land, as pointed out by Eso, J.S.C. (as he then was) in *Ransome-Kuti v. AG Federation* (1985) 2 NWLR (Part 6) 211. It follows that any violation of its provisions would in addition constitute a breach of international obligation.

Equally too, the respondents have not justified the forceful detention of the 2nd applicant for a couple of days. Hence both applicants have succeeded in establishing facts which *prima facie* show that their fundamental rights were infringed. In my own view, the respondents have failed to exclude any circumstances of justification as decided by the Court of Appeal in the very recent case of *Agbakoba* to which reference has already been made above. As contained in the Calliol statement of 1992:

"The judges bear particular responsibility for ensuring that all branches of government – the Legislature and the executive, as well as the judiciary itself – conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times but also during period of public emergency threatening the life of the Nation. It is at such times that the fundamental human rights are most at risk and when courts must be especially vigilant in their protection. It is vital that

the courts ensure that emergency powers be exercised, if at all, only to the extent, and for the limited time, demonstrated to be necessary". (vide page 58 of the *Journal of Human Rights Law Practice,* Volume 2, Number 3, November, 1992 published by the Civil Liberties Organisation). Based on the uncontradicted and uncontroverted affidavit evidence adduced before me as fortified by the oral testimony of the sole witness for the applicants which I accept, I am satisfied that the applicants have justified their right to the three (3) declarations sought by them. That being so, declarations 1, 2 and 3 as contained in their motion paper are hereby granted.

But before I consider the consequential orders sought by the applicants I must register some comments on the reaction of the respondents to this very important application. It will be recalled that the contents of the letter addressed to this court by the respondents' counsel have already been reproduced above in full. That letter was written on 17 June, 1994 i.e. two clear days before the date originally fixed for the hearing of the present application. Which is the period normally allowed between the service of a motion, in terms of order XXXIII rule 17 of the Federal High Court (Civil Procedure) Rules, 1976. Although the learned State Counsel had enough time to compose that letter yet he was unable to advise this court in a few words the nature of the applicants offence and the legal warrant for depriving them of their fundamental right to personal liberty, freedom of movement, the right to property, the right to impact and disseminate news, information and ideas to the general public as guaranteed by the 1979 Constitutional and the African Charter. Secondly, unless the court directs otherwise there must be at least eight (8) clear days between service of motion and the day fixed for hearing. However, the motion must be entered for hearing within fourteen (14) days after leave has been granted. The applicants obtained the fiat of the court on 14 June, 1994. It will thus be seen that the dates suggested by the learned state counsel in his letter under reference, i.e., 30/6/94, 5/7/94 or 7/7/94, are clearly outside the mandatory period stipulated under order 2 rules 1 and 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979. It is beyond my contemplation that a legal officer is not averse to violating mandatory procedural rules that were carefully fashioned out to protect the most valuable rights that are the subject of the present application.

Thirdly, instead of sending a copy of his letter directly to the learned counsel for the applicants, whose address is clearly reflected on the motion paper, Mr. Omonowa simply requested the court Registrar to inform the applicants' counsel who was not expected in court until 20 June, 1994.

This attitude plainly epitomizes the importance which he attaches to such a very important issue. Fourthly, by the time we resumed on 20 June, 1994, I was advised that the 2nd applicant had been released. However, the respondents did not issue any return to indicate the reason(s) why this gentleman was deprived of his liberty. One is therefore justified in concluding that the Respondents were aware that they had no lawful justification for their action.

Nonetheless, I took the precaution as earlier stated above, of directing the Court Registrar to advise them of the adjourned date of hearing. Which directive was duly implemented as borne out by the Registrar's letter already reproduced above. They simply chose to be absent. Those were the reasons that impelled me to proceed with the application on 28 June, 1994. To do otherwise would be tantamount to aiding and abetting a breach of the law. I have no doubt in my own mind that the respondents are guilty of illegal and excessive use of power. They had no legal authority for their action. At any rate, on defence has been advanced by them.

In the face of the cavalier and almost callous reaction of the respondents to the plight of the applicants the insistence of Chief Gani Fawehinmi for the award of exemplary damages is reasonably well understood. It is instructive to recount the words of Lord Denning MR. (as he then was) in similar circumstances when a horde of British tax officials, in collaboration with the British police, who were armed with a search warrant which was declared invalid for lack of particularity:

"A good end does not justify a bad means. The means must not be such as to offend against personal freedom and the privacy of individuals, and the elemental rights of property. Every man is presumed to be innocent until he is found guilty. If his house is to be searched and his property seized on suspicion of an offence, it must be done by due process of law. And due process involves that there must be a valid warrant specifying the offence of which he is suspected...." See *Rossminster* case (1979) 3 All E.R. 385.

In this instance, not only was a search warrant not issued before the invasion of the 1st applicant's premises and the detention of the 2nd applicant but also all the illegal activities were carried out at a most unreasonable hour, i.e. 3 a.m., on the day in question. Our constitution does not tolerate any state action against the citizen unless it is in conformity with the law. That is the essence of due process. As was pointed out by Oputa, J.S.C. (as he then was):

"There is no doubt that we are under a Military Regime but it is a regime that had pledged itself to observe and abide by the Rule of Law". The rule of Law presupposes:

1. That the state (including the Lagos State Government) is subject to the Law.
2. That the Judiciary is a necessary agency of the Rule of Law.
3. That Government (including the Lagos State Government) should respect the right of individual citizens under the Rule of Law.

See the celebrated case of *Government of Lagos State v. Chief Emeka Odumegwu Ojukwu* (1986) 1 NWLR (Part 18) 621 at page 647. Which is why exemplary damages are not unusually approved in cases of insolence, malice, cruelty and oppressive or callous conduct in the hope that the strength of the law will thereby be vindicated.

Much as the contention of Chief Fawehinmi appears to be adequately justified, I am not too convicted that I should adopt that approach in this case for these reasons. First, such an exemplary award will not serve any penological purpose that can be regarded as progressive. Secondly, an exemplary award will not be quite appropriate since restitution must inevitably be paid out of public coffers. Which will in turn be an indirect impost on the taxpayers of this great nation who are already going through the hoop. In any case, if exemplary damages must be awarded the trend of judicial authorities suggest that it should be moderate. Finally, the conduct of one wrongdoer does not permit the award of exemplary damages against other joint wrong doers in the absence of compelling evidence. See *McGregor* on *Damages* (Fourteenth Edition) at page 232 to 242, especially at paragraphs 326 to 334.

Military regimes by their very nature do not possess more than a nodding acquaintance with democracy. We must appreciate that it is not part of their tradition to impugn superior orders, let alone disobey them. That is why they deserve our sympathy in their abrupt but premeditated conversion from stratocracy to democracy. All the same it is to be expected that Government will aspire to respect its own laws, including court decisions. This expectation is all the more significant now that Nigeria is contemplating to invoke the jurisdiction of the world court over the claim made by the Republic of Cameroon to the Bakassi Peninsula which has always been regarded as part of Nigeria territory. Otherwise submission to the jurisdiction of a supranational judicial organ by Nigeria will only be accepted with mixed

feelings, if not outright skepticism, in view of the consistent history of defiance of her own domestic laws. More importantly, persistent disobedience of court orders puts the moral authority of the Government itself into question.

Nonetheless, in fixing the amounts which will be shortly announced, I must take into account the conduct of the parties, especially the fact that the 2nd applicant has since been released from illegal detention; the fate of the 1st applicant's employees (over 400 of them) whose monthly wage bill is nearly N2 million; the gross monthly income of the company which is approximately N10 million; the possibility that the 1st applicant may be liable to their clients for breach of advertisement contracts; the means of the parties and the frequently depreciating value of the naira. In other words, the awards must be such as would constitute a fair and balanced estimate of the injuries suffered by the applicants as a result of the respondents' unlawful conduct. With these considerations in mind, the 1st applicant is hereby awarded N25 million while the 2nd applicant is awarded N100,000. For the avoidance of doubt, it is hereby ordered as follows:

(1) The Applicants are hereby granted Declarations 1, 2 and 3 as contained in the motion paper filed herein.
(2) The Respondents, whether themselves or their officers, agents, servants, privies or otherwise howsoever, shall forthwith vacate the business premises of the 1st Applicant.
(3) The Respondents, their officers, agents, servants, privies or otherwise howsoever are hereby restrained from continuing to seal up and occupy the business premises of the 1st Applicant or in any other manner preventing the Applicants from carrying out their lawful business.
(4) The 1st Applicant shall be awarded N25 million (Twenty-five million Naira) being damages against the Respondents for the illegal and unconstitutional sealing-up, invasion and subsequent stoppage and/or disruption of lawful activities of the 1st Applicant.
(5) As the 2nd Applicant has already been released, prayer 5 on the motion paper is hereby struck out.
(6) The 2nd Applicant shall be awarded N100,000 (Hundred thousand Naira) being damages for unlawful detention of the 2nd Applicant. That will be the order of this court.

Pronounced in open Court at Lagos this 29th day of July, 1994.

MRS. BETTY MASON-CHIDEBE

V

1. **THE CHIEF OF GENERAL STAFF**
2. **THE ATTORNEY-GENERAL OF THE FEDERATION**
3. **THE INSPECTOR-GENERAL OF POLICE**
4. **THE DIRECTOR OF STATE SECURITY SERVICES**

HIGH COURT OF LAGOS STATE

SUIT NO. M/584/89

JUSTICE A. O. SILVA

TUESDAY 19TH DECEMBER, 1989

Cited Cases:

Agbaje v. Ibru Sea Foods Ltd. (1972) 5 SC. 50 at 55.
Alagbe v. His Highness Samuel Abimbola, the Oluwo of Iwo and ors (1978) 2 S.C. 39 at 40.
Ariori v. Elemo (1983) 1 SCNLR 1 at pg 28.
John Folade v. Attorney-General of Lagos State & 4 ors (1981) 2 NCLR pt 771 and 779.
Yinusa Saidu v. The State (1982) SC 41 at 69.

RULING

The Applicant is the mother of a little boy who was arrested in March, 1987 at New York International Airport for being in possession of substance suspected to be cocaine hidden in the false bottom of his travelling luggage. Apparently, the boy travelled alone, and when this discovery was made and the boy's arrest was effected, the Interpol Section of the Nigerian Police was contacted. The Applicant was informed and she went along immediately to the police at Alagbon Close, Ikoyi. She was arrested on the suspicion that she was involved in the export of cocaine by her young son. Since her arrest, the Applicant has not been released by the Police and no charge has been brought against her. She denied knowledge of any involvement in the alleged offence by her son, and explained to the Police that the bag with which her son travelled to the United States of America was a gift to her son by the Chairman of her employer Company, Aico Travels Limited. The said Chairman of her employer Company was arrested by the police.

The Applicant had languished in police and prison custody since March, 1987 a period of over two years before she became aware of her rights

under the Constitution of the Federal Republic of Nigeria. Consequently, upon an ex-parte application brought by her in October, 1989, I made an order on 6th November, 1989 extending the time within which she could bring the ex-parte application and also giving her leave to bring an application to enforce her fundamental right to personal liberty. Thereafter she filed the instant application pursuant to Orders 2, 3, 4, and 6 of the Fundamental Rights (Enforcement Procedure) Rules, 1979, claiming the following reliefs:

"(1) A DECLARATION that the continued detention of the Applicant, a LIBERIAN CITIZEN, at the Kirikiri Women Prisons without trial since March, 1987 by officers of the Federal Military Government of Nigeria is unconstitutional, unlawful, illegal, null and void.

(2) AN ORDER releasing the Applicant from detention at the said Kirikiri Women Prisons pending the commencement and determination of her trial for any offence or offences with which the Federal Republic of Nigeria may wish to charge her, upon such condition or condition (if any) as this Court may deem necessary to impose.

(3) AND for such further order or other orders as this Honourable Court may deem fit to make in the circumstances."

The application is supported by an affidavit of 12 paragraphs and a statement showing the reliefs sought and the grounds upon which they are sought, which are:

"(1) That the continued detention of the Applicant is not in accordance with the procedure permitted by law, and is not justified by any of the circumstances stated in Section 32 (1) (a) – (f) of the Constitution of the Federal Republic of Nigeria, 1979 as amended.

(2) That the continued detention of the Applicant for over two (2) years without trial is a gross and inhuman violation of her fundamental rights as preserved by Section 32 (1) and 33 (1) of the 1979 Constitution."

The facts narrated at the beginning of this ruling are the facts deposed to in the affidavit sworn to in support of the application.

Service of the application was duly effected on each of the four Respondents on 29th November, 1989, 30th November, 1989, 29th November, 1989 and 8th November, 1989 respectively, but none of them has filed a counter affidavit and none has appeared in Court either personally or by Counsel to oppose the application.

Since the facts contained in the affidavit in support of the application are not contradicted, I accept them as true – see *Agbaje vs. Ibru Sea Foods Limited* (1972) 5 S.C. 50 at 55, and *Alagbe v, His Highness Samuel Abimbola, the Oluwo of Iwo and others* (1978) 2 S.C. 39 at 40 cited by learned Counsel for the Applicant, Mr. Mike Ozekhome, who also submitted that the Applicant's detention for over two years is in violation of Section 33 (4) which says time and if not tried within a reasonable time he is entitled to walk free until the authorities are ready to bring him to trial – see *Yinusa Seidu vs. The State* (1982) S.C. 41 at 69; *John Folade vs. Attorney-General of Lagos State and 4 others* (1981) 2 N.C.L.R. Part 771 and 779.

Learned Counsel also submitted that the Applicant cannot waive her right to speedy trial which is an integral part of fair hearing even where he is aware of his rights but did not exercise it. This is so in view of the decision in *Ariori vs. Elemo* (1983) 1 S.C.N.L.R. 1 at page 28. He urged me to hold that there is an infringement of the Applicant's fundamental right to personal liberty in that she had been held in custody for over two years without trial and consequently there is a failure of justice.

I have said in the earlier part of this ruling that the Respondents have not appeared in Court and have not filed any counter affidavit. It is safe in view of the Respondents' silence to presume that they have no reason at all for holding the applicant in custody for over two years without trial. Sections 23 (1) and (2) and 33 of the Constitution are intact. They are not suspended. An accused or an offender is entitled to his personal liberty except in the cases listed in Section 32 (1). He is also presumed innocent until proved guilty – Section 33 (5) of the Constitution. Furthermore, an offender is entitled to fair hearing within a reasonable time – Section 33 (1) of the Constitution.

Detention of the Applicant without trial for well over two years is to say the least a wanton abuse of executive power. I find it difficult to believe that it takes two years to confirm that the suspected substance found in the little boy's luggage is a prohibited drug. I cannot also believe that police investigations in such a straight forward case will take that long to conclude. Even if it does take that long, the Applicant ought not to be kept in custody at the pleasure of the police.

I am satisfied that the Applicant is entitled to the declaration sought and to her freedom.

It is hereby declared that the detention of the Applicant since March, 1987 without trial is unconstitutional, unlawful, illegal, null and void. It is therefore ordered that she be released forthwith. A copy of this order shall be served on each of the four Respondents herein.

GBENGA KOMOLAFE ..... APPLICANT

V

ATTORNEY-GENERAL OF THE FEDERATION ..... RESPONDENT

CITATION

SUIT NO. FHC/L/M59/89
SUIT NO. FHC/LM60/89

T. A. ODUNOWO, J.

FRIDAY 1ST DECEMBER, 1989

CITED CASES:

A.M.F. Agbaje v. Commissioner of Police (Suit No. M/2/69) at pg 36 of the Book.
Adamu Gimba and 30 ors (suit No. K/M 35/85) at pg 455 of the Book.
Adejumo v. Adejumo (1974) 1 All NLR 28.
Adenuga Oresanya 3 ors v. Inspector General of Police and anor (Suit No. M/18/79) at pg 247 of the Book.
Anisminic v. Foreign Compensation Commission (1969) 2 AC. (HL) 147 p. 170.
Anya v. Iyayi (1988) 3 NWLR (pt 82) 359.
Barclays Banks Ltd v. Central Bank of Nigeria (1967) 1 All N.L.R. (pt 1) 409 at pg 421.
Captain Monday Asikhia v. Inspector General of Police (suit No. M/71/75) at pg 167 of the Book.
David Oluwole Idowu v. Inspector General of Police & anor. (Suit No. M/132/77) at pg 166 of the Book.
Edet Okon Eyo v. Chief of Staff of the Armed Forces and anor (No Suit No.) at pg 76 of the Book.
Enweazor v. Onyejekwe (1964) 1 All N.L.R. 14 at pg 20.
Garba v. F.C.S.C. (1988) 1 NWLR (pt 71) 449 at page 469.
I. I. Akaza v. Commissioner of Police and anor (Suit No. ID/106/74).
Iron and Steel Workers Union of Nigeria and 2 ors v. General Ibrahim Babangida and 3 ors unreported-suit No. CA/L/107/88.
Justice Robert P.G. Okawa and 2 ors v. Professor F. N. Ndili (1989) 4 NWLR (pt 118) 700 at pg 715.
Re: Okafor Nwanji (Suit No. B/11M/69) at pg 30 of the Book.
Said v. Commissioner of Police (Suit No. CA/K/11/87) reported in Guardian Newspaper 20 Sept or 20 Oct. 1987.
Seaford Court Estates Ltd v. Asher (1969) 2 K.B. 481).
Segun Okeowo v. Inspector General of Police & anor (Suit No. M/76/78) at pg 181 of the Book.
The Zamora (1916) 2 A.C. 77 at pg 107.
Wang Ching-Yao and 4 ors v. Chief of Staff S.H.O. Dodan Barracks, Lagos and 2 ors Suit No. CA/L/25/85 at pg 437 of the Book.
Wilson v. Attorney General of Bendel State (1985) 1 NWLR (pt 4) 572.

Counsel:
Mr. Alao Aka-Bashorun.

IN THE MATTER OF AN APPLICATION BY GBENGA KOMOLAFE FOR THE ENFORCEMENT OF HIS FUNDAMENTAL RIGHTS.

RULING

On 25 October 1989, I granted the two applicants leave to apply for redress to enforce their fundamental human rights following two separate applications which were filed on their behalf pursuant to Order 1, rule 2 and Order 4, rules 1, 2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules 1979. At the same time I directed that a copy of the order made by me be served on the honourable Attorney-General and Minister for Justice. I also ordered that the detainees be produced before me on the next date of adjournment i.e. 30 October, 1989.

It is most gratifying to record that both men were promptly brought to court as directed throughout the trial. The commendation on the respondent which was so well articulated by the learned counsel for the applicants, Mr. Alao Aka-Bashorun, must therefore be re-inforced by me. by this gesture the respondent has demonstrated that the confidence of the general populace in the present administration as a responsive Government has not been misplaced. Be that as it may, the reliefs sought by the first applicant (Gbenga Komolafe) save for some minor differences of detail, to which I will shortly refer, are as follows:

(1) A declaration that his arrest by agents of the Federal Military Government on 9 October 1989 is illegal, unconstitutional as it violates section 32 of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to simply as "the 1979 Constitution").

(2) A declaration that the applicant's detention of the applicant without trial since 9 October, 1989 amounts to a violation of his right to personal liberty which is guaranteed by the 1979 Constitution.

(3) A declaration that the applicant's detention without trial violates the provisions of articles 5, 6, 7, 12 and 17 of the Africa Charter on Human and People's Rights (Ratification and Enforcement) Act, 1983 and article 13 of the International Bill of Rights which is more commonly known as the Universal Declaration of Human Right and (4) An order for the immediate release of the applicant from illegal custody.

The two applications are supported by an affidavit of 10 paragraphs in the case of the first applicant, Gbenga Komolafe who is a final year student in the Department of English, University of Ibadan – and a 14

paragraph affidavit In the case of Gbenga Olawepo, a Part II student in the Department of Mass Communications, University of Lagos.

Both affidavits were deposed to by the human rights activist, Dr. Beko Ransome-Kuti, a medical practitioner of Imaria Street, Anthony Village. Be it noted that the same dependent also subscribed to an affidavit of urgency in both cases. The two students are scheduled to write their different examinations this week.

Whereas Gbenga Komolafe was arrested on 9 October 1989 at Dugbe Posts Office Ibadan where he was detained between 9 and 12 October 1989 when he was brought to Lagos, Gbenga Olawepo was apprehended in Lagos on 19 September, 1989. Both were alleged to have been kept incommunicado. Unlike the first applicant, Gbenga Olawepo is the current Public Relations Officer of the National Association of Nigerian Students (NANS). They both sought the reason for their incarceration but none was forthcoming from the officials of the State Security Services. When the matter came up for hearing, it was agreed by the learned counsel for both sides, with my concurrence, that the two applications should be consolidated, as permitted under order 2, rule 3 of the Fundamental Rights (Enforcement procedure) Rules, 1979, since the reliefs sought by both men are identical. Consequently this ruling covers the two applications.

The respondent too has not been idle. An identical 11 paragraph counter affidavit was sworn to by one Bose Fatunla, a Superintendent in the State Security Services, Ikoyi; certified true copies of both Detention orders (DO 1410 and 1411) were annexed to both affidavits.

The essential paragraphs of the identical affidavits are these, and I quote:

"2. That by virtue of my position I am conversant with the facts of the case.

3. That I have seen and read the affidavit of Gbenga Komolafe sworn to by Beko Ransome-Kuti.

5. That the applicant is being detained under the State Security (detention of persons) Decree, 1984, No. 2 of 1984 as amended by the State Security (detention of persons) Amendment) Decree, 1986 No. 12 of 1986 for acts prejudicial to State Security.

6. That the applicant was arrested pursuant to the detention order referred to in paragraph 5.

7. That the applicant is being detained at the SSS cell as specified in the detention order.

9. That a certified true copy of the Detention order is hereby attached and marked exhibit "A".

10. That P. O. Nwokedi Counsel informed me and I verily believe her that the court has no jurisdiction to entertain this matter."

This response in turn provoked a further identical 5 paragraph affidavit in reply which was deposed to by Sola Ebiseni Esq., one of the junior counsel assisting Mr. Alao Aka-Bashorun, the leading counsel for the applicants, in this case. The relevant paragraphs of this affidavit are two, and I quote:

"3 That I have read the counter-affidavit of Mrs. Bose Fatunla of the State Security Service deposed to on 1st November, 1989.

4. That Mr. Alao Aka-Bashorun informed me and I verily believe him that the State Security Service has formations in all the 21 states of the Federation including Abuja – the Federal Capital Territory."

We must now proceed to consider the objections of the respondent to the present applications as canvassed by the learned state Counsel, Miss P. O. Nwokedi. She contended that section 4(2) of the state security (Detention of persons) Decree, 1984, hereinafter referred to as Decree No. 2 of 1984 and section 1 (2) (b) (ii) of the Federal Military Government (Supremacy and Enforcement Powers) Decree, 1984 otherwise known as Decree No. 13 of 1984 have suspended Chapter IV of the 1979 constitution dealing with fundamental human rights. These two Decrees deal with anything done or proposed to be done and anything so done shall not be inquired into in any court of law. The combined effect of these two sections is to oust the jurisdiction of the courts. She then drew my attention to the distinction between abatement of an action and ouster of jurisdiction. I was referred to page 4 of Black's Law Dictionary (5th edition) where abatement is defined as "the complete overthrow or destruction of the suit so that it is squashed and ended." Reference was also made to the case of *Enweazor v. Onyejekwe* (1964) 1 ALL N.L.R. 14 at page 20. These two amendments render null and void and suit pending before any court of law which seeks to challenge the competence of the Federal Military Government to make any Decree.

A detention order is a statutory Instrument made in pursuance of Decree No. 2 of 1984 in exercise of the powers conferred on the Chief of General Staff. It follows that if the court cannot strike down a Decree it cannot also declare invalid a detention order made pursuant to the Decree. So that an application for the enforcement of fundamental human rights cannot challenge the powers of the Chief of General Staff under section

1(1) of Decree No. 2 of 1984 if the latter is satisfied that the applicant was concerned in acts prejudicial to state security or has contributed to the economic adversity of this country and it is necessary to exercise control over such a person. The court cannot inquire into the sufficiency of the acts that satisfied the Chief of General Staff. There is no suggestion in the supporting Affidavit that the detaining authority did not act in good faith. Miss Nwokedi then drew my attention to a plethora of cases most of which are reported in Chief Gani Fawehinmi's Book, *The Nigerian Law of Habeas Corpus* (hereinafter referred to for brevity as "the Book") to show that those charged with responsibility for national security must be the sole arbiters of what national security requires. Incidentally the author himself was a victim of Decree No. 2 of 1984: These cases are: (1) *Wang Ching-Yao and 4 others v. Chief of Staff S.H.Q. Dodan Barracks, Lagos and 2 others* (Suit No. CA/L/25/85 at page 437 of the Book.

(2) In the matter of an Application at *Adamu Gimba and 30 others* (Suit No. K/M 35/85) at page 453 of the Book.
(3) *Iron and Steel Workers Union of Nigeria and 2 others v. General Ibrahim Babangida and 3 others* unreported decision of the court of Appeal in Suit No. CA/L/107/88.
(4) *Adejumo v. Adejumo* (1974) 1 ALL N.L.R. 28
(5) *Captain Monday Asikhia v. Inspector General of police* (Suit No. M/71/75) at page 169 of the Book.
(6) *The Zamora* (1916) 2 A.C. 77 at page 107.
(7) *Adenuga Oresanya 3 others v. Inspector General of Police and Another* (Suit No. M/18/79) at page 247 of the Book.
(8) *Edet Okon Eyo v. Chief of Staff of the Armed Forces and Another* (which has no suit number) at page 76 of the Book.
(9) *Ishola Kazeem v. Inspector General of Police* Suit No. M/26/75) at page 119 of the Book.
(10) In Re: *Okafor Nwanji* (Suit No. B/11M/69) at page 30 of the Book.
(11) *David Oluwole Idowu v. Inspector General of Police and Another* (Suit No. M/132/77) at page 166 of the Book.

On behalf of the applicants, Mr. Aka-Bashorun pointed out that the entire submission of the learned State Counsel is predicated on the erroneous assumption that anything done or purported to be done in pursuance of Decree No. 2 of 1984 cannot be challenged in any court of law. He demonstrated the fallacy of that assumption by this example: if the Chief of

General Staff in purported exercise of his power under Decree No. 2 of 1984 shoots counsel's son, the court will be obliged to tell him he has no such power. He submitted that the respondent must show that the Detention orders Nos. 1410 and 1411 attached to the affidavits of Bose Fatunla were issued pursuant to Decree No. 2 of 1984. If the court is not satisfied that they were issued in accordance with the provisions of the law, then the applicants are entitled to the protection of this court under the Fundamental Rights (Enforcement procedure) Rules, 1979. The ouster clause can only be relevant if the court is satisfied that the detention was carried out in accordance with the decree Nos. 2 and 13 of 1984. It is conceded that the Chief of General Staff is the sole determinant of acts prejudicial to state security.

But after such a determination, he must also be satisfied that he needs to exercise control over the detainee. In addition, he must state in writing that such a person must be detained in "a civil prison or a police station or such other place specified by him." It shall be the duty of the person or persons in charge of the place of detention to keep the detainee in custody. The order must satisfy these conditions before it can be operative. Learned counsel then went on to examine the Detention Order in detail one after the other. He pointed out that apart from stating that the applicant has committed acts prejudicial to state security it is completely silent as to whether it is necessary to have control over him.

The place of detention is stated to be SSS Cell. He submitted that this can only be a civil prison or police station or "other place" known to the law. There is no law creating SSS Cell. A prison is a creation of statute and it is defined in section 1 of the prison Act. No.41 of 1960. A police station is also a creation of statute and it is defined in section 1 of the Prison Act No. 41 of 1960. A police station is also a creation of statute as defined in section 1 of the Criminal procedure Act. Mr. Aka-Bashorun went on to point out that as far as he was aware, it is only the National Security Agencies Decree No. 19 of 1986 that has set up the three agencies specified in section 1 thereof. But there is nothing therein about the SSS Cell. Nonetheless it is accepted for purposes of argument that SSS means State Security Service, there is nothing under section 2 (3) of Decree No. 2 of 1984 which allows the SSS to create a cell. That being so the Chief of General Staff cannot dispatch any Nigerian to such a place. Above all, the applicants filed a Reply to the Counter-affidavit where it was stated in paragraph 4 that the State Security Service has 21 formations scattered throughout Nigeria including Abuja. The place of detention is not specified.

This averment was not denied. When such enormous powers are being exercised, the law must be strictly observed. Once it is shown that the 1st applicant was detained in Ibadan, which is not denied, whereas the Detention Order is so vague that the court cannot ascribe Ibadan or Lagos to SSS cell then it cannot be a good Detention Order. He referred to the case of *A.M.F. Agbaje v. Commissioner of Police* (Suit No. M/2/69) at page 36 of the Book.

The Detention Order was not addressed to anybody. It is clear from section 1 (2) of Decree No. 2 of 1984 that the order must be directed to a named person. Until the order made complied with section 1 the applicant cannot be arrested. Once an applicant is able to show that the Detention order was not made under Decree No. 2 1984 then the protection accorded it is lost. The thrust of Mr. Aka-Bashorun's argument is that law-makers themselves are still expected to obey their own laws:

He referred me to these cases: *Wilson v. Attorney General of Bendel state* (1985) 1 N.W.L.R. (Part 4) 572; *Anya v. Iyayi* (1988) 3 N.W.L.R. (Part 82) 359; *Commissioner of Police v. A.M.F. Agbaje* (reported at page 42 of the Book) where the defunct Western State Court of Appeal affirmed the decision of Aguda J (as he then was), and the case of *Garba v. F.C.S.C.* (1988) 1 N.W.L.R. (Part 71) 449 at page 469.

Let me interpose here to say that after Mr. Aka-Bashorun concluded his arguments on the ouster of jurisdiction, it occurred to me that counsel should also simultaneously address me in the alternative i.e. on the assumption that I have jurisdiction. This will make for expeditious disposal of the applications. Secondly, this approach will avoid the possibility of listening to the same argument twice. Moreover, once an objection is taken to the validity of the Detention Orders, I do not see how the court can deal with this particular issue without scrutinizing the two Detention Orders. To embark on such enquiry amount to the exercise of jurisdiction. Hence I called on both counsel to address me on this procedure. In the end, Mr. Aka-Bashorun was allowed to move his own application and thereafter the learned state counsel responded to it.

So Mr. Aka-Bashorun resumed his argument. He urged me to hold that Detention Orders Nos. 1410 and 1411 are not in consonance with the provisions of Decree No. 2 of 1984 as amended, for the reasons earlier adduced. He buttressed his submissions with these additional cases: The first is the case of *Segun Okeowo v. Inspector General of Police & Another* (Suit No. M/76/78) which is reported at page 181 of the Book, a persuasive authority, and the other case which is binding on this court is a decision of the Court of Appeal in the case of *Justice Robert P. G. Okara and 2 Others*

v. Professor F. N. Ndili (1989) 4 N.W.L.R. (Part 118) 700 at page 715. The court cannot assume that the State Security Service has a right to create a Cell. He therefore urged me to hold that the detention of the two applicants is illegal and their immediate release should be ordered.

Miss Nwokedi submitted on behalf of the respondent that nowhere is it stated under Decree No. 2 of 1984 that the Chief of General Staff has to show any reason on the detention order. The fact that such an order was issued presupposes that the appropriate authority deemed it necessary to exercise control over the applicants. She referred me once again to section 1 (1) of Decree No. 2 of 1984. She opined that the phrase "or such other place" can include detention in this court. She also contended that this particular provision also gives the Chief of General Staff the right to create a Cell or any other place of detention becomes a Cell for detention under the State Security Service. She pointed out that the letters "SSS" constitute an abbreviation for State Security Service, where the two applicants are being held, whose office is at 15 Awolowo Road, Ikoyi, Lagos, as contained in the two affidavits in support. Learned State Counsel further argued that it is a misconception on the part of Mr. Aka-Bashorun to say that the Orders were not directed to anyone but to the world at large. She contended that the order was directed to the security officers. The cases cited by the learned counsel for the applicants are irrelevant to the present case because they all relate to termination of appointments whereas the two applications under consideration concern the issue of acts prejudicial to state security. Learned counsel for the respondent also maintained that it has not been shown that the orders were made in bad faith; she urged me to apply the presumption of regularity in favour of the respondent. The fact that the applicant, Gbenga Komolafe, was moved from Ibadan to Lagos does not vitiate his own detention order. The case of *Edit Okon Eyo v. Chief of Staff and Another* shows that the removal of a prisoner from one prison to the other, as was done in this case, cannot be impugned on that ground alone. Since section 4 (2) of Decree No. 2 1984 has suspended the whole of chapter IV of the 1979 Constitution it follows that this court cannot grant the declaration sought by holding that the detention of the applicants is unlawful. The African Charter on Human Rights has nothing to do with this matter. This Human Rights Charter is subordinate to the 1979 Constitution, which in turn is subordinate to Decree No. 2 of 1984. She conclude her arguments by referring me to the Court of Appeal decision in the case of *Said v. Commissioner of Police* (Suit No. CA/K/11/87) which was reported in the *Guardian* newspaper of 20 September or 20 October 1987, Photostat

copy of which Miss Nwokedi kindly placed at my disposal, where a similar application was struck out. Consequently she invited me to dismiss the present application.

In a brief reply on point of law, Mr. Aka-Bashorun argued that it appeared that the learned State Counsel did not grasp the substance of the issues involved in this case because all that is being canvassed is that the Detention Orders were not made in conformity with the enabling Decree. That misconstruction will be obvious when one reads page 80 of the report of *Eyo's* case because what the presiding Judge (Kazeem J. as he then was) said was not what Miss Nwokedi has told the court. On the contrary, it was found that the prison authorities took the prisoner to another place under a particular law, and for the prisoner's benefit. In the instant case, they have admitted that the man was taken from Ibadan to Lagos and no explanation has been given. The respondent has now admitted that the two applicants are at 15 Awolowo Road, Ikoyi Lagos. The orders do not mention 15 Awolowo Road.

There is no presumption in law that SSS Cell means 15 Awolowo Road, Ikoyi. No such evidence can be found in any of the affidavits. He maintained that SSS Cell is not known to the law. And there is no provision in either Decree No. 2 of 1984 or Decree 19 of 1986 that gives authority to the Chief of General Staff to create a Cell. It is imperative that there must be a delivery to the man in charge of the place of detention. There is nothing about this on the face of the order. SSS Cell is not a prison. Learned counsel urged me to hold that there omissions vitiate the two detention orders. Once an order has been made in pursuance of Decree No. 2 of 1984, then chapter IV of the 1979 Constitution is to that extent suspended. The decision of the court adverted to by him were intended to show the attitude of the courts as to how "ouster clauses" have been interpreted. Finally, it is only sections 32 (3) to (7) of the 1979 Constitution that were suspended. But subsections (1) and (3) are still very much intact. At the end of his address, Mr. Aka-Bashorun invited me to hold that the continued detention of the applicants is illegal and that they are entitled to immediate release.

The foregoing account constitutes a summary of the facts as amplified by the arguments of counsel. The burden of the next few pages is to evaluate the evidence and pronounce on the legality, or otherwise, of the two Detention Orders under which the two applicants have been detained. In doing so it must be stated that the twenty odd cases cited to me have been carefully digested to my grateful benefit. While the principles

embedded in them will be fully borne in mind in considering all the issues posed by the present applications I may not need to refer further to any of them during the course of this judgment.

Learned State Counsel has contended that this court has no power to enquire into the validity of the two Detention Orders issued by the Chief of General Staff under powers vested in him by virtue of section 1 (1) of the State Security (Detention of persons) Decree, 1984 otherwise more affectionately or disdainfully known as Decree No. 2. I cannot cavil at this general proposition of law, *ceteris paribus*. In fact no sensible person who has the interest of this country at heart will endorse a situation where people conduct themselves in such a way that they either have no respect for the rights of other citizens or the stability of the polity. In this process the law has to strike a happy medium so as to ensure that the corporate existence of the state is not jeopardized. To achieve the necessary social equilibrium certain restrictions on individual liberty are certainly inevitable. The Romans have embodied this idea in the *maxim salus populi supreme lex*. Which means the welfare of the nation is the supreme law.

Having said that much, we must hasten to add that any restriction imposed on the liberty of the subject must be shown to be in conformity with the law which authorizes the exercise of such power. In other words, both the rulers and the ruled are amenable to the rule of law. It is beyond controversy that the Court cannot question the validity of any Decree promulgated by the Federal Military Government which deprives it of jurisdiction.

Nevertheless the court has the authority to enquire whether or not it has jurisdiction over the matter which the particular Decree purports to exclude from judicial review. This point was lucidly expressed by Fatayi-Williams, J.S.C. (as he then was) in these words:

"In considering whether or not a court has jurisdiction to entertain any claim it is our view that while a person's right of access to the courts may be taken away or restricted by statute, the language of any such statute will be watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. That is why it is now well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that if such a provision is reasonably capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court.

(See *Anisminic v. Foreign Compensation Commission* (1969) 2 A.C. (HL) 147 p.170. Moreover there is a clear distinction between stating that the court has no jurisdiction to hear a case and stating that that court has no jurisdiction to determine whether or not it has jurisdiction to hear the case..." See *Barclays Banks Ltd v. Central Bank of Nigeria* (1967) 1 All N.L.R. (Part 1) 409 at page 421.

It is obvious from this authoritative exposition of the law that notwithstanding the ouster clause contained under section 4 (1) of Decree No. 2 of 1984, as amended, this court still has power to consider whether or not it has jurisdiction. This is so because the ouster clause itself is not absolute. Consequently it cannot be correct, as the learned state Counsel has contended, that once the jurisdiction of the court is excluded that is the end of the matter.

That being my conclusion, our next task is to set out the provisions of section 1 of Decree No. 2 of 1984 in an effort to see how far the two Detention Orders which are now before the court have satisfied the conditions laid down under Decree No.2 1984, and I quote:

"1 – (1) if the Chief of General Staff or the Inspector-General of Police is satisfied that any person is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that that person be detained in a civil prison or police station or such other place specified by him; and it shall be the duty of the person or persons in charge of such place or places, if an order made in respect of any person is delivered to him, to keep that person in custody until the order is revoked."

Careful analysis of this particular sub-section will reveal that in exercising his formidable powers under this enactment, the Chief of General Staff must proceed in the following fifteen (15) stages which I must meticulously spell out as follows:

(1) He must be satisfied that any person is or
(2) recently has been concerned in acts prejudicial to state security or
(3) has contributed to the economic adversity of the nation or
(4) in preparation or
(5) instigation of such acts and
(6) that by reason thereof it is necessary to exercise control over him;

(7) he may by order in writing
(8) direct that that person be detained
(9) in a civil prison or
(10) police station or
(11) such other place specified by him; and
(12) it shall be the duty of the person or persons in charge of such place or places.
(13) if an order made in respect of any person is delivered to him
(14) keep that person in custody
(15) until the order is revoked.

It will thus be seen from the restrictions on his powers contained in section 1 (1) of Decree No. 2 of 1984 that stipulations (1) to (7) above cannot be subjected to any scrutiny by this court because the Chief of General Staff is the sole determinant and the degree of certitude cannot be questioned. But I am of the firm view that the principles which can be distilled from all the relevant authorities clearly dictate that if one or more or the remaining eight (8) conditions are absent the orders exhibited before me could not legally be said to have emanated from section 1 (1) of Decree No. 2 of 1984. We must therefore proceed to examine the two Detention Orders so as to determine if all the necessary conditions precedent to their validity have been satisfied. Condition (8) is satisfied because both applicants were ordered to be detained. Stipulations (9) and (10) are clearly alternatives to (11) which is described as "such other place". When one looks at both Detention Orders, the "other place" specified is SSS Cell. It is quite clear to me in this connection that the burden of proof is on the respondent to show that SSS Cell is another place that is analogous to or *ejusdem generis* as a civil prison or police station. As far as can be seen, no effort was made to adduce evidence in this direction, let alone educate the court as to what the place specified stands for or its exact location. It was only during argument that the learned counsel for the respondent acknowledged the act that the place of detention is 15 Awolowo Road, Ikoyi. Granted this were so it should have been so spelt out on the face of the order.

In the case of *I. I. Akaza v. Commissioner of Police and Another* (Suit No. JD/106/74) which is reported at page 112 of the Book Bate, S.P.J. (as he then was) held that an applicant who was ordered to be detained in "police custody at Jos" was entitled to his freedom when Decree No. 24 of 1967 under which he was detained stipulated the place of detention as "a civil prison or a police station" and the learned Judge explained his reason

thus: "No statutory or judicial definition of the phrase "police station" has been brought to my notice. But giving the words their plain, ordinary and everyday meaning I think that "police custody" has a wider meaning than "police station". The distinction is not a mere technicality. It is well established law that the courts will construe legislation affecting the liberty of the subject as strictly as it construes penal legislation..." (See page 115 of the Book).

It is thus quite evident that SSS Cell cannot be "such other place" as a "civil prison or police station" because SSS Cell has not been shown to be an established place of detention of a civil character. And in any case, the address or location of such an establishment must be obvious on the face of the order. Which is not the case in both cases.

So the contention of Mr. Aka-Bashorun on all these grounds cannot be faulted. In support of this interpretations, we have the following words in brackets under the inscription SSS Cell, and I quote: "other places to be specified".

The meaning of the verb "specify" is given as - "To mention or state explicitly; to designate as one condition of a group of specifications; to designate in detail, so as to clearly distinguish or limit". (See Webster Dictionary, Volume 2 at page 933). Contrary to the startling submission advanced by the learned state Counsel, I have been unable to see anything in either Decree No. 2 of 1984 or Decree No. 19 of 1986 or any other enactment whatsoever which invests the Chief of General Staff with the power of creating the entity described as "SSS Cell" on the face of both Detention orders. This submission has no legal basis.

We must now direct our attention to conditions (12) and (13) which I propose to consider together for ease of exposition. Even though "the English Language is not an instrument of mathematical precision" (to borrow the felicitous language of Lord Denning in *Seaford Court Estates Ltd v. Asher* (1969) 2 K.B. 481) it is nonetheless obvious that a person or persons" must be in charge of the place of detention, wherever it may be located, and the order must be delivered to the custodian of the place. This confirm the view that the making of an order implies that someone is obliged to obey or disobey the order so given. No order can be given in *vacuo*. The order must be addressed to either the officer in charge of civil prison or police station or any other person in charge of the place of detention as specified in section 1 (1) of Decree No. 2 of 1984. In other words, it must be self-authenticating.

Although the order stated that the applicants should be detained but it did not specify that they should be kept in custody. The address of the custody or cell is not given. From the language adopted, it is clear that full details of the place of detention ought to be given. It must be presumed that the draftsman appreciates the subtle distinction between "to keep in custody" "and to detain." So on this view, condition (14) above was omitted, as well as (15) because nowhere is it spelt out that the custodian of the applicants was to keep them in custody until the orders are revoked. In this connection, attention should be drawn to the usual forms which are in use by the courts for apprehension of witnesses or commitment of recalcitrant witnesses. Specimens of these forms can be found on pages 266 to 268 of *Criminal Law and Procedure* by Dr. T. A. Aguda (1982 edition). It will be observed that all the specimen forms shown therein are designed to be addressed to specific police officers or prison officers. It is quite patent from the foregoing analysis that the eight (8) conditions which are within the impeachable discretion of the Chief of General Staff, five, namely, 12, 13, 14, 15 and 16 have not been complied with on the face of both Detention Orders exhibited in court. Nevertheless learned state Counsel has invited me to presume that the two Orders are regular. There must be legal basis for the operation of the presumption of regularity. More so as the issues involved relate to the liberty of two citizens of this great country, a country which is recognized throughout the comity of civilized nations as an avowed advocate or human rights under the rule of law. If I should embrace this invitation, it will be tantamount to solving problem by working to the answer. This may be feasible in the realms of elementary mathematics. But for the citadel of justice to adopt this formula is nothing short of judicial apostasy. The nearest approach to the suggested course is to be found in the realm of retroactive legislation. Which is not the case under this unique Decree, No. 2 of 1984, which has been the subject of acrimonious debate for quite some time now.

It is for the above stated reasons that I am fully satisfied that the two applications must succeed. This means that the two Detention Orders (DO 1410 and DO 1411) respectively dated 19 September 1989 and 9 October 1989 are hereby declared illegal, null and void. In the result, the two applicants are entitled to immediate release from detention. That will be the order of this court.

Pronounced in open court at Lagos this 1st day of December, 1989.

1. **GENERAL SANI ABACHA**
2. **ATTORNEY GENERAL OF THE FEDERATION**
3. **STATE SECURITY SERVICE**
4. **INSPECTOR-GENERAL OF POLICE**

APPELLANTS

V

CHIEF GANI FAWEHINMI ..... RESPONDENT

SUPREME COURT OF NIGERIA

CITATION
SC.45/1997

SALIHU M. ALFA BELGORE, JSC
MICHAEL OGUNDARE, JSC
UTHMAN MOHAMMED, JSC
ANTHONY IKECHUKWU IGUH, JSC
OKAY ACHIKE, JSC
SAMSON O. UWAIFO, JSC
AKINTOLA O. EJIWUNMI, JSC

FRIDAY, 28TH APRIL, 2000

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Mobil Producing Nigeria Unlimited v. Umenweke (2002) 9 NWLR Pt. 773, 543 at 561.
Mohammed v. State (2007) 13 NWLR 1050, 186.
Musa v. C.O.P. (2004) 9 NWLR Pt 879, 483 at 497.
Nasco Management Services Ltd v. A. N. Amaco Transport (2002) FWLR Pt. 135, 652 at 677.
Ndukwe v. LPDC (2007) 5 NWLR Pt. 1026, 1 at 12.
Obade v. State (1991) 6 NWLR Pt. 198, 438 at 455.
Offorlette v. State (2000) FWLR Pt. 12, 2081 at 2102.
Ojuade v. Inspector General of Police (1964) ANLR 495 at 496.
Oladejo v. State (1994) 6 NWLR Pt 348, 101 at 127.
Olaniyan v. Adeniyi (2007) 3 NWLR Pt. 1020, 1.
Omega v. O.B.C. (2005) 21 SCNLR 771 at 800.
Omoyeni v. Gov. Edo State (2004)5 NWLR Pt. 865, 175.
Oyakhire v. State (2005) 15 NWLR Pt. 947, 159 at 178.
P.D.P. v. I.N.E.C. (2001) 1 WRN 1 at 34.
Pharmaceuticals Society v. London and Provincial Supply Association (1879 – 80) AC 857
R v. ICR Haulage Ltd (1944) All ER 691.
Shekete v. NAF (2007) 14 NWLR Pt. 1053, 159 at 169.
Shodiya v. State (1992) 3 NWLR Pt 230, 457 at 499.
Sokwo v. Kpongbo (2003) 2 NWLR Pt. 803, 111 at 154.
State v. Ilor, & ors (1983) 1 SCNLR 94.
Tesco Supermarkets ltd v. Natrass (1972) AC 153.
The King v. Darbarilal shaw (1949) All India Report vol. 36 Calcutta 677.
UBN v. Ayodare & Sons Nig Ltd (2007) 13 NWLR Pt. 1052, 567.

Counsel:

Cheisonu Okpoko, Esqr., Legal Officer, Federal Ministry of Justice for Appellants.

Ebun-Olu Adegboruwa Esqr. (with him, Mohammed Fawehinmi), for the Respondent.

M. E. OGUNDARE, JSC. (*Delivering the Leading Majority Judgment*)

The facts of this case are simple enough. The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday January 30, 1996 at about 6 a.m., by six men who identified themselves as operatives of the State Security Service (hereinafter is referred to as SSS) and policemen, and taken away to the office of the SSS at Shangisha where

he was detained. At the time of his arrest the Respondent was not informed of, nor charged with, any offence. He was later detained at the Bauchi prisons. In consequence, he applied *ex-parte* through his counsel, to the federal High Court, Lagos pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for the following reliefs against the 4 Respondents who are now Appellants before us and shall hereinafter be referred to as Appellants:-

1. A declaration that the arrest of the Applicant, Chief Gani Fawehinmi at his residence at 9A Ademola close GRA, Ikeja, Lagos on Tuesday, January 30, 1996, by the State Security Service (S.S.S.) or officers, servants, agents, privies of the Respondents and/or of the Federal Military Government constitutes a violation of the Applicant's fundamental rights guaranteed under Sections 31 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.
2. A declaration that the detention and the continued detention of the Applicant without charge since Tuesday January 30, 1996 when the Applicant was arrested by the officers, servants, agents, privies of the Respondents at his residence 9A Ademola Close GRA, Ikeja, Lagos constitutes a gross violation of the Applicant's fundamental rights guaranteed under Sections 31, 32 and 38 of the Constitution and Articles 5, 6 and 12 of the African Charter on Human & Peoples' Right (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.
3. A mandatory Order compelling the Respondents, whether by themselves or by their officers, agents, servants privies or otherwise howsoever to forthwith release the Applicant.

ALTERNATIVELY

An Order of Mandamus compelling the respondents to forthwith arraign the applicant before a properly constituted court or tribunal as required by section 33 of 1979 Constitution of the Federal Republic of Nigeria 1979 as preserved by Decree 107 of 1993 and Article 7 of the African Charter on human and People's Rights (Ratification and Enforcement) Act. Cap. 10 Laws of the Federation 1990.

An Injunction restraining the Respondents whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.
N10,000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and or detention of the Applicant - Chief Gani Fawehinmi.

Leave having been granted, he applied by motion on notice for the said reliefs. On being served with the motion papers, learned counsel for the Appellants filed a preliminary objection to the effect that the Respondent could not maintain the action against the Appellants on the ground that the court lacked competence to entertain it. The reasons given for the objection were:

(i) By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by Section 4 of the aforementioned Decree No.2 of 1984 (as amended). The Respondent/Applicants are immuned to any legal liabilities in respect of any action done pursuant to the Decree.

(ii) The Federal Military Government (Supremacy and Enforcement of Powers Decree No. 12 of 1994 and Constitution (Suspension and Modification) Decree No. 107 ousts the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.

(iii) This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

Arguments on the preliminary objection were taken from learned counsel appearing for the parties in the course of which a detention order No.00455 dated 3/2/96 by which the Respondent was detained was shown to the Court and counsel for the Respondent. In a reserved ruling given on 26th of March 1996, the learned trial Judge found –

1. "That the Inspector-General of Police has been given the power to detain a person by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 as amended by the

State Security (Detention of persons) Amendment Decree No. 11 of 1994.

2. That the Court cannot question the legality of the Detention Order since it was made by the appropriate authority under the decree.
3. That any of the provisions of the African Charter on Human and Peoples' Rights which is inconsistent with decree No. 107 of 1993 (the grundnorm) is void to the extent of its inconsistency.
4. That the African Charter on Human and Peoples' Rights has no legs to stand on its own under the Nigerian Law. It cannot be enforced as a distinct law as such, it is subject to our domestic law and ouster decrees."

The learned Judge concluded -

> "In the result, I hold that the jurisdiction of this Court is ousted by Decree No.2 of 1984 and the therefore, it cannot entertain the action. Consequently, the objection raised by the Respondents is sustained, this Suit is accordingly struck out. This ruling affects the order of this Court made on the 14th of February, 1996."

The Respondent being dissatisfied with the decision of the Federal High Court, appealed to the Court of Appeal which Court, in a unanimous decision given on 12th day of December 1996 allowed the appeal in part and remitted "the case back to the Court to consider the issue of the consequences of the detention for the four days of the (detention of the) Appellant which is apparently not covered by the order." In coming to this conclusion, the Court of Appeal found:

1. "That the learned trial Judge was right in coming to the conclusion that the Inspector-General of Police is empowered to issue a detention Order under the provisions of Decree No.2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of Section 4 of Decree No. 2 of 1984 as amended and Decree No. 12 of 1994, the jurisdiction of the Court is ousted to entertain the Appellant's case."
2. That though the Detention Order should have been exhibited to the Notice of Preliminary objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice."

3. That not withstanding the fact that Cap.10 was promulgated by the National Assembly in 1993, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No.12 of 1994 cannot-affect its Operation in Nigeria.
4. That the provision of Cap. 10, (The African Charter on Human and Peoples' Rights Act) of the Laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the Court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military Government is not legally permitted to legislate out of its obligations.
5. That the Appellant (Respondent before us) was wrong in the procedure he adopted to enforce the Charter under the special jurisdictions of the Court in reliance on Section 42 of the Constitution. The learned trial Judge was right to decline jurisdiction under the circumstances on the basis of the procedure adopted.
6. That the Detention Order is not a legislative judgment by any means.

Pats-Acholonu, JCA in his concurring judgment disserved:

> "When I look at this case, I observed that one of the respondents is the Head of State – General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of Section 67 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceeding against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore, that the name of the Head of State should not have been reflected in the suit in the first place. It offends the provision of the Constitution."

No other Judge of the Court below who sat on the appeal made any observation to the same effect. But this observation of Pats-Acholonu JCA is not made a ground of appeal in the cross appeal.

Both parties are aggrieved by the decision of the Court below and have appealed to this Court. In the main appeal, the Appellants complained against those parts of the judgment of the Court below that relate to findings

on the status of the African Charter on Human and People's Rights and the order remiting the case to the trial court for the action before the latter court to be resolved on the period of four days not covered by the Detention Order. The Respondent cross-appealed against those parts of the decision of the Court below relating to –

(i) Power of Inspector-General to sign and issue a determination order
(ii) Mode of enforcement of fundamental rights guaranteed under the African Charter on Human and People's Rights (hereinafter is referred to simply as the African Charter,
(iii) Procedure for tendering detention order, and
(iv) Immunity of the Head of State.

Pursuant to the rules of this Court the parties filed and exchanged their respective written briefs of argument. And at the oral hearing of the appeal, their learned counsel proffered oral arguments in further elucidation of the issues raised in their respective briefs. I have fully considered the submissions made by Learned Counsel both in their briefs and oral arguments.

I will consider first the main appeal under two broad headings: (i) Status of the African Charter *vis-à-vis* the country's municipal laws including the Constitution and (ii) The period of Four Days not covered by the Detention Order. These two broad headings cover all the issues formulated by the parties in their respective briefs. The status of the African Charter is strictly not necessary for the determination of the main appeal in that inspite of what their Lordships of the Court below said on it, it did not affect the final decision they arrived at. The Respondent has, however, raised it again in his cross-appeal in arguing that his case should be sent back to the trial Court for trial not in respect of the period of four days before the detention order was issued but in respect of the entire period of his detention.

STATUS OF THE AFRICAN CHARTER

The Organisation of African Unity of which Nigeria is a member, on 19th January, 1981 adopted the African Charter on Human and Peoples' Rights providing for rights and obligations between member States (e.g. Art.23) and between citizens and member States (e.g. Art. 19). Nigeria adopted the treaty in 1983 when the National Assembly enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 (now Cap. 10 Laws of the Federation of Nigeria, 1990[1/2].

I have carefully considered all that has been said by learned counsel for the parties on the status of the Charter as an international treaty entered into by our country. I do not consider it necessary to set out in this judgment their submissions. Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides:

> "12 (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (AFRC).
>
> (See not the re-enactment in section 12(1) of the 1999 Constitution). Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justifiable in our courts. See the recent decisions of the Privy Council in *Higgs & Anor. v. Minister of National Security & Ors.* The Times of December 23, 1999 where it was held that -
>
> "In the law of England and The Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature.
> Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' rights and duties in common or statue law.
> They might have an indirect effect upon the constitution of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty."

In my respectful view, I think the above passage represents the correct position of the law, not only in England, but in Nigeria as well[3],

Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 (hereinafter is referred to simply as Cap.10), it becomes binding and our courts must give effect to it like all other laws

falling within the judicial Powers of the Courts. By Cap.10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions[4].

No doubt Cap.10 is a statute with international flavour. Beings so, therefore, I would think that if there is a conflict between it and another statute, Its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it remove it from our body of municipal laws by simply repealing Cap.10. Nor also is the validity of another Statute be necessarily affected by the mere fact that it violates the African Charter or any other treaty for that matter – See *Chae Chin Ping v. United States, 130 US. 181* where it was held that Treaties are of no higher dignity than acts of Congress, and they be modified or repealed by Congress in like manner; and whether such modification or repeal is wise or just is not a judicial question[5].

With all I have said above, I now come back to the case on hand. The Respondent was said to have been detained by virtue of a detention order issued by the Inspector-General of Police in exercise of the Powers conferred on him by section 1(1) of the State Security (Detention of Persons) Act, Cap. 414 Laws of the Federation of Nigerian, 1990 (formerly Decree No.2 of 1984). It is the case of the Appellants that the Act ousted the jurisdiction of the courts in respect of anything done under the Act. This submission found favour with the Court below. For Musdapher J.C.A. who delivered the lead judgment of that Court with which the other Justices that sat with him agreed, said:

> "In such matters involving the ordinary laws, the Courts in this country have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of the administrative law which frowns at abuse or misuse of power. But in Nigeria there are provisions in Decrees such as No. 2 of

1984 which empower the executive to detain people without trial. Usually no reasons are given by the detaining authority as to how a detainee constitutes a menace or threat to the State. It is regarded as a matter of the security of the State which is not open to probing by the Courts, also for security reasons. Attempts by Courts to order the release of such detainees on application by *habeas corpus* is even ousted. See Decree No.22 of 1986. In *Lekwot v. Judicial Tribunal (1993) 2 NWLR (Pt.276) 410 at 447*, I quoted as follows from a paper presented by the Chief Justice of Nigeria at the Sixth International Appellate Judge's Conference, 1991:

'Human Rights under a Military Regime may be abberatious. In a democratic government under the rule of law, all judicial powers of the State are vested in the judiciary. Under the Military Regimes, the powers are invariably eroded.
The erosion may be creating Military (or Special) Tribunals .....
It may also be the ouster of the jurisdiction of Courts of law.'

In *Okeke v. A-G Anambra State (1992) 1 NWLR (Pt. 214) 60 at 86*, UWAIFO, JCA observed as follows:

"Decree No. 13 of 1984 is an ouster legislation. Once the provisions of a Decree or Constitution ousting the jurisdiction of the Courts on any specific matters are clear and unambiguous, the Courts are bound to observe and apply them. They are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted constitution."

In view of the authorities, I have to resolve the 5th and 6th issues against the Appellant."

It is as a result of this conclusion that the learned Justice of Appeal finally held:

"In the result, this appeal partially succeeds. I remit the case back to the trial Court to consider the issue of the consequences of the detention for the four days of the (detention of the) Appellant which is apparently not covered by the order."

Muhammad JCA in his own judgment observed:

"The grundnorm in Nigeria under the present Military administration is the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the subsequent Decrees regulating the exercise of Executive, legislative and judicial powers in the country. Section 5 of Decree No. 107 enacts as follows.'

'No question as to the validity of this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict be entertained by any court of law in Nigeria.'

The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 provides:

'No civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree, the proceedings abate, be discharged and made void.'

These two enactments, which have been judicially examined since the inception of the Military regimes in Nigeria in a plethora of cases leaves no room for any interpretative mechanisms to found jurisdiction when jurisdiction has been effectively ousted. The courts have always construed such clauses strictly. However, where, as in this case, the language is plain, the courts have to give effect to it. The legislations are undoubtedly drastic, but the courts are bound to give effect to them and decline adjudicating."

And Pats-Acholonu JCA, for his part, said:

"Let me pause here and examine the case in hand with the background of Section 4 of the State Security (Detention of Persons) Act Cap. 414.

'4 (1) No suit or other legal proceedings shall be taken against any person for anything done or intended to be done in pursuance of this Act.

(2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question where any provision thereof has been or is being or would be contravened by anything done or

proposed to be done in pursuance of this Act shall not be inquired into in any court of law and accordingly Sections 219 and 259 of that Constitution shall not apply in relation to any such question.'

(Before going further, I wish to remark in passing and in further buttressing of my opinion and holding that the suspension of operation of the provision of African Charter and the Incorporating Act has never been intended nor to my mind carried out).

On the fact of it the purport of the provision is that the jurisdiction of the court is completely ousted."

The Respondent has argued strenuously against the position taken by their Lordships, II, too, must say that I find it rather strange that after the views expressed by them on the status and applicability of the African Charter they could turn round as they did, to reach the position that the courts jurisdiction was ousted in detention cases. It looks a summersault!

Now Section 4 of the State Security (Detention of Persons) Act provides:

"4. (1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.

(2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question."

Be it noted that while Chapter IV of the Constitution was suspended for the purpose of the Act, no mention was made of Cap. 10 which was then already in existence. I would think that Cap. 10 remained unaffected by the provisions of Section 4(1)[6][7]. A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly expressed in the later statute see *Cook v. United State*, 228 US 102[8]. This is more so in this case as Section 1 of Cap. 10 provides:

"1. As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."

It is thus enacted that *all* authorities and persons exercising *legislative executive* or *judicial* powers in Nigeria are enjoined to give full recognition and effect to the African Charter. That is, the plenitude of the Government of Nigeria cannot do anything inconsistent with the charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1983 and 1999; It remained in force throughout this period. The position then is that the courts' jurisdiction to give "full recognition and effect" to the African Charter remained unimpaired [9/10].

This conclusion is, in my respectful view, further reinforced by sections 16 (1) & (2) and 17 of the Constitution (Suspension and Modification) Decree, No.107 of 1993, in force at all times relevant to the proceedings leading to this appeal. The sections read:

"16. (1) Subject to this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree, all existing law, that is to say, all laws (other then the Constitution of the Federal Republic of Nigeria 1979) which whether being a rule of law or a provision of an Act of the National Assembly or of a Law made by a State House of Assembly or any other enactment or instrument whatsoever, shall, until that law is altered by an authority having power to do so, continue to have effect with such modifications (whether by way of addition, alteration or omission) as may be necessary to bring that law into conformity with the Constitution of the Federal Republic of Nigeria 1979, as amended, suspended, modified or otherwise affected by this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree, and with the provisions of any Decree made after the commencement of this Decree or Edict relating to the performance of any functions which are conferred by law on any person or authority.

(2) It is hereby declared that the continued suspension by this Decree or any other Decree made after the commencement of this Decree by any Decree or any provision of the constitution of the Federal Republic of Nigeria

1979 shall be without prejudice to the continued operation in accordance with subsection (1) of this section of any law which immediately before the commencement of this Decree was in force by virtue of that provision."

"7. All laws (other than any law to which section 16 of this Decree applies) which, whether being, a rule of law or a provision of an Act, a Decree, an Edict or a Bye-law or of any other enactment or instrument whatsoever, was in force immediately before the commencement of this Decree or made before that date but comes into force or after the commencement of this Decree shall until that law is altered by an authority having power to do so, continue to have effect as it made in exercise of the powers conferred by or arrived under this Decree.

By these provisions, Cap. 10 remaining in full force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any decree made after the commencement of Decree No.107 of 1993, that is, after 17th November 1993. Cap. 10 was no inconsistent with any provision of the 1979 Constitution or any **suit** decree [11][12].

I think both Courts below were in error to decline, pursuant to Cap.10, jurisdiction to entertain Respondent's case for the entire period of this detention.

One reason given by the Court below for abruptly denying the Respondent redress under the Charter is that he came by way of a wrong procedure. With profound respect to their Lordships, I think they are wrong for so holding. In *Fajinmi v. The Speaker, Western House of Assembly* (1962) Vol. 4 NSCC 144; NWLR Pt. 1 pages 206 this Court held that where there is no provision as to the procedure to be followed in enforcing the jurisdiction conferred the plaintiff was entitled to bring the case in the usual form of an action and to have it heard. And in *Ogugu v. The State* (1994) 9 NWLR 1, again this Court, per Bellow CJN, at page s 26-27 held:

> "However, I am unable to agree with Mr. Agbakoba that because neither the African Charter nor its Ratification and Enforcement Act has made a special provision like Section 42 of the Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the Charter has become part of our domestic laws, the enforcement of its provisions like our other laws fall within the juridical powers of the courts as provided by the Constitution and all other laws relating thereto .....

It is apparent from the foregoing that the human and people rights of the African Charter are enforceable by the several High courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court".

From these authorities the Court below could not be right when it held that the Respondent came by a wrong procedure. The Respondent could have come by way of an action commenced by a writ or by any other permissible procedure such as the Fundamental Rights (Enforcement Procedure) Rules, 1979[3]. The trial court, therefore, wrongly declined jurisdiction to entertain Respondent's action before it, for the same reason.

It has been suggested that section 1(2)(b)(i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1994, No. 12 of 1994 ousted the jurisdiction of the Courts in this matter. My simple answer is that the Decree would not apply. The Decree Provides:

> "WHEREAS the military revolution which took place on 17th November, 1993 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree No. 107 of 1993.
>
> .....
>
> AND WHEREAS by section 5 of the said Constitution (Suspension and Modification) Decree, no question as to the validity of any Decree or any Edict (in so far as by section thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any Court of law in Nigeria.
>
> .....
>
> 1. (1) the preamble thereto is hereby affirmed and declared as forming part of this Decree.
>
> 2. It is hereby declared also that:
>
> (a) for the efficacy and stability of the Government of the Federal Republic of Nigeria; and
>
> (b) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria: -

(i) no civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree the proceedings shall abate, be discharged and made void;

(ii) the question whether any provision of Chapter IV of the constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done or purported to be done in pursuance of any Decree shall not be inquired into in any Court of law and accordingly, no provision of the Constitution shall apply in respect of any such question."

As earlier observed in this judgment, Cap. 10 is preserved by sections16 and 17 of Decree No. 107 of 1993. By virtue of the preamble to Decree No. 12 of 1994 and section (1) thereof, Cap.10 is equally preserved by the said Decree[14/15]. I can find nothing in the claims of the Respondent that calls in question the validity of any decree. The only evidence before the trial court was the affidavit of Ganivat Fawehinmi in which she deposed, inter alia, as follows:

"3. That on Tuesday, January 30, 1996at about 6.00a.m. six (6) men who identified themselves as operatives of the State Security Service (SSS) and policemen invaded our residence at 9A Ademola Close GRA, Ikeja, Logos and arrested the Applicant.

4. That no warrant of arrest was shown to the Applicant before and after his arrest although the applicant demanded for same.

5. That thereafter the Applicant was taken away in a light blue Peugeot 504 Station Wagon car with Reg. No. LA 3123 H to the State Security Service, Shangisha, and detained there.

6. That at the time of the said arrest the Applicant was not informed of the offence he had committed.

7. That the applicant has not been charged with the commission of any crime in any court."

There was no counter-affidavit impugning the facts deposed to above. The notice of preliminary objection filed by the Appellants to the Respondent's

application for the enforcement of his rights did not say that the Respondent was detained pursuant to any detention order. Nor was there any affidavit evidence to the effect. I cannot therefore, see how it could be said that the Respondent's action is a challenge to any decree.

I am not unmindful that in the course of proceedings in the trial court a detention order was shown to the Court. As it was never tendered and admitted in evidence, it did not form part of the proceedings in this case. Nor was it evidence on which the Court could act – see

Ouster of court's jurisdiction is not a matter of course. For the court's jurisdiction to be ousted it must be clearly shown that a particular action falls within the ouster clause[16/17]. That is not the case here. With respect to their Lordships of the Court below, I am not impressed by the views expressed by them on the failure of the Appellants to tender in evidence the detention order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of the 1994 does not apply.

From all I have said above, it is crystal clear that the issues raised in the man appeal must be resolved against the Appellants. I unhesitatingly dismissed their appeal. For the same reasons, issue 3 of the cross-appeal is resolved in favour of the Respondent as cross-appellant.

I am now left with Issues 1, 2 & 4 of the cross-appeal. Issue I raises the question of the competence of the Inspector-General of Police to issue the detention order in this case. Decree No. 2 of 1984 empowered the Chief of Staff to issue a detention order. By amendments to the Decree, the power was given variously to the Chief of General Staff or the Inspector-General of Police [State Security (Detention of Persons) (Amendment) Decree No. 12 of 1986], Chief of General Staff, inspection-General of Police or the Minster of Internal Affairs (State Security (Detention of Persons) Amendment) Decree 1988), Chief of General Staff only (State Security (Detention of Persons) Amendment) Decree No.3 of 1990 and the Vice President (State Security (Detention of Persons) Amendment) Decree No. 24 of 1990. The changes in the designation of Chief of Staff to Chief of General Staff to Vice-President followed the constitutional changes made to the nomenclature of the office of No. 2 in the military regime. In the Constitution (Suspension and modification) Decree No. 107 of 1993, the office of the Vice-Prescient disappeared and we have instead the office of the Chief of General Staff – a return to the 1985 position. No consequential amendment was, however, made to the State Security (detention of Persons) Decree as to the person entitled to issue a detention order. The position remained as it was in 1990 when the Vice-President was given that power.

Then Came 1994 when another amendment was made to the Decree. The State Security (Detention of Persons) Decree No. 11 of 1994 which came into force on 18th August 1994, provided as follows:

> "1. The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of Persons) Amendment) Decree 1984, 1988 and 1990 is further amended:
>
> (a) By inserting immediately after the words 'Chief of General Staff' the words 'or the Inspector-General of Police' wherever they occur in the Decree."

It would appear that this amendment overlooked Decree No. 24 of 1990 which substituted the Vice-President for the Chief of General Staff. The position in law was that as at the time of the promulgation of Decree No.11 of 1994 only the Vice-President, a non-existing office at the time, could issue a detention order, the Chief of General Staff had not been given back that power. It is the muddle in Decree No.11 of 1994 that the Respondent is now capitalizing on to submit that -

> "Since the Chief of General Staff was non-existent under and unknown to Decree No.2 of 1994 as amended by Decree No.24 of 1990, the office of the Inspector-General of Police cannot with respect, be inserted after an office that does not exist."

With respect, I do not accept this submission. As a result of the muddle made in Decree No.11 of 1994 only the Inspector-General of police was left to issue a detention order. And since he was the one who signed the order detaining the Respondent, the order could not be faulted on this ground. Had the order been signed by the Chief of General Staff, I would not have hesitated in declaring it void as his power to issue such an order had been taken away by Decree No.24 of 1990.

In conclusion I resolve issue I against the Respondent.

On Issue 2, I think the Respondent misconstrued what the Court below decided. That Court did not say that the procedure adopted by the trial court in dealing with the detention order was right but that the irregularity did not occasion a miscarriage of justice. This is what Musdapher JCA who read the lead judgment said:

> "There is no dispute that the Detention order in the instant case was produced in Court and was examined by the learned trial Judge and the Appellant's counsel. The issue of admissibility of

the Detention Order was not raised at the trial. It is a new issue first raised on appeal without leave. Throughout his lengthy submissions in the Court below, the learned counsel for the Appellant did not protest the manner the Detention Order was introduced in the proceedings. He not only referred to it in his submissions but used it to show that the Appellant was arrested and detained days before the Detention Order was signed. A party to any civil proceedings who knowing of an irregularity, allows the irregular procedure to be adopted and indeed used document irregularly produced in the proceedings cannot complain on appeal on the procedure adopted: see *Akhiwu v. The Principal Lotteries Officer, Mid-Western State* (1972) 1 All NLR (Pt.1) 229. The Detention Order, should have been exhibited or some how tendered. It was not tendered. The learned counsel for the Respondents produced it. It was accepted by the learned counsel for the Appellant who not only read it but also relied upon it to show the illegality of the arrest or detention of the Appellant for a few days. I am of the view, that under these circumstances, the Appellant cannot now at the appeal stage impugn the admissibility of the Detention Order. In any event, the substantive action has not commenced. What is in contest is whether the court has jurisdiction to entertain the suit. It was on that preliminary issue the Detention Order was examined by all concerned, the Appellant's counsel relying on it to argue that the Inspector-General of Police could not in law issue it. I do not think it is of any moment to now argue that the Detention Order was not formally admitted in evidence. Though the Detention Order should have been exhibited to the Notice of Preliminary objection, the way and the manner it was introduced in the court below did not occasion any miscarriage of justice."

It is not disputed here that the irregularity did not occasion a miscarriage of justice. The Failure to fault this finding puts an end to the case of the Respondent on this complaint. I, therefore, resolved the issue against the Respondent.

On Issue 4, the unsolicited passing remark of Pats-Acholonu JCA, not being a decision, cannot be made a subject of an appeal. The learned Justice of Appeal had observed:

"When I look at this case, I observed that one of the respondents is the Head of State – General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of Section 267 of the Constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It was wrong in law to have joined him as a party. The constitution is the primary law of the land. I hold therefore that the name of the Head of State should not have been reflected in the Suit in the first place. It offends the provision of the Constitution."

The observation above did not arise out of any issue canvassed before the Court below nor were arguments advanced on it. It is, therefore, not a decision that could be appealed against; it is only a mere remark. All this notwithstanding, it is patently clear that the observation is erroneous in law. Section 267 referred to therein had been suspended by Decree No.107 of 1993. Even if it were not suspended it is clear that by its provisions it would not apply to a case where the official concerned (here, General Sani Abacha) was sued in his official capacity – See sub section (2) of section 267

"(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 a person is only a nominal party."

I leave the matter at that and say no more on it.

Since, I have resolved Issue 3 in favour of the Respondent, it follows that his cross-appeal must succeed and it is allowed by me. I set aside the consequential order made by the Court below and in its place I order that Respondent's case be remitted to the Federal High Court for trial of all his claims by another Judge of that Court. I award to him N10,000.00 costs in this Court.

A. I. IGUH, JSC: I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I am in complete agreement that while the main appeal is devoid of substance and must therefore fail, the cross-appeal is clearly meritorious and ought to be allowed.

I need to stress, in the first place, that the African Charter on Human and People's Rights was duly adopted by Nigeria in 1983, by the enactment

of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983, Cap.10, Laws of the Federation of Nigeria, 1990. As a result, the rights and obligations therein covered under the said Charter became fully and legally enforceable in Nigeria as any other municipal or domestic law of the land.

In the second place, it is crystal clear that whereas the provision of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 which deals with fundamental human rights were expressly *suspended* for the purposes of the State Security (Detention of Persons) Act by Section 4 thereof, the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983, Cap. 10, Laws of the Federation of Nigeria, 1990 were left undisturbed and therefore unaffected.

Section 4 of the State Security (Detention of persons) Act provides as follows:

> "4. (1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.
>
> (2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question."

It is plain that while the said Section 4 of the State Security (Detention of Persons) Act expressly suspended Chapter IV of the Constitution of Nigeria, 1979, it in no way repealed, abrogated or suspended the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983, Cap.10 Laws of the Federation of Nigeria, 1990. In my view, the law makers, if they had intended to suspend or repeal the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 along with Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 would have specifically so stated by clear words[19/20/21]. See *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* (1960) A.C. 260 at 286 where Viscount Simonds, delivering the judgment of the House of Lords expressed this principle of law as follows:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words"[22].

Although, a later statute may suspend or repeal an earlier one either expressly or by implication, suspension or repeal by implication is not, as a general rule, favoured by the courts in the absence of clear words to that effect. See *Chorlton v. Tonge Overseers* (1871) L.R. 7 C. P. 178. As Coke, C. J. put it in *Dr. Fosters* Case (1914) 11 Rep. 56b at P.63a:

> "For as much as Acts of Parliaments are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be a brogated"[23/24].

And if, as with all modern statutes, the later Act contains a list of earlier enactments which it expressly repeals or suspends, the omission of a particular statute from such list will be highly indicative of a strong presumption of intention on the part of the law makers not to repeal or suspend the statute thus omitted. See *R. v. Poor Law Commissioners, Re St. Pancras Parish* (1837) 6 Ad. and El. 1

In the present case, section 4 of the State Security (Detention of Persons) Act unequivocally and in clear terms mentions Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 as the earlier enactment which it expressly suspends. It neither mentioned nor did it include the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 as one of the enactments concerning fundamental human rights it was suspending. My attention was not drawn to any Decree or, indeed, to any other Act or Law promulgated after 1983 which in clear terms repealed or suspended the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, 1983 in relation to detention of persons. In the circumstance, I think the said African charter on human and Peoples' Right (Ratification and Enforcement) Act, 1983 remained effective and in full force at all times material to the respondent's alleged detention[25]. I entertain no doubt also that both courts below, with profound respect, were in definite error when they held that there was no jurisdiction in the law courts to entertain the respondent's claims for the entire period of this alleged detention. I think such jurisdiction exists. This is by virtue of the fact, firstly, that the African Charter on Human and Peoples' Rights (Ratification and

Enforcement) Act, 1983 was at no time suspended or repealed. There is, secondly, section 1 of that Act which stipulates that from the date of its commencement, the provisions of the African Charter on Human and Peoples Rights shall, subject as provided thereunder, *have full force of law, in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria.* Thirdly, and finally, is the fact that the respondent's action was *expressly* founded in his originating summons, not only under the 1979 Constitution, but also under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10, Laws of the Federation of Nigeria, 1990 which, as I observed, remains fully in force and enforceable in Nigeria. It is my view, therefore, that there is ample jurisdiction in the law courts to entertain the respondent's claim under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983.

I need finally to say a word or two with regard to two Decrees from which it would appear that the trial Federal High Court held it had no jurisdiction to entertain the respondent's claims. These are section 5 of the Constitution (Suspension and Modification) Decree No.107 of 1993 and section 1 (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994.

Section 5 of Decree No.107 of 1993 states as follows: -

> "No question as to the validity of this Decree or any other Decree, made during the period 31st December, 1983 to 26th August, 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria"

There is next section 1 (2) (b) (i) of Decree No. 12 of 1994. This provides thus:-

> "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree, the proceedings shall abate, be discharged and made void"

In the first place, it ought to be pointed out that no question as to the validity of any Decree or Edict, whether made before, during the period 31st December 1983 to 26th August, 1993 or at any other time thereafter is in issue on the face of the respondent's action. His claim against the

appellants are fully set out in the leading judgment of my learned brother, Ogundare, J.S.C. and I need not repeat them all over again in this judgment. These comprise of declaratory claims in respect of the alleged arrest and detention of the respondent, a mandatory order for his release, an order of injunction restraining the appellants from any further arrest of the respondent and N10,000,000.00 damages for the alleged unlawful arrest and/or detention of the respondent. It suffices to state that the main issues before the trial court centre on the alleged unlawful arrest and detention of the respondent by the appellants and not with the validity of any Decree or Edict.

In the second place, the respondent in paragraphs 3-7 of the affidavit in support of his originating summons carefully deposed as follows -

"3. That on Tuesday, January 30, 1996 at about 6.00 a.m., six (6) men who identified themselves as operatives of the State Security Service (SSS) and policemen invaded our residence at 9A Ademola Close G.R.A., Ikeja, Lagos and arrested the Applicant.
4. That no warrant of arrest was shown to the Applicant before and after his arrest although the applicant demanded for same.
5. That thereafter the Applicant was taken away in a light blue Peugeout 504 Station Wagon car with Reg. No. LA 3123 H to the State Security Service, Shangisha, and detained there.
6. That at the time of the said arrest the Applicant was not informed of the offence he had committed.
7. That the applicant has not been charged with the commission of any crime in any court."

No counter-affidavit was filed by the appellants in answer to the above depositions of the respondent. The obvious result is that having regard to the unchallenged depositions of the respondent, there was no evidence before the court to the effect that the respondent's claims had anything to do with or were in respect of any act, matter or thing done pursuant to any Decree or Edict. The onus was on the appellants to depose to facts to establish, or at least, to alleged that whatever action they took against the respondent was pursuant to a Decree or Edict they were relying on. This they failed to do. It cannot in the circumstance be said that there was any evidence before the court to connect Decree No. 12 of 1994, or indeed, any other Decree or Edict with whatever acts the appellants were said to have done in the present action. In my view, in the total absence of any deposition, whether from the respondent or the appellants, to connect

the appellants' alleged conduct complained of with Decree No. 12 of 1994, it would be wrong to invoke the Decree *in vacuo*, that is to say, without any claim whatsoever from either of the parties to the effect that the action in question is in respect of an act or thing done pursuant to the Decree[26]. In this connection, I ought to observe that while it is a principal rule of pleading that a party must plead material facts only and not law, yet every party is permitted by his material facts only and not law, yet every party is permitted by his pleading to raise a point of law. It is thus not only unnecessary but contrary to the rules of pleadings to plead law, statutes, or sections thereof before reliance can be placed on them. If a party's case depends on a statute, all he needs do is fully to plead material facts necessary to bring his case within that statute. See *Read v. Brown* 22 Q.B.D. 128, *Re Vandervell's Trasts.* (No.2) (1974) 3 A11 E.R. 205 at 213 (C.A.) *Anyanwu v. Inbara* (1992) 5 N.W.L.R. (Part 242) 386 at 398.
In the present case, no material facts were deposed to by the appellants in answer to the affidavit in support of the respondent's originating summons to bring their case within the purview of either Decree No.107 of 1993 or Decree No. 12 of 1994. I think both courts below were clearly in error to have invoked both decrees in holding that there was no jurisdiction in the trial Federal High Court to entertain the respondent's claims[27].

It is for the above and the more detailed reasons contained in the judgments of my learned brothers, Ogundare and Uwaifo, JJ.S.C. that I, too must resolve the main appeal against the appellants. Their appeal is accordingly dismissed for want of substance. The cross-appeal, for the same reasons, succeeds and it is hereby allowed. The judgment and orders of the court below are hereby set aside and, in substitution thereof, the respondent's case is remitted to the trial Federal High Court for hearing and determination on its merits before another Judge of that court, I award to the respondent against the appellants costs in this court which I assess and fix at N10,000.00.

S. O. UWAIFO, JSC: There are two appeals for consideration one is an appeal and the other a cross-appeal against the judgment of the Court of Appeal, Lagos Division given on 12 December, 1996 in this matter. The judgment is in respect of the decision of the Federal High Court delivered on 26th March, 1996 upon a preliminary objection to this action which was begun by the cross-appellant as applicant in February, 1996.

A short background of the cross-appellant is relevant. I take it from the affidavits and other documents filed in court. No one has disputed the

facts revealed therein. The cross-appellant at the time this action was filed had had over 31 years of experience as a legal practitioner. In those years he turned out to be an active legal advocate, an author and publisher particularly in the field of law. He was also widely known as human rights activist and pro-democracy campaigner, and towards this involvement he became the National Co-ordinator of a party known as the National Conscience Party. He is not known to have committed any offence under the law and has never been charged with the commission of any crime in any court. He prides himself as a law-abiding citizen who does not indulge in carrying guns or other dangerous weapons.

On Thursday, 30 January, 1996 at about 6a.m., the cross-appellant was arrested at his residence No. 9A Ademola Close, G.R.A., Ikeja, Lagos without any warrant. He was taken to the State Security Service Detention Centre at Shangisha, Lagos. From there he was taken to Bauchi Prison where he was detained incommunicado. He was not brought to trial over any offence. On February 1, 1996, the cross-appellant whose only known forum of seeking to redress a grievance is the law courts, filed an application to begin an action at the Federal High Court, Lagos, to challenge his arrest and detention by the respondents. The action was brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

In the action which was first by way of an ex parte motion, the cross-appellant asked for a number of reliefs. But those finally sought in the motion on notice include two declarations that his arrest and detention constitute a violation of his fundamental rights guaranteed under the 1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990. The others were mandatory order to compel the respondents to release the cross-appellant, an injunction and damages of N10 million. The learned trial judge (Nwogwugwu, J.) granted leave to the cross-appellant on February 1, 1996 to move for those reliefs.

By a notice of preliminary objection filed by the present appellants as respondent in the High Court, the competence of the court to entertain the action was called into question on the grounds that (1) by a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by the State Security (Detention of Persons) Decree No. 2 of 1984 as amended) and further by Section 4 of the said Decree, the respondents are immune from any legal liabilities in respect of an action done pursuant to that Decree; (2) the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No.107 of 1993 ousted

the jurisdiction of the court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree; (3) the court lacks the jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

The earned trial judge held that the Inspector-General of Police was empowered to issue the order with which the cross-appellant was detained and that such detention order having been made by the appropriate authority under the Decree, could not be legally questioned. On the effectuality of the provision of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, he held that Decree No. 107 of 1993 represented by the grundnorm of Nigeria at the material time and that any of the provisions of that Act which are inconsistent with that Decree are void to the extent of the inconsistency. In the result he struck out the action on the ground that the court was incompetent to entertain it.

The cross-appellant in his appeal against that judgment to the Court of Appeal presented such a compendius and comprehensive brief of argument that could hardly fail to make a favourable impression on a listening tribunal. Reading through that brief, I marvel at the strength of the arguments and the industry engaged in putting them across. I shall be obliged to rely on some of those arguments in the course of this judgment. The lower court, upon a thorough understanding of the judgments of the three learned Justices, appreciated the issue about the status of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act as contained in Cap. 10 of the laws of the Federation, 1990.

In his opinion, Musdapher JCA who gave the leading judgment observed admirably in that case reported as *Fawehinmi v. Abacha (1996) 9 NWLR (pt.475) 10 at 747; (1998) I HRLRA 531 at 590-591* as follows:

> "It seems to me that the learned trial Judge acted erroneously when he held that the African Charter contained in Cap.10 of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is common place (knowledge), that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1993, it is a legislation with international flavour and the ouster clauses contained in Decree No.107 of 1983, it is a legislation with international flavor and the outster clauses contained in

> Decree No. 107 of 1993 or No.12 of 1994 cannot affect its operation in Nigeria ..... it is for the above that I hold that the provisions of Cap. 10 of the Laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may override other municipal Laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter."

The other learned Justice of the Court of Appeal, R.D Muhammad JCA, said (1996) 9 NWLR (Pt.475) at p. 751; (1998) 1 HRLRA at p.596:

> "On the issue of the status of the African Charter on peoples right, I agree that ordinarily, a state, which is a party to a treaty will not be permitted to legislate locally out of its obligations. But in this matter, Decree No.2 of 1984 as amended did not exclude the operation of the clauses of the African Charter ..... I am of the opinion that the ouster clauses contained in the enactments do not affect the African Charter."

The third member of the Court of Appeal panel, Pats-Acholonu JCA observed *(1996) 9 NWLR (pt.475) at p.758; (1998) 1 HRLRA at p. 606* inter alia:

> "It is apparent ..... that the human and peoples rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court ..... By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal ..... The intention of Cap. 10 is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and adopts the full contents and import of the convention or charter but has gone the extra mile of incorporating same into a municipal law. It is to be noted that the Act has neither been abrogated not repealed either directly, impliedly or inferentially."

The learned Justices said in the above quoted paragraphs from their judgments and much more that the appellants could not circumvent the effect of the *African Charter* as adopted by an Act in Cap. 10 of the Laws of

the Federation of Nigeria, 1990 as long as the Act remains in the statute book. I do appreciate that Pats-Acholonu JCA meant to express the due effect to be given to the African Charter when he said that having been adopted as part of our domestic law by an Act, "the preamble and section of the Act seem to vet that Act with greater vigor and strength than mere decree for it has been elevated to a higher pedestal." I shall endeavour later to put this in a manner to depict clearly what the status of the African Charter must be seen to be and how it should be treated and applied in this country. But there is no doubt that one after the other, the learned Justices seemed subsequently to have capitulated to the argument of appellants' counsel that the cross-appellant adopted a wrong procedure for seeking relief by relying on the Fundamental Rights (Enforcement Procedure) Rules, 1979. Overlooking some contractions indulged in by lower court, as I am inclined to do, but concerned about the apparent misinterpretation of the observation of Bello CJN in *Ogugu v. The State (1994) 9 NWLR (pt.366) 1 at 26*, it was anti-climax in the otherwise enterprising judgment of Musdapher JCA., who, after acknowledging that Bello CJN., said that the African Charter Articles could also be enforced by applicable "Rules of practice in the Courts", observed at page 748 and page 592 respectively of the Law Reports:

> "I am of the view that the Appellant (i.e. now cross-appellant) was wrong in the procedure he adopted to enforcement the Charter under the special jurisdictions of the Court in reliance on Section 42 of the Constitution. The learned trial Judge was right to decline jurisdiction under the circumstances on the basis of the procedure adopted."

Yet the case was ordered to be remitted back to the trial court to consider the consequences of an aspect of the cross-appellant's detention. The other learned Justices endorsed this judgment and order. There is obvious contradiction there between that finding and this order.

Both sides have appealed to this court: the respondents as appellants and the applicant as cross-appellant. The appellants raised the following issues:

> "1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfill an international obligation which it voluntarily entered into and agreed to be bound and the Government cannot be allowed under international law to contract out of its international obligations by local legislation.

2. Whether the Court of Appeal was right in holding that African Charter CAP. 10 Laws of the Federation is not inferior to the Decrees of the Federal Military Government on the ground according to the Court below that the legislation has international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters touching on African Charter.

3. Whether the Court of Appeal having concurred with (sic) the decision of the trial Federal High Court declining jurisdiction to entertain the respondents application for the Enforcement of rights guaranteed under the African Charter on Human and Peoples Right Cap. 10 Laws of the Federation of Nigeria 1990 because of the procedure adopted therefore, to wit, procedure by way of Fundamental Rights (Enforcement) Procedure Rules 1970, adjudged by courts as incorrect was right -

   (i) in not striking out the application right away; and
   (ii) in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.

4. Put the other way but in form of questionnaires (sic) and for better clarity and comprehension, issues No. 1 & 2 above may be epitomized as follows

   (i) What is the nature of a treaty or agreement between two or more sovereign states, such as the African Charter on Human Rights Particularly as regards its force and applicability.
   (ii) Where a treaty or agreement between two or more sovereign states is incorporated into the municipal law of a contracting state by its Constitution or municipal legislation does it have force or effect greater or higher than that of the Constitution or the municipal law because of its international flavour? Further, in the particular case of Nigeria as a country ruled by an absolute Military Government whose Decrees are supreme over the unsuspended provisions of the Constitution 1979 and over all the other pre-existing laws does the African Charter as incorporated into Nigeria's municipal law by legislation of National Assembly Cap. 10 LFN 1990 have a

force or effect greater or higher than that of a Decree so that a Decree cannot oust the jurisdiction of the Court in respect of its provisions.

Issue 4(i) & (ii) purports to be a variant of issues 1 and 2 hut in my view, issue 4(i) is incompetent as it is merely a general issue not directed to the circumstances of this appeal. So is the first part of issue 4(ii).

The respondent to the appeal in the respondent's brief put the issues arising as follows:

"1. Whether it is permissible for a State party to a multilateral treaty to promulgate municipal legislation that are inconsistent with its obligations under the treaty.

Alternatively.

2. Whether the African Charter on Human and Peoples' Rights as adopted by Nigeria is inferior or superior to municipal laws promulgated by the Government of Nigeria.
3. Whether the Court of Appeal was right in remitting the case back to the trial Court to consider the consequences of the detention of the respondent for the period of four days not covered by the detention order."

I think issues I can be made more specific if stated as: "Whether it is permissible for Nigeria which is a party to and has adopted the African Charter on Human and Peoples' Right to promulgate municipal legislation that are inconsistent with its obligations under that Charter while it remains in its statute book."

In the cross-appellant's brief, the following issues for the determination of the cross-appeal are set down.

"1. Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No.11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.

2. Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.
3. Whether the procedure adopted by the cross-appellant in this case in enforcing the articles of the African Charter on Human and Peoples' Rights was proper.
4. Whether the 1st Respondent, as Head of State of Nigeria is immuned (sic) from civil or criminal actions in all cases."

The appellants raised two objections: one was against the competence of ground 5 of the grounds of appeal filed by the cross-appellant. I shall deal later with this in this judgment. The other was to have 2 struck out on the grounds, according to counsel, that it was not covered by any ground of appeal,

Argument was canvassed at length on this by the appellants' counsel. In his reply brief, the cross-appellant dealt very briefly but effectively with it. I agree with him that issue 2 is covered by ground 2 of the grounds of cross-appeal. I need not say more to this. I therefore overrule that objection.

I shall consider the main appeal first. I shall do so bearing in mind all the relevant issues raised in it by both sides. I do not intend to deal with them one after the other but I shall endeavour to answer them as necessary. But I think the proper approach to this appeal is to get at the pith and substance of it as quickly from the outset as possible. This can be achieved by considering and resolving the inevitable question, to what extent and in what circumstances is the Government of Nigeria bound by the African Charter which it has adopted as one of its domestic laws? It is the answer to this main poser that leads to the easy resolution of all other issues.

The African Charter on Human and Peoples' Rights was adopted by the Organisation of African Unity (OAU) on 19 January, 1981. Nigeria is a member of the OAU. The said Charter was passed wholesale into Law by Nigeria, Known as the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, 1983 (the Act) on 17 March, 1983. It can be found in Chapter 10 of the Laws of the Federation of Nigeria 1990, Vol. 1. It is part of the laws of the Federation of Nigeria which are not repealed but were kept in force under the Revised Edition (Laws of the Federation of Nigeria) Decree 1990 by the Federal Military Government. Section 1 of the Act states as follows:

"1. As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided,

have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria" [28].

I consider it necessary to recite some of the provisions of the said Charter here. First, I take some aspects of the preamble enunciated by the member States of OAU which read:

> "Considering the Charter of the Organisation of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'
>
> Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;
>
> Reaffirming their adherence to the principles of human and people's rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations:
>
> Firmly Convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

It was following these affirmations that the member States agreed the Charter on Human and Peoples' Rights, the most pertinent of which for the purposes of these appeals provide:

> ARTICLE 2
>
> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

ARTICLE 4

"Human beings are inviolable, Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right."

ARTICLE 5

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

ARTICLE 6

"Every individual shall have the right to liberty. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained."

(Emphasis by me)

ARTICLE 7

"1. Every individual shall have the right to have his cause heard. This comprises.

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force."

(emphasis by me)

ARTICLE 26

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

Learned counsel for the appellants has argued that the African Charter is a contract between the participating sovereign states. As a contract in the form of a treaty, it binds only the states who are parties to it. He says further that being a treaty and not a statute, it has not the force and effect

of a statute and therefore does not bind those, whether individuals or states, who are not parties to it. He contends that the stipulations in a treaty are entirely beyond the cognizance of municipal courts because they do not administer treaty obligations between independent states, arguing further that the nature a treaty is established by authorities to be referable to an "act of state". In this regard he cites *Salaman v. Secretary of State for India* (1906) 1 K.B. 613 at 639 where Fletcher Moulton L.J. said:

> "An act State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and whatever it be, municipal Courts must accept it, as it is, without question. But it may, and often must be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of State, and as thus affording an answer to claims by a subject, the Courts must decide whether it was in truth an act of State, and what its nature and extent."

Citing the House of Lords decision in *Sobhuza 11 v. Miller* (1926) A.C. 518, 522-524 as having approved Fletcher Moulton L.J's statement of the law, the learned counsel came to the conclusion that the cross-appellant cannot rely on the African Charter to found jurisdiction in the High Court to entertain his action.

Learned counsel for the cross-appellant contends however, that a treaty is not simply a contract in the ordinary sense. But rather, unlike a mere contract, being a treaty creating benefits to individuals in a state, can be enforced in the municipal courts of the State, relying on the cases of *Application des Gaz SA v. Falks Veritas Ltd* (1974) 3 All ER 51; *Schlorsch Meier Gmbh v. Hennin* (1975) 1 All ER 152; *Garden Cottage Food Ltd. v. Milk Marketing Board* (1984) A.C. 130.

First, let me say that the definition of a treaty by learned counsel for the appellants as a mere contract as understood under contract law is too limited in content and is bound to mislead as to the import and purport of a treaty. I think it is useful to remember that the relevant law on the matter is now generally governed by the Vienna Convention on the law of Treaties of 1969. The convention was based upon draft articles proposed by the International Commission and was adopted at the Vienna Conference on the Law of Treaties. According to the convention "treaty" means an international agreement or by whatever name called, e.g. Act, charter, concordant, convention, covenant, declaration, protocol or statute, concluded between states in written form and governed by international law, whether

embodied in a single instrument or in two or more related instruments and whatever its particular designation: See *Halsbury's Laws of England*, 4th edn. Vol. 18, para. 1769 and 1796n[3], Page 918[29]

Second, I cannot help remarking that learned counsel for the appellants has misconceived the meaning and essence of what is known as an act of State. Act of State doctrine is a doctrine denying to municipal courts (1) the jurisdiction to pass judgment upon the validity of legality of the acts of a foreign state and (2) the Right to challenge executive statements of their own government on the conduct of foreign affairs. As observed by Chief Justice Fuller of the United States Supreme Court in *Underhill v. Hernandez* (1897) 168 U.S. 250, "Every sovereign state and the court of one state will not sit in judgment on the acts of another done within its own territory"[30].

The African Charter as far as Nigeria is concerned, is not purely a matter of public international law (or International customary law per se) regulating the relationship between member states which are signatories to it. It is an understanding between some African States concerned to protect and improve the human rights and dignity of their citizens and other citizens within the territorial jurisdiction of their countries, to the commitment of which, that understanding has been translated into a legal obligation by adopting the Charter as a domestic law. In our case, it is the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act earlier referred to which is the domestic law[31].

The next question to ask is whether an individual can rely on the Act, first, as to the jurisdiction of the national courts to entertain his cause and second, to sustain that cause on the basis that his human rights protection under that Charter has been violated. The Charter contains a number of rights recognised and guaranteed to every individuals. Some have been recited earlier in this Judgment as they appear in Articles 2, 4, 5, 6, 7(1)(a) and 26. These and other Articles of the Charter show that individuals are assumed rights which they can seek to protect from being violated and if violated to seek appropriate remedies. It is in the national courts such protection and remedies can be sought, and, if the cause is established, enforced contrary to the contention of learned counsel for the appellants. In other words, those individual rights are justiciable in Nigerian Courts.

There are many authorities of comparable relevant which support this proposition. The European Communities Act, 1972 has made the Economic Communities Treaty part of the Laws of England the same way as our Act in Cap. 10 Laws of the Federation of Nigeria has made the African Charter part of the laws in Nigeria. In regard to the European

Communities Act, 1972 and the Community Treaty, Halsbury's Laws of England, 4th edn. vol.51, para. 3.05, pages 378-179 says:

> "The fact that rights and obligations etc. arising directly under Community law are transformed into enforceable community rights and obligation under the European Communities Act 1972 has consequences in domestic law. It would appear that in so far as a Community obligation gives rise to rights in favour of individuals, breach of that Community obligation becomes in English law a breach of a statutory duty imposed for the benefit of private individuals to whom loss or damages is caused by a breach of that duty. Thus a breach of a provision of Community law giving rise to individual rights may constitute a cause of action in English private law as a breach of statutory duty."

In *Application des Gas SA v. Falks Veritas Ltd* (1974) 3 All ER 51,a company had instituted an action against another Company for infringement of the copyright in a drawing it claimed was assigned to it. The defendant relied on the defence that the action was contrary to the European Economic Communities Act which by its article 85 forbids any concerted practice which unduly restricts competition within the common market and article 86 which forbids any abuse of a dominant position within the common market or a substantial part of it. The issue that fell for determination was whether the right created by a treaty are available to an individual and whether such rights are enforceable in municipal (or national) courts. The Court of Appeal answered the questions in the affirmative. Lord Denning M.R., in reliance on a judgment of the European court, said *inter alia* at page 58:

> "Put into English, that judgment of the European Court shows that acts 85 & 86 create rights in private citizens which they can enforce in the national courts and which the national courts are bound to uphold. Furthermore, on 27th March 1974 the European Court held that it is the national Courts to assess the fact so as to see whether they amount to an infringement.
>
> So we reach this conclusion. Articles 85 and 86 are part of our law. They create new torts or wrongs ..... Any infringement of these articles can be dealt with by the English courts. It is for our courts to find the facts, to apply the law, and to use the remedies which we have available ..... It is for us to give the judgment and to enforce it. It is a task worthy of our mettle."

Similarly in *Schlorsch Meir GmbH v. Hennin* (1975) 1 All ER 152, at page 157, Lord Denning M.R. said:

"I turn now to the Treaty of Rome. It is by statute part of the law of England. It creates rights and obligations not only between member states themselves, but also between citizen and the member states, and between the ordinary citizens themselves and the national courts can enforce this rights and obligations.

More recently, the House of Lords upheld the same principle of law in *Garden Cottage Foods Ltd. v. Milk Marketing Board* (1984) A.C. 130. At page 144, Lord Diplock said that it was" ..... the duty of national courts to protect the rights conferred on individual citizens by directly applicable provisions of the treaty." On his part, Lord Wilberforce said at page 151:

> "It can I think be accepted that a private person can sue in this country to prevent an infraction of article 86. This follows from the fact, which is indisputable that this article is directly applicable in member states ..... It is for the national courts of member states to safeguard the rights of individuals. Since Articles 86 says that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct."

I think the position has also been made clear in Nigeria in the case of *Ogugu v. The State* (1994) 9 NWLR (pt.366) 1 at pages 26-27; (1998) 1 HRLRA 167 at 187-189 where Bellow CJN, in reference to the enforcement of the African Charter as to its human rights provisions within a domestic jurisdiction observed *inter alia* as follows:

> "Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto ..... it is apparent ... that the human and people's rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court."

See also *Oshevire v. British Caledonian Airways Ltd* (1990) 7 NWLR (pt. 163) 507; *U.A.C. (Nig.) Ltd v. Global Transport SA* (1996) 5 NWLR (pt.448) 291; and *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (pt.498) 124 in which the Warsaw Convention, 1929 (a treaty) was given effect to by Nigerian Courts, It follows that the contention of the appellants that the African Charter being a treaty could not be a subject of litigation entertainable by Nigerian courts utterly misconceived[32/33].

It seems to me that where we have a treaty like the African Charter on Human and Peoples' Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them,, particularly when we have adopted them as part of our laws. To my mind, this remains a valid attitude whether in military or civilian government. This will necessarily extract from the judiciary, so much so in military regime, its will and resourcefullness to play its role in the defence of liberty and justice. The judiciary must not be seen as assisting those who step on liberty and justice to effectively press them down. Of course, if its role is completely taken away or abrogated in any particular situation, it will be obvious that no blame can be laid at its door for the infraction of human rights and liberties in question in any given situation. I subscribe to every view which supports the attitude that "we cannot afford to be immuned (sic) from the progressive movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understanding as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicating roles in other jurisdictions" to use the words of Aguda JCA in *Attorney-General of Bostwana v. Unity Dow* (1998) 1HRIRA 1 at 127-128. (HRLRA is Human Rights Law Reports of Africa)[34].

With this is in view, I must now say that the prevailing attitude is to give special consideration to treaties adopted by any state as part of its domestic laws vis-à-vis other domestic laws. It was this, I think, that led Musdapher JCA in the present case at page 747 and pages 590-591 of the respective Law Reports already cited to observe that "the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority ..... It seems to me that the learned trial Judge acted erroneously when he held that the African Charter contained in Cap.10 of the Laws off the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government ..... It is my view, that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in1983, it is a legislation with international flavour and

the ouster clauses contained in Decree No. 107 of No. 12 of 1994 cannot affect its operation in Nigeria."

With due respect, I am of the opinion that the learned Justice of the Court of Appeal was absolutely right to say that the African Charter is in a class of its own as I shall endeavour to show. In their own judgments in support, Muhammad and Pats-Acholonu JCA held the same view. But Pats-Acholonu JCA went a little further to say at page 758 and page 606 of the respective Law Reports (supra), in reference to the Act incorporating the African Charter as part of our laws, that:

> "By not merely adopting the African Charter but enacting it into our organic (sic) law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere Decree for it has been elevated to a higher pedestal..."

This passage from Pats-Acholonu JCA's judgment could give the impression that he regards the Act as superior to and overrides a Decree (or the Constitution) but I think the misrepresentation arises only because of the language used. If that was his view I would without hesitation disagree with him and overrule it as I earlier indicated.

But the learned justice later at that same page 758; 606 cited s. 17 of the Constitution (Suspension and Modification) Decree No. 107 of 1993 apparently preserving the African Charter which section I shall more particularly consider in the course of this judgment, and in between he made the following observation:

> "The intention of Cap 10 is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and adopts the full contents and import of the convention or charter but has gone the extra mile of incorporating same into our municipal law: It is to be noted that the Act has neither been abrogated nor repealed either directly, impliedly or inferentially..... The full import of this provision (of s.17 of Decree No.107 of 1993) is that an Act such as Cap.10 of 1990 is still a law to which the court (sic judiciary) the executive and the legislature which is really the Provisional Ruling Council by virtue of section 10 (2) of the Decree No.107 of 1993 must give due recognition and enforce. It then means that the obvious interpretation is that the law is in full force, and because of its genesis it has an aura of sacrosanctity unlike most municipal laws and may as long as

> it is the statute book be clothed with vestment of inviolability (by reason) except where a decree specifically repeals it."

It appears all the learned justice laboured to say was that Decree 107 of 1993 preserved the Act in Cap. 10 of the 1990 Laws of the Federation of Nigeria (i.e. the African Charter) and because of its international character with its attendant image implication for Nigeria, the Act attained a special status and should be accorded due recognition for what it is[35]. He then reasoned from that premise that the African Charter, like the Hague Rules incorporated as part of English Rules, should be construed with some degree of uniformity in the various jurisdictions where it is operative. He cited *Stag Line Ltd. v. Fascolo Mango & Co. Ltd* (1932) A.C. 328 at 350 where Lord Macmillan said of the Hague Rules:

> "As these rules must come under consideration of foreign Courts it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."

I respectfully agree with Lord Macmillan's observation[36]. I would like to remark that Pats-Acholonu JCA's perception of the status of the African Charter will be better appreciated on the grounds (1) that Decree No. 107 of 1983 specifically preserved the Act which incorporated the African Charter as Part of Nigerian municipal laws (2) that the Charter has international image implication for Nigeria (3) that since no law has abrogated or repealed the Act, the Charter is entitled to due recognition by all the arms of government, and in particular, enforcement by the courts. Trust being the situation which I have no reason to criticise, the next curse is to ensure is to examine in what manner the efficacy of that Charter should be ensured[37].

The position in Belgiun was referred to by the Court of Appeal in *Oshevire v. British Caledonian Airways Ltd.* (1990) 7 NWLR (p.63) 507 at page 523-524 where the case of SA.

The position in Belgiun was referred to by the Court of Appeal in *Oshevire v. British Caledonian Airways Ltd.* (1990) 7 NWLR (p.63) 507 at page 523-524 where the case of *S.A. Ameniorex v. Societede drait Jordanien Alia et Societe de droit Saudien SAUDIA Arabian Airlines* (reported in 1986 Uniform Law Review Biannual vol. II, page 538) was cited. The Court of Appeal of Brussels is Belgium was said to have held that:

> "Belgium case law affirms that a convention whose purpose is the unification of law must be interpreted on the basis of the specific characteristics of the Convention, in particular, its object, purpose and context, as well as of the *tavaux preparatories* and its origins, as it would be pointless to work out a convention establishing international rules if it were to be interpreted by the courts of each state in accordance with the state's own legal concepts."

The clear implication of this is that the spirit of a convention or treaty demands that the interpretation and application of its provisions should meet international and civilized legal concepts. That means those concepts which are widely acceptable and at the same time of clear certainty in application[38].

I have been profoundly assisted by the brief submitted by the cross-appellant in this court and even more by the one he submitted in the lower court from which I learned of the next case, *TovaKahu et v. Trans World Airlines Inc.* 16 Avip. 18, 641. In that case which is very instructive, a passenger filed claims against Trans World Airlines for damages for herself and her children which were occasioned by the hijacking of the aircraft they traveled in from Tel Aviv, Israel to New York, U.S.A. The defence was a reliance on Article 29 of Warsaw Convention which bars suits against airline companies if not commenced within two years of the time of arrival or scheduled arrival of the aircraft. It was however the contention of the plaintiffs that Article 29 being a limitation clause was subject to the limitation imposed by U.S.A. municipal law. The New York appellate court held that it was the intention of the signatories to the Warsaw Convention that actions governed by the convention were to be immune from the uncertainty which would attach were they to be subject to the various provisions of the laws of the members states and that Article 29 was intended to be absolute. This decision must have a bearing on the consideration to be given to ouster clauses imposed by any member state to the African Charter which may have a tendency to water down the rights guaranteed under the said Charter.

A further case referred to in *Oshevire v. Bristish Caledonian Airways Ltd,* at page 520 is known as *Aero Fret v. Air Cargo Egypt* decided by the Court of Appeal Paris (reported in the Uniform Law Review Biannual, 1987, vol.2 page 669) where it was held that:

> "The provisions of an international treaty, in this case, the Warsaw Convention, as amended by the Hague Protocol, which has been ratified prevail over the rules of domestic law when they are incompatible with the later."

In *Attorney-General v. British Broadcasting Corporation* (1981) A.C. 303, Lord Scarman observed at page 354:

> "……there is a presumption, albeit rebuttable that our municipal law will be consistent with our international obligations…… if the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country's international obligation to observe the Convention (for the Protection of Human Rights and Fundamental Freedoms) as interpreted by the Court of Human Rights"[39].
>
> (Parenthesis added by me)

There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate a rule of international law. In other words, the courts will not construe a statute so as to bring it into conflict with international law. Thus it was observed in *Bloxham v. Favre* (1883) 8 P.D. 101 at 107(adopting the opinion expressed in *Maxwell on interpretation*) that -

> "every statute is to be so interpreted applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law.

The application of this principle does not imply that a Statute will be declared *ultra vires* as being in contravention of a treaty or of an international law, or that the treaty is superior to the national laws (a completely erroneous concept), but that the courts would desist from a construction that would lead to a breach of an accepted rule of international law: see *Cheney v. Coan Airways* (1968) 1 All ER 779; *Colocraft Ltd. v. Pan-Am Airways* (1969) 1 Q.B. 616[40]. In *Macarthys Ltd. v. Smith* (1979) 3 All ER 325, Lord Denning M. R. observed that directly applicable European Economic Community treaty prevailed over the internal law of a member state whether passed before or after joining the community. He added however at page 329 that:

> "If the time should come when our Parliament deliberately passes an Act with the Intention of repudating the Treaty or any provision

> in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament." (Emphasis mine)

Although this observation has been duly acknowledged, the editors of the 4th edition of Halsbury's Laws of England, vol. 51 para.3.14, page 388 have reacted thus:

> "It is submitted that a distinction may be drawn between United Kingdom legislation which conflicts with a substantive provision of Community law and United Kingdom legislation which expressly amends or repeals the European Communities Act 1972. In the former case, Section 2(1) does not equate substantive Community law with United Kingdom legislation; rather it provides in effect for the recognition and enforcement in the United Kingdom of community rights, powers, liabilities, obligations and restrictions arising from directly applicable or directly effective provisions of community law. It is inherent in the concept of a directly and generally applicable regulation that it should not be affected by the unilateral acts of one member state, and it is inherent in the concept of direct effect that provisions of community law giving rise to rights enforceable by individuals before courts may be invoked despite the existence of substantive incompatible national legislation. It is therefore submitted that later United Kingdom legislation would prevail only if it amended or repealed the European Communities Act 1972, or at least Sections 2(1), 2(4) and 3(1), and that otherwise United Kingdom courts must continue to recognise enforceable community rights and obligations."

I think, with due respect, the above-quoted passage correctly summarises the prevailing legal position and concept. I must add that the European Community experience as regards the way the Treaty applies to member states (particularly Britain with whose Laws on it we are fairly familiar) may appear far more settled than what we face with the African Charter but the principles involved are not, in my opinion, very different when properly considered and understood[41].

The European Court laid down two principles to guide European Community Countries even long before United Kingdom joined the European Community. They are (1) that an obligation imposed by EEC Treaty shall

On damages, the applicant submitted that the right of the court to award damages even substantial damages is no longer in dispute and he referred to the cases of *Federal Minister of Internal Affairs v. Shugaba* (1982) 3 NCLR 915; *Adigun v. Attorney-General of Oyo State* (1987) 1 NWLR (Part 53) page 678 at pages 708 and 721 and *Arec Ltd v. Amaye* (1986) 3 NWLR (Part 31) page 653 at page 664.

In awarding damages the applicant urged that I should bear in mind the value of the naira and he referred to the case of *Kalu v. Mbuko* (1988) 3 NWLR (Part 80) page 86 at page 105 and submitted that there is no dispute that all those involved in this matter as respondents are Government officials and Government has been defined in Section 277 (1) of the Constitution, he therefore urged that I make an order for the return of the books.

In his reply, Mr. Adio learned Director of Civil Litigation Federal Ministry of Justice referred to Chapter IV of the Constitution and submitted that in order to invoke that Chapter one must bring oneself within one of the Sections of 30 to 40 of the Constitution.

Learned Counsel submitted that the nearest to what is before me is as contained in Section 40 of the Constitution but stated that respondents did not acquire the books but they seized them and so the remedies available to the applicant may be somewhere else not under the Fundamental Rights. Counsel submitted that not all rights are fundamental rights and he referred to the case of *Mustapha v. Governor of Lagos State* (1987) 2 NWLR (Part 58) page 539 at page 585 paras "D" to "E" and submitted that the applicant cannot argue that he has a human rights to those books he could have some other rights and so treating the application as it is, he submitted that Fundamental Human Rights does not apply and so the 12 months period does not apply.

Counsel submitted as follows:

(i) that even if a Decree conflicts with the Constitution, the Decree prevails. Counsel referred to the case of the *Nigeria Union of Journalists v. Attorney-General* (1986) Law Report of the Common-wealth Constitution page 1 at pages 9 – 11.

(ii) that even though Fundamental Human Rights exist but a Decree can take those rights away. Counsel referred to Decree No. 2 of 1984 Section 4 (2)

(iii) that by virtue of Sections 4 and 20 of the Police Act and Sections 53 – 55 of the Criminal Procedure Act Cap. 43, the Police have very wide preventive powers and if the Police are investigating a crime suspected to have been committed, the police have powers to seize goods which are subject matter of such crime.

(iv) that when the Government is exercising executive powers the Courts will not intervene.

(v) that it is those in charge of security who will determine whether it is undermined or not and the reasons are subjective and they do not have to give reasons.

(vi) that paragraphs 13 and 14 of the applicant's affidavit are consistent with paragraphs 5, 6, 7, 8 and 9 of the respondents' affidavit. Counsel referred to Aguda: Practice and Procedure paragraph 28.32A page 364 and Smith Judicial Review of Administrative Action p.435.

(vii) that the books were seized in June but applicant did not come to court until September. Counsel referred to grounds 3 and 4 of the prayer in their Motion and Sections 12 and 13 of the High Court Law, Laws of Lagos State Cap. 52; Order 29 rule 1 (12) of the Rules of the Supreme Court of England, 1985 Edition and Injunctions by David Bean 1st Edition at page 9 and submitted that promptness is essential in actions of this nature.

(viii) that an injunction cannot be granted for an action that has been completed. Counsel referred to the case of *John Holt Nig. Ltd. v. Holts African Workers Union* (1963) 1 ALL NLR 379 at pages 383 – 384.

To discharge an injunction granted exparte, Counsel referred to Order 29 Rule 1 (22) of the Rules of Supreme Court of England, 1985 Edition and O'Hara & Hill on Civil Litigation Chap. 14 page 238.

(ix) that we are still running a Federal System – Executive, Legislative and Judiciary and each does not exercise its powers in order to sabotage the other. If the Executive says it is investigating someone for some good or bad reasons or for no reasons at all, the Judiciary should not impede that investigation. Counsel referred to the case of *Ojukwu v. Governor of Lagos State* (1986) 2 SC 271 and submitted that the Courts do not have a supervisory power over the Legislative and Executive arms of Government - Counsel referred to the case of *Adesanya v. The President* (1981) A ALL NLR Part 1 page 1 at page 41.

(x) that *Garba's* case (supra) was argued on Decree No. 17 and on Contract of employment and if the learned Justices of the Supreme Court of Nigeria expressed opinions on other issues that must be *obitar.*

to hear and determine. In the course of that it would consider and determine to what extent the details of the acts allegedly committed by him to warrant his arrest ought to be disclosed to him; and also to his right under Article 7(1)(d) to be tried within a reasonable time by an impartial court or tribunal instead of an indefinite detention.

As to whether the courts have jurisdiction to entertain his cause of action, this court can decide that on this appeal. I think the lower court reached a decision that the ouster clauses relied on by the appellants did not operate against the cross-appellant in the face of the provisions of the African charter. Article 7(1) provides or the right of every individual to have his cause heard. In particular 7(1)(a) provides for "the right to an appeal to competent it national organs against acts of violating his fundamental Rights as recognised and guaranteed by conventions, laws, regulations and customs in force"[45]. But the lower court was in grave error when it held that the fundamental Rights Procedure under which the cross-appellant brought his cause before the Federal High Court was not proper procedure. I think the lower court misread the observation of Bello CJN in *Ogugu v. The State (supra)* at page 26 as follows:-

I am inclined to agree with Mr. Agbakoba that the provision of Section 42 of the Constitution for the enforcement of fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not Constitute a monopoly for the enforcement of those rights ..... it must be emphasised that the section does not exclude the application of other means for their enforcement under common law or statute or rules of court .....

It is apparent from the foregoing that the human and peoples rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules of practice and procedure of each court".

I cannot comprehend how the lower court took the above observation to mean that the Fundamental Rights procedure under s.42 of the Constitution was not available to the cross-appellant. What Bello CIJ said was not new. He merely reiterated what this court had earlier said that fundamental rights proceedings may be commenced under the Fundamental Rights (Procedure) Rules, 1979 or any other form of action as may be appropriate See *Saude v. Abdullahi* (1989) 4 NWLR (pt. 116) 387 at 418-419, See also *Minister of Internal Affairs v. Shugaba Darman* (1982) 3 NCLR 915 at 997. The Fundamental Rights (Procedure) Rules are rules of practice and procedure available to any High Court in Nigeria.

In this particular situation in which reliance is placed on the African Charter where no procedure for commencing action is provided, there can be no doubt that any appropriate procedure may be adopted and this includes the Fundamental Rights (Procedure) Rules. There was a direct observation on the applicability of those rules to proceedings under the African Charter by Ogwuegbu JSC at p.47 of Ogugu's case as follows:

> "By the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap.10, Vol.1 Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and People's Rights as part of their municipal law. The provisions of that charter are enforceable in the same manner as these of Chapter 4 of the 1979 Constitution by application made under Section 42 of the Constitution" [46/47].

Where the procedure for the enforcement of obligation or rights of by an individual against national authorities before national courts, arising from treaty, charter etc. is not provided for, it will be useful to resort to the statement in Halsbury's Laws of England vol.51, para. 3, 71, page 448, 4th edn. Which says:

> "Where an individual or trader wishes to enforce Community law against national authorities before national court, the basic principle remains that, in the absence of any relevant Community rules, normal national remedies should be used provided that they do not make it practically impossible to exercise enforceable Community rights, and that those national rules are non-discriminatory and subject to the overriding obligation on national courts to protect directly effective rights under Community Law."

It follows that either the procedure for fundamental right, or judicial review, or common law or statutory procedure for obtaining declaration, an injunction or damages may be used where appropriate: See *Garden Cottage Foods Ltd v. Milk Marketing Board* (1984) AC 130; (1983) 2 All ER 770; *Davy v. Spelthorne Brough Council* (1984) AC 262; (1983) 3 All ER 278[48]. I am satisfied that the cross-appellant filed this action by an appropriate procedure and that the lower court was in error to have held to the contrary.

There is the issue whether the procedure adopted by the trial court in taking judicial notice of the detention order was proper. Although there was agreement on both sides that a detention order on the cross appellant was signed by the Inspector-General of Police and that his counsel had a

look at the one that was produced in the course of hearing at the trial court, no detention order was formally tendered and admitted in evidence. There was an aspect of the preliminary objection to the jurisdiction of the court to entertain the action. This was on the ground that the detention order having been made by the Inspector-General of Police in exercise of the powers conferred on him by the State Security (Detention of Persons) Decree No 2 of 1984 (as amended), Decree No.107 of 1993 and Decree No.12 of 1994 ousted the jurisdiction of the court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree. An argument was canvassed that since at the time the Inspector-General was made an alternate signatory to the Chief of General Staff, the post of the Chief of General Staff had been replaced by that of Vice-President, the Inspector-General could not be an alternate to a non-existent office.

I think that was the only reason it was necessary to physically see the detention order at the stage of the proceedings to ascertain that what it really contained was Chief of General Staff or Inspector-General as authorised signatory. Learned Counsel for the cross-appellant then perused the detention order after it had been produced and shown to the court by learned counsel for the appellants. The court did not at that stage admit it in evidence but handed it back to learned counsel for the appellants. When addressing the court later, learned counsel for the cross appellant contended that the failure to tender the detention order for admission as an exhibit in court was fatal although it had been shown to the court. In this ruling the learned trial Judge said:

> "..... I observed in the course of this proceedings (sic) that the said Detention Order No. 004556 was produced in open court and shown to applicant's counsel who had every opportunity to peruse it. It was also shown to the court, I perused it and was satisfied that it was issued by the Inspector-General of Police, though the usual thing would have been for the respondent (sic) counsel to annex (sic) it to the motion or to tender it as exhibit before the court. Furthermore, by virtue of section 75(1) of the Evidence Act, the court is enjoined to take judicial notice of any legislation. I therefore hold that this court has taken judicial notice of the Detention Order No. 004556 dated 3/2/96 as subsidiary legislation (shown to the Court though not tendered) see section 75(1) of Evidence Act."

When a document is produced before a court for the purpose that it be used in the proceedings, the proper procedure is to tender it formally. If it is admissible it is accordingly admitted as an exhibit in its original form. But if it is a document that cannot be parted with by the person in whose custody it is, or the original is not available, a copy or certified copy as secondary evidence in appropriate cases will meet the occasion. If it was necessary that would have been done in this case. I do not think it was a question of recourse to taking judicial notice as the learned judge said, of a legislation or subsidiary legislation the way he did[49]. When a court takes judicial notice of a legislation under s.75(1) of the Evidence Act, the legislation is placed before it and it takes judicial notice of its contents and of the fact that the legislation was duly made unless that is an issue[50]. In the present case, however, the question was whether the inspector-General was competent to sign the detention order (which I do not regard as a subsidiary legislation), if technically he could not be an alternate signatory to a functionary of a non-existent official designated office. That question can be decided even without the detention order being tendered at that stage of the proceedings. I do not think there was any miscarriage of justice or that the failure to tender the detention order was fatal.

The final issue relates to the unnecessary observation made by Pats-Acholonu JCA at page 754 of the Law Report (supra) as follows:-

> "When I look at this case, I observe that one of the respondents is the Head of State-General Sani Abacha himself. I wonder whether the appellant is unaware of the provisions of Section 267 of the constitution of the Federal Republic of Nigeria. That section provides immunity against the civil or criminal action or proceedings against the person of the President or the Head of State. It is wrong in law to have joined him as a party. The Constitution is the primary law of the land. I hold therefore that name of the Head of State should not have been reflected in this suit in the first place. It offends the provisions of the Constitution"

This was what the cross-appellant complained of in his ground 5 of his grounds of appeal. After quoting the passage above as an error in law, the error was particularized by reference to Section 267 of the Constitution on which gives immunity only in case of action brought in respect of acts done in personal capacity. It was also said the issue was raised *suo motu* without allowing parties to address on it. It was this ground of appeal the appellants objected to as being incompetent. This observation, no doubt, is an *obiter dictum* of the learned Justice of the Court of Appeal. It was not part of the

argument before the court. The learned Justice adverted to the point on his own in the course of his judgment. It played no part whosoever in the decision reached either by the lower court or even by the maker himself. It is not a fit subject for appeal as appeal is fought on the basis of the decision of the court and is not taken against mere *Obiter*[51].

But I consider the observation a rather expensive obiter quite capable of misleading the unwary and therefore deserves to be corrected at the first opportunity Section 267 of the 1979 Constitution (now Section 308 of the 1999 Constitution) provides:

> "267 (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 such a person shall be applied for or issued:
>
> Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom, this section applies no account shall be taken of his period of office.
>
> (2) The provisions of subsection (1) of this section shall not apply to civil or criminal proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
>
> (3) This section applies to a person holding the office of President or Vice-President, Governor or deputy; 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."

Sub-section (2) is self-explanatory. The immunity provided for does not apply to the person in question in his official capacity or a civil or criminal

proceeding in which such a person is only a nominal party. The immunity is to protect such a person from the harassment of his person while in office for his action done in his private capacity before or during his tenure in office. In fact in the present case, the suit is against the "Head of State and Commander-in-Chief of Armed Forces (General Sani Abacha)" and it is in respect of his alleged action in his official capacity. The immunity provided for in the Constitution does not arise and does not apply[52].

Before ending this judgment, I need to add that the cross-appeal was very contentious. The judgment of my learned brother Achike JSC which I had the privilege of reading in advance expresses the consensus view on the appeal. But the dismissal arrived at by him of the cross-appeal, the reasons for which I respectfully acknowledge he has painstakingly stated in the clearest possible manner, was initially a majority position while on the other hand I held a minority view to allow the cross-appeal. After I made a draft of this judgment available, it appeared the merit of the cross-appeal become crystal clear and so the majority view emerged in favour of allowing the cross-appeal.

From what I have discussed in this judgment, I now proceed to answer the issues for determination in respect of the two appeals. The issues raised by the appellants are indeed those raised in issues 3 and 4 since 1 and 2 are rested in issues 4(i) and 4(ii). The said issues 4(i) and 4(ii) have been fully discussed in this judgment. Issue 3 would have been answered in the negative but in view of issue 3 raised by the cross-appellant which I have answered in the affirmative nothing has been achieved by the appellants in regard to that issue.

From the totality of the discussion of both the appeal and the cross-appeal, the central question is whether the trial court has jurisdiction to entertain the suit. This was what was sought to be determined by the preliminary objection raised against the suit. My judgment is that the trial court has jurisdiction to entertain the suit and to reach appropriate decisions upon the reliefs sought. I therefore dismiss the appeal and allow the cross-appeal. I accordingly order that the suit be remitted to the Federal High Court to be heard and determined by another judge in respect of all the reliefs sought. I award costs of N10,000.00 in favour of the cross-appellant.

A. O. EJIWUNMI, J.S.C.: I have had the privilege of reading before now the draft judgment of my learned brother, Ogundare JSC. It is noted in that judgment, my learned brother's conclusion is that the main appeal must

fail. I fully agree with him and his reasons not only for dismissing the main appeal, but also for upholding the cross-appeal of the respondent. It is my desire to add a few comments of my own. For this purpose, I need to give briefly the facts leading to this appeal. The Respondent, a distinguished legal practitioner of many years standing at the Bar, in addition to his legal practice at the Bar, also been well known as front line defender of human rights' abuses in this country. However, on Tuesday, January 30th 1996, he was himself arrested by virtue of a Detention Order dated the 3rd day of February, 1996, signed by the Inspector-General of Police, pursuant to powers conferred on him by the State Security (Detention of Persons) decree No. 2 of 1984, as amended. This authorised the arrest and detention of any persons believed by the authorities to have been "Concerned in acts prejudicial to State Security."

As the respondent felt that he has been unlawfully arrested and detained by the appellants, he filed an application at the Federal High Court, Lagos, challenging his arrest and detention by the appellants. The application, by motion ex-parte for leave to enforce his fundamental rights, was brought pursuant to section 42(1) of the Constitution of the Federal Republic of Nigeria 1979, Order 1, Rule 2(1) (2) and 6 and Orders 4 and 6 of the Fundament Right (Enforcement Procedure) Rules 1979, and the inherent jurisdiction of the Court as preserved by the 1979 Constitution. The following were the reliefs sought by the respondent, as applicant: -

(a) A declaration that the arrest of the applicant, Chief Gani Fawehinmi at his residence at 9A Ademola Close G.R.A. Ikeja, Lagos on Tuesday, January 30th 1996, by the State Security Service (S.S.S.) or Officers, Servant, agents, privies of the Respondents and/or of Federal Military Government Constitutes a violation of the applicant's fundamental rights guaranteed under Sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(b) A declaration that the detention and the continued detention of the Applicant without charge since Tuesday, January 30th, 1996 when the applicant was arrested by the officers, servants, agents, privies of the Respondent at his residence 9 A Ademola Close G.R.A. Ikeja, Lagos constitutes a gross violation of the Appellant's fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 5, 6 and 12 of the African Charter on Human and Peoples Rights (Ratification and

Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

(c) A mandatory Order compelling the Respondents, whether by themselves or by their officers, agents, servants, privies or otherwise however to forthwith release the applicant.

ALTERNATIVELY

An Order of Mandamus compelling the Respondents to forthwith arraign the Applicant before a properly constituted Court or Tribunal as required by Section 33 of 1979 Constitution of the Federal Republic 1979 as preserved by Decree 107 of 1993 and Article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap.10 Laws of the Federation 1990.

(d) An Injunction restraining the Respondents, whether by themselves or by their officers, servants, privies or otherwise however from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.

(e) N10,000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/or detention of the Applicant - Chief Gani Fawehinmi."

The appellants on the receipt of the motion filed a Notice of Preliminary Objection challenging the courts jurisdiction to entertain the Respondent's case on the grounds, inter alia, that by the combined effect of the State Security (Detention of persons) Decree No.2 of 1984 as amended and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No.107 of 1993, the Court could not exercise jurisdiction in terms of the reliefs sought by the respondent.

After hearing arguments presented by learned counsel for the parties Nwaogwugwu J. of the Federal High Court, Lagos struck out the suit holding that the court has no jurisdiction to entertain the suit. In the course of his ruling, the learning (sic) trial Judge recognised that the African Charter on Human and People's Rights is an International Treaty, and that Nigeria being a party to the treaty, had incorporated it into its municipal law by virtue of its enactment in Vol. 1 Cap. 10, Laws of the Federation 1990. His Lordship of the Federal High Court further observed that the fundamental Human Rights provisions of Chapter 4 of the 1979 Constitution of the Federal Republic of Nigeria is in truth and in fact a replica of the provisions of

Articles 4, 5, 6, 7 and 12 of the African Charter on Human and People's Rights. However, after due consideration of Decree 107 of 1979, he held that any law which is inconsistent with it is void. Hence, he further held "that any of the provisions of the African Charter on Human and People's Right which is inconsistent with it is void to the extent of its inconsistency." The learned trial judge finally held thus:-

> "In the result, I hold that the jurisdiction of this Court is ousted by Decree No.2 of 1984 and therefore, it cannot entertain the action. Consequently, the objection raised by the Respondents is sustained, this suit is accordingly struck out. This ruling affects the order of this Court made on the 14th of February, 1996."

As the respondent was not satisfied with the decision and orders of the trial court, he appealed to the Court of Appeal. His appeal succeeded substantially, when in allowing the appeal, the court below, held in what could be described as a unanimous judgment, held inter alia, that:-

(i) The learned trial judge was right in coming to the conclusion that the Inspector-General of Police is empowered to issue a detention Order under the provisions of Decree No.2 of 1984 as amended and that he had no jurisdiction to entertain the matter in that by virtue of the provisions of Section 4 of Decree No.2 of 1984 as amended and Decree No. 12 of 1994, the jurisdiction of the Court is ousted to entertain the appellant's case.

(ii) That the learned trial judge acted erroneously when he held that African Charter contained in Cap 10 of the Federation 1990 is inferior to the Decrees of the Federal Military Government.

(iii) That the Decree of the Federal Military Government cannot oust the jurisdiction of the Court when properly called upon to do so in relation to matters pertaining to Human Rights under the African Charter.

(iv) That the learned trial judge was right in declining jurisdiction in that the procedure followed in the commencement of the suit was improper.

(v) That the case be remitted back to the trial court to consider the consequences of the detention for four days of the respondent(s) which period was not covered by the detention order.

(iv) That the arrest and detention of the appellant on the facts adduced clearly breached the provisions of the African Charter. The contracting parties, the court below continued are bound to

establish some machinery for the effective protection of the Charter."

As the appellants were not satisfied with the Judgment of the Court of Appeal (Lagos) allowing the appeal and remitting the case back to the trial court as contained in the considered judgment delivered by the court below, they have now appealed to this Court. The issues raised in this Court, (vide appellants brief, dated 19th June 1998) read in part thus:-

"(1) Whether the Court of Appeal applied the principle of international law currently when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil an international obligation which is voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.

(2) Whether the Court Of Appeal was right in holding that African Charter Cap. 10 Laws of the Federation is not inferior to the Decrees of the Federal Military Government on the ground according to the Court below that the legislation has international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters torching on African Charter.

(3) Whether the Court of appeal having concurred with the decision of the trial Federal High Court declining jurisdiction to entertain the respondent's application for the enforcement of rights guaranteed under the African charter on Human and Peoples Rights Cap.10 Laws of the Federation of Nigeria 1990 because of the procedure adopted therefore, to wit, procedure by way of fundamental Rights (Enforcement) Procedure Rules 1979, adjudged by both courts as incorrect was right – (i) in not striking out the application right away; and (ii) in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by Detention Order."

Issues (1) and (2) would be considered together as they are both concerned with whether the Court of Appeal was right to have found that notwithstanding the fact Cap 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No.107 of 1999 or No.12 of 1994 cannot affect its operation in Nigeria.

In this context, I think it is desirable to quote Musdapher JCA who in the course of his leading judgment said at page 186 of the Printed Record thus - Now Article 1 of the Charter provides: -

> "The member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this chapter and shall undertake to accept legislative or other measures to give effect to them."

> "The member countries-parties to the protocol-recognised that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly, by the promulgation of Cap.10, the Nigerian State attempted to fulfil its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and the detention of the Appellant on the facts adduced clearly breached the provision of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the international Commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiyi v. Anretiola* (1992) 8 NWLR (Pt.258) 139."

Then at page 211 of the Records, Pats Acholonu JCA, quoting from the judgment Bello CJN in *Ogugu v. The State* (1994) 9 NWLR (Pt.366) I at 27, said, inter alia: -

> "It is apparent from the foregoing that the human and peoples rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court ..... By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal and as Bellow CJN said in *Ogugu v. State* (supra), its violability becomes actionable ....."

The passages quoted above from the judgment of the learned Justices of the Court of Appeal, have provoked a lot of great and lengthy argument from the learned counsel for both parties to this appeal. For the appellants, the thrust of the argument being that the Court below was wholly wrong on the view they took of the position of the African Charter on Human and Peoples' Right *vis-à-vis*, the municipal laws of Nigeria is erroneous and must be rejected, learned counsel; for the Respondent has argued to the contrary. The various authorities that were cited in support of their arguments though very valuable, I think the simple question that must be determined is whether indeed the African Charter on Human and People's Rights, now Cap. D of the Laws of the Federation of Nigeria indeed enjoys a higher status than the municipal laws of Nigeria.

It is common ground that this law is indeed an International Treaty as it was the product of the Organisation of African Unity of which Nigeria is a member. It is also common ground that Nigeria in accordance with the Protocols enshrined in the Charter, caused through the National Assembly of the then Government of Nigeria enact as part of our municipal law, all the provisions of the African Charter on Human and Peoples' Rights.

This was done in accordance with the provisions of section 12(1) of the 1979 Constitution (S.12(1) of the 1979 Constitution) which Provides:

> "12 (1). No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (IFRC)"[53].

It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly. This position is generally in accord with the practice in other countries. In the recent case of *Higgs & Anor v. Minister of National Security & Ors.* The Times of December, 23, 1999 the Privy Council held that:-

> "In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature.
>
> Domestic Courts had no jurisdiction to construe or apply treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens rights and duties is common or statute law.

> They might have an indirect effect upon the construction of Statutes or might give rise to a legitimate expectation by citizens that the Government, in its acts affecting them, would observe the terms of the treaty"[54].

I think the above ought to be accepted as representing the position of our law with regard to International Treaties entered into by the Federal Government of Nigeria. If such a treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it. Its Provisions cannot therefore have any effect upon citizens' right and duties. However, it is also pertinent to observe that the provisions of an incorporated treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty[55].

Bearing in mind the above observations, the African Charter on Human and Peoples' Rights, having been passed into our municipal law, our domestic courts certainly have jurisdiction to construe or apply the treaty. If follows then that anyone who felt that his rights as guaranteed or protected by the Charter, have been violated could well resort to its provisions to obtain redress in our domestic courts. It remains for me to say that view held of the provisions of the Charter, by the court below, may not be out of place for the reasons given above, and also because of its source - Being the product of an International Treaty. But, its status, cannot as argued by Mr. ADEGBORUWA, learned counsel for the respondent be superior to the constitution. That argument of counsel is erroneous. This is because as Cap 10, has become part of our law, it is certainly open to our National Assembly to revoke it by the simple exercise of repealing it from our law[56].

On the third issue raised, I will only say briefly that the Court below was wrong to have held that the respondent approached the court for his redress by a wrong procedure. It is now settled that a person whose right have been violated must be free to seek redress for such wrongs in the courts. It is a mere technicality to hold it against him that he failed to approach the court properly as in this case. In any event no specific procedure had been laid down for the enforcement of violated rights under Cap.10. The case of *Ogugu v. The State* (supra) is in my humble view in support of the view held above. The respondent was therefore free to approach the court by commencing enaction by a writ or by any other procedure such as the Fundamental Right (Enforcement Procedure Rules, 1979) 57.

In the result, I will therefore dismiss the main appeal for the above reasons and the fuller reasons given in the leading judgment of my learned brother Ogundare JSC. For the same reasons given in respect of appellant's issue 3 of the Cross-Appeal, that issue, is hereby also resolved in favour of the respondent as Cross-Appellant.

The respondent filed cross-appeal as he was not satisfied with certain aspects of the decision of the Court Below. Pursuant thereto, he filed five grounds of appeal challenging certain aspect of the judgment of the court below. In accordance with the Rules of this court, cross-appellant brief was dully filed and served, wherein four issues were identified for the determination of the cross-appeal. They are:

"(1) Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No.11 of 1994, the inspector-General of Police is competent to issue and sign detention order and whether if the answer to this question in the affirmative, he can be compelled to disclose the reasons for issuing same.

(2) Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.

(3) Whether the procedure adopted by the Cross-appellants in this case in enforcing the articles of the African Charter, on Human and Peoples' Rights was proper.

(4) Whether the 1st Respondent, as Head of State of Nigeria is immuned from civil or criminal actions in all cases.

I do not need to comment particularly on issues 1 and 2 as I agree with the reasoning of my learned brother Ogundare, JSC which led to the conclusion that the issues so raised by the cross-appellant are unmeritorious and therefore deserve not to succeed. I also dismissed the said issues. I also endorse the reasons amply given by Uwaifo JSC, in his concurring judgment, in respect of issue 4.

As I have already upheld the 3rd issue during consideration of the main appeal, that issue must also, therefore, be resolved in favour of the cross-appellant. In the result, the cross-appeal is allowed. And it is ordered that the matter be he heard by the Federal High Court before another judge of that court. This is in connection with whether the action of the appellants/cross-appellants constituted a violation of the cross-appellant's rights under Articles 4, 5, 6 and 12 of the African Charter on Human and

Peoples (Ratification and Enforcement) Act Cap.10, Laws of Federation of Nigeria, 1990, and under certain sections referred to under the 1979 constitution. It is of course settled law that the jurisdiction of a court to hear a matter is invariably determined by the claim of the plaintiff. See *A.G. Anambra State v. A.G. Federation* (1993) 6 NWLR (Pt. 302) 69258. I have before now, set out the Application made by the Cross-appellant in the trial court. A careful reading of the reliefs sought by the cross-appellant, clearly shows that the cross-appeal anchored his reliefs on both the provisions of fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution, and also Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples Rights (Cap.10) of the laws of the Federation).

For the respondent the argument urged on the court with regard to whether the cross-appellant could pursue his remedies under the above provisions of the Constitution and Cap 10 of the Laws of Federation, 1990 was anchored on the ground that their provisions have been suspended by Decree 107 of 1993. However, the contrary argument was put forward for the cross-appellant. In addition, it was urged on the court to apply the principles, already recognised in this court, that the court must in order to protect its jurisdiction, construe strictly such laws as tend to deny or whittle its jurisdiction.

As Decree 107 of 1993 by its S.17 has left intact the provisions of Cap.10, The Human and Peoples Rights, it is my view that in such circumstances, the cross-appellant could quite properly pursue his action in the Federal High Court and before another judge of that court.

I will therefore allow the Cross-Appeal for the above reasons and the fuller reasons given in the judgment of my learned brother Ogundare JSC. The cross-appellant is awarded costs in the sum of N10,000.00 for the main appeal and the cross-appeal.

O. ACHIKE, JSC. (Dissenting): The respondent, a human rights activist, was arrested at his residence on Tuesday, January 30, 1996 and by virtue of a Detention order dated the 3rd day of February, 1996 and signed by the Inspector General of Police purportedly pursuant to powers conferred on him by the State Security (Detention of Persons) Decree No.2 of 1984, as amended, which authorised the arrest and detention of any person believed by the authorities to have been "concerned in acts prejudicial to state security."

On the 1st day of February, 1996, the respondent, as applicant, filed an application at the Federal High Court, Lagos challenging his arrest and detention by the appellants, as respondents to the application. The application, by motion ex-parte for leave to enforce his fundamental rights, was brought pursuant to section 42(1) of the Constitution of the Federal Republic of Nigeria 1979, Order 1 Rule 2(1) (2) & (6) and Orders 4 & 6 of the Fundamental Rights (Enforcement Procedure) Rules 1979 and inherent Jurisdiction of the Supreme Court as preserved by the 1979 Constitution.

The reliefs sought by the application were:

"1. A Declaration that the arrest of the Applicant, Chief Gani Fawehinmi at his residence at 9A Ademola Close G.R.A., Ikeja, Lagos on Tuesday, January 30, 1996, by the State Security Service (S.S.S.) or officers, servants, agents, privies of the Respondents and/or of the Federal Military Government constitutes a violation of the Applicant's fundamental rights guaranteed under Sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act, Cap.10, Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

2. A declaration that the detention and continued detention of the Applicant without charge since Tuesday January 30, 1996 when the Applicant was arrested by the officers, servants, agents, privies of the Respondent at his residence 9A Ademola Close, G.R.A., Ikeja, Lagos constitutes a gross violation of the Applicants' fundamental rights guaranteed under Sections 31, 32 and 38 of the 1979 Constitution and Articles 5, 6 and 12 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap.10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional.

3. A mandatory Order compelling the Respondent, whether by themselves or by their officers, agents, servants, privies or otherwise however to forthwith release the Applicant.

Alternatively

An Order of Mandamus compelling the respondents to forth with arraign the applicant before a properly constituted court or tribunal as required by section 33 of 1979 Constitution of the

Federal Republic of Nigeria 1979 as preserved by Decree 107 of n1993 and Article 7 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap.10 Laws of Federation 1990

4. An Injunction restraining the Respondents, whether by themselves or by their officers, agents, servants, privies or otherwise however from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.
5. N10,000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and or detention of the Applicant-Chief Gani Fawehinmi."

The appellants filed a Notice of Preliminary Objection, challenging the jurisdiction of the Federal High Court to entertain the action of the respondent by the combined effect of the provisions of section 4 of State Security (Detention of Persons) Decree No.2 of 1984 (as amended), the Federal Military (Supremacy and Enforcement of Powers) Decree No.2of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993, particularly any action relating the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and People's Right (Ratification and Enforcement) Act.

The learned trial Judge, Nwaogwugwu, J declined jurisdiction in that the procedure adopted by the respondent was improper and struck out the suit.

Dissatisfied with the ruling, the respondent appealed to the Court of Appeal, Lagos Division which, in allowing the appeal partially, held as follows:

1. That the learned trial Judge was in error in holding that the African Charter embodied in Cap. 10 of the Laws of the Federation 1990 is inferior to the Decrees of the Federal Military Government.
2. That the Decrees of the Federal Military Government cannot oust the jurisdiction of the court when called to do so in relation to matters pertaining to Human Rights under the African Charter.
3. That the learned trial Judge was right in declining jurisdiction in that the procedure followed in initiating the suit was improper.
4. That the case be remitted to the trial court to consider consequences of the detention for four days of the respondent which period was not covered by the detention order.

5. That the arrest and detention of the respondent on the facts adduced clearly breached the provisions of the African Charters. The contracting parties to the African Charters are obliged to establish some machinery for the effective protection of the terms of the Charter.

Undoubtedly, the main appeal before us can be summarized as one against the judgment of the Court of Appeal, Lagos Division, wherein it partially allowed the appeal and remitted the case to the trial court to consider the consequences of the detention of the respondent for the four days not covered by the detention order.

The appellants and the respondent filed and exchanged briefs of argument.

The Appellants identified three issues for detention, viz,

1. Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.
2. Whether the Court of Appeal was right in holding that African Charter CAP.10 Laws of the Federation is not inferior to the Decrees of the Federal Military Government on the ground according to the Court below that the legislation has international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters touching on African Charter.
3. Whether the Court of Appeal having concurred with the decision of the trial Federal High Court declining jurisdiction to entertain the respondent's application for the enforcement of rights guaranteed under the African Charter on Human and People's Rights Cap.10 Laws of the Federation of Nigeria 1990 because of the procedure adopted thereof, to wit, procedure by way of Fundamental Rights (Enforcement) Procedure Rules 1979, adjudged by both courts as incorrect was right -

   (i) in not striking out the application right away; and
   (ii) in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.

Recasting issues 1 and 2 above, in the form of questions:

Federal Republic of Nigeria 1979 as preserved by Decree 107 of n1993 and Article 7 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap.10 Laws of Federation 1990

4. An Injunction restraining the Respondents, whether by themselves or by their officers, agents, servants, privies or otherwise however from further arresting, detaining or in any other manner infringing on the fundamental rights of the Applicant.
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   (i) in not striking out the application right away; and
   (ii) in remitting the application to the Federal High Court to consider the consequences of the detention of the respondent for the period of four days not covered by the Detention Order.

Recasting issues 1 and 2 above, in the form of questions:

"(1) What is the nature of a treaty or agreement between two or more sovereign states, such as the African Charter on Human Rights particularly as regards its force and applicability?

(ii) Where a treaty or agreement between two or more sovereign states is incorporated into the municipal law of a contracting state by its Constitution or municipal legislation does it have force or effect greater or higher than that of the Constitution or the municipal law because of "its international flavour"?? Further, in the particular case of Nigeria as country ruled by an absolute Military Government whose Decrees are Supreme over the unsuspended provisions of the Constitution 1997 and over all the other pre-existing laws, does the African Charter as incorporated into Nigeria's municipal law by legislation of National Assembly Cap. 10 LFN 1990 have a force or effect greater or higher than that of a Decree so that a Decree cannot oust the jurisdiction of the Court in respect of its provisions?

For the respondent, the following two main issues for determination were formulated:

"1. Whether it is permissible for a state party to a multilateral treaty to promulgate municipal legislations that are inconsistent with its obligations under the treaty.

Alternatively

2. Whether the African Charter on Human and Peoples' Rights as adopted by Nigeria is inferior or superior municipal laws promulgated by the Government of Nigeria.
3. Whether the Court of Appeal was right in remitting the case back (sic) to the trial court to consider the consequences of the detention of the respondent for the period of four days not covered by the detention order."

At the oral hearing, Mr. Chiesonu Okpoko, Learned Legal Officer for the Appellants cities the case of *Ibidapo v. Lufthansa Airways* (1996) 4 NWLR (Pt. 498) 124 at p.150 in support of his contention that the principle of international law will not override domestic laws and further submits that the provisions of the African Charter of Human and Peoples' Rights set out in Cap. 10 of the Laws of the Federation of Nigeria are not superior to the State Security (Detention of Persons) Decree No. 2 of 1984, as amended,

having been incorporated into the Nigeria Law should be treated as any other law. He finally urges us to allow the appeal.

Mr. Ebun-Olu Adegboruwa, Learned counsel for respondent, submits that the main issue in the appeal is to determine the status of the African Charter vis-à-vis the domestic law. Learned counsel submits that once an international treaty, like the African Charter, is adopted by local legislation, the adoptive state is not competent to modify the treaty as incorporated into the domestic law, reliance was placed on Starke and Brownlie, Principles of Public International Law p.29. Thus, according to counsel, Nigeria cannot under Cap. 10. Referring to Article 10 of the African Charter, counsel emphasises that there is the need for adoptive state to exhaust all local remedies before any recourse is made to the African Charter. He also submits that Ibidapo case cited by counsel for the appellants is not apposite and urges us to dismiss the appeal.

Counsel refers to the Preliminary Objection which necessitated the filing of a Reply brief to address the issue raised therein. In adopting the respondent's brief in the cross-appeal, counsel urges us to allow same.

Mr. Okpoko, of counsel, formally adopted the cross-respondents' brief.

In his final address, Mr. Adegboruwa, of counsel, submits that an international treaty adopted by this country is superior to all her domestic laws, including the Constitution, and refers to section 12 of the 1979 Constitution.

First we turn to the main appeal. There is very little to choose between appellants' and respondent's sets of issues for determination. Nevertheless, I wish to adopt the appellants' issue for the determination of this appeal. In order to avoid undue repetition, I would take appellants' Issues 1 and 2 together as they seems to encompass respondent's Issue No.1.

Issue No. 1

Whether the Court of Appeal applied the principle of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international Law to contract out of its international obligations by local legislation.

Learned counsel for the appellants, Mr. Okpoko, in his oral argument, as well as placing reliance on the appellants' brief, submits that a treaty between two or more sovereign states is a contract, and is exactly of the same nature as a contract between two or more individuals and the only

difference between them is that while the treaty derives its binding force and effect from international law, a contract between individuals derives it bindingness from municipal law. As a result, according to learned counsel, a treaty binds only the states-parties thereto. In consequence, counsel further submits that a treaty does not bind individuals or other states who are not parties to it nor does it have any effect in municipal law. Counsel identifies a treaty as an example of an "act of State" and not a subject or municipal law and cannot be "challenged, controlled or interfered with by municipal courts. Its sanction is not that of law but that of sovereign power" and stipulations in a treaty "are entirely beyond the cognisance of municipal courts because they do not administer treaty obligations between independent states", per Fletcher Moulton, L.J. in *Salaman v. Secretary of State for India* (1906) 1 K.B. 603 at 639. Reference was also made to *Walker v. Baird* (1892) A.C. 491 at p.497 and *Sobhuza II v. Miller* (1926) AC 518, pp 522-524; See also *Halsbury's Laws of England*, Vol. 18 14th ed. (1977) para 1413. Learned counsel further submits that a state – party to a treaty is competent and at liberty to enact laws that are inconsistent with its treaty obligations, but this is without prejudice to any remedies available against it in international law at the instance of the other states-parties to the treaty. It is counsel's further submission that municipal law does not recognise inherent superiority of the provisions of a treaty or the rules of customary international law over those of municipal law since the contrary will subvert the sovereignty of each state. It is also counsel's submission that the principles of international law adumbrated herein cannot apply in the instant case as the parties are not states and it is not a claim by one nation against another for breach of a treaty between them, more so as the treaty enacted into law by Cap.10 of the Laws of the Federal Republic of Nigeria 1990 (hereinafter referred to as Cap.10 LFN 1990) was between the members of the Organisation of African Unity of which Nigeria is one but that did not empower the respondent to sue the Federal Military Government for breach of any of the provisions of the treaty, relying on the authority of *Ikpeazu v. A.C.B.* (1965) NMLR 374. Learned counsel, in conclusion, urges us to hold that the lower court was in error when it applied the principles of international law in the international of the municipal law between two citizens of a state as that court lacked the competence to pronounce on the international matter before it.

Issue No. 2

This Issue seeks to determine the judicial status of a treaty in municipal law that has been incorporated into a domestic or municipal law.

Rationalising from the principles of international law adumbrated by the Court of Appeal in its judgment, it held, inter alia, first that Cap.10 LFN 1990 is not inferior to the Decrees of the Federal Military Government and secondary that the provision of the said Cap.10 LFN are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as determined by the Supreme Court in *Labiyi v. Anretiola* (1992) 8 NWLR (Pt.258) 139 and therefore the ouster clause in Decrees of the Federal Military Government cannot oust the jurisdiction of the Court in relation to the African Charter. It is counsel's further submission that a treaty is not applicable in domestic law unless it is adopted or transformed into the statute enacted by the legislature of the state, and the Nigeria approach in relation to the African Charter was by adoption as stipulated in the 1979 Constitution, section 12 which provides that "no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted." Counsel refers to Articles 1 of Cap.10 FNL to establish that the Federal Government applied the principle of adoption in giving effect of African Charter in its domestic law. Accordingly, counsel submits that an adopted treaty ranks at par with the municipal or domestic legislations or laws and could be modified or abrogated by domestic enactments. In this regard, learned counsel refers to a similar practice in the United States of America wherein courts in that country resort to treaties as they would do to Acts passed by Congress, and calls in aid several decisions of the Supreme Court of U.S. including *Cook v. U.S.* 288 U.S. 102, *Chae Chan Ping v. U.S.* (Chinese Exclusive Case) 130 U..S. 581. Counsel also submits that the decision of the lower court in this regard ran contrary to the principles stated above, particularly the Supreme Court decision in *Labiyi v. Anretiola* (Supra) and there is no basis for the lower court's assertion that the African Charter has been elevated to a higher pedestal. Learned counsel further submits that the analogy of surrender of parliamentary supremacy by British Parliament by virtue of the effect of European Community Act., 1972 is misconceived as it relates to the Nigerian situation which is not a member of the European Community Union where, to some extent in respect of certain specific matters, sovereignty lies with the Union. The Organisation of African Unity cannot be compared with the European Union, counsel further submits and calls in aid the work of ECS Wade and Bradlyon, *Constitutional and Administrative Law* (11th ed. by Bradlyon) at p.73.

In summary, counsel urges us to hold that the African Charter contained in Cap. 10 LFN is not superior to Decrees nor can it override ouster clauses contained in Decrees in matters touching African Charter.

Mr. Adegboruwa, learned respondent's counsel, replied to appellants' Issues Nos.1 and 2 together which, as earlier noted, encompass the respondent's issue No.1. Counsel identifies a "treaty" (as defined under Article 2 of the Vienna Convention of May 23, 1969, and which came into force on January 27, 1980) as an agreement whereby two or more states establish or seek to establish a relationship between themselves governed by international law. He submits that the broad definition of a treaty as defined by appellants' learned counsel in terms of a mere contract would lead to over simplification of that tem in international law and that definition may only be appropriate to domestic law and relationship between individuals. Counsel also submits that the principles of privity of contract as it applies in domestic law does not govern international law because rights enure to individual under a treaty concluded on their behalf by a member state and may be available for enforcement in a municipal court; he refers to *Garden Cottage Food Ltd. v. Marketing Board* (1984) A.C. 130 at p,144.

It is learned counsel's further submissions for the respondent, which was upheld by the lower court, that the appellants being agencies of a state-party to the African Charter could not promulgate the State Security (Detention of Persons) Decree No. 2 of 1994, which provides for an indefinite detention of a person in custody without trial and also the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 which, denies a person right to civil proceedings for anything done under a Decree where such rights are protected under the African Charter. Put very succinctly, counsel's submission is that the ouster clauses enacted in those Decree could not rob the respondent on rights protected or guaranteed under the African Charter, in support of this proposition he relies, on the authority of *Oshevire v. British Caledonian Airways Ltd* (1990) 7 NWLR (pt.163) 507 at 519. Counsel further cities the Bostwana Case of *A. & Bostwana v. Unity Dow* (1998) H.R.R.A. Page 1 and the Ghana case of *New Patriotic Party (NPP) v. The Inspector-General of Police, Gana & Ors.* No 493 delivered on 30th/11/93) where even though Botswana and Ghana were yet to adopt any specific legislation incorporating the African Charter into the municipal laws of those countries, nevertheless their municipal courts declared the African Charter to be above their municipal law

It is counsel's submission that Nigeria having specifically, by legislation (i.e. Cap. 10, LFN 1990), incorporated the African Charter into her domestic law, the Nigerian Courts ought readily to assume jurisdiction to pronounce on the African Charter rather than decline jurisdiction. Counsel finds support for his submission by reference to section 1 of Cap. 10 LFN 1990 and the

long title to Cap 10 LFN 1990 i.e. An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights.

Counsel further submits that the African Charter having been incorporated into the Nigerian Laws does not make it subject to or conditional upon any domestic legislation. Counsel reiterates that the African Charter has been made part of Nigerian laws by the process of incorporation whereby the whole of the African Charter is given effect to under the Nigerian Laws by reproducing the African Charter unedited in the schedule to the municipal law, i.e. in this case, schedule to Cap..10 LFN1990, in contrast to incorporation of substantive provision of an international treaty into the municipal law so that the treaty (herein African Charter) is not directly enacted. To counsel, African Charter can only be limited to the extent to which its Charter itself provides any limitation and not subject to the provision of enactments in Nigeria, such as Decree No. 2 of 1984 or Decree No.12 of 1994 or be suspended by such Decree or Decrees. For the same reason, he also submits that section 12 of the Constitution of the Federal Republic of Nigeria 1979 does not equat a treaty to the same status as municipal legislation which the national Assembly can modify or repeal like any other enactment. Therefore, counsel submits that section 12 of the 1979 Constitution cannot be placed on the same footing as Article 6 clause 2 of United States of American Constitution.

On the issue of supremacy of the 1979 Constitution in relation to treaties, counsel submits that although the supremacy of the Constitution was entrenched by virtue of section 1 of that Constitution, the doctrine of supremacy of the 1979 Constitution is limited to the territorial entity known as Nigeria by reason of its section 1(1). Consequently, counsel argues that the provisions of the Constitution cannot have effect in Ghana, Kenya and other countries within the Organisation of African Unity (O.A.U) and therefore the concept of constitutional supremacy is in relation to any other law within Nigeria and not treaties concluded voluntarily with other nations. It is counsel's further submission that in signing a treaty with other nations there is an element of assumed voluntary surrender of sovereignty for the purpose only of being bound by the treaty and so Nigeria cannot contract out of its obligation under a treaty. Counsel further submits that the fact that Nigeria is under an absolute Military Government cannot derogate from her international obligation such as under the African Charter nor even suspend the operation of provisions of the Charter or such international treaties that relate to human rights and fundamental freedoms because "a

state remains a subject of international law irrespective of whether it is military absolutism, civil democracy or a fascist repression."

International law and Hierachy of municipal laws

It is also counsel's submission that a state party to a treaty is not permitted to subject the treaty to a hierarchy of superiority along with its municipal legislations as it is an affront to common sense for a state subject to international law to attempt to form a hierarchical pyramid between its municipal legislation and international law. In the result, counsel submits that the decision of the Supreme Court in *Labiyi v. Anretiola* (supra) though sound in many respects, nevertheless has no bearing on the status of international law in the municipal circles and therefore the decision of the lower court in this regard cannot be said to be disrespectful or having been handed down *per incuriam* the supreme Court's decisions in *Labiyi* case.

Machinery of enforcement of the African Charter

Learned counsel referred to the decision of the lower court's assertion that the African Charter "is a legislation with international flavour" whose operation in Nigeria cannot be affected by the ouster clause contained in Decree No.2 of 1984 and that the lower court was right to proceed on the principle that Nigeria being a state party to the African Charter cannot legislate out of its international obligations municipally. Furthermore, counsel submits that by adopting the African Charter under Cap.10 FLN 1990, and which became binding on Nigeria from 21/10/86, Nigeria became enjoined to give effect to rights and freedoms guaranteed by the Charter and this will obviously mean that in the absence of a laid down procedure for enforcement in the Charter, the citizen should be at liberty to approach the court by action for the enforcement of the rights guaranteed to him by the Charter. Counsel calls in aid *Fajinmi v. The Speaker Western House of Assembly* (1962) 1 All NRL (Pt.1) 205. Concluding, he submits that the same procedure provided for enforcement of fundamental rights under Charter IV of the 1979 Constitution could be adopted for the enforcement of rights guaranteed under the African Charter, and relies on *Ogugu v. The State* (1994) 9 NWLR (Pt.366) 1 at pp 26-27.

It seems to me that our starting point is to identify the nature and judicial status of a treaty in relation to municipal law. The term treaty has been variously identified. Suffice it to say that a treaty is a compact, an agreement or a contract - bilateral or multilateral - between sovereign states (two or more) whereby they establish or seek to establish a relationship

between themselves governed by international law. A treaty, therefore, in a broad sense, is similar to an agreement under the civil law. The difference between an ordinary civil contract (or agreement) and a treaty is that while the former is an arrangement between individuals and derives its bindingness from municipal or domestic law of a state, a treaty on the other hand derives its binding force and effect from international law. See Article 2 of the Vienna Convention of May 23, 1969 which came into force on January 27, 1930. Thus, ordinarily, a treaty binds only states parties to it just as a contract binds on individuals who are parties thereto. There is therefore no jurisdiction for oversimplification of a treaty in terms of a contract[59]. Under strict customary international law, individuals are not subjects of international law nor where municipal or domestic courts called upon to control or administer treaty obligations between sovereign states. See *Walker v. Baird (supra)* and *Sobhoza v. Killer* (Supra). This is so because unincorporated treaties cannot change any aspect of Nigerian law, even though Nigeria is a party to those treaties. Indeed, unincorporated treaties have no effect upon the rights and duties of citizens either at common law or statutes law. They may however indirectly affect the rightful expectation by the citizen that government acts affecting them would observe the terms of the unincorporated treaties. See the recent Privy Council Opinion in *Higgs & anor v. Minister of National Security & ors.* Judgment was handed down on 14/12/99, per *The Times* of 23/12/99[61]. That, however, is not the true position today of treaty obligations between independent nations under international law. Within limits today, we are familiar with provisions of a treaty that create benefits in favour of individuals of a state party to the treaty. Thus the classic example of privity of contract under municipal law, exemplified by the authority of *Ikpeazu v. A.C.B.* (Supra) which ordinarily will deny individuals of a state party to a treaty the right to maintain an action on a treaty on the ground that such individuals are not parties to the treaty are completely untenable [62].

Authorities abound today wherein municipal or domestic court is at liberty to apply and enforce a treaty. See *Schorsch Meler Gmbh v. Hennin* (1975) 1 A 11 E.R. 152 where, relying on the European Economic Community Treaty, Article 106 and the English European Communities Act, 1972, section 2(1), a German company sued at an English court claiming judgment not in English pounds sterling but in German Deutsche marks, the German company having contended that the ordinary rule of English law (by which and English court could give judgment only in Sterling pound) was incompatible with Article 106 of the Treaty. The trial judge refused the claim and held that the old English common law canons of construction applied and that article 106

did not prevail on the rule of common law. The Court of Appeal overturned the decision and held that the European Economic Act had modified the old English rule of not given judgment in foreign currency. See also *des Gas Sa v. Falks Veritas Ltd* (1974) 3 A11 E.R.51 and the decision of the Nigerian Court of Appeal in *Oshevire v. British Caledonian Airways Ltd* (1990) 7 NWLR (Pt. 163) 507 in which that court applied and gave effect to the Warsaw Convention, 1929 as reproduced in the schedule to the Carriage of Goods by Air (Colonies, Protectorates and Trust Territories) Order 1953 - at p. 168 of the Laws of Federation of Nigeria, 1958 ed. vol. 6. So also in *U.A.C. (Nig.) Ltd. v. Global Transport S.A.* (1996) 5 NWLR (Pt. 448) 291 the Court of Appeal gave effect to the Hague Rules. Again, the applicability of the Warsaw Convention 1929 by our Court of Appeal in a fairly recent decision in *loidapo Lufthans Airlines* (1997) 4 NWLR (Pt.498) 124 was upheld by the Supreme Court [63].

From the above plethora of judicial authorities, it is crystal clear today that treaties may create rights and obligations not only between member states themselves, but also between citizens and the member states, and between the ordinary citizens themselves. It is therefore clear that the over-simplification of the word treaty in terms of ordinary contract as the term is understood in municipal law, and as submitted by the learned counsel for the appellants, is very restrictive and unacceptable. Furthermore, neither is counsel's submissions that a treaty does not bind individuals - not being parties to the treaty nor is a treaty subject of municipal law that can be challenged in municipal, court, supportable[64].

Be that as it may, it is common ground that Nigeria, by legislation – Cap 10 of Laws of the Federation of Nigeria 1990 the African Charter on Human and Peoples Rights (hereinafter referred to as "African Charter") - has been given effect to under the Nigerian Law by reproducing the African Charter unedited in the schedule to the municipal law (i.e. schedule to Cap 10 (LFN, 1990) in contrast to mere incorporation of substantive provisions of an international treaty into the municipal law without the treaty itself being directly enacted. What seems important to underline is the status of the African Charter *vis-à-vis* the other Nigerian legislations. Both counsel in the appeal hold divergent views on the scope and nature of the local enactments in comprison with the African Charter. Thus while learned appellants' counsel is of the view that the African Charter on incorporation, assumes the charter of an ordinary municipal legislation, ranking at par with it, and is therefore not superior to such enactments, learned respondent's counsel is clearly of the view that a treaty, like the African

Charter, enjoys pride of place and cannot be abrogated or modified by domestic enactments nor is the treaty subject to the Consntitution[65].

It is necessary to get our bearings right. The Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances. For avoidance of doubt, the 1979 Constitution stated categorically in its chapter 1, section 1(1) as follows

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

For purposes of clarity, its section 1(3) goes further to state;

> "1(3) If any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

It is against these provisions of the Constitution that the African Charter was promulgated. Since its enactment, the African Charter has been accorded legislative force and its section 1 stipulates as follows:

> "As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall subject therefore as provided have force of law in Nigeria and shall be given full recognition and effect can be applied by all authorities and persons exercising legislative executive or judicial powers in Nigeria."

Finally, it is crystal clear that the position of a treaty vis-à-vis the Constitution must conform with the provisions of section 12(1) of the 1979 Constitution which stipulates thus:

> "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty is enacted into law by the National Assembly."

The combined effect of sub-sections (1) and (3) of section 1 and section 12(1) of the 1979 Constitution leaves one in the doubt, not only about the pride of place of the Constitution but brings to the glare that a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be prescribed by the legislative66.

This effect notwithstanding. Pats-Acholonu, JCA, in his concurring judgment (to the leading judgment of musdapher, JCA) stated pointedly.

> "By not merely adopting the African Charter but enacting it into our organic law, tenor and intendment of the preamble and section seem to vest that act (i.e. African Charter) with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal,
>
> (emphasis supplied)

With the utmost respect to his Lordship, the underlined part of the above excerpt neither readily lends itself to easy comprehension nor is it in consonance with the law. No authority was given in support of this far-reaching proposition. On the contrary, the proper proposition is manifestly at variance with section 12(1) of the 1979 Constitution which stipulates that "no treaty between the Federation and any other Country shall have the force of law except to the extent to which any such treaty has been enacted." Indeed , in enacting the African Charter as an Act of our municipal law and as a schedule to the only two sections of the Act., i.e. Cap.10 LFN 1990, a close study of that Act does not demonstrate, directly or indirectly, that it has been 'elevated to a higher pedestal" in relation to other municipal legislations. The provisions of the only two sections of Cap 10 LFN 1990 incorporating the African Charter into our municipal law are conspicuously silent on a "higher pedestal" to which the learned justice of the lower court arrogates to the African Charter vis-à-vis the ordinary laws. The general rules is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws. It is rather startling that a law passed to give effect to a treaty should stand on a "higher pedestal" above all other municipal laws, without more, in the absence of any express provision in the law that incorporated the treaty into municipal law. See prof. Ignax Seidle-Hovenvelden, "Transformation or Adoption of International Law into Municipal law" (1963 (12 Inter and Comp. L.Q. 90 at p.115, pp 111-112[67].

Speaking in the same vein, Musdapher, JCA. In his leading judgment did not help matters either. Said he,

The provision of the (African) Charter are in class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiyi v. Anretiola.* (1992) 8 NWLR (pt.258) 139. It seems to me that the learned trial Judge acted erroneously when he held that the *African Charter* contained in Cap.10 of the Laws of the

Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government."

It may be recalled that the hierarchical classification in order of superiority of laws in Nigeria was enunciated by the Supreme Court in *Labiyi v. Anretiola* (supra). For ease of reference, the order of superiority as on the 31st December, 1984 runs thus:

1. Constitution (Suspension and Modification) Decree 1984
2. Decrees of the Federal Military Government
3. Unsuspended provisions of the Constitution 1979
4. Laws made by the National Assembly before 31/12/83 or having effect as if so made
5. Edicts of the Governor of a State
6. Laws enacted before 31st December, 1983 by the House of Assembly of a state, or having effect as if so enacted [68/69].

By the time-honoured doctrine of precedent as it operates in Nigeria and all common law countries, the decision on a given issue of law handed down by the apex court, which for us in Nigeria is the Supreme Court, is not only superior but binds all subordinate courts, including all courts exercising appellate jurisdiction[70]. It is the law that a decision of a court of competent Jurisdiction, no matter that it seems palpably null and void, unattractive or insupportable, remains goods law and uncompromisingly binding until set aside by a superior court of competent jurisdiction; see *Babatunde & anor v. Olatunji & anor* (2000) 2 NWLR (Pt.646) 557, and *Ezeokafor v. Ezeilo* (1999) 6 S.C. (Pt.11) 1[71]. With the utmost respect to Musdapher, JCA, it is an inexcusable judicial disrespect or arrogance to deny the subsistence of the hierarchical order of superiority of Nigerian laws as adumbrated by the Supreme Court in *Labiyi* case. This posture of the lower court is more starling in the absence of any convincing reason given for that far-reaching proposition of the law when the doctrine of precedent, *stare decisis*, of great antiquity, embedded in the English common law, and indeed, an integral part of our law which is anchored in good reason, logic and common sense and has not been demonstrated to be manifestly out of step with modern development in law should be blown away by a side-wind. There is therefore no basis whatsoever for the lower court not to have followed the decision in *Labiyi* case. Had the lower court done so, notwithstanding that the African Charter is a legislation with international flavour, it is, for all intents and purposes, simply an international law incorporated into the Nigerian body of municipal laws, and like such international-incorporated treaties, it remains

at par with other municipal legislations. The elevation of the African Charter to a "higher pedestal" and the denial of the continued validity or authority of *Labiyi* case by the lower court is totally absurd, untenable and unwarranted[72].

Therefore, the appellants' contention that the African Charter is inferior to the Constitution and the Decrees is supportable. To hold otherwise is to erect an indefensible barrier into an enactment by introducing words that are not there, more so when no ambiguity has been shown to exist which may warrant introducing such extraneous Construction in aid of clarifying any ambiguity. I shall therefore decline to read either in the African Charter or Cap 10 LFN 1990 that incorporated the African Charter into law words that are not there ascribing any superiority to the African Charter vis-à-vis other municipal legislations[73/74].

There is a further colouration given to the doctrine of supremacy of the Constitution by the respondent. Contrary to the general and lucid view of the term supremacy of the Constitution as set out in sections 1(1) and (3), learned respondent's counsel ingeniously submits that the doctrine of supremacy of the Constitution is limited in its connotation to the territorial entity known as Nigeria because section 1(1) states, in part, that the "Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". To counsel, this constitutional provision makes it clear that the provisions of the Constitution will have no binding force e.g., in Ghana, Kenya, and with the state members of the Organisation of African Unity. In other words, the concept of constitutional supremacy is in relation to "any other law" within Nigeria and not in relation to treaties concluded voluntarily with other nations.

With due respect to learned counsel, I find the submission very strange and unacceptable, so also his hypothesis that the concept of constitutional supremacy under section 1(1) of the Constitution relates to "any other law" within Nigeria and not to treaties. On the contrary, if section 1(1) is read harmoniously with section 1(3) rather than disjointly, as counsel seemingly seeks to do, the concept of constitutional supremacy – as is generally understood - will be placed in focus because section 1(3) stipulates that "any other law" which is inconsistent with the Constitution, the Constitution will prevail and that other law shall to the extent of the inconsistency be void. More importantly, the African Charter having been incorporated into the body of the Nigerian municipal laws cannot be preferentially treated but should rank at par with other municipal legislations and be subordinated to the Constoitution[75].

By extension of constitutional supremacy, respondent's learned counsel touched on voluntary surrender of sovereignty by state members to a treaty for the purpose only of being bound by the treaty. In that regard, it is his submission that a state is not permitted on signing a treaty only to turn around to assert its sovereignty solely for the purpose of defeating the treaty by legislating out of their international obligations. Counsel urges that Nigeria should emulate the state practice of Ghana and Botswana where the courts in those states have affirmed the supremacy of the African Charter over their municipal laws, even in the absence of specific legislation incorporating the African Charter in their respective municipal laws. Learned appellants' counsel holding a view to the contrary, submits that a state party to a treaty is competent and at liberty to enact law inconsistent with its obligations without prejudice to such remedies available against it in international law at the instance of other state signatories to the treaty.

The assumption of voluntary surrender of state's sovereignty by a state party to a treaty, within limits, is well-recognised in international law. Consequently, it is an exception rather than the rule for a state party to a contract out and defeat the legitimate operation of a treaty to which it is a signatory by derogating from the treaty through passing a municipal law inconsistent with the treaty. Since a state at any moment, despite the provisions of a treaty that is a signatory to, is at liberty to withdraw its involvement in the treaty, it follows that a state's treaty obligations can be neutralised by enacting a new legislation inconsistent with those obligations. But this is without prejudice to any remedies available against the recalcitrant statute in international law at the instance of the other states parties to the treaty. Invariably, this is a political decision involving such sanctions that the other states signatory to the treaty may deem fit to impose. See A. H. Robertson Human Rights in National and International Law, (1968 ed) p. 12, Ian Browlie, Principles of Public International Law (4th ed.) J.G. Starke. Introduction to International Law. 9th ed. pp 413-415, and *Macarthy Ltd v. Smith* 1979) 3 A11E.R. 325 AT 329 Pg 22 [76/77].

It remains to observed that the respondent in his brief (at pp. 37-41) in his Issue No. I discussed under the sub-title, "Machinery of Enforcement of the *African Charter*". I am clearly of opinion that that sub-title neither arose under the grounds of appeal raised by the appellants nor the issues for determination identified by the parties. The law is clear that any consideration in a brief of matters neither predicated on a ground of appeal nor subsumed under any issue for determination would be discountenanced. This shall be the fate of respondent's submission made on the above sub-title [78].

Notwithstanding the authoritativeness of the decision in *Labiyi* case, about which I have no doubt, it is important to recall that the act being questioned in this appeal is one perpetrated by the Inspector-General of Police i.e. detention of the respondent under State Security (Detention of persons) Decree No.2 of 1984, as amended by Decree No.11 of 1994. Furthermore, it is necessary to remember that section 4(1) of this Decree also contained an ouster clause of the courts jurisdiction. Its section 4(2) suspends the operation of Chapter 4 of the 1979 Constitution, so also sections 219 and 259 of the Constitution, Nevertheless, for avoidance of doubt, a wider and embracing protection was given to acts done by the members of the executive during the period of military regime. Thus by section 1 (2) (b) (i) of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.12 of 1994, it is provided:

> "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree, the proceedings shall abate, be discharged and made void."

Since, as we have stated earlier herein, that an incorporated treaty, like the African Charter ranks at par with other municipal legislations, it is clear that respondent's action, predicated on the executive act of the Inspector-General of Police under Decree No.2 of 1984, as amended by Decree No. 11 of 1994, is void. It will surely be foolhardy for any Court to overlook the far-reaching and devastating effect of the provisions of section 1(2) (b) on the jurisdiction of the court[79].

All in all, despite the appellant's erroneous denial that domestic courts can entertain matters arising under international or multinational treaties, it is clear that the main issues respectively canvassed under appellants' Issues Nos. 1 and 2 and respondent's Issue No.1 should be and the same are hereby resolved in appellants' favour.

Issues No. 3

This issue which is respondent's Issue No.2 seeks to answer the question whether the lower court "was right in remitting back (sic) the case to the trial court to consider the consequences of the respondent's detention for four days not covered by the detention order" in the face of its holding that the procedure adopted in the commencement of the said suit was improper.

It will be recalled that the trial High Court Judge declined Jurisdiction to entertain the suit partly because of the ouster clause in the State Security (Detention of Persons) Decree No.2 of 1984, as amended and partly because the procedure for initiating the suit, i.e. under the procedure expressly set out for redress under the Fundamental Human Rights Enforcement Rules, was erroneous. He accordingly struck out the suit. But on appeal in his leading judgment, with R.D. Mohammed and Pats-Acholonu, JJCA, concurring, Musdapher, JCA while upholding the validity of the detention order, ordered that the case be remitted to the trial court for consideration of the claim in respect of the four days not covered by the detention order. It is the submission of appellants' counsel that the lower court having accepted that the trial judge was right to have declined jurisdiction, the only consistence order the lower court ought to have made was one striking out the suit, otherwise if the suit was remitted to the trial court the appellants would still raise a preliminary objection under the Fundamental Human Rights Enforcement Rules 1979 for four days not covered by the detention Order, bearing in mind that the application was one for the entire period, whether covered by the detention order or not.

Respondent's counsel submits that the decline of jurisdiction by the trial court based partly on the validity of the detention order and commencement of the suit by the procedure under section 42 of the 1979 Constitution, was improper and erroneous. It is counsel's further submission that the articles of the African Charter are enforceable in Nigerian courts in the same or different manner that municipal legislations similar to it are enforced; *Ogugu v. State* (1994) 9 NWLR (Pt.366) 1 is cited and relied upon to bring home counsel's submission. He finally calls attention to the fact that the Issue is raised as respondent's Issue No.3 in the cross-appellant's brief. Learned counsel also says that if the trial court had given the cross-appellant the opportunity of addressing it on the issue of the enforcement of the *African Charter,* he would have directed it to the authority decision of *Ogugu v. The State* (supra). Counsel also cites *Agbakoba v. The Director, State Security Services* (1994) 6 NWLR (Pt.351) 475 at p. 500 paras A-B p. 499 para E to buttress *Ogugu* case.

It is sensible to take appellants' Issue No. 3 in the main appeal together with the across-appellant's Issue No. 3; this will avoid unnecessary repetition. Learned across-appellant's counsel places a great premium on the authority of *Ogugu v. State* (supra) as good authority for enforcing the provisions of *African Charter* by the procedure set out under section 4 of the 1979 Constitution as the cross-appellant did in the case under review. He urges us to so hold.

I cannot agree more with learned cross-appellant's counsel that *Ogugu v. State* (supra) is a good authority that the African Charter having been duly incorporated into our municipal laws, it would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 Constitution for enforcing fundamental rights enshrined in the Constitution, are applicable, by extension, to the provisions of the African Charter[80/81]. As I had highlighted earlier on this judgment, the process of incorporating the African Charter into the body of our domestic laws simply places the Charter at par with all our domestic legislations and in turn brings the African Charter within the judicial powers of the courts established under the Constitution. Such judicial powers, among others are clearly set out in sections (6) (6)(b) and 236(1) of the 1979 Constitution, as well as section 230 of the Constitution as modified by the Constitution (Suspension and Modification) Decree 1993, in particular, paragraphs (q), (r) and (s) of the subsection[82]

Beside the procedure under the Fundamental Rights (Enforcement Procedure) Rules, it is clear to me that any procedure which will enable an aggrieved person to approach the court for the redress of a violation of human rights guaranteed by the African Charter, more so in the absence of any express provision for enforcement under the African Charter, can be evoked. Today, the courts make less fuss about complaints based solely on adjectival law that tend only to impede the attainment of judice. I am encouraged to so hold by the maxim *ubi jus, ibi remedium* (where there is a right there is a remedy.) Besides, before the Fundamental Rights (Enforcement Procedure) Rules were prepared complaints of abuse of fundamental rights under the Constitution were appropriately dealt with, and were not allowed to be defeated by technical submissions of absence of formal procedural rules.

From the foregoing, it is manifest that the Court of Appeal was right to have frowned in the judgment of the trial court in declining jurisdiction to entertain the application because it was brought under inappropriate procedure, i.e. under Fundamental Rights (Enforcement Procedure) Rules[83]. Having upheld the propriety of the procedure adopted by the respondent, it is, therefore, clear that the period of four days established and conceded to on both sides which is not covered by the detention order remains inviolate. In the result, the appeal against the order of the lower court's remitting the case to the trial court for consideration of the consequences of the respondent's detention for the said four days fails. Undoubtedly, appellants' Issue No. 3 is the hub or central point of interest in the main appeal. It has collapsed.

All in all, therefore, the appeal fails and the same is dismissed

CROSS-APPEAL

This brings us to the cross-appeal. The respondent being dissatisfied with parts of the judgment of the Court of Appeal, as cross-appellant, has appealed against the same on five grounds of appeal and also submits four main issues for our determination, namely.

"1. Whether going by the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 and its various amendments, particularly as amended by Decree No.11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.

2. Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.

3. Whether the procedure adopted by the Cross-appellant in this case in enforcing the articles of the African Charter on Human and Peoples' Rights was proper.

4. Whether the 1st Respondent, as Head of State of Nigeria is immuned from civil or criminal actions in all cases.

It may be observed that Issue No. 4 as postulated is rather too wide, and to some extent speculative and so outside the scope of the judgment appealed against. It is enough if the issues is re-couched:

'Whether the 1st Respondent, as Head of State of Nigeria is immuned from civil or criminal action in the circumstances of the case.'

Preliminary Objection

The appellants, as cross-respondents, in their brief, first raised their Notice of Preliminary Objection, as follows:

"(a) for an order striking out ground No. 5 the Notice of Appeal as filed by the Cross-Appellant on the 11th day of March , 1997. (See page 241-242 of the record).

(b) for an order striking out issues No. 2 and legal argument arising therefore, from the Cross-Appellant's brief. (See page 4 of the Cross-Appellant's brief)."

Thereafter the cross-respondents identified two issues for determination, to wit,

"1. Whether the Inspector-General of Police having regard to Decree No. 2 of 1984 as amended by Decree No.11 of 1994 is a competent person and/or authority to sign and issue a detention order under the said decree.

2. Whether the provisions of the *African Charter* on Human and People's Rights can be enforced through the Fundamental Rights (Enforcement Procedure) Rules made pursuant to section 42 of the 1979 Constitution as amended"

Finally, cross-appellant filed a Reply Brief which was a response to the Notice of Preliminary objection filed by the cross-respondents.

Resolution of Preliminary Objection

I shall tackle the points raised under the Preliminary objective seriatim.

(i) Objection to ground 5 of the grounds of appeal

The reason for cross-respondents' prayer that ground 5 be struck out is that the complaint is against the concurring judgment of Pats-Acholonu, JCA rather than the leading judgment of Musdapher, JCA. Cross-respondent's counsel calls in aid the decision of this Court in *Idise v. Williams Int. Ltd* (1995) 1 NWLR (Pt.370) 142 or (1995) 1 SC NJ 120.

Learned counsel to the cross-appellant however stressed that the principle in *Idise v. Williams Int. Ltd* (supra) can only come into play when there is a fundamental divergence between the leading and concurring judgments. This, according to the cross-appellant, is not applicable to ground 5 of the cross-appeal. Counsel refers to *Bolaji v. Bamgbose* (1986) 4 NWLR (Pt.37) 632, a judgment of this court to buttress his contention.

One may then ask, what is the judgment of the court? Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the *ratio decidendi* or *rationes decidendi* of that case in contrast to the passing remarks, otherwise referred to as *obiter dictum* or *obiter dicta* made by the court in the course of preparing the judgment. The problem, such as the one raised in this appeal, arises when three justices (as is usually the case in the Court of Appeal) or five justices (as is usually the case in the Supreme Court) preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the leading judgment and others under the mandatory provision of

the Constitution, are obliged to render either their concurring or dissenting judgments. In such a situation, it is the leading judgment that is, in legal circles, regarded as the judgment of the court. The other judgments may respectively be a two word judgment, e.g. "I concur" or judgments longer or shorter that the leading judgment[84/85].

The point of jurisprudential interest and of considerable interest in this appeal is the relationship of the bindingness of the *ratio decidendi* or *rationes decidendi* contained in the leading judgment on the one hand, and the other concurring judgments, on the other hand. Are they at par or are some superior to others? The jurisprudence and practice of law in this country appears to be tolerably clear: it is the *ratio* or *rationes* contained in the leading judgment that constitutes or constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are *obiter dictum* or *dicta*. *Obiter dicta* in the leading judgment as well as in the concurring judgments may be of persuasive effect in other occasions. This is my understanding of *Idise* case[86/87]. I do not, with respect, find *Bolaji v. Bamgbose* (supra) helpful

Accordingly, the preliminary objection to ground 5 of the grounds of appeal succeeds the said ground of appeal is therefore struck out.

(ii) **Objection to Issue No.2 of the Cross-appellant**

The complaint under this objection is direct and straight forward, namely, that Issue No.2 does not arise from the grounds of appeal in the cross-appeal. Learned counsel calls in aid several legal authorities, including *Akilu v. Fawehinmi* (1989) 2 NWLR (Pt. 102) 122 at 161 and *Ibe v. State* (1992) 7 NWLR (Pt. 244) 624, to buttress his contention.

In reply, learned cross-appellant's counsel submits that the objection to Issue No.2 is not sustainable because Issue No.2 flows directly from ground 2 of the grounds of the cross-appeal. Furthermore, he submits that this becomes clearly obvious when the ground is read together with the particulars. Accordingly, he urges us to discountenance the contention under the second ground of preliminary objection.

I have closely examined the cross-respondents' contention in relation to the second ground of objection. It is exquisitely clear to me, reading the said ground of appeal either alone or together with its particulars, that the gravamen of that ground of appeal is the endorsement by the lower court of the procedure adopted by the trial Court in taking judicial notice of the detention order. I find the second objection not properly-founded and that Issue No.2 of the cross-appellant's appeal is competent and properly arose

from ground 2 of the cross-appeal. The objection lacks merit and is accordingly struck out.

Argument on the Cross-appeal

I prefer the issues for determination identified in the cross-appellants' brief for the resolution of this appeal.

Issue No. 1

Whether going by the provisions of the State Security (Detention of Persons) Decree No.2 of 1984 and its various amendments, particularly as amended by Decree 11 of 1994, the Inspector-General of Police is competent to issue and sign a detention order and whether if the answer to this question is in the affirmative, he can be compelled to disclose the reasons for issuing same.

Some background information is obviously useful for proper comprehension of the subtle question raised by the cross-appellant under Issue No.1. Under the State Security (Detention of Persons) Decree No.2 of 1984 as originally promulgated, it was the Chief of Staff alone who was conferred with the power to issue detention order. However, by virtue of the State Security (Detention of Persons) (Amendment) decree No.12 of 1986, the Chief of Staff was substituted with the Chief of General staff or the Inspector-General of Police. Again, by virtue of the State Security (Detention of Persons) (Amendment) Decree of 1988 the Minister of Internal Affairs was named as the third additional authority to issue a detention order. However, by the State Security (Detention of Persons) (Amendment) Decree No. 3 of 1990, the Inspector-General of Police and the Minister of Internal Affairs were removed as authorities empowered to issue detention order. Consequent to the controversy generated over the designation of Vice Admiral Augustus Aikhomu as Vice President or Chief of General Staff, the Federal Military Government (FMG) by yet another amendment, deleted the Chief of General Staff and substituted it with Vice-President by virtue of State Security (Detention of Persons) (Amendment) Decree No.24 of 1990.

On assumption of office by the 1st cross-respondent in November, 1993 and by virtue of the Constitution (Suspension and Modification) Decree No.107 of 1993, section (8) (1) (b), the officer of the Chief of General Staff was credited and that of Vice-President abolished. It became apparent by reason of the promulgation of Decree No.107 of 1993, that a vacuum was created with regard to the person who could sign a detention order under Decree No. 24 of 1990. Yet the FMG promulgated the State Security

(Detention of Persons) (Amendment) Decree No. 11 of 1994 which provides as follows

"1. The State Security (Detention of Persons) Decree 1984 as amended by State Security, (Detention of Persons) (Amendment) Decree 1984, 1986, 1988 and 1990 is amended:

(a) By inserting immediately after the words "Chief of General Staff" the words "or the Inspector-General of Police" wherever they occur in the Decree."

(b) By replacing section 2 with the following section:
The Chief of General Staff or the Inspector-General of Police, as the case may be, shall not later than three months after the date of an order made by him under this decree and every three months thereafter, review the case of every person, detained pursuant to the order and, if satisfied that the circumstances no longer require the continued detention of the person affected, may revoked the order."

Reading first on G.C. Thornton, Legislative Drafting, p.303, learned cross-appellant's counsel submits that a reference to a statute is to be construed as reference to that statute as amended from time to time. Thus, he further submits that the reference in Decree 11 of 1994 to Decree No.2 of 1984 is as amended by Decree No. 24 of 1990 which was the last amendment. Now, counsel further submits, that since Decree No. 2 of 1984 as amended by Decree No. 24 of 1990 only recognised the office of Vice-President and not Chief of General Staff and since the office of Chief of General Staff was non-existent and unknown to Decree No.2 of 1984, as amended by Decree No. 24 of 1990, the office of the Inspector-General of Police cannot be inserted after an office that does not exist. To counsel, Decree No.11 of 1984 has created a lacuna and ought not to be construed liberally in favour of the law-maker who seeks thereby to encroach on the liberty of the cross-appellant. In aid of his submission he relies on *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt.135) 688 at 733, *Jennifer Maduike v. I.G. of Police* (1992) 3 NWLR (Pt.227) 70 at 107, *Onuzulike v. CDS, Anambra State* (1992) 4NWLR (Pt. 232) 731 at pp. 820-821. It is his further submission, relying on *Vickers, Sons of Maxim Ltd. v. Evans* (1910) AC 444 at 445 and *Thompson v. Goold & Co.* (1910) AC 409 at 420 that it is a cardinal rule of construction of statute that nothing is to be added or taken away from a statute, and that the lower court was in error in reading into Decree No. 24 of 1990 and Decree No.11 1994 inferences

which were not contained therein. Finally, he submits that Decree No. 11 of 1994 was not just inelegant, as Mustapher, JCA, held in the leading judgment, but was "ambiguous, ridiculous, defective, anamolous and absurd and fundamentally and irreconcilably in conflict with Decree No. 2 of 1984 as amended by Decree No. 24 of 1990". He urges that the fundamental defect be resolved in favour of the liberty of the cross-appellant.

The response of the cross-respondents was concise but lucid. While rejecting the cross-appellant's submission of the Chief of General Staff being non-existent under the amendment of Decree No. 20 of 1984 created by Decree No. 24 of 1990 argued that it is a well settled principle of law that statutes are interpreted or construed to give effect to the intendment of the legislature. Thus the intention of the legislature in promulgating Decree 11 of 1994 is to empower the Inspector-General of Police to issue and sign detention orders under State Security (Detention of Persons) Decree No. 2 of 1984 as amended. Counsel further submits that the amendment as contemplated in section 1(a) of Decree No.11 did not make the existence of the office of the Chief of General Staff a condition precedent for the office of the Inspector-General of Police to exercise the power under the State Security (Detention of Persons) Decree No.2 of 1984 as amended because a careful perusal of section 1(a) of Decree No. 11 of 1994 shows that it says "or the Inspector-General of Police" and in law the inserting is disjunctive. Therefore, counsel finally submits that the insertion of the office of Inspector-General of Police is totally independent of the offices of the Chief of General Staff or even that of the Vice-President as the case may be. Accordingly, Counsel urges us to accept the harmonious interpretation as stated by the lower court because to hold otherwise will make a mockery of commonsense.

Be that as it may, I agree with learned cross-appellant's view that where a statute tends to encroach on, curtail or abridged the freedom of liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit therefom[88]. It is also a well-known rule of construction that where a statute in its ordinary meaning and grammatical construction some clear absurdity would result, some effort would be made by the court to avoid the absurdity by modifying the structure of the sentence or the meaning of the words. There is no doubt whatsoever that interpreting section 1(a) of Decree No.11 of 1994 strictly, as promulgated and without any judicial modification, will result in an absurdity which the law-maker cannot be presumed to have intended. It is clear that Decree No. 1 of 1990 which removed the Inspector-General of Police and the Minister of Internal Affairs left the Chief of General Staff as the only signatory for

the operation of State Security (Detention of Persons) (Amendment) Decree No.12 of 1986 as amended. The result is that when Decree No. 24 of 1990 deleted the Chief of General Staff and substituted it with the Vice-President, the only signatory left for the operation of State Security (Detention of Persons) (Amendment) Decree under Decree No. 24 of 1990 was the Vice-President. By the Constitution (Suspension and Modification) Decree No. 107 of 1993 which created the office of Chief of General Staff, this left the operation of Decree No. 24 of 1990 in a limbo as no steps were taken to subsequently amend Decree No. 24 of 1990 whereby the Vice-President, was the surviving signatory for the detention of persons under the original Decree No.2 of 1984 and which office was implicitly abolished by Decree No.107 of 1993. This omission was oversighted by the law-maker. It is this oversight that has led to an apparent state of impasse in an effort to construe section 1(a) of Decree No.11 of 1994, the latest amendment to the original Decree No.2 of 1984 89. Indeed, this is the crux of the objection of the cross-appellant in relation to the exercise of power of signing of detention order by the inspector-General of Police. It has been strenuously submitted on behalf of the cross-appellant that "the moment Decree No.107 of 1993 was promulgated, nobody in Nigeria had the power under the law to sign a detention order as there was no longer a Vice-president."

Learned counsel's submission in this regard in quite interesting. But the main question now is whether section 1(a) of Decree No.11 of 1994 with the apparent case of omission arising from oversight on the part of the legal draftsman should be allowed to stand in the face of its absurdity or should the court interfere in such a way to avoid the absurdity? It is quite clear to me that there was an obvious oversight on the part of the law-maker in amending Decree No. 24 of 1990 without providing for the substitution of the Vice-President with the office of child of General staff so that when the amendment Decree No.11 of 1994 was promulgated the provisions of its section 1(a) would have tallied with the intendment of the legislature, and in turn avoid the absurdity under Decree No. 11of 1994 of inserting the phrase "or the inspector-General of Police" after a non-existent office. Therefore, section 1(a) of Decree 11 of 1994 should be construed as follows:

By Inserting immediately after the words "Vice-President" the words "or the Inspector-0General of Police" wherever they occur in the Decree because that was the general intention of the law-maker.

It seems to me that the suggested constructional approach by judicial modification of a statute to supply a seeming omission of word or words in a statute and thereby avert the absurdly that would follow a literal

interpretation of the statute can also be achieved by reading the whole of the decree together or harmoniously, particularly if this will assist the court in deciphering the legislative intention in relation to the statute in order to effectuate it as the court has judicial responsibility to interpret a statute according to its true intent. As Nnaemeka-Agu, JSC succinctly put it in *Nwosu v. Imo State Environmental Sanitation Authority* (supra) at p.724:

> "I believe that an indubitable offshoot of the principle of construction that the court must seek out the legislative intention and give effect to it that every statute must be construed according to its tenor."

This harmonious approach found with the Court of Appeal. Undoubtedly, it is evident from communial reading of the State Security (Detention of Persons) Decree No.11 of 1994 along with the amendment Decrees of 1984, 1986, 1988 and 1990, would leave no one in doubt that the true intent of Decree No.11 of 1994 is to empower the Inspector-General of Police with the authority to issue detention order independently with another person. If for any reason that other person cannot perform that function that cannot in any way affect the powers sought to be conferred on the Inspector-General of Police in this regard since the word "or" in the context of section 1(a) of Decree No.11 of 1994 is unmistakably disjunctive in its meaning.

In the result, whether by invoking the harmonious rule of construction or by judicial modification to supply or fill in an apparent case of obvious oversight or omission in order to avoid absurdity which the legislature was presumed not to have intended, I turn in an affirmative answer to Issue No.1 and hold that the Inspector-General of Police is competent and empowered to issue and sign a detention order, under Decree No.2 of 1984 as variously amended[90].

Whether the Court can inquire into the reasons behind the satisfaction of the Donee of a detention order.

Learned cross-appellant contends that the court is competent to compel the donee of a detention order to disclose the reasons behind his conclusion that a particular person, e.g. the cross-appellant herein, is a security risk. Although section 4 of Decree No 2 of 1984 has an ouster clause, while section 2 of Decree No. 12 of 1994 forbids the court from inquiring into anything done or purported to be done under a Decree, it is counsel's submission that before Decree No.12 of 1994 can apply, the respondents must show that they acted within the provisions of Decree 2 of

1984 otherwise the jurisdiction of the court will not be ousted. He calls in aid *Madike v. I.G.P.* (1992) 3 NWLR (Pt. 227) 70 at 107 and *Onuzulike v. C.D.S. Anambra State* (Supra) at pp. 820-821. To request the court to subject the issuance of a detention order to judicial review, according to counsel, is not questioning the competence of the respondents to promulgate Decrees No.2 of 1984 and No. 12 of 1994, rather the court can subject it to judicial review by way of interpretation having regard to the phrase in section 1(1) of Decree No.2 of 1984, i.e. "if the Chief of Staff is satisfied that any person is or recently has been concerned in acts prejudicial to state security he may by order in writing direct that the person be detained until the order is revoked". To counsel, the use of the words "if", "satisfied" and "may" suggest that the court can look into the adequacy of the reasons that informed the satisfaction of the Chief of Staff, more so that in deciding whether or not to issue a detention order, he is exercising a public function and such scrutiny would show whether or not the Chief of Staff or an issuing authority acts in good faith or on extraneous considerations. To give the issuing authority unbridled powers, if he is satisfied, and thereby keep the persons detained behind the bars in perpetuity without question is to lay a monstrous foundation in which no society can thrive. Counsel submits that there are implied conditions which must be satisfied by the issuing authority for the proper exercise of powers under Decree No. 2 of 1984. These conditions include well-settled rules of natural justice in exercising the power to issue detention order.

Counsel refers to the English case of *Liversidge v. Anderson* (1942) A.C. 206 as an example where the court declined jurisdiction to question the exercise of discretionary and subjective power such as the one exercisable by the Inspector-General of Police. *Liversidge* case was followed in Nigeria by *Wang Ching-Yao & Ors. v. Chief of Staff* (unreported) Appeal No. CA/L/25/85 of April, 1 1985, per A. Ademola, JCA and a host of other cases. But counsel urges us to depart from the approach under *Liversidge* case, having regard to modern judicial developments. Finally, he submits that *Liversidge* case is no longer the law having regard to *Nakkuda Ali v. Jayaratine* (1951) A.C. 66 at pp. 76-77; *Padfield v. Minister of Agriculture, Fisheries & Food* (1986) A.C. 997 at p. 1032 - 1033 and *Stitch v. A.G. Federation* (1986) 5 NWLR (Pt. 46) 1007 at 1025 and, urges that the court should have the power to ascertain whether in the exercise of the discretion to issue out a detention order against a citizen, such as the cross-appellant, the detaining authority ought not to have good reasons in fact to claim satisfaction that the cross-appellant, at the time of his arrest, constituted a threat to state security.

The respondents did not react in anyway, either in their brief or during oral hearing, to the second arm of the cross-appellant's Issues No.1 The crux of the matter being contested under the second arm of issue No. 1 is whether in the exercise of powers conferred on a detaining authority to issue detention orders, the donee of the said power is under any obligation to disclose the reasons for his conclusion that a particular citizen, such as the cross-appellant, is a security risk to warrant his confinement by issuance of a detention order. What calls for detention is the operative phrase in the State Security (Detention of Persons) of Decree No. 2 of 1984 section 1(1), (with its various amendment Decrees of 1986, 1988, 1990 and 1994) which states as follows:

> "..... If the Chief of Staff is satisfied that any person is or recently has been concerned in acts prejudicial to state security ..... he may by order in writing direct that the person be detained ... until the order is revoked".

No doubt, the power donated herein is wide and starling. Nevertheless, the inquiry in this regard is whether, directly or by implication, the above provisions place an obligation on the authority issuing detention order to disclose the reasons behind his satisfaction to issue a detention order. It is indisputable that the issuing authority is, by the tenor of the Decree, vested with expansive power which is both discretionary and subjective. This, much, the cross-appellant's counsel readily concedes in his brief of argument. I am unable to discover from close reading of section 1(1) of Decree No. 11 of 1994 any obligation on the authority issuing detention orders to disclose reasons in the way and manner he exercise his subjective discretion. Contrary to the submission by learned cross-appellant's counsel that the Decree, as amended, has spelt out conditions or circumstances which must exist before the Inspector-General of Police can issue a detention order, I have searched, in vain, to discover the said conditions-precedent. Clearly, learned counsel is reading implied conditions into the lucid and unambiguous provisions of section 1(1) of Decree No.11 of 1994. This cannot be right in the absence of any authority to do so.

It is perhaps, desirable at this juncture to consider the land mark decision of the English House of Lords in *Liversidge v. Anderson* (supra). The defence (General) Regulations, 1939, Regulaltion 18b, para. (1) states as follows:

> "If the Secretary of state has reasonable cause to believe any persons to be of hostile origin or associations or the have been

recently concerned in acts prejudicial to the public safety or the defence of realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

In construing these provisions in *Liversidge v. Anderson,* the House of Lords held, by majority decision, that the matter is one for executive discretion of the Secretary of State.

Accordingly, in the action for false imprisonment, the court cannot compel the Secretary of State to furnish particulars of the.grounds on which he had reasonable cause to believe the plaintiff to be a person of hostile associations or that by reason of such hostile associations it was necessary to exercise control over him. It may be noted that the Defence (General) Regulations, 1939, Regulation 18b, para 1 were made for emergency period in England.

The principle in *Liversidge* case was applied in many Nigerian cases where the jurisdiction of courts of law had been muzzled by the inclusion of ouster clauses in statutes. See *Wang Ching-Yao & ors v. Chief of Staff* (unreported) Appeal case No./CA/L/25/85 delivered on April, 1985, per A. Ademola JCA and *Mohammed v. Commissioner of Police* (1987 4 NWLR (Pt.65) 420 at 438.

Now let me return to the case in hand. It is quite clear that the provisions under section 1(1) of Decree No.11 of 1994 give the inspector-General of Police a free and unfettered power to reach his conclusion, relying on such data and information that he may deem fit in being satisfied that any particular persons act is prejudicial to states security. No reasons are given by the detaining authority to anyone as to how a detainee is or constitutes himself in acts detrimental to states security. Put tersely by frankly, it is manifested that the power vested in the detaining authority can be wielded arbitrarily and capriciously without any remedy or right to seek a review of the decisions of the decisions of the detaining authority. Indeed, the Decree was further shielded by the ouster clause in section 4 of the same Decree. Learned cross appellant's counsel has urged that the phrase "if the chief of Staff is satisfied" should be interpreted to mean "if the Chief of Staff has adequate reasons in fact to be satisfied." With utmost. Respect to counsel, I am unable to accept this; it is an unwarranted entrustment on the plain and unambiguous provisions of the statute. In any event, the inbuilt ouster clause under section 4, as it were, shields the arbitrariness in which the power of the detaining authority is shrouded. It is pertinent to remember that the relevant time of the operation of these

Decrees was during the military regime, a time that provisions of the 1979 Constitution had been substantially suspended and when judicial powers of the state had been radically eroded and inclusion of ouster of the jurisdiction of courts of law in statutes became the rule rather than the exception. It is against this background that the plenitude of subjective discretionary power conferred on the detaining authority could be better appreciated[91/92].

From the foregoing, I turn in a negative answer to the second arm of Issue. No. 1.

Issue No.2

Whether the court below was right to have held that the procedure adopted by the trial court in taking judicial notice of the detention order was proper.

It appeared that at the trial the cross-appellant protested the admissibility of the detention order because it was not attached to the respondent's notice of preliminary objection: the order was not exhibited and was not admitted in evidence before the trial court. In the circumstance, there was no detention order for consideration. Be that as it may, the learned cross-respondents' counsel produced it. It was common ground that learned counsel for the cross-appellant not only read it, like the respondents' counsel, but relied on it to show the illegality of the arrest and detention of the cross-appellant for a few days. Thus it is submitted by cross-appellant's counsel that the fact that he, at a point, perused the detention order does not make him "a party to any civil proceedings who knowing of an irregularity, allows the irregular procedure to be adopted". In order words, the ratio in the case of *Akhiwu v. The Principal Lotteries Officer Mid-Western Region* (1972) 1 All NLR (Pt.1) 229 would not apply. Not having properly admitted the detention order in evidence, cross-appellant's counsel then submitted that the court was in error to have taken judicial notice of the existence of the detention order unless one was produced from the custody of the detention center where the detained was being kept or a certified true copy hereof was tendered in evidence.

Again, the cross-respondents made no impute in respect of this issue in their briefs.

Except that section 4 of the State Security (Detention of Persons) (Amendment) Decree No.11 of 1994 had erected an ouster clause stifling the right of a citizen to question a Decree, it seems to me that the handling of the issue of the detention order at the trial was irregular despite the protest at the trial court of the absence of the copy of the detention order by the cross-appellant's counsel.

A detention order, at best, is a public document. In the absence of the original copy its certified copy becomes admissible in evidence. Clearly, it is not open to the court to take judicial notice of such a document in the absence of any law authorising such approach. There is no gainsaying the fact that the copy of the detention order was a material document to both parties as well as the court. The cross-appellant needed it to establish the illegality of the detention, on the one hand, while the cross-respondents can only properly establish the legality of the detention, on the other hand, by the same document. Although in the absence of the detention order itself, a certified copy thereof ought to have been produced[93].

Finally, could the court rightly have taken judicial notice of it? I have grave doubt that the court could do so. While a court can take judicial notice of any law, the same cannot be said of a detention order, which as we have earlier observed, can at best be ranked as a public document. Its authenticity or otherwise can only be properly considered by the court after it has been duly admitted on evidence. Alternatively, the court can take judicial notice of detention order if it can be subsumed as a "subsidiary legislation" or a "subsidiary instrument". It may then be asked, what is a subsidiary legislation and can a detention order be do subsumed? The legal status of a detention order had been considered by the Court of Appeal in at least two cases. First, in *Wang Ching-Yao* case, the question whether photocopies of detention orders, tendered as exhibits, were public documents or subsidiary legislations was answered by A7denekan Ademola, JCA as follows:

> "The answer to this is a simple one. I do hold that the exhibits (photocopies of detention orders) are not public documents or documents as so understood within the context of the Evidence Act. Nor are they subject to rules of admissibility or weight under the rules of evidence. Their true nature is more of pieces of subsidiary legislation enacted under State Security (Detention of Persons) Decree 1984, (Decree No. 2 of 1984). The orders of detention are "subsidiary instruments" made in the exercise of powers conferred on the Chief of Staff by Decree No.2 of 1984. The orders made here, that is Exhibits 4 and 5, are enactments within section 27(1) of the Interpretation Act 1964. They are not public documents or otherwise. I am enjoined by the positive enactment in section 73(1) (a),(b) of the Evidence Act to take judicial notice of them and by the provision of section 1 of the suspended part of the constitution to enforce it"[98].

The next case was *Abdulmumuni Yaro Saidu v. C.O.P.* (unreported), Suit No.CA/L/ 1/87 of 10th November, 1987. Here, the question of inadmissibility of photocopies of detention orders tendered in evidence at the trial court was answered by the Court of Appeal in the affirmative. A consideration of the poser, what is a subsidiary legislation, was given by the Court of Appeal, Coram Maidama, Ogundere & Achike (JJCA). In my leading judgment of the Court in that case, I observed:

"Generally, the term subsidiary legislation is used to connote any enactment, that is, legislation made under an enabling law. The term subsidiary legislation may therefore be used interchangeably with the term "subsidiary instrument". Now "subsidiary instrument" means any "order, rules, regulation, rules of court or bye-laws made either before or after the commencement of this Act - (this Act herein is a reference to the Interpretation Act, 1964) - in exercise of powers conferred by an Act". (See section 27 (11) of the Interpretation Act, 1964). The term "Order" in this context is a term applied to instruments, made under statutory powers embodying directions, commands or mandates which are of general character (underlining mine) as distinct from specific instructions to which the term "directions" is applied: (See Halsbury's Statutory Instruments Vol. 1 of 1972 page 6). In my view, the hall-mark of an "order" which makes it cognizable as a "subsidiary instrument" or "subsidiary legislation" lies in the generality of its application in contradiction to a mere specific direction which in ordinary parlance, but definitely not in the legal sense, may be referred to as an order. An "order" as a subsidiary legislation must be seen as a statutory instrument, for example, S.1 17 of 1984, Customs Tariff (Import prohibition) No.2) Order of 1st April, 1984 is made under powers conferred under section 7 of the Customs Tariff (Consolidation) Act 1983. Furthermore, this order may be cited as the Customs Tariff (Import Prohibition) (N0.2) Order 1984. Clearly, the detention order, Exhibit A does not exhibit any similarity to a statutory instrument or subsidiary legislation in the manner it was made nor can it be said to be an instrument of such general application.

From the foregoing I think that any detention order made by the relevant authority under Decree No.2 of 1984 cannot be subsumed under subsidiary legislation or subsidiary instruments, not being an order of a general character. In my view this court cannot take judicial notice of such order under section 73 (1) (a) and (b) of the Evidence Act."

In the result, guided by the foregoing, I am clearly of the view that the trial court was in error to have taken judicial notice of the detention order. Although the Court of Appeal disapproved of this informal procedure, nevertheless it held that it was of no moment to now argue at the appeal

stage that the detention order was not formally admitted in evidence, bearing in mind the access both parties had to the order and the use to which it was put by them, more so as it did not occasion any miscarriage of justice. While endorsing the lower court's conclusion on the informal way the detention order was introduced at the trial, it must be strongly denounced and much to be discouraged. In further, such issue should be thoroughly tested and thrashed out at the court of trial under the strict rules of admissibility of documentary evidence and not postponed to postmortem when the case is on appeal[95].

For all I have said, Issue No.2 is regrettably resolved against the cross-appellant.

Issues Nos. 3 & 4

While Issue No.3 was resolved earlier in this judgment in favour of the cross-appellant, Issue No. 4, predicated on ground 5 of the grounds of appeal, was not sustainable as ground 5 of the grounds of appeal was successfully struck out as a being incompetent.

In the final analysis and from the foregoing, the main appeal lacks merit and fails; the same is dismissed. So also the cross-appeal.

On the question of costs I confess that I have some difficulty. The appellants were successful at the trial court while the cross-appellant succeeded in the Court of Appeal. The two lower courts made their respective orders as to cost in the exercise of their discretion with which this Court cannot interfere. Undoubtedly, this Court has a discretion to exercise as to the costs of this appeal. The general rule is that costs should follow the event. The appellants lost in the main appeal while the cross-appellant was also unsuccessful in the cross-appeal. The parties' positions in the contest are even. Accordingly, I make no order as to costs.

S.M.A. BELGORE, JSC. (Dissenting): I have read in draft after having a conference the judgment of my learned brother, Achike JSC and I am in full agreement with him that the main appeal must fail. In international relations nation parties resolve several aspects by treaties and protocols some of which either exist already in their domestic statutes or are adopted into domestic laws by acts of parties mentioned. Whilst Nigeria in her 1979 Constitution had a part exclusively devoted to Fundamental Human Rights some of which are more explicit than the African Charter on Human and Peoples' Rights, the Country none the less went ahead to incorporate the Charter into her domestic laws by an Act of parliament it referred to as "This Act may be cited as the African Charter on Human and Peoples' Rights

(Ratification and Enforcement) Act". The Act then sets out as a Schedule the Articles of the Charter[96].

The difference between the Act (Chapter 10, Laws of the federation of Nigeria 1990) and Fundamental Rights in the Constitution is that no method was prescribed for enforcing the Right thereunder. There is provision in the Charter for a Commission to be set up, but since 19th January 1981 when the Charter was made in Banjul, The Gambia, no Commission has been set up. The Commission itself by the nature of the Articles is a monitoring and researche body rather than a judicial body with enforcement powers[97].

By their nature, treaties are abided with in good faith, especially through a prolonged treaty practice and most invariably through the habit of transforming some aspect of treaties from JUS STRICTUM into JUS AEQUUM. But many treaties are naturally destroyed by circumstances that change the nature of contracting parties or change of circumstance of the subject-matter of the treaty no more existing. But of a recent are new developments, especially in newly emerging Countries with a problem of Constitutional and political stability. Nigeria is a typical example, it has been subjected to many coups d'etat than Constitutional and democratic governance. Thus when the African Charter on Human and Peoples' Rights was by Parliament adopted into Nigeria Statutes with commencement date on 17th day of March 1983, the country was under a democratically elected government. The Fundamental Rights in the 1979 Constitution certainly gave effect to the Charter before the Federal Parliament formally adopted it. Thus Article 1 of Chapter 1 of the Charter reading:

> "The member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them"

anticipated not only domestic law reflecting the rights, duties and freedoms enshrined in the Charter but if possible Constitutional provisions[98]

By the end of 1983 there came in the Military via the usual coup d'etat suspending the Parliament (Legislature) and taking over both the Executive and Legislative powers of the State. The Judiciary was left untouched but the Fundamental Rights in the Constitution were suspended. As the Military incursion into governance was through the force of arms and succeeding thereby it was their style to make their decree by which they govern superior to the Constitution. The net result is clear. Whereas the Constitution was the fountain of all laws where any other law is in

conflict with it, it is void, the Military Decrees now became superior to the Constitution[99]".

It is therefore clear that once the Military regime got entrenched in governance it is natural for self-preservation to promulgate decrees that curtail liberties, a very unfortunate legal situation. Thus early in 1984 State Security (Detention of Persons) Decree was promulgated. Each successive Military regime adopted or modified the decree known popularly as Detention Decree. The respondent was held under this Decree except four clear days before the Order was signed [100].

As the Decrees of the Military regimes always contain ouster clauses to bar interference by the judiciary the judiciary made earlier skirmish in 1970 in Lakanmi's case but the Military descended heavily on Judiciary by Decree No.28 of 1970 called Supremacy Decree. The only way to stop these Military overwhelming curtailment of freedoms is to make their coup fail, but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree[101].

Thus the coup d'etat of 1983 December and the Constitution (Suspension and Modification) Decree of 1984 put into abeyance the Fundamental Rights in the Constitution, which as I have said earlier is a forerunner of the adoption of the Charter and of course The Charter itself by implication. Coup d'etat is a treasonable offence but that is only when it fails. The Charter, just as the Fundamental Rights in the 1979 Constitution was by implication unsuspended. If the Charter was not suspended even by implication, it would have run counter to the Decree of the Military which in essence makes the charter void.[102]. This amounts to breach of treaty obligation by Nigeria, which is a political rather than a judicial act. In countries which have Constitutions, albeit, under a dictatorship, the municipal laws and the Constitutions are held in superior status than any international law like a treaty. Sometime a municipal statute on the same subject-matter like the treaty in issue is preferred by municipal Courts. The net result in many cases is that municipal Courts may not automatically apply treaties entered into between their State and foreign States if those treaties would modify domestic laws. However, if the domestic laws in question are modified to accommodate the articles of the treaties municipal court will enforce them, not because they are treaties but for the reasons only that they have become parts of municipal laws[103].

At any rate Section 1(2) (b) (i) of Federal Military Government (Supremacy and Enforcement of Power) Decree No. 12 of 1994 providing:-

> "No civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or

pursuant to any Decree or Edict and if such proceedings are instituted before on or after the commencement of this Decree the proceedings shall abate, be discharged and made void".

ousts any jurisdiction by Court including the adopted Charter which was an existing law as of the time action leading to this appeal was instituted.

I therefore, I agree with my learned brother Achike JSC that the detention of the respondent, other than for the first four days not covered by Detention Order in question could not be challenged in any Court of Law. The cross-appeal fails on this. The four days not covered by the Detention order could then be tried as ordered by the Court of Appeal. I therefore dismiss the main appeal as well as the cross appeal. I make no order as to costs. I also dismiss the cross-appeal for the above reasons and the reasons in the judgment of Achike JSC.

U. MOHAMMED, JSC (Dissenting): I agree with the opinion of my Lord Achike, JSC., in the judgment just read. I have had the privilege of reading the judgment, in draft, before now. I only which to emphasise on the appellants' issues 1 and 2 and the cross-appeal. Those issues read as follows:

"1. Whether the Court of Appeal applied the principles of international law correctly when it held that in signing the treaty on African Charter, Nigeria attempted to fulfil an international obligation which it voluntarily entered into and agreed to be bound and that Government cannot be allowed under international law to contract out of its international obligations by local legislation.
2. Whether the Court of Appeal was right in holding that African Charter 10 Laws of the Federation is not inferior to the Decree of the Federal Military Government on the ground according to the Court below that the legislation has international flavour and accordingly the ouster clause contained in the Decrees cannot operate to oust the jurisdiction of the court in matters touching on African Charter".

The respondent, cross-appellant, Chief Gani Fawehinmi, was arrested and detained on the 30th day of January, 1996 under the orders of Inspector General of Police. The respondent questioned the action of the Inspector-General of Police in a suit filed in the Federal High Court, Lagos Judicial Division. He sought for a declaration that his arrest and detention constituted a violation of his fundamental rights guaranteed under Sections 31, 32 and 38 of 1979 Constitution and articles 4, 5, 6, and 12 of the African Charter on

Human and Peoples' Right (Ratification and Enforcement) Act, Cap.10, Laws of the Federation of Nigeria 1990. He held that the arrest and detention were illegal and unconstitutional.

Secondly, he sought for a declaration that his detention and continued detention without being taken before a court on a charge constituted a gross violation of his fundamental rights guaranteed under the Constitution and African Charter on Human and Peoples' Rights. The Learned Counsel, Chief Gani Fawehnimi, sought for a mandatory order from the court to direct the appellants, in this appeal, to release him forthwith. In the alternative Chief Gani Fawehinmi applied for:

"AN ORDER OF MANDAMUS compelling the respondents to forth with arraign the applicant before a properly constituted court or tribunal as required by section 33 of 1979 Constitution of the Federal Republic of Nigeria 1979 as preserved by Decree 107 of 1993 and Articles 7 of the African Charter of Human and peoples' Rights (Ratification and enforcement) Act. Cap.10 Laws of the Federation 1990.

AN INJUNCTION restraining the respondents, whether by themselves or by their officers, agents, servants, privies or otherwise howsoever from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant. N10,000,000.00 (Ten Million Naira) damages for the unlawful and unconstitutional arrest and/or detention of the applicant.

It is not a matter of dispute on the material facts of this case that the African Charter on Human and People's Rights is an International Treaty. Nigeria has ratified the Treaty and incorporated it into Nigerian Law – See Cap. 10 Laws of the Federation of Nigeria, 1990.

I will now consider the submissions made in respect of issue I. Learned Counsel for the appellants submitted quite correctly that a treaty between two or more sovereign states derives its binding force and effect from international law. The basis of the binding force of a treaty as a contract is agreement and the recognition given to agreements between states in international law as a law creating fact – Pacta Sunt Servanda. An "act of state" is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. What the learned counsel wants to emphasise here is that as against a state-party to a treaty in its relations to another state party under international law the State cannot escape from its treaty obligations by pleading a contrary provision in its existing municipal law or by adopting a new legislation inconsistent with those obligations.

Learned counsel is right in the submission above. But a State is always at liberty if it deems desirable due to domestic circumstances or international considerations to legislate a law inconsistent with its treaty obligations. I agree that such an exercise will be without prejudice to any remedies available against the states in international law at the instance of the other states who ratified the treaty. Once the State decides to exercise such right through a legislation the courts in the Country are bound to follow the promulgated law. In *Macarthys Ltd. v. Smith* (1979) 3 All E.R. 325 at 329 Lord Denning M.R. held as follows:

> "If the time should come when our Parliament deliberately passes an Act with the intention of repudiating a Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the Statute of our parliament" [104/105].

In considering the submissions of both counsels on issue 2, I will say that in incorporating African Charter on Human Rights this country (Nigeria) provided that the treaty shall rank at par with other ordinary municipal laws. In other words, this country did not expressly state that the treaty after its ratification and embodiment into our municipal laws had attained a status superior to our constitution or other municipal laws[106]. With respect to the opinion of the court below it cannot be right to hold thus:

> "The provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiyi v. Anretiola* (1992) 8 NWLR (Part 258) 139. It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained it Cap.10 of the Laws of the Federation of Nigeria 1990 is inferior to Decrees of the Federal Military Government. It is common place, that no Government will be allowed to contract out by local legislation, its international obligations. Its is my view, that notwithstanding the fact that Cap.10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of the 1993 or No. 12 of 1994 cannot affect its operation in Nigeria.... while the Decrees of the Federal Military Government may override other municipal laws, they cannot oust the jurisdiction of the Court whenever properly called upon to do so in relation to matter pertaining to human rights under the African

charter. They are protected by International law and the Federal Military Government is not legally permitted to legislate out of its obligations"

The decision of the Court of Appeal would elevate the African Charter above the Constitution. This will then be a violation of the provisions of the Supremacy of our constitution.
It is axiomatic that the Decree ousting the jurisdiction of the courts is superior to the Constitution. See *Lakanmi & Anor. v. Attorney-General (West) & ors.* (1970) NSCC 143 and *Labiyi v. Anretiola* (1992) 2 NWLR (Part 258) 139 at 160[107/108].

Turning to the Cross-Appeal it is my respectful view that the Military Administration by enacting Decree No.2 of 1984 and suspending Chapter IV of the Constitution which dealt with Fundamental Human Rights had intended to curtail any right of access to courts against any breach of the Fundamental human rights of Nigerians by Military Government. It is therefore wrong to say that a citizen could still challenge the action of the Military Government by resorting to African Charter on Human and Peoples' Rights which is now part of our municipal laws. In any event The Federal Military Government (Supremacy and Enforcement of Powers) Decree No.12 of 1994 has clearly ousted the jurisdiction of courts to determine any claim by any individuals against the Military Government's action Section 1(2) (b)(i) of Decrees No.12 of 1994 provides:

> "No civil proceedings shall be or instituted in any court for or account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before or after the commencement of this Decree the proceedings shall abate, be discharged and made void"[109].

It will therefore be an exercise in futility to send this case back to the Federal High Court to rehear the claim of the Respondent/Cross-appellant for damages for his unlawful arrest and detention. The High Court's jurisdiction has been ousted by the provisions of that Decree. I agree however, that the Cross-appellant can claim for the four days which were not covered by the Order of the appellants detaining him.

For these reasons and fuller reasons in the judgment of Achike, JSC, which I adopt as mine, both the appeal and the cross-appeal fail and are dismissed. Each party to bear own costs.

1. **CHIEF DR. (MRS.) OLUFUNMILAYO RANSOME-KUTI**
2. **MR. FELA ANIKULAPOKUTI**
3. **DR. BEKO RANSOME-KUTI**
4. **AFRICA 70 ORGANISATION LIMITED**

V.

1. **THE ATTORNEY-GENERAL OF THE FEDERATION**
2. **THE CHIEF OF STAFF ARMY HEADQUARTERS**
3. **COMMISSIONER FOR JUSTICE &**
4. **PERMANENT SECRETARY, MINISTRY OF DEFENCE**
5. **LT. COL. ADEDABO**
6. **MAJOR DAUDU**
7. **LT. IKOKU**
8. **LANCE CORPORAL AGWU**
9. **PRIVATE LAWAL**

SUPREME COURT OF NIGERIA

SC.123/1984

AYO GABRIEL IRIKEFE, J.S.C. *(Presided)*
KAYODE ESO, J.S.C. (*Read the lead judgment)*
DAHUNSI OLUGBEMI COKER, JSC.
ADOLPHUS GODWIN KARIBI-WHYTE, J.S.C.
CHUKWUDIFU AKUNNE OPUTA J.S.C.

FRIDAY, 28TH JUNE, 1985

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Bainbridge v. Post Master-General (1901) 1 KB. 178
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Gilbert v. Trinity House (1886) 17 QBD. 795.
Jaundoo v. Attorney-General, Guyana P. C. (1971) AC. 972.
Mackenzie-Kennedy v. Air Council (1927) 2 KB. 517.
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Drop v. Dulles 356 US. 86 (1958)
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Roper v. P.W.C. (1915) 1 KB. 45.
Tobin v. R. (1864) 143 C.P.
Viscount Canterbury v. Attorney-General (1843) 41 Ch.
Wheeler v. P.W.C. (1903) 2 I.R. 202.

Counsel:

Tunji Braithwaite, Esq. (with him Dr. Olu Onagoruwa, Tunde Sanu and Femi Delumo) - for the Appellants.
Chike Ofodile, S.A.N. *(with him M.I.N. Duru, P.S.C. Tunji Daniel, S.C.)* for the Respondents

ESO, J.S.C. (*Delivering the Lead Judgment*): Because of the importance of this case, both in regard to the legal issues involved and the publicity that has attached to it, I will set out the facts of, the issues involved in and the legal submissions thereupon in the case in some considerable detail. I will start with the events that led to the litigation.

The Incident Previous to Litigation:

On 18th February, 1977, at about mid-day, one Segun Ademola, an employee of the 2nd Plaintiff, Fela Anikulapo Kuti, traveled in a landrover belonging to the 2nd Plaintiff, and driven by one Segun Adams along Agege Motor Road. At a point on the road, precisely at Ojuelegba, a military traffic policeman stopped these two people and questioned them as to why their vehicle failed to carry a plate number in the front. The two people told the military policeman that the vehicle had a plate number at the back, but the one which should have been in front was inside the vehicle, near the glass wind-shield. The Soldier thereupon demanded that they should surrender the key of the vehicle to him. This they refused to do and the soldier in consequence blew his whistle to attract the attention of other military men. Segun Ademola instructed Segun Adams to drive the vehicle in reverse into 14A Agege Motor Road, the property belonging to the Plaintiffs, even though by that time, the soldier had sat on the bonnet of that vehicle to prevent its movement. In addition, there was a traffic hold up around the vehicle, and in no time, the vehicle was virtually besieged by soldiers.

Segun Ademola took another step. He decided to make a report to his boss, the 2nd plaintiff. What has not been clear from the evidence was whether Segun Adams, whom Segun Ademola sent to make the report, returned to the scene.

However, what follows is to be gathered from the evidence on court as put together by the learned trial Judge. The soldiers got hold of Segun Ademola and beat him to pulp. One Balogun, a driver helped to convey him to 14A Agege Motor Road where he remained quite helpless. The 2nd Plaintiff got the narration from Segun Ademola and then Ordered that Segun Ademola be taken to the hospital.

Meanwhile, soldiers had massed outside the gate of 14A Agege Motor Road. The soldiers would like to enter the house to arrest Segun Ademola but 2nd Plaintiff would not yield. He demanded their warrant. More soldiers arrive. The evidence talked of about 500 of them and they carried guns. The 2nd Plaintiff retired to the balcony of the house. A Mercedes Benz car arrived and the 5th defendant, Major Daudu was alleged to have spoken to the occupant of the car. The car then left and immediately after that, the soldiers rained stones, bottles and other missiles towards 14A Agege Motor Road.

It was just after this that the 3rd Plaintiff, Dr. Beko Ransome-Kuti came in. He went to join the 2nd Plaintiff upstairs. Then, more soldiers arrived. And the evidence was that they came from the nearby Abalti Barracks. They carried arms and warned people, by a display of a signpost, against the people risking being shot. 2nd Plaintiff remained on the balcony which had now been barricaded with chairs and tables. Then, for a while the missile attack stopped but the generator outside and the van on which it stood were already on fire. Again, the evidence was that it was a soldier, the 7th defendant, Corporal Agu, who poured petrol on the generator while one Lawal, another soldier struck the match.

Now, the soldiers advanced to the gate, cut down the wire fences and moved into the compound of the house. There was a stampede, with the soldiers throwing out everybody in the house except 1st Plaintiff Dr. (Mrs.) Olufunmilayo Ransome-Kuti and the third, her son, Dr. Beko Ransome-Kuti. But the soldiers did not stop there. They moved into the main house, set fire to it and razed it to the ground.

That was not all! There was looting, beating up of the occupants of the house and the woman therein assaulted. And, as if that was not enough the inmates were marched into Army barracks. The two brothers, Fela and Beko, also with them. The injuries these people suffered are better described in the evidence of Mr. Amechi Obiora, a Consultant Surgeon in Lagos

University Teaching Hospital who treated them. He said there were 52 patients, 5 of whom were admitted into the Hospital and the injuries they suffered ranged from laceration, burns, head injuries, minor bruises and even breaking of bones. Both the 1st and the 2nd Plaintiffs were among those admitted into the hospital.

These then were the facts. They were no doubt grim and upon these facts the plaintiffs brought a suit.

The Suit:

claiming

> "N25,000,000.00 (Twenty-five Million Naira) against the Defendants jointly and severally being damages suffered by the plaintiffs when the defendants by their servants and or agents on Friday 18th day of February 1977, willfully and maliciously set fire to the plaintiff's 2-storely Building House and Bungalow and appurtenances situate at No. 14A Agege Motor Road, Yaba. Lagos together with other plaintiffs' personal effects, valuable properties, cash, professional and or business equipments, including motor vehicles and buses, all of which were totally destroyed by the said fire set to them by the defendants: And for Assault and Battery suffered by the plaintiffs."

It is to be noted at this stage that the claim was severally and jointly. Most of the paragraphs of the Statement of Claim are also relevant, especially as to the *nature* of the action, which, indeed is very important, and which will later be discussed in this judgment. These are paragraphs 4-14.

"4. The first, second, third and fourth defendants, are being sued in representative capacities in their official positions; the fourth being as Garrison Commandant of Abalti Barracks, Yaba, Lagos.

5. The first and second plaintiffs lived and resided and were the occupants of a 2-storey house on a large Plot of land at No. 14A. Agege Motor Road, Yaba, Lagos, which said house and building contained all their belongings, jewelries, personal effects and professional instruments as well as the original of the 2nd plaintiffs musical recordings, films and films sound tracks, their cars and other vehicles.

6. The 3rd plaintiff who is a medical practitioner occupied a five room bungalow on the same plot of land at No. 14A Agege Motor Road, Yaba, Lagos for the practice and maintenance of his medical profession and which bungalow was furnished and

equipped with expensive and sophisticated medical equipments and instruments for a high quality service to his many patients

7. The 4th plaintiff also used the said house and address for its corporate business as well as for storage of its properties such as original of musical recordings, artistes' costumes, unpublished playing records, motor cars, buses, vans and other valuable company's properties
8. In the afternoon of Friday the 18th of February, 1977, the 4th and 5th Defendants and others unknown caused some men and officers of the Nigerian Army numbering between 500 and 1000 soldiers to surround the aforesaid address at No.14A Agege Motor Road, Yaba, Lagos and the whole neighbourhood.
9. The said men of the army or soldiers (as they were) arrived at the aforesaid scene or address carrying fully-loaded guns and other weapons. At first, they attacked the plaintiffs and others with missiles and heavy stones breaking doors, windows, fences of the said building and bungalow and other properties as well as assaulting and causing grievous bodily harm to the plaintiffs.
10. The 4th, 5th, 6th, 7th and 8th defendants either by themselves and or by their servants or agents as soldiers also unlawfully and maliciously burst into the said house and bungalow willfully setting fire to the whole house and bungalow by pouring highly inflammable substance on the plaintiffs' electric generator and setting fire thereon which fire quickly and inevitably spread to the entire house and bungalow and the whole premises.
11. The plaintiffs aver that fire-fighting personnel that is to say men of the Fire Brigade Service and others who raced to the scene to try and put off the fire, thereby saving or reducing the damage and the loss suffered by the plaintiffs were prevented and driven away by the aforesaid defendants.
12. The fire which raged unabated completely destroyed a 2 – story building, the said bungalow and premises together with all their contents, consisting of jewelries, personal effects, furniture, professional instruments and equipments, original of master discs recordings, film sound tracks and all other articles and properties mentioned in paragraphs 4, 5 and 6 supra together with a motor car of the 3rd plaintiff as well.
13. The defendants at the same time and place as aforesaid either by *themselves and or by their servants and agents maliciously and violently battered and assaulted the plaintiffs striking them*

on the head, body, arms and legs with their guns and other dangerous weapons thereby cutting open and fracturing the plaintiffs' head, arms and legs causing them grievous harm and pain, wherefore the plaintiffs and 4th plaintiff's personnel had to be admitted to hospital for treatment to their injuries.

14. The plaintiffs will at the trial invoke all statutory and common law provisions and provisions of the Constitution of the Federation of Nigeria with particular reference to Chapter III and Section 19 of the said Constitution."

(Italics of some of the words in the Statement of Claim is mine for emphasis as to the nature of the claim)

At this stage, it is to be noted that what is being complained of in paragraphs 4-13 of the Statement of Claim, *supra,* is grounded in tort, while paragraph 14 invokes "all statutes and common law provisions and provisions of the Constitution of the Federation 1963 particularly chapter III dealing with fundamental human rights and section 19 thereof". Actually, put simply, it is a claim of vicarious liability of the Federal Military Government for the wrongful acts of its servants and agents, the soldiers.

Nature of Action:

I have just said that paragraphs 4-13 would appear to put the claim in tort while paragraph 14 invokes all other defences. Mr. Braithwaite, learned counsel for the plaintiffs in the trial Court and who is also the learned counsel for the plaintiffs/appellants in the Court of appeal, and who is, further the learned counsel for the plaintiffs/appellants in this Court, said in his address to the trial Court:-

> "On Relation of GOVERNMENT TO DEFENDANTS 4, 5, 6, 7, and 8 (the first Defendant being the Attorney-General of the Federation who is usually sued *virtute officii* as representing the Government, the second – the Chief of Nigerian Army, Army Headquarters who too was not present but was sued as a representative of the Government and the third Permanent Secretary Ministry of Defence, obviously sued as representing the Federal Military Government. The plaintiff withdrew the action against the 2nd and the 3rd Defendants in the course of the proceedings). *The plaintiffs' claim is grounded in the vicarious liability of the Federal Military Government for the wrongful acts of its servants and agents.* The claim is also against each of the

said servants or agents in their individual capacity, so well as being one for joint and several liabilities. The 1st, 2nd and 3rd defendants are sued as representatives of the Federal Military Government. The 1st defendant is under the law, authorised to prosecute and defend all actions or claims involving the Federal Government of Nigeria." (Italics mine)

And to make it more pointed, that the claim was in tort, learned counsel, Mr. Braithwaite, further submitted -

> "I recognise however that the plaintiffs still have to prove the identity of the *tort feasors* as well as their respective part of role". (Italics mine)

That was not all. He said further –

> "The Attorney-General in his statement of defence has not denied their identities or station in the Nigerian *Army.* What I understand his pleadings to say is that rather *than the tort* having been committed by these fellows, it was all done by "an exasperated and an unknown person" (Italics mine)
>
> .....
>
> "The strong evidence of the plaintiffs proving (1) *The commission of the tort* and (ii) the identities of 4th, 5th, 6th, 7th and 8th defendants and most important (iii) their respective part or role in the acts or omission *comprising the tort* remains before you unshaken and unchallenged." (Italics mine for emphasis)

In discussing the right of the 2nd plaintiff, the learned counsel was still aware of the tortious action he has brought for he said –

> "It is one of the rights of all of us, including the *individual torfeasors* themselves....."

And on damages Mr. Braithwaite declared that when he claimed the amount of N25 million as though quantifying the scale of the *tort* he was making an appropriate statement of fact. In concluding, learned counsel said, in his submission –

> "That the pleading and the evidence show that the *torfeasors* were not limited only to those individual defendants/servants of the Federal Military Government". That other soldiers as sergeant of the Federal Military Government also took part in the *outrageous tort* complained of ....."

Finally, when learned counsel made submissions in reply to paragraph 10 of the Statement of Defence, he said, unequivocally –

> "My argument postulates that the *whole of our claim in this case is one purely in tort and nothing else. And I hereby so submit.*"
>
> .....
>
> *"A look cursorily or carefully at the endorsement on the Writ and the accompanying Statement of Claim shows that the claim is in fact and in substance a claim for injury to the persons* of the plaintiffs and their chattels, in contradiction to claims in reality. There is no claim here for the value of the land of No. 14A Agege Motor Road." (Italics mine)

Learned Counsel's submission which treated the action as tortious, and which postulated that the petitions of rights did not lie in this case covered 10 pages!

I have taken the trouble to relate here the learned counsel's own conception of his action, and the fact that he had no doubt that it was an action in tort he brought wherein the issue of vicarous liability arose because of the same learned counsel's present attitude in this court that at no time did the Plaintiffs, who are appellants herein, seek a remedy in tort, their remedy being, according to Mr. Braithwaite only limited to its enforcement of fundamental human rights.

The Learned counsel representing the Defendants was no less in doubt about the nature of the Plaintiffs' action. His first submission in the trial court was that the plaintiffs could not sue "the Federal Military Government for this *tort*." He then dealt with the law on Petitions of Right, and he concluded that a petition did not lie for tort.

And so there is no doubt, whatsoever, that both the plaintiffs and the defendants joined issues on a tortious action and no more.

THE DECISION OF THE TRIAL COURT:

Dosunmu J., as he then was, was quick to identify the nature of the claim before him. He said while discussing the law in the matter –

> "That this *is an action in tort against* the Government and its servants is not in doubt"

The learned Judge added, and this is of importance -

> "Mr. Braithwaite for the plaintiff *emphasised this*".

The learned trial Judge then examined the case, as it involved "crown proceedings. He held after a considerable consideration of the authorities that in this country, unlike in England, where the position had been altered by the Crown Proceedings Act, 1947, Federal Military Government had an immunity against an action in tort based on the old common law doctrine – "The King can do no wrong" – and no action would lie against the Attorney-General as representative of the Government for a wrong committed by its servants. He however examined the evidence as it affected the defendants personally and individually for he went on the clear legal premises that the servants of the Government are liable for wrongs committed by them in their private capacities. Each servant of the Government, he said, is a fellow servant of the other and does not stand in the relationship of employer and employee for each must bear his own burden.

The learned Judge then examined the evidence against each defendant and held that whatever role they played in the whole "sordid incident" they did not come near the allegations in the pleadings that they burst into the house and maliciously set fire to it. The Judge could not find any evidence either that they ordered any soldier to do so either. The learned Judge concluded on this point –

> "It is beyond dispute, of course, that many soldiers, a witness gave the figure of 1,000, surrounded the entire buildings, hauling stones, and broken bottles. Many of them got inside the building, set fire to it as well as the generator in the compound. It was, indeed a brave attempt on the part of any witness to try to identify any particular soldier doing this or that if one accepts the description of the whole incident. It was hell let loose."

It was after this finding of the near-impossibility, having regard to the circumstances, of the witnesses identifying the real culprit in this disgraceful and infamous episode that the learned trial judge observed, a bit sadonically

> "I suppose it is the difficulty of identifying the particular soldiers who took part in the atrocities that drove the plaintiffs to want the Attorney-General responsible because they are servants or soldiers of the State ..... An action in tort is met by the defence that the State is not liable for wrongs committed by its servants. Should the plaintiffs suffer in vain? I believe something has to be done to correct a situation where citizens of Nigeria must suffer this type of wrongful action without legal redress. In the memorandum of the Nigerian Bar Association on the Nigerian

Draft Constitution 1977 it is said under the heading: *RIGHT TO SUE AND ENFORCE HUMAN RIGHTS*

> The fundamental rights guaranteed in the Constitution are worthless unless the citizen has free and unfettered access to the law courts to enforce them. There exists in the country today, the Petitions of RIGHTS LAW under which citizens cannot institute actions in the law Court without first petitioning the Attorney - General of the STATE. Many Nigerians do not know about the existence of this LAW. It was abolished in Britain as far back as 1947. A provision should be made in the Chapter of Human Rights that any citizen whose rights are infringed shall be entitled to institute an action in the Law Courts against the Government, its agents, servants and organs, in contract, tort, or in any other respect, in the same manner as a citizen has a right to institute actions in the Courts of Law against another citizen.
>
> We shall look up to the day when such a provision will be made either in the Constitution or any other statutes".

Earlier in his finding the learned Judge had held that the action of the plaintiffs was not one seeking redress for the violation of fundamental rights as entrenched in the Constitution. It was not an action brought under the Constitution. In regard to paragraph 14 of the Statement of claim which called in aid "all statutory and common law provisions and provisions of the Constitution with particular reference to Chapter III and s. 19 of the said Constitution" Dosunmu J. held –

> "There has been nothing to demonstrate that the plaintiffs rights ..... as guaranteed by the Constitution have been infringed ..... s. 32 of the Constitution vest the Court with special jurisdiction in relation to all these fundamental rights. But plaintiffs have not approached this court under this special jurisdiction. The section provides that any person who alleges that any of the provisions of Chapter III has been contravened in any territory in relation to him may apply to the High Court of that territory for redress. No such allegation of violation of fundamental rights has been made here apart from the general reference to fundamental rights in their pleadings ..... And after all said and done, nowhere does the Constitution provide for the award of damages, as the plaintiffs now claim, for the infringement of the provisions in relation to fundamental rights. So that if it is

the claim of the plaintiffs that there had been violations of their rights, the Constitution does not provide award of damages in the event. It is the common law that provides for the award of damages to the plaintiffs when assaulted or battered, and it is the same common law that immunizes the State or its servants form liability. The Nigerian Republican Constitution has not changed the legal position."

COURT OF APPEAL:

The plaintiffs, dissatisfied with the judgment of the High Court, as would be expected, appealed to the Court of Appeal on nine grounds of appeal. In that court, learned counsel adopted the submission he made to the High court when he replied to paragraph 10 of the Defendants statement of defence and part of which I have already made reference to. One should remind oneself that it was in that submission, now adopted for the Court of Appeal, that Mr. Braithwaite said that this argument postulated that the whole claim by the plaintiffs was one "purely in tort and nothing else" and that he thereby so submitted." However in his further submission, learned counsel in that court referred to the whole of Chapter 3 of the 1963 Constitution as the basis of the case for the Plaintiffs/Appellants. Learned counsel referred to his submission in the High Court which he had adopted for the Court of Appeal that the Petitions of Right would not be for tort and there was, therefore, no means of making the Crown liable on tort.
The Court of Appeal in a considered judgment, as per Ademola J.C.A. who read the lead judgment, identified two of, what he called, red herrings

(i) the applicability of the Petitions of Right, and
(ii) the doctrine of the Crown Immunity from tortious action.

and said both learned counsel in the case in the Court of Appeal rightly submitted that the Petitions of Rights Act has no application to this matter on the authority of *Williams v. The Attorney-General* 11 N.L.R. 49. Then the learned Justice in Court of Appeal looked at the issue from an angle different from what obtained in the High Court. He asked the question – dose the question of non-liability by the Crown for tort arise? Then he answered the question in the negative and continued –

> "The mere fact that the Attorney-General is made a party to a suit does not mean the action is against the Head of State or Government. The Attorney-General is a Minister of State under the Constitution and can sue or be sued. The doctrine of non-liability for torts does not apply to him. It is only when the Head

of State is involved in a suit can the doctrine be involved. It does not apply here.

Paragraph 4 of the Statement of Claim states that the Attorney-General and others are being sued in their representative capacities in their official position. Can an action be maintained in tort against somebody representing people, who have committed the tortuous action given the nature of tort being *action personalis?* The answer is an emphatic NO. The action against the Attorney-General should have been the doctrine of non-liability for tort by the Crown.

As in the case of other Defendants (Respondents) against whom there was no evidence of any act of tort and thereby the claims against them were rightly dismissed, the same could be said about the Attorney-General in this suit."

Then the learned Justice of appeal dealt with argument of learned counsel on the issue of Fundamental Rights. He said

"Mr. Braithwaite has put his argument on appeal on the issue of Fundamental Rights enshrined in the Constitution of 1963. He relied heavily on the *Jaundoo's case.*

The Constitution of Guyana has a section dealing with Fundamental Human Rights in similar terms with Chap.3 of the 1963 Constitution.

The short point for decision in the *Jaundoo's case* is whether a person who claimed that his fundamental right is being threatened by a Government acquisition notice of his land without compensation for it under the law can come to court by way of originating summons. The Privy Council answered that a person who alleges that his fundamental right is threatened could come to court by *any means whatsoever* for a redress in as much as the rule making authority in Guyana (Same in Nigeria until recently) has not prescribed any way an applicant could invoke the jurisdiction of the Guyana Court under Act 19 of the Constitution of Guyana (see Act 32 of 1963 Constitution of Federal Republic of Nigeria). *The Appellants here have not invoked the jurisdiction of the High Court under Act 32 of the Constitution of 1963. They have not alleged in their writ that any of their fundamental rights have been violated. Their claim as set out is for wilful and malicious damage to their properties. The claim is*

tort simpliciter. It is correct that in the pleadings Counsel said *he would be relying on provisions of Chap. 3 of the 1963 Constitution but that is not the same thing as basing an action of the violation of the fundamental right of the Constitution and seeking redress under Act 32 of it; Aoko v. Fagbemi & Others* (1961) All N.L.R. p.400." (Italics mine)

Ademola, J.C.A. saw the whole matter as one of form of action. There was nothing, he said, barring the making of monetary compensation to the Appellant in a claim for violation of fundamental right if such a claim and redress had been sought under the 1963 Constitution. He dismissed the appeal of the appellants. Both Nnaemeka-Agu and Uthman Mohammed JJCA concurred in the judgment.

Nnaemeka-Agu was more specific in his view on the issue of fundamental right. This is important, for no doubt the appellants have shifted position from the dual anchor of basing their remedy on both "tort" and the fundamental right" to just fundamental right *simpliciter.* The learned Justice of Court of Appeal held the view –

> "I agree with Mr. Braithwaite that in the interpretation of the right of a person who alleges that any of the provisions of Chapter III of the 1963 Constitution has been contravened in relation to himself to apply to the High Court of the territory for redress includes the right to claim damages. In my view the word "redress" is wide enough to include damages. But the problem raised by that aspect of the Appellants' appeal is that Chapter III did not provide for a blanket protection of all rights but went ahead to provide for specific rights which are protected thereunder. For a plaintiff who comes to Court in reliance upon Chapter III of the 1963 Constitution to succeed, he must show that one or more of the rights guaranteed by that Constitution had been infringed or threatened with infringement. That the Appellant on the claim he brought before the Court failed to allege or prove, assuming he relied on the provisions of Chapter III of the Constitution."

After disposing of the Constitutional plank on which the appellants rested their case, Nnaemeka Agu, J.C.A. saw the case of the appellants in its nakedness for he said further –

"The case the Appellant brought to Court was *based on tort.* I agree with the learned Assistant Director for Litigation that the Crown Proceedings Act of 1947 is not applicable in Nigeria, moreso because of *Adaption of Laws, (Miscellaneous) Provision order* L.N. 112 of 1964, and Sections 45 of the Interpretation Act 1958 and 43 of the High Court Law of Lagos State (Cap. 52). I also agree that the State cannot, in Nigeria, be sued in tort. With all respect, I would not go so far as to say that when the Attorney-General is sued, as in this case, in his official capacity as a representative of the State, that the State has not been sued. As I understand it, it has been a rule of practice of long standing that whenever an action is to be brought against the Crown (or State) the Attorney-General is sued as representing the State instead.

I would therefore also dismiss the appeal and it is hereby dismissed. I would make no order as to Costs."

THE SUPREME COURT:

The Appellants were dissatisfied with the dismissal of their appeal and they have therefore appealed to this Court on two grounds of appeal which are better set out *verbatim* -

"GROUNDS OF APPEAL:

1. *Their Lordship erred in law by holding that the appellant's claim failed due to the use of "a wrong form of action" when they had already held correctly, that "any person who alleges that his rights have been infringed in any way could invoke the jurisdiction of the Court."*

PARTICULARS

The then rule-making authority had not at the material time prescribed any special form of action, though the Constitution had already provided for a redress to persons whose rights had been injured.

The appellants' form of action at the Lagos High Court was in conformity with the form by which the Courts approached under the law, and nonetheless, the appellants specifically pleaded the fundamental rights of the Constitution of the Federal Republic of Nigeria, 1963.

2. Their Lordships' decision is wrong in holding that the injuries suffered by the appellants did not come within those injuries for which redress must be provided under the Federal Republic of Nigeria Constitution, 1963."

I will like to state at this juncture that the issue of facts never came before that Court of Appeal for review and decision as so that Court, rightly, never touched on it. The decision of the High Court in regard to non-identification of the perpetrators of the atrocities therefore remained unchallenged in the Court of Appeal nor has that decision been challenged in this Court. The issue of the so-called "unknown soldier", an infelicitous phrase to which I intended to return later remained unresolved as it probably would be without any challenge to the facts as found by the trial court.

Mr. Braithwaite, learned counsel for the Appellants, and as I have earlier said, he had been the counsel for the plaintiffs/appellants in this case throughout, filed a brief in this Court, which though, concise, went into the heart of the matter. The questions he set down for determination were founded on what he referred to as the "*only* issue for determination" and that is, the question of form of action having regard to the judgment of the Court of Appeal (obviously the lead judgment of Ademola J.C.A.) and the further fact that the defence of the Defendants failed both in the High Court and the Court of Appeal.

Mr. Braithwaite argued further in that brief, and I must say with considerable force, that the distinction between the Fundamental Rights enshrined in the Constitution and "tort" *simpliciter* is immaterial for the purpose of redressing the injury complained of. I take it that the argument has a lot of logic in it if what learned counsel was urging upon this court was not to be unnecessarily bogged down by forms of action, especially, if that would lead to a miscarriage of justice. For there is no doubt that forms of action could not be wiped out clear as the form indicates the case the opponent is being called upon to meet. I will however come back to this point as I consider it to be very important. "Tortuous injuries," said learned counsel, do "overlap constitutional and fundamental rights" in many cases.

Learned counsel then pinned his case on s.32 of the Constitution of the Federation of Nigeria 1963. He gave six reasons for this and I think it would be best to have these reasons summarised here having regard to the importance learned counsel attached to them, and more so, because as would be seen *anon,* learned counsel had shifted grounds completely from basing his action on Tort which he originally considered to be the

basis of his action and no more, to one of pure constitution and no more. It was only in reply to the Respondents' brief that learned counsel touched on the issue of fact.

Now, the six reasons upon which learned counsel, Mr. Braithwaite, places reliance in this Court for his challenge of the judgment of the Court of Appeal are as follows –

1. Where there is no provision with respect to practice and procedure, as in s.32(3) of the Constitution, the plaintiff could institute proceedings in accordance with the ordinary procedure of the High Court.
2. A right of action is a constitutional right which is exercisable by a person with complaints touching his civil rights and obligation against another person, government or anything.
3. When the writ and the statement of claim are read together, it would be seen that the claim is based *inter alia* on constitutional right.
4. Technicalities should be waived for the purpose of getting to the heart of the matter.
5. The preamble of the Constitution which proclaims justice and equality has been held by this Court to be borne in mind.
6. Damages should be awarded under chapter III of the constitution.

For his part, the learned Attorney-General, representing the Respondents relied on five points in answer to the appellants' Brief. Learned Attorney-General argued in his brief -

1. The wrong complained of by the Appellants is one grounded in the Common Law and not in the Constitution. S.32 of the 1963 Constitution would therefore not apply.
2. The procedure pursued by the Appellant was correct but the action does not lie against the State in tort.
3. The writ does not allege a wrong under the Constitution of 1963 Chapter III.
4. As this is not a Constitutional issue, the question of waiving technicalities does not arise.
5. The procedure of justice and equality in the preamble to the Constitution does not derogate from the principle of validity of existing laws.

In his oral submission in court, Mr. Braithwaite emphasised that he pleaded section 19 of the 1963 Constitution and this has not been abrogated by the Constitution (Suspension and Modification) Decree 1966 No. 1. The action he brought therefore was in violation of human rights. Learned counsel then referred us to sections 22 and 32 of the Constitution and submitted that these sections provide remedy for any citizen who alleges that his civil rights have been violated. With the provisions of the Constitution, there is no room, counsel further urged, for the common law doctrine of non-liability of the State for tort. As regards the Respondents argument of non-liability of the State for Tort, the immunity has been swept away by the provisions of the Constitution.

The learned Attorney-General, Mr. Ofodile S.A.N. argued that the nature of the section was very important, S.32(2) of the 1963 Constitution governs all the provisions in Chapter III. In any event concluded, learned Attorney-General, the fundamental rights would not override the common law.

I have set out the facts and the sequence of this case in so much detail having regard, as I earlier said, to the importance attached to it. I have no doubt in my mind that having regard to the writ of summons, the statement of claim, the evidence, the legal submissions of learned counsel at the various stages of the case, and I have already referred to passages in respect thereof, that the action brought by the plaintiffs against the defendants was one of the Tort.

I am, certainly, not unmindful of paragraph 14 of the Statement of Claim which states that –

> "The plaintiffs will at the Trial invoke all statutory and common law provisions of the Constitution of the Federation of Nigeria with particular reference to Chapter III section 19 of the said Constitution."

This paragraph no doubt *calls in aid the provisions of s.19 of the Constitution* of 1963. The question however is to what extent does it *add to or modify* the cause of action of the plaintiffs? The cause of action of the plaintiffs was one of tort *simpliciter,* for as I have already stated, and shown earlier in this judgment, the learned counsel for the plaintiffs punctuated his address in many parts by maintaining that the action he brought on behalf of the plaintiffs was in tort. In so far as the action against the 1st Respondent is concerned therefore, the plaintiffs/appellants could *only rely* on the vicarious

liability of that defendant/respondent though in *process thereof* he could seek in aid Chapter III of the Constitution for proof of his tortuous action but certainly not as a separate cause of action.

To my mind therefore, it is necessary to examine the grounds of appeal relied upon by the appellants thoroughly to find out what issues are placed thereby before this Court. The only issue arising from the two grounds of appeal is the scope of the applicability to this case of the fundamental rights guaranteed by Chapter III of the 1963 Constitution with particular reference to s. 19 thereof. In this respect sections 19, 22 and 32 of the said Constitution are relevant. That is in so far as appellants case goes by his grounds of appeal.

But compared with this, is the Respondents' case that the whole case of the appellants is grounded upon an action in tort. In respect therefore, the issue of the immunity of the State in regard to liability in tort would be relevant.

It is important, and I think, I must reiterate again, that neither side, (but indeed this applies more to the appellants), has appealed on the facts. So, in so far as this appeal is concerned, the findings of the learned trial Judge on facts remain for ever unchallenged. It is upon the acceptance of the facts as they were found by the trial court that the legal points raised by both sides in this court must be considered.

I think it would be more appropriate to discuss the appellants' case first, for if the appeal succeeds thereupon, it would be unnecessary to discuss the issue of "liability by the State in tort" upon which, the appellants' counsel has protested, so vehemently in this court, that he never based his case. Though he did!

S.19 of the 1963 Constitution provides –

> "*No person shall be subjected to torture* or to *inhuman* or degrading punishment or other treatment."

This is no doubt a right guaranteed to everyone including the appellants by the Constitution. But what is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence and what has been done by our constitution, since independence, starting with the Independence Constitution, that is, the Nigeria (Constitution) Order in Counsel 1960 up to the present Constitution, that is, the Constitution of the Federal Republic of Nigeria, 1979 (the latter does not in fact apply to this case: it is the 1963 Constitution

that applies) is to have these rights enshrined in the Constitution so that the rights could be "immutable" to the extent of the "non-immutability" of the Constitution itself.

It is not in all countries that the Fundamental Rights guaranteed to the citizen are written into the Constitution. For instance, in England, where there is no written constitution, it stands to reason that a written code of fundamental rights could not be expected. But notwithstanding, there are fundamental rights. The guarantee against inhuman treatment, as specified in section 19 of the 1963 Constitution, would, for instance, appear to be the same as some of the fundamental rights guaranteed in England, contained in the *Magna Carter* 1215 - Articles 19 and 40 which provide –

> "*no freeman may be taken or imprisoned, or* disused of his freehold or liabilities in free customs or be outlawed or exiled or *in any way molested* nor judged or condemned except by lawful judgment or in accordance with the law of the land ..... And the crown or its ministers *may not imprison or coerce the subject in an arbitrary manner" (Underlining mine)*

In the United States, the Eighth Amendment to the United State Constitution provides -

> "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted."*

We are concerned here with cruel and unusual punishment" for it is this that could amount to inhuman treatment which in *Prop v. Dulles 356 US 86, (1958)* pp.100-101 the Supreme Court of the United States regards as "one which must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Yet, neither the *Magna Carter nor the Eighth Amendment to the United States Constitution would be equated to and* proceeded with except under a *separate cause of action.* If either had amounted to tort simpliciter resulting in a claim for tort to amount to a complaint under fundamental human right, there could have been no necessity for the common law tort of assault, battery, false imprisonment or even inhuman treatment. The *Magna Carter* itself would have been relied upon as creating that cause of action, but actionable, not on the judicial authorities of those common law wrongs, but on the Code of the *Magna Carter* itself, or in the United State there would not have been such plethora of constitutional actions brought in regard to fundamental rights when a common law action could have sufficed to provoke this.

What happens when there is a breach of a fundamental right? In this country, the 1963 Constitution S.3 provides the answer. It says –

> "32(1) Any person who alleges that any of the provisions of this Chapter has been contravened in any territory in relation to him may apply to the High Court of that territory for redress."

And so, assuming the case of the plaintiffs was on inhuman treatment under section 19 of the 1963 Constitution, they should apply for redress, just as a citizen would have applied for redress in England under the *Manya Cater* or redress under the Eight Amendment in the United States, not under the cloak of a Tortuous action but positively under the *Magna carter* (if in England or the Eighth Amendment (if in the United States) .But then how if not by a mere process of a claim in tort?

MANNER OF REDRESS:

That is the real question. What is the manner of redress in this country? This is answered by s.32 (2) and (3) which provide procedure for the *enforcement or securing the enforcement* of the right. It provides –

> "32 (2) Subject to the provisions of section 115 of this Constitution, the High Court of a territory shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, within that territory of any rights to which the person who makes the application may be entitled under this chapter"

That is the jurisdiction conferred in the High Court. But by what process? Sub-section (3) is the answer.

> "(32) The Chief Justice of Nigeria may, with the consent of the Executive Counsel, by order, make provision with respect to the practice and procedure of the High Courts of the territories for the purpose of this section and may confer upon those courts such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling those courts more effectively to exercise the jurisdiction conferred upon them by this section."

The Chief Justice of Nigeria never made any provision under this section. That being the case, could one really insist on any particular procedure? In this regard, it is paragraph 14 of the Statement of Claim that is relevant and it needs close examination to see if it constitutes an application for the purpose of s.32 of the 1963 Constitution:-

> "14 The plaintiffs will at the trial *invoke all statutory* and common law provisions and *provisions of the Constitution of the* Federation of Nigeria with particular reference to Chapter III and section 19 of the said Constitution" (underlining mine).

Could this invocation of "all statutory and common law provisions of the Constitution" be held sufficient pleading of the Constitutional provisions having regard to the manner the paragraph has been drafted in the context of other paragraphs? Ademola J.C.A. said:-

> "Their claim as set out is for wilful and malicious damage to their properties. The claim is *in tort simpliciter.* It is correct that in the pleadings counsel said he would be relying on provisions of Chapter 3 of the 1963 Constitution *but that is not the same thing as basing an action on the violation of the fundamental right of the Constitution and seeking redress* under s.32 of it." (Italics mine)

Mr. Braithwaite says this is not correct. But is it not? In *Aoko v. Fagbemi* 1961 1 All N.L.R. p.400 which was relied upon by both the court and learned counsel, a High Court decision, and which, though was in regard to the 1910 Constitution, Fatayi-Williams J., as he then was, said, and I am in full agreement with his postulates therein:-

> "With regard to procedure, it would appear that the procedure adopted in bringing the matter before this Court for adjudication is not strictly an application for an order of certiorari to issue. This application was made in pursuance of the provisions of section 31 of the Second Schedule to the Nigeria (Constitution Order in Council) ..... Since no law *with respect to practice and* procedure has as yet, been passed by Parliament, I am of the opinion that the procedure adopted in the present application is in order."

What was the procedure adopted in that case? It was *an application for an order to quash a conviction.* It did not follow strictly the procedure of

certiorari. But the fact is there was *an application* seeking that redress or to use the language of s.32 (2), enforcing or seeking the enforcement of the applicants' right to be free.

Similarly, in *Olawoyin v. Attorney-General* (1961) 1 All N.L.R. 269 the *redress* was sought by a *declaratory action.* Again, there was an action *seeking the redress,* that is, again, seeking the enforcement of, or enforcing his right.

In my view, under the 1963 Constitution, as it is under the present Constitution,) the subject was at liberty to *approach* the court for *enforcement* of his right or, generally, at liberty to seek redress in *any manner* which he, *the subject* may deem to be convenient in any given circumstance. Though he could do this by any of the prerogative actions, or by originating summons or declaratory relief he *must seek that* redress before the Court could be called upon to apply the provisions of the Constitution to his case.

I do share the views of Ademola J.S.C. that the claim of the plaintiffs was tort *simpliciter* and the only question that could be posed by the appellants is whether that claim in tort, with reference to fundamental right in paragraph 14 of the Statement of claim would be sufficient for the Court to be called upon to start enquiry as to the violation of that right. On this topic, I am definitely inclined to the view held by Nnaemeka-Agu J.C.A. that –

> "For a plaintiff who comes to court in reliance upon in Chapter III of the 1963 Constitution to succeed *he must show that one or more of the rights guaranteed by that Constitution had been infringed".* (Italics mine)

I believe to seek "redress" under s.32 (1) of the Constitution, the plaintiff must be known, by whatever application he employs in the High Court, *to be seeking that redress.* Redress under sub-section (1) of s.32 has been spelt out in subsection (2) therein to mean "enforcement" or seeking the enforcement of the guaranteed right.

The right guaranteed by this provision is not, in my respectful view a mere right, it is a *special one,* the remedy for which is outside the purview of an ordinary action which is brought mainly to seek *damages* for a delict. And when one is out just to *seek* damages for a tort, allegedly committed by another, the ordinary common law, which it would appear, that plaintiffs in this case have brought, (and not the special law) is the answer. While the special law is meant to seek redress which indeed may even include

compensation for the damage done, the plaintiff *must be known to* be seeking that redress and *not merely calling in aid* constitutional provisions in his action for damages for tort. It is in this context and to this extent that I understand and regard as correct, Ademola, J.C.A.'s statement that –

"The question here as I see it is a matter of form of action."

When the Court of Appeal held further that *monetary compensation* could be claimed in a claim for violation of fundamental right. I think their Lordships are right. But then it is incumbent on a plaintiff *to be clear as to* what *he seeks,* the manner of approach notwithstanding. His opponent must know what the claim against him is and not be left to guess. That is the essence of pleadings. That is also the essence of joining issues.

Indeed, it is on account of the effect of the type of action brought by the plaintiffs that Mr. Braithwaite, to my mind, has now changed stance from a claim in pure tort to one *only* under the Constitution! He has now insisted even unto the point of stating that learned counsel were outraged to learn that anyone could suggest the plaintiffs' action was in tort and NOT for redress under the Constitution, That he never brought an action in tort at any time. But did he not? I take it, that all learned counsel is trying to do here is to "change gear" for, as I have pointed out earlier, learned counsel, Mr. Braithwaite himself was in *no doubt that his action* was in tort and nothing else. He said so several times and the Court understood him to be saying so. But not only that, the defendants were made to understand him as saying so.

Indeed, the entire record of proceedings was replete with statements by Mr. Braithwaite himself that the action brought by the plaintiffs was in tort and NO MORE. It is too late for counsel to change course at top stream, his cause of action is well defined in his writ and his statement of claim. *Ubi Jus ibi remedium.* The "jus" is tort, the remedy sought was in damages for Tort and NOT redress under the Constitution. *Ubi remedium ibi jus.* The remedium was in damages that *jus* is still in tort. And so be it.

In *Jaundoo v. A.G. of Guyana (P.C.)* (1972) AC 972 as at p. 982 where, as in this case Parliament had not provided rules of procedure of seeking redress in matter dealing with fundamental rights, Lord Diplock reading the judgment of the Board approved the dictum of Warrington J. in re *Meises, Lucius and Bruking* Ltd. (1914) 31 TLR 28 where the learned Judge had said

> "where the Act" (*sic* Constitution_ "merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in *any way* in which the court *can be approached.*"

"Approach" here must mean approach by an application for the *particular redress.* I agree with Lord Diplock, especially, as he was quick to add an important proviso. He said –

> "There is only one qualification needed to this statement. It is implicit in the word "redress." The procedure adopted *must be such as will give notice of the application to the person or the legislative or executive authority against whom redress is sought and afford him or it an opportunity of putting the case why the redress should not be granted."(Italics mine)*

Even this accords with common sense. Applying this dictum, what notice has the plaintiffs given to the defendants in this case? It is clearly, and indeed very clearly, a notice of a claim in *damages for Tort* where the plaintiffs would call constitutional provisions *in aid* for *that claim.* And as a further proof, in what looks like a written address, submitted by learned counsel for the plaintiffs, in the High Court, he minced no words about the notice he has given to the defendants. That notice is implicit in his submissions which I have already referred to in this judgment and at the risk of repetition. I will state it again. He said -

> "My argument postulates that the *whole of* our claim in the case is one *purely* in tort *and nothing else.* And I hereby so submit. A look (sic) cursory or careful at the endorsement on the Writ and the accompanying Statement of Claim shows the claim is *in fact* and *in substance* a claim *for injury to the persons of the plaintiffs and their chattels* ....." *(Italics mine)*

There is no doubt whatsoever, that this is clear notice enough, and the defendants *were obliged* to join issue with the plaintiffs only on this action which was *purely in tort and nothing else.* After all, the plaintiffs and their counsel knew or should know what action they intended to seek and in fact sought and the defendants are *not* to expect more or even less when they joined issues. Here, it is an action in tort and no more. For justice is to be done according to law and certainly not according to sentiments. Ground 1 of the Grounds of Appeal fails.

Ground 1, having failed, one could have said that the ground 2 no longer arises for, if the plaintiffs never claimed under the Constitution, but under the common law wrong of tort, the only thing that should be outstanding was whether the defendants were liable either jointly or severally. The Government is brought in here as a vicarious defendant. I will therefore, for what it is worth, still deal with the liability of the defendants at common law. Mr. Braithwaite has said that the only issue for determination by this Court is the form of action he had brought but he has made some assumptions as his premises for this conclusion.

The brief he filed reads inter alia:-

> *"QUESTIONS FOR DETERMINATION:*
> Since the facts of the considerable damages suffered by the appellants are not in dispute, and the respondent's main objections in law, to wit:
>
> The defendants will contend at the trial –
>
> (1) that the second, third and fourth defendants are not legal persons to be sued in representative capacities;
> (2) that the Government could not commit a wrong personally or authorise a wrong to be committed in its name
> (3) that the procedure adopted by the plaintiffs in bringing this action is wrong in so far as the action should have been commenced by petition of rights'
>
> failed both in the High Court and the (sic) Federal Court of Appeal."

The assumption by learned counsel is that the Respondents had already failed in two courts on the issue of immunity of the State in a claim in tort and procedure for bringing this action but these assumptions made by learned counsel and main objections are, with respect not correct. Learned counsel was asked to make submissions upon these points in this Court. He did not. Even when this Court asked him questions on them, Mr. Braithwaite still would not, as he insisted his case had always been one dictated on the Constitutional claim. Having held therefore that the plaintiffs never sought redress in the High Court under s.32 of the Constitution 1963, there is hardly any reason for further discussion but because of the importance of this case I will still discuss the liability, if any, of the defendants.

First, the defendants were sued both jointly and severally. The High Court, in regard to *several liability,* made a finding, after considering the evidence led by the plaintiffs in support of these allegations. He said that

whatever role the named "officers" that is, the defendants who were alleged to have personally taken part in the episode, have played, the role does not come near the allegations in the pleadings that they burst into the house and maliciously set fire to it. He went on –

> "I add further that there was no evidence that they ordered any soldiers to do so either. It is trite saying that evidence must support what is pleaded and not otherwise. I have no evidence that any of these officers burst into 14A Agege Motor Road and ignited generators there to cause the conflagration."

The learned judge concluded on this point -

> "I suppose it is the difficulty of identifying the particular soldiers who took part in the atrocities that drove the plaintiffs to want to hold the Attorney-General responsible because they are servants of the State."

There was *no appeal* on this finding either to the Court of Appeal or this Court. The appellants could not complain now and, in fairness to them, are not really complaining about individual liability.

What is left is in regard to the vicarious liability of the Government, but the appellants have been met by that old and almost anachronistic legal phraseology that the King can do no wrong. The State (the King in England) has immunity at common law against being sued. This was based on the ancient principle of non-impleading the King in his own courts. Petitions of right which could be addressed to the King would not however lie for tort. This is the prerogative of Kings, and Bacon, using a picturesque expression, has adequately described it as –

> "a garland of prerogatives woven around the pleadings and proceedings of the King's suits."

But the doctrine of immunity was in fact older than Bacon. Maitland regarded "some of the flowers of this garland" to be merely buds in the days of Henry III. That was long before Bacon. However, by the 16th Century, Petitions of right have been distinctly identified from petitions of grace. Yet it had always been recognised that petitions of right would never lie for a mere tort. If the King, did wrong, he just could not be sued. It was the agent who committed that wrong on behalf of the King that would be liable. Again, that is the prerogative of Kings.

There is no doubt that there is a back ground and history for this archaic doctrine in that country-England. Their bards have described the country as a "teaming womb of royal Kings. "But what is strange is that this common law doctrine remained part of our received laws and continued to be part of the common law administered in this country even after this country had become independent of that "royal throne of Kings."

By virtue of the Interpretation Act (Cap 89) Laws of the Federation of Nigeria and Lagos 1959, section 45(1) which provides –

> "Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1990, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation."

has preserved this ancient and royal doctrine of immunity of the State in our laws.

But that is not all. By Ordinance No. 19 of 1915, the Petitions of Rights Ordinance was passed. This Ordinance was subsequently amended, the last amendment being made in 1964 (see Laws of the Federation and Lagos 1958 Cap 149). This last amendment could have been an opportunity to repeal a law which preserved immunity in the State. But it is remarkable that, though is 1947, England, "the Earth of Majesty," which introduced the doctrine into the common law and which has historic justification for such introduction had passed the Crown Proceedings Act, s.2 of which provides –

> "Subject to the provisions of this Act, the Crown shall be subject to *all those liabilities in tort* to which if it were a private person of full age and capacity it would be subject ....." Italics mine)

thus bringing to an end the immunity of the Crown, in that year 1964, 14 years after Great Britain had passed their Crown Proceedings Act, and a year after this country became a Republic thus shedding off the last vestige of colonialism, the Petitions of Rights Act Cap 149 was amended, but such that the position as it was in pre - 1947 England be retained in Nigeria, so far as tort is concerned! Leaving this country to be more royal than Royalty itself"

I have checked all our Constitution prior to 1979 and regrettably I am not able to find any provision which one could apply, even remotely but rightly, in an annulment of this doctrine. The Court is to administer law as it is, and not as it ought to be.

This immunity attaching to the State in this country is sad. For the learned trial judge who took evidence described the scene that day as "hell let loose" and this he had set out in his analysis of the evidence. He said. –

> "It is beyond dispute, of course, that many soldiers, a witness gave the figure of 1,000, surrounded the entire buildings, hawling stones and broken bottles. Many of them got inside the building, set fire to it as well as the generator in the compound."

This is bad. It should not be right that once the actual perpetrators could not be determined, the State, whose soldiers these perpetuators are could not be made liable. But then as I said the immunity of the State persisted at the time of the incident.

As it is the 1963 Constitution that governs this case I have made special study of the provisions that I believe may be applied to exclude this immunity. S.22 is the closest but then it deals only with determination of rights and talks about fair hearing being within a reasonable time. The complaint here is not that the appellants did not have fair hearing. No provision has helped.

Happily for the country, but this does not affect the instant case, section 6 of the 1979 Constitution which vests the judicial Powers of the country in the court has to my mind removed this anachronism.
Sub-section (6) of the section provides –

> "(6) The judicial powers vested in accordance with the provisions of this section –
>
> .....
>
> (b) shall extend to all matters between persons, or between government *or authority* and any person in Nigeria, and *to all actions* and proceedings relating thereto, for the determination *of any questions as to the civil rights and obligations of that* person." (Italics mine)

There is no equivalent of this provision in previous Constitutions. For if it had been, the importation of the expression "unknown soldier" which expression is normally revered all over the world, be it East or West, and which expression has now been turned into a joke and infelicitousness as a

sult of an enquiry into the identity of the vandalists that day, would not ave excused the State from liability.

As it is, the appeal must fail and it is hereby dismissed. There shall e no order as to costs.

IRIKEFE, J.S.C. (*Presiding*): I had earlier read in draft the marathon judgment in this matter just read by my learned brother, ESO, J.S.C. I agree absolutely with the said judgment and would not wish to add anything to it.

I agree further that the appeal should fail and I hereby dismiss it. I adopt the order on costs as contained in the lead judgment aforesaid.

COKER, J.S.C.: I am in full agreement with the judgment just read by my learned brother Eso, J.S.C., a draft of which I have had the advantage of reading before now. The undisputed facts have been copiously stated and the issues of law raised by both counsel have been thoroughly examined. I have nothing to add. I will dismiss the appeal but make no order for costs.

KARIBI-WHYTE, J.S.C.: I have had the privilege of a preview of the judgment of my learned brother Kayode Eso in this appeal. I entirely agree that this appeal should be dismissed. I only wish to make my contribution in this keenly contested appeal relating to the well settled proposition with respect to the immunity of the State in actions in tort. The real issues in this appeal are

(1) To what extent, if any, is the State liable for actions in tort committed by its servants acting on its behalf.
(2) If there is immunity, whether the right vested in the citizen by S.19 (b) of the Constitution 1963 prevails against such immunity.

I have considered it unnecessary to state the facts of this case which have been very fully stated in the judgment of my learned brother Kayode Eso, J.S.C. The facts are in any case not in dispute.

This appeal is against the unanimous judgment of the Court of Appeal dismissing the appeal by Plaintiffs/Appellants against the judgment of Dosunmu, J. (as he then was) of the High Court Lagos dismissing the claims of the plaintiffs against the defendants. Plaintiffs have claimed from the defendants as follows:-

"The plaintiffs' claim is for N25,000,000 (Twenty-five Million Naira) being damages suffered by the plaintiffs when the defendants by their servants and or agents on Friday 18th day of February, 1977, willfully and maliciously set fire to the plaintiffs' 2-storey Building House and Bungalow and appurtenances situate at No.14A Agege Motor Road, Yaba, Lagos together with other plaintiffs' personal effects, valuable properties, cash, professional and business equipment, including motor vehicles and buses, all of which were totally destroyed by the said fire set to them by the defendants. And for Assault and Battery suffered by the plaintiffs."

Paragraphs 1, 2, 3 of the statement of claim stated the respective interests of the plaintiffs in the action. Paragraphs 4 and 10 reproduced hereunder also state the capacity in which the respondents were being sued as follows –

"4. The first, second, third and fourth defendants are being sued in representative capacities in their official positions. The fourth being as Garrison Commandant of Abalti Barracks, Yaba, Lagos.

"10. The 4th, 5th, 6th, 7th, and 8th defendants either by themselves and or by their servants or agents as soldiers also unlawfully and maliciously burst into the said house and bungalow willfully setting fire to the whole house and bungalow by pouring highly inflammable substance on the plaintiffs' electric generator and setting fire thereon which fire quickly and inevitably spread to the entire house and bungalow and the entire premises."

It was assumed that the Attorney-General was being sued as representing the State, and the 2nd and 3rd respondents as representing the Ministry of Defence which has responsibility for the soldiers alleged to have committed the wrongs. The 4th respondent was described as the Commandant of the Garrison at Abalti Barracks. The contention of the appellants, as it is apparent on the endorsement of the claim on the writ of summons and paragraphs 4 and 10 of the statement of claim, is that the 1st - 4th respondents are responsible for the actions of the 5th - 8th respondents and are therefore liable for the wrongful actions of the latter. Appellants in paragraphs 14 of their statement of claim stated *that they would at the trial invoke all statutory and common law provisions and provisions of the Constitution of the Federation of Nigeria with a particular reference to Chapter iii and section 19 of the said Constitution.*

The defendants have denied liability. They have filed a common statement of defence and in paragraph 3 thereof denied the averments in paragraphs 4 and 10 of the statement of claim. In paragraph 4 of the Statement of defence paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of the statement of claim were also denied, and put in issue to be proved by the plaintiffs. The burden was therefore on the appellants establish the averments in paragraphs 4, 8 and 10 of the statement of claim. That is that the State is liable for the injuries suffered by the plaintiffs because such injuries were caused by 7th & 8th respondents who are soldiers, and are its servants, and that the 2nd and 3rd respondents being great officers of State responsible for matters relating to soldiers are thereby liable.

The respondents demurred, declined to lead evidence and relied on grounds of law pleaded in paragraph 10 of their statement of defence to urge the dismissal of the action. Paragraph 10 of the statement of defence stated as follows –

"10. The defences will contend at the trial:-

(i) That the second, third and forth defendants are not legal persons to be sued in representative capacities;
(ii) That the Government could not commit a wrong personally or authorise a wrong to be committed in its names;
(iii) That the procedure adopted by the plaintiffs in bringing this action is wrong in so far as the action should have been commenced by petition of right."

In a careful and well considered judgment, the learned judge considered the second question in the demurer whether the action in tort against the Government and its servants could lie. The learned trial judge after a closely reasoned and careful analysis of the statutes and English common law held that the position of the liability of the State in Nigeria is the ame as that of the position of the Crown proceedings Act 1947. He cited and relied on *Raleigh v. Goshen (1998)* 1 Ch. 73, *Mullins v. Secretary of State for War (1926) 43 T.L.R. 106* and *Mackenzie-Kennedy v. Air Council* (1927) 2 KB. 517 and *Halsbury's Laws of England 4th* Ed. Vol. 6 p.829 for the importation into Nigerian law of the English common law that no proceedings to enforce a remedy for tort will lie against the Crown, or against any servant of the Crown as representing in the proceeding the Crown without the consent of the Crown. The learned judge also referred to and relied on S.45 of the Interpretation Act 1958, and S.13 of the High Court of Lagos Act Cap. 52.

The learned trial judge referred to the argument that the provisions of the Fundamental Rights had swept away the immunities of the Crown and observed as follows –

> "Inspite of the brilliant speech of counsel on this aspect of the case, he failed to identify any particular provision of the Constitution abrogating this immunity either directly or indirectly. It needs to be made clear that the present action by the plaintiffs is not one seeking redress for the violation of human rights as entrenched in the Constitution. It is not an action brought under the Constitution. It is true that in paragraph 14 of the statement of claim, it was pleaded that the plaintiffs will at the trial invoke all statutory and common law provisions, and provisions of the Constitution of the Federation of Nigeria with particular reference to Chapter III and section 19 of the said Constitution, but there has been nothing to demonstrate that the plaintiffs' rights like any other citizen of Nigeria; as guaranteed by the Constitution has been infringed." (see pp. 99-100).

The learned judge referred to S.32 of the Constitution No. 20 of 1963 which vested the Court with jurisdiction for the enforcement of infringements of the provisions of Chapter III and held that plaintiffs did not approach the Court for redress under that section. He also referred to sections 19(1); 22(11) and 23(1) of the Constitution relied upon by the appellants and said,

> "The first section speaks of inhuman treatment. The second obliges the Court to accord a speedy hearing to any person seeking the declaration of his rights. The third section provides that every person shall be entitled to his private and family life. All these are far from the matters of trespass to properties and persons that that plaintiffs complained about and seek damages in respect of." (see p. 100 lines 16-22).

Now, considering the facts of the case whether the 4th, 5th, 6th, 7th, and 8th respondents were responsible for the damage done to appellants; after analyzing the evidence led by the plaintiffs against the 4th and 5th defendants the learned judge found that the evidence did not establish their responsibility for the wrongs alleged. The learned judge said, (at p. 103, lines 17-20)

"It seems clear to me that whatever role these named officers played in the whole sordid incident, *They do not come near the allegations in the pleadings that they burst into the house and maliciously set fire to it. I add further that there was no evidence that they ordered any soldiers to do so either. I have no evidence that any of these officers burst into 14A Agege Motor Road and ignited the generators there to cause the conflagration." (Italics mine)*

With respect to the evidence against the 7th and 8th defendants the learned Judge said, (at page 103, lines 24-33)

"Of the 7th and 8th defendants *it was said that they ignited the van and the generator outside the building, and not that they burst into the house and ignited the generator inside the compound as pleaded.* There was evidence as to how the entire building got engulfed in fire from the 1st plaintiff who said many soldiers ran into the house and set it on fire. The 2nd plaintiff, Fela, also testified as to how the soldiers moved into the house and set fire on all his belongings. *It has not been suggested that it was the fire which was set on the generator outside that spread to the main building* ....."

The learned judge found that the evidence was not sufficient to enable a finding that any of the respondents named was responsible for the alleged injuries to plaintiffs. He said, (at p.103 line 36 to page 104 lines 1-7).

"It was, indeed, a brave attempt on the part of any witness to try to identify any particular soldier doing this or that if one accepts the description of the whole incident. It was hell let loose. *I suppose it is the difficulty of identifying the particular soldiers who took part in the atrocities that drove the plaintiffs to want to hold the Attorney General responsible because they are servants or soldiers of the State." (Italics mine)*

The learned judge accordingly dismissed the action. Plaintiffs, hereinafter referred to as appellants, appealed to the Federal Court of Appeal (now the Court of Appeal). Nine grounds of appeal were filed. They were argued together. The issues canvassed in the Federal Court of Appeal were –

(a) Whether the action was one in tort against the State or its servants representing it and in respect of which the State cannot be made liable?
(b) Whether the provisions of section 19(1) of the fundamental right provision in the 1963 Constitution gave appellant a remedy in this case?

Although the Federal Court of Appeal (now the Court of Appeal) unanimously dismissed the appeal, the reasons of the Justices for doing so were not uniform.

Adenekan Ademola, J.C.A with whom Uthman Mohammed, J.C.A. agreed, held the view that the question of the liability of the State for torts did not arise merely because the Attorney-General was made a party to the suit. He held quite rightly in my view, but too widely stated that "the mere fact that the Attorney-General is made a party to a suit does not mean the action is against the Head of State or Government." He went on to say quite correctly (at p.151, lines 31-35) that,

> "The Attorney-General is a Minister of State under the Constitution and can sue or be sued. The doctrine of non-liability for tort does not apply to him. It is only when the Head of State is involved in a suit can the doctrine be invoked. It does not apply here."

The learned Justice of the Court of Appeal then stated the true ground on which the action ought to have been dismissed in the High Court. He said, (at p. 152 lines 1-7)

> "Paragraph 4 of the statement of claim states that the Attorney-General and others are being sued in their representative capacities in their official position. Can an action be maintained in tort against somebody representing people, who have committed the tortuous action given the nature of tort being actio personatis? The answer is an emphatic No. The action against the Attorney-General should have been dismissed on this ground without recourse to the doctrine of non-liability for tort by the Crown."

Nnaemeka-Agu, J.C.A., holds a contrary view to the statement on the issue of suits against the State in the name of the Attorney-General. His view was that in the particular facts of the case before him Adenekan Ademola,

J.C.A. had stated the rule too wide. I agree with him. He said, (ap.154lines 25-32)

> "With all due respect, I would not go so far as to say that when the Attorney-General is sued, as in this case, in his official capacity as a representative of the State, that the State has not been sued. As I understand it, it has been a rule of practice of long standing that whenever an action is to be brought against the Crown (or State) the Attorney-General is sued as representing the State instead."

Adenekan Ademola, J.C.A. rejected the contention of appellants in this case that they were entitled to rely on the provisions of the fundamental rights provisions of the 1963 Constitution for redress. He said, (at pp. 152 lines 32 to p. 153, lines 1-9)

> "The appellants here have not invoked the jurisdiction of the High Court under section 32 of the Constitution of 1963. They have not alleged in their writ that any of their fundamental rights have been violated. Their claim as set out is for wilful and malicious damages to their properties. The claims are in tort *simpliciter.* It is correct that in the pleadings counsel said he would be relying on provisions of Chapter 3 of the 1963 Constitution but that is not the same thing as basing an action on the violation of the fundamental right of the Constitution and seeking redress under section 32 of it. *Aoko v. Fagbemi & others* (1961) All NLR. 400."

The learned justice of the Court of Appeal then added, the statement which counsel for the appellant clung to throughout his argument before us as if his entire case depended on its validity. He said

> "The question here as I see it is a matter of form of action. I cannot help feeling, with great respect to learned counsel to the appellants, that a wrong form of action had been embarked upon in this case., (see p. 153 lines 10-13).

Appellants have now come before us on two grounds of appeal against the judgment of the Court of Appeal. The grounds of appeal are reproduced below for ease of reference.-

GROUNDS OF APPEAL:

1. Their Lordships erred in law by holding that the appellants' claim failed due to the use of "a wrong form of action" when they had already held correctly, that "any person who alleges that his rights have been infringed in any way could invoke the jurisdiction of the Court.

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1a. The then rule making authority had not at the material time prescribed any special form of action, though the Constitution had already provided for a redress to persons whose rights had been injured.

b. The appellants form of action at the Lagos High Court was in conformity with the form by which the Courts approached under the law, and nonetheless, the appellants specifically pleaded the fundamental rights of the Constitution of the Federal Republic of Nigeria, 1963.

2. Their Lordships' decision is wrong in holding that the injuries suffered by the appellants did not come within those injuries for which redress must be provided under the Federal Republic of Nigeria Constitution, 1963."

Counsel for both parties in this appeal filed briefs of argument which they were expected to rely on in the elaboration of their arguments before us. It is important to observe *anon* that there is no appeal against the findings of fact by the trial judge in this case which were accepted by the Court of Appeal. The grounds of appeal filed allege only errors of law in the Court of Appeal. *It seems to me clear from a careful reading of both grounds of appeal filed and argued before us, that appellants are relying on rights derivable and assumed to have accrued to appellants by virtue of the provisions of section 19(1) of Chapter III of the Constitution of the Federation 1963.* This must necessarily be so because ground I complains that the Court of Appeal was wrong to hold that a right under S.19(1) of the Constitution No.20 of 1963 did not avail the appellants in the manner the action was brought. Ground 2 alleges that the Court of Appeal was wrong to hold that the injuries suffered by appellants did not come within those injuries envisaged and for which redress must be provided under the provisions of section 32 of Chapter III of the Constitution 1963.

However in his formulation of the question for determination in page 3 of his brief of argument, learned counsel for the appellants stated quite graphically,

> "*.....it is submitted that the only issue for determination in this appeal is the question "of form of action." (Italics mine)*

This formation of the question for determination which completely ignored the grounds of appeal filed was summarily rejected by the respondents' counsel at page 1 of this brief where it was stated,

> "But first, in reply to the points made by the appellants in paragraph 3 of their brief the respondents do not agree that the only issue for determination in this appeal is the question of form of action as the question still continues to be a major crucial and fundamental issue in this matter."

It seems abundantly clear from the contentions of the appellants in their brief of argument and its elaboration by counsel before us that the crux of appellants' argument in this Court is that they have a right of action guaranteed by the provisions of S. 19(1) of the Constitution 1963, which overrides the common law provision that the State cannot be made liable in an action in tort. Accordingly it was contended it was immaterial for the purposes of their claim whether the claim was founded on the provisions of section 19(1) relied upon, or on tort *simpliciter.* Thus formulated it will be raising a partial question to accept the formulation of the question for determination as contended by Counsel for the appellants. I am therefore in complete agreement with the criticism of appellants' formulation of the questions for determination by counsel for the respondents. In my opinion; properly construed, the two grounds of appeal filed and argued before us raise the questions

(i) Whether on the endorsement of the claim in the writ of summons and averments in the statement of claim an action in torts lies against the respondents;

(ii) Whether in the action as framed, appellants were entitled to rely on the provisions of S.19(1) of chapter 3 of the Constitution 1963 for redress.

The answers to these two related and inseparable questions on the facts of this case are essential for the determination of the appeal before us. *The issue is not of the use of a wrong form of action, but essentially and only the question of the immunity of the State from tortious liability.*

It is relevant purpose to emphasize the admission by My. Braithwaite, Counsel for the Appellants both at the Court of trial and in the Court of

Appeal (see pages 70, 79, 80, 83, 84, 140) that the action was founded entirely on tort. This is supported by the endorsement of his writ of summons and averments in his statement of claim already referred to in this judgment. This fact was pointed out by the learned Judge in his judgment and by Adenekan Ademola, J.C.A in the Court of Appeal, where he said, at p.153,

> *"Their claim as set out is for willful and malicious damage to their properties. The claim is in tort simpliciter."*

Nnaemeka-Agu, J.C.A. stated simply at p.154

> "The case the appellant brought to Court was based on tort."

Before us, Mr. Braithwaite did not actually deny that his claim was founded on torts *simpliciter.* But he altered his position as was clearly stated in his brief where he said,

> "It is submitted further that the distinction between the Fundamental Rights enshrined in the Constitution and "tort simpliciter" is immaterial for the purposes of redressing the injury complained of. In many cases tortuous injuries overlap constitutional and fundamental rights."

It seems to me obvious from the judgment of the learned trial judge and the judgments of the Court of Appeal that appellants did not allege in their writ of summons or in their statement of claim over facts which show that any of their fundamental rights guaranteed under section 19(1) of the Constitution 1963 was violated by the respondents.

In his judgment, L.J. Dosunmu, J. (as he then was) said, at p.99

> "In the first place it needs to be made clear that the present action by the plaintiffs is not one seeking redress for the violation of fundamental rights as entrenched in the Constitution. It is not an action brought under the Constitution. It is true that in paragraph 14 of the statement of claim, it was pleaded that the plaintiffs will at the trial invoke all statutory and common law provisions, and provisions of the Constitution of the Federation of Nigeria with particular reference to chapter III and section 19 of the said Constitution but there has been nothing to demonstrate that the plaintiffs' rights, like any other citizen of Nigeria as guaranteed by the Constitution have been infringed."

In the Court of Appeal Adenekan Ademola, J.C.A., expressed it more lucidly when he said, at p. 152-153

> "The appellants have not invoked the jurisdiction of the High Court under Act (Sec. 32) of the Constitution of 1963. They have not alleged in their writ that any of their fundamental rights have been violated ..... It is correct that in the pleadings counsel said he would be relying on provisions of Chap.3 of the 1963 Constitution but that is not the same thing as basing an action of the violation of the fundamental right of the Constitution and seeking redress under Act (sic) S. 32 of it; *Aoko v. Fagbemi & Others* (1961) All NLR p.400."

Again, Nnaemeka-Agu, J.C.A. (at p.154 lines 8-15), said,

> "For plaintiff who comes to Court in reliance upon Chapter III of the 1963 Constitution to succeed, he must show that one or more of the rights guaranteed by that Constitution had been infringed or threatened with infringement. That the appellant on the claim he brought before the Court failed to allege or prove, assuming he relied on the provisions of Chapter III of the Constitution."

It is therefore clear from these dicta that appellants did not aver facts which would enable them rely on the provisions of S. 19(1) of the Constitution 1963.

It is both elementary and fundamental that issues before the Court are decided on the pleadings of the parties. A party must state all the material facts which he relies upon in support of his claim before the Court. Material facts not so pleaded cannot be raised at the trial. – See *Ambrosini v. Tinko* (1929) 9 NLR 8, *North Brewery Ltd v. Mohammed* (1972) NNLR. 133. A party to a case is bound by his pleadings - see *Ogiemen v. Ogiemen* (1967) NMLR 243. A party cannot depart from his writ of summons and statement of claim and put up a case different from the pleadings. See *A.C.B. Ltd. v. Attorney-General for N. Nigeria* (1969) NMLR. 231. It is well settled that judgment must be confirmed to a determination of the issues raised on the pleadings and for what has been properly claimed. - See *Ochoma v. Unosi* (1965) NMLR. 321, *Ekpenyong & ors. v. Nyong & ors.* (1975) 2 SC. 71, *Nigerian Housing Development Society Ltd. & anor v. Humuni* (1977) 2 Sc. 57. I have examined the writ of summons and statement of claim of appellants. I entirely agree with the views expressed in both

Courts below that there is neither endorsement in the writ of summons nor averments in the statement of claim suggestive that any of the rights of appellants guaranteed under S. 19(1) was infringed or indeed threatened. In the circumstances, the issue did not arise, and the trial court rightly confined itself to the issues disclosed on the endorsement in the writ of summons and averments in the statement of claim.

This, in my opinion, answers the second of the two questions necessary for the determination of this appeal. The pleadings disclosed the common of a tort against the appellants. The real issues disclosed on the pleadings therefore was whether on the state of the law as it was, at the time of the alleged wrong, appellants ought to succeed against the respondents. This is the first question to be answered in the determination of this appeal. Before an attempt to answer this question is made, I think it is necessary to dispose of the assumption of Counsel for the appellants that the distinction between the Fundamental Rights enshrined in the Constitution and *"tort simpliciter"*, is immaterial for the purposes of redressing the injuries overlap constitutional and fundamental rights."

A careful reading of the provisions of Chapter (III) as a whole discloses that the sections in that chapter, were designed for the protection of the individual against the harsh and oppressive legislations of the State; and to provide a remedy against the arbitrary exercise of executive power. In each of these sections, the rights of the citizen declared to be fundamental is subject to the operation of all other valid laws of the State. The relevant sections are 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 31. The protection of the rights entrenched in these sections is circumscribed either by exceptions or provisions enabling the interference of the legislature or the executive within the scope of the exceptions indicated. It is for this reason that in *Chike Obi v. D.P.P.* (1961) 1 All NLR. 186 Ademola C.J.N. described the freedoms as "ordered freedom." It can safely be said therefore that the entrenched rights are not absolute and exist in so far as they as they co-exist with other validly made laws – See *Attorney-General of St. Christopher, Nevis & Angiulla v. Reynolds* (1980) AC. at p. 654.

Stricto sensu, section 19(1) relied upon by the appellants in this case affords a protection against criminal punishment described as inhuman at the hands of the executive, namely the security force, Police and Prisons. It also protects against legislation authorising such treatment. This is clearly borne out by the express words of the section which provides that

> "19(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

2. Nothing in this section shall invalidate any law by reason only that it authorises the inflictions in any part of Nigeria of any punishment that was lawful and customary in that part of the first day of November, 1959."

The date of 1st November, 1959 in subsection (2) of section 19 is reminiscent of punishments at customary criminal law imposed in the Alkali Court in Northern Nigeria before the promulgation and introduction of the Penal Code and accordingly excluding such punishments from violations of s.19(1). It seems to me fairly obvious that the enforcement of the right not to be tortured or subjected to inhuman or degrading treatment under the provisions of S. 19(1) by means of S.32 contemplate torture or inhuman treatment arising from criminal process. It does not envisage ordinary actions arising from civil wrongs. Where a civil action is contemplated from wrongs arising from criminal wrongs, the individual is entitled to resort to his civil remedy. *In my opinion the purpose of chapter III is to preserve the civil rights of the citizen within the limits and scope allowed by the law. The rights conferred on the citizen, though described as fundamental do not, as was being suggested by Mr. Braithwaite override all laws.* The right is fundamental in the sense that it inures in man as *home sapiens*, and as a member of the political community. It is the reciprocal of his duty to the political community, by virtue of his association in it. Thus an action brought to claim damages from trespass is a tort, *simpliciter.* It is not also an action brought under S.19 (1); and the two actions are clearly not interchangeable. It may well be that the same facts relied upon for an action in tort may support an action under section 32 for the enforcement of a right under s.19 (1); but the negative formulation of the right and the redress prescribed under s.32 (2), which is the making of *"such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement ..... of any rights to which the person who makes the application may be entitled under the chapter,"* makes all the difference. The Court of Appeal decision in FCA/K/109/80 *Shugaba Darman v. The Minister of internal Affairs & ors.* (1983) 3 NCLR. 915 cited and relied upon, is clearly different. In that case Plaintiff had in his claim, a separate head for damages for violation of his right based on Section 18 (3) of the Immigration Act 1963. There was no such head of claim in this case. Beside, the issue was the liability of the Minister of Internal Affairs, not as representing the State but in his capacity as such Minister. Similarly the Privy Council case of *Jaundoo v. A-G for Guyana* (1971) A.C. 972 is different. The claim is *Jaundoo's case* was not founded

on liability in tort against the Crown. It was founded on a provision for compensation payable to the owner of land compulsorily acquired. The question of the immunity of the Crown in tort was in issue in that case.

It is undoubted that the entrenched rights are the same whether the claim is by an individual against a fellow citizen or against the State as the case may be. The effect of entrenchment is to save the rights from subsequent legislative interference, and enable its assertion against arbitrary and oppressive, illegal executive action. – (See Sections 1, 4(1) of the Constitution 1963). It does not do more than that. It does not create rights where none existed and did not abrogate any immunity validly conferred by the law on the individual or State. Rather, all rights conferred by any law which were in existence is by Section 156(1) of the Constitution 1963 saved and continued at the commencement of the Constitution. See *Attorney-General of St. Christopher, Nevis & Angiulla v. Reynolds* (supra).

I shall now turn to the question whether on the claim as framed, that is, the endorsement on the writ of summons and averments in the statement of claim, action lies against the respondents. The action against the respondents undeniably is in tort. Before the case was concluded Plaintiffs/Appellants withdrew their claim against the 2nd and 3rd defendants, and proceeded against the remaining defendants.

The first ground of appeal has alleged that the Court of Appeal was wrong for holding that the action of appellants failed due to the use of "a wrong form of action". It then proceeded to state in its particulars that at the time of the action the rule making authority had not prescribed any special form of action, though the Constitution had made provision for redress. The particulars of this ground of appeal stated that appellants were in conformity with the form of action for initiating claims in the High Court of Lagos and specifically pleaded the provisions of the fundamental rights of the Constitution of 1963 relied upon.

With due respect to learned Counsel to the Appellants he seems to have completely misunderstood the reasoning of the learned Justices of the Court of Appeal and the true reasons for dismissing the appeal in that Court. As I have already stated in this judgment, the *rationes* for dismissing the appeal were

(a) that appellant cannot sue the State in tort
(b) that an action in tort being *action personalis* cannot be brought against another in a representative capacity.

(c) appellants relying on the provisions of S. 19(1) of the Fundamental Rights chapter III of the Constitution 1963, neither alleged in their writ of summons, nor averred in their statement of claim, any violations or threat of violations of such entrenched rights.

Although Adenekan Ademnola J.C.A., stated in his judgment (at p.153 of the Record of Appeal lines 11-13 that the wrong form of action had been used in this case, that was not one or any of the grounds on which the appeal was decided. Nnaemeka-Agu J.C.A. did not mention the question of the form of action, but dismissed the appeal on the grounds stated in (a) and (c). (See p. 154 lines 8-32)

I therefore entirely agree with Chike Ofodile, Esqr, SAN. the Hon. Attorney-General for the Federation, that Learned Counsel for the Appellants was in error to regard the dictum of Adenekan Ademola JCA, on the form of action as the *ratio decidendi*. These reasons should dispose of the two grounds of appeal which obviously are misconceived and lack merit.

However in arguing the appeal, Counsel for the appellants argued a point of law which was not directly but was obliquely raised in his grounds of appeal. This is the crux of the appeal although Counsel for the appellant has wrongly formulated his questions for determination. This is the question whether the State cannot be sued and made liable in action on tort where the action is brought by a victim who claims but did not alleged violations under S.19(1) of the provisions of chapter III of the 1963 Constitution.

In arguing this points Mr. Braithwaite for the Appellants referred to the writ of summons and to paragraph 14 of the statement of claim where section 19 of chapter III of the Constitution 1963 was pleaded. Counsel referred to S.1 of the Constitution (Suspension and Modification) Decree No.1 of 1966 and submitted that sections 19, 22, 23, of the Constitution of 1963 were not suspended. It was argued that the action was brought under the provisions of the Fundamental Rights of 1963. Counsel submitted that sections 22, 32of the Constitution provide a remedy in Court for any citizen who alleges a violation of the provisions of Chapter III. It was argued that the word "person" within S.32 of the 1963 Constitution includes the State. It was submitted that the claim includes assaults and batteries and that the Court should not make any distinction between enforcement of Fundamental Rights and a claim in Tort and that the provisions of chapter III should be construed broadly. Referring to the immunity of the State in actions in tort, Counsel submitted that the immunity of the State had been removed by the entrenched provisions of Chapter III of the 1963 Constitution. It was submitted finally that there were findings of fact that the soldiers were

acting under orders, therefore an action certainly lies against the State in respect of wrongs so committed. The following cases also were referred to in argument *Sofekun v. Akinyemi* (1981) 1 N.C.L.R. 147; *Eyesan. v. Sanusi* (1934) 4 SC. 115; *Juandoo v. A.G.* (1971) A.C. 972; *Ariori & ors. v. Elemo & ors.*

In his reply, the learned Honourable Attorney-General made three submissions. First, that the form of the action *per se* will not prevent the Court from determining the substance of the claim before it, and that even where the form was wrong the Court can still determine the substance of the claim. He relied on *Asinobi v. A.G.* (1956) 1 L.R.E.N.L.R. 22 for this proposition.

Secondly, that it was clear from the proceedings before the Court that the action was a claim in tort. Thirdly, the action being a claim in tort, the State cannot be liable, and this is the true legal position even where appellants was claiming under S.19 by virtue of S.32 (2). The Honorable Attorney-General for the Federation summarised the submissions of paragraph 4-5 at pp.2-6 of his very helpful brief of argument.

The proposition of law contended for in this appeal questions the immunity of the State from liability for actions in tort in the face of the provisions of the fundamental rights of the citizen entrenched in the Constitution of 1963. The alleged wrongs which gave rise to this action were committed on the 18th February, 1977. The action was brought against the defendants by wrongs alleged to have been committed by "Their servants and or agents". The defendants here are the Attorney-General of the Federation and Commissioner for justice, Lt. Col. Adebayo, Major Daudu, Lt. Ikoku, Lance Corporal Agwu and Private Lawal. On the 13th February, 1977, the Constitution of the Federation No. 20 of 1963 as amended by Decree No.1 of 1966 and Constitution (Basic Provisions) Decree No.32 of 1975 was in operation. Section 16 of Decree No32 of 1975 provided for the continued operation of existing laws. Again S. 19 makes the Interpretation Act 1964, (except S.2 thereof) applicable to the interpretation of provisions of the Decrees.

It seems clear to me from the endorsement on the writ of summons and averments in paragraphs 4, 8, 10 of the statement of claim that the claim is against the Federal Military Government which is sought to be made vicariously liable for the alleged injuries to the persons and properties of appellants. I think this is clearly supported by the declaration of Counsel for the appellants in Court, and the fact that the Attorney-General has been sued in his official capacity without indicating the Ministry he represents.

Section 3 of the Petition of Rights Act as modified by the Adoptation of Laws (Miscellaneous Provisions) Order, 1964 provides

"All claims against the Government of the Federation or against any Ministry or Department there, *being of the same nature as claims which before the commencement of the Crown Proceedings Act 1947 of the Parliament of the United Kingdom might in England have been preferred in England by petition, manifestation or plea of right may, with the consent of the Attorney-General of the Federation,* be preferred in a High Court having original jurisdiction in respect thereof or if the Supreme Court has such jurisdiction, in that Court, in a suit instituted by the claimant as plaintiff *against such persons as the said Attorney-General may designate, as defendant, for the purpose"*

Since claims in the nature of tort were not claims in respect of actions which could be brought against the Government before the Commencement of the Crown proceedings Act, 1947, it follows that such other law was applicable. This was the law applicable on the 18th February, 1977. The law applicable in England before the commencement of the Crown Proceedings Act, 1947 in actions in tort was in accordance with S. 45(1) of the Law "(Miscellaneous Provisions) Act, Cap.89, the Common Law of England or any statutes of general application in force on the 1st day of January, 1900. See *Uwaifo v. A.G. of Bendel State & 4 ors.* (1982) 7 SC.124. This is the common law of England. In no proposition of law are the authorities more unanimous than in the English common law proposition that the Crown cannot be sued at common law in an action in tort. This ancient doctrine of the Crown's immunity from suit in actions in tort, inconvenient and anachronistic as it is, is part of our common law heritage and one of the survivors of the doctrine of the infallibility of the sovereign. The situation has been reversed in England by the Crown proceedings Act, 1947. Since our political independence, the Governor or Governor-General, has been substituted for the Crown, and since Republican status in 1963, the President has been substituted for the Governor-General. These now enjoy the doctrine of the sovereign's immunity from suit derived from the English Common Law.

In *Mackenzie-Kenny v. Air Council* (1927) 2KB. at p. 531, Atkin L.J., declared,

> "It is clearly established that no proceedings to enforce remedy for tort will lie against the Crown, or against any servant of the Crown as representing in the proceeding the Crown consents to such a proceeding ....."

See also Romer J. In *Raleigh v. Goschen* (1897) 1 Ch. D.78-79 *Gilbert v. Trinity House* (1886) 17 QBD. 795, at p. 871; *Wheeler v. Public Works Commissioners* (1903) 2.1. R202, at p.229, *Hale-Please of the Crown.* Vol. 1, p.43, Holdsworth- *History of English Laws,* Vol. IX (1976) pp. 8-15. Pollock & Maitland – *History of the laws of England* Vol. 1 p.501. There is also judicial authority for this doctrine of immunity of the sovereign as part of the law of Colonia Nigeria. In *Fritz Williams v. The A.G. of Nigeria* (1932) 1 NLR. 49, decided by the Full Court consisting of Webber and ..... on the 3rd March, 1982, the Court reversed the ruling of the Chief Justice rejecting the demurer filed by the Attorney-General against the action for tort on the ground that a petition of right will not lie against the Crown for the recovery of property tortuously seized by the crown. The facts were that Fritz Williams presented a petition of right in which he alleged that his property real and personal were on his conviction and sentence to two years imprisonment on 24th January, 1916, for theft confiscated by the Government and sold. Also a cash of £457 was taken. He was granted a free pardon on the 17th January, 1929. The sum of £497 was refunded after. The sale of the properties confiscated fetched £907 out of which he was paid the sum of £139. The petition is for the balance of £768 with interest of 5% to date of payment. After referring to and discussing the cases of *Viscount Canterbury v. A.G.* (1843) 41 Ch; *Tobin v. Regina* (1864) 143 C.P; *Feather v. Regina* (1965) E.R. 122, the Court held that it was well established principle of law that a petition of right will not lie against the Crown for the tortuous acts of its servants.

Immediately after the attainment of political independence and in 1961, Morgan Ag. Chief Justice of the Western Region in *Olasupo & ors. v. A.G. Western Nigeria & Ors.* (1961) 1 All NLR 562 without referring to *Fritz Williams v. A.G.* (supra) in a motion to strike out a petition of right; on the ground that a Petition of Right will not lie for a declaration that a wrong has been done by the Crown quoted the dictum of Cockburn C.J. in *Feathers v. The Queen,* 12 L.T. 114, at p.117 to the effect that a Petition of Right will not lie in respect of a wrong alleged to have been done by the Crown and said,

> "And by section 3(1) of the Petitions of Right Law Cap.90 of the Laws of Western Nigeria, the claims which are the subject matter of a petition of right are those "of the same nature as claims which may be preferred against the Crown England by petition, manifestation or plea of right."

The motion was on this ground granted, and the Petition was struck out. If the State is held to be immune from petitions alleging commission of a tort, a *fortiori* in civil actions.

The averment is that the respondents committed the alleged trespass themselves or through their servants, thereby holding the State liable for the trespass of its servants. The trial Judge in his fact finding capacity has found, (and there is no appeal against the findings) none of their respondents able although he found that one of the members of the crowd, more likely a soldier, might have been responsible.

It is all settled that the State being immune from tortious liability cannot be held vicariously liable for tort committed by its servant. – See the dictum of Atkin L.J in *Mackennis-Kennedy v. Air Counsel* (supra) and *Bainbridge v. Post Master-General* (1906) 1KB. 178; *Roper v. Public Works Commissioners* (1915) IK.B. 45; in *Raleigh v. Goschen* (supra) at p. 78 Romer J. said,

> *"Now, in the first place, in as much as the Plaintiffs could not sue the Crown for a past or threatened trespass, they could not in respect of any trespass, sue the defendants in the capacity of agents for as representing the Crown."*

This view is in support of the earlier judgment of Day J. in *Gilbert v. Trinity House Corporation* (1886) 17QBD. 795 at p. 301, where he said,

> "All the great officers of State are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals."

The immunity would seem to extend to torts committed by person purporting to have acted on behalf of the respondents who are representatives of the State. This was the view expressed by Romer J. in *Raleigh v. Goschen* (supra) where he said,

> "..... the plaintiffs could not sue the defendants merely on the footing that, as representing a branch of the executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government or of the Admiralty as a Department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown, or the Government or the Admiralty."

Hence, where only some of the defendants acting on behalf of the State had committed trespass, even if it was established, but was not in this case, that is no justification for suing the other defendants who had taken no part in the transaction. This was clearly brought out in the judgment of Atkin L.J. in *MacKenzie-Kennedy v. Air Council* (supra) at p. 532, where the learned Lord Justice said,

> "I think that perhaps it might be more accurate to distinguish between a suit against a person in his individuals capacity and in a representative capacity, for I cannot see that if you are in fact suing an individual on his personal capacity it makes any difference whether you describe him as an official or not. If, however, you sue him as representing some interests or asset other than his own, which you seek to bind by the action, for it may be found that as representative he is not liable at all. And this is clearly true of the representative of the Crown who as such cannot be sued in tort."

The common law therefore is that the State cannot be sued in tort for the actions of its servants in their representative capacity. The immunity does not however extend to torts committed by its servants in their individual capacity. Thus where, as in this case, a plaintiff bringing an action in tort against servant of the State in their representative capacity seeking to make the State liable, such an action cannot lie. The immunity for the sovereign from actions in tort covers the situation

Thus at the time of the alleged wrong which resulting in the action, as it still is, there were both judicial and statutory authority for the application of the well settled English common law proposition of the immunity of the State for actions in tort. – See *Uwaifo v. Attorney-General of Bendel State & ors.* (1982) 7 S.C. 124, 273.

Counsel for the Appellants has argued that since the Constitution is supreme and the fundamental rights provision is entrenched, its enforcement should override any other law. On the facts of this case, this is a hypothetical proposition. This is because appellant has been held not to have endorsed his writ of summons, or averred in his statement of claim with facts of violations of S.19 of the Constitution. Accordingly appellants cannot be entitled to claims not made by them. - See *Oshonma v. Ohesi* (supra)

It is essential to appreciate the distinction between the provisions of S.19 (1) already reproduced in this judgment, protecting and preserving appellants fundamental right under that section from interference by the

legislature or oppressive coerceive administrative action, and the same provision depriving another of an immunity vested in him by the law. Whereas S.19 (1) does not by itself give to the citizen a cause of action, it enables the citizen to assert the preservation by the Constitution of his fundamental right. Thus where S.19 (1) is violated by the functionary of the State beyond the scope permitted under S.19 (2), the victim can enforce this violation by means of S.32.

There appears to be no provision in the 1963 Constitution similar to section 6 (6) (b) of the present Constitution 1979 vesting jurisdiction in the Courts *in all matters between persons or between government or authority and any person, in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligations of that persons,"* and also the provision of S.236(1), vesting in the State High Court, unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue....." Although the Court is by virtue of these provisions of the Constitution 1979 vested with jurisdiction, this does not affect the liability of the defendants who rely on the immunity of the State at common LAW. Hence in this appeal the issue whether respondents are liable or not is one of substantive law, and a defence to which they are entitled. The defence does not deprive Appellants of any right of action they may have against other persons for the violation or threatened violation of the provisions of S.19 (1). But as against the respondents such rights do not provide a remedy. – See *Fritz Williams v. A.G. for Nigeria* (supra) – It is obvious from the cases cited and discussed and analysis of the provisions of the Constitution in this judgment, that the provisions of S.19 (1) of the Constitution 1963 does not override the immunity of the State from liability from tort. The position of the law on the liability of the State for torts committed by its servants as representing the State is well settled. The infallibility of the State which clothes it with immunity for wrongs committed on is behalf is still with us. Since the theory that public revenue cannot be made liable to remedy wrong committed by servants of the Sate without its consent is the governing consideration, it requires a revolutionary amendment of the law to render the State liable for wrongs committed by its representative servants. Until this is done the common law remains applicable. However, the case before us failed in the High Court not only because the state cannot be held liable for actions in tort. It also failed because appellants failed to establish that any of the respondents was responsible for the injury they alleged.

Despite the interesting legal arguments addressed to us on well settled principles of the common law, this appeal lacks merit. I also will dismiss the appeal with N300 to the Respondents.

OPUTA, J.S.C. I have had the privilege of reading in draft the leading judgment just delivered by my learned brother Kayode Eso, J.S.C. I am in complete agreement with him that this appeal ought to and should be dismissed. I will only make a few personal comment in order to support and fortify the conclusions in the lead judgment. The horrendous nature of what happened in this case deserves nothing but outright condemnation. The trial court described it as "hell let loose". But we have a Court of law up here and not a court of sentiment and the Plaintiffs/Appellants to succeed must prove their case as framed and as pleaded.

The Claim before the trial court was for "the sum of N25,000,000.00 (Twenty-five million Naira) against the defendants jointly and severally being damages suffered by the plaintiffs when the defendants by *their servants and or agents* on Friday 18th day of February, 1977, *willfully and maliciously set fire* to the plaintiffs' 2-storey Building, House and Bungalow and appurtenances situate at No. 14A, Agege Motor Road, Yaba, Lagos, together with other plaintiffs' personal effects, valuable properties, cash, professional and or business equipments, including motor vehicles and lenses, all of which were totally destroyed by the said fire set to them by the defendants; and for Assault and Battery suffered by the plaintiffs". From the above claim, two things are clearly obvious:-

1. Firstly, the first arm of the plaintiffs' claims sounds in Tort-the tort of Trespass to Property whereby, by the ancient Writ of Trespass, the defendants were commanded to show cause - "quare clausum querentis fregit." The second arm of the plaintiffs' claims is also grounded on Tort-the tort of Trespass to the Person in the form of Assault and Battery.
2. Secondly, the alleged tort (to property and to the person) was committed not by the defendants personally and directly but "by their servants and or agents."

At the trial, the plaintiffs gave evidence and called witnesses. The defendants offered no evidence and called no witnesses. In such a situation, the end result will be that unless the accounts given by the plaintiffs and their witnesses are so improbable that no fair minded jury would believe

them, the plaintiffs' story will be believed. The facts as deposed to by the plaintiffs and their witnesses are therefore not in dispute for, as was observed by the learned trial judge, "the defendants did not contradict the facts of this case."

The more serious question however is: -

What did those facts establish?

Here I will reproduce the ipsissima verba of the learned trial judge himself. At p.97, lines 20 to 22, the judge observed:

> "That this is an action in tort against the Government and its servants is not in doubt. Mr. Braithwaite for the plaintiffs emphasized this. The question, therefore, is whether such an action will lie?"

Then at p.99 from line 23 onwards, the learned trial judge remarked:

> "It was contended by the plaintiffs' counsel that the Constitution has swept away the immunities of the Government from tortuous claims, and he made copious references to certain provisions of the Constitution, particularly in relation to the Fundamental Rights. In spite of the brilliant speech of counsel on this aspect of the case, he failed to identify any particular provision of the Constitution abrogating this immunity either directly or indirectly. In the first place, it needs to be made clear that the present action by the plaintiffs is not one seeking redress for the violation of fundamental rights as entrenched in the Constitution. It is not an action brought under the Constitution. It is true that in paragraph 14 of the Statement of Claim, it was pleaded that the plaintiffs will at the trial invoke all statutory and common law provisions, and provisions of the Constitution of the Federation of Nigeria with particular reference to Chapter III and Section 19 of the said Constitution, but there has been nothing to demonstrate that the plaintiffs' rights ..... as guaranteed by the Constitution have been infringed ..... And after all said and done, no where does the Constitution provide for the award of damages, as plaintiffs now claim, for the infringement of the provisions in relation to fundamental rights ..... It is common law that provides for the award of damages to the plaintiffs when assaulted or batteried and it is the same common law that immunizes the State or its servants from liability."

Concluding his judgment, Dosunmu, J. (as he then was) stated emphatically "the Court cannot offer any redress to the plaintiffs whose claims are hereby dismissed."

The plaintiffs, aggrieved by the judgment of Dosunmu, J. (as he then was), then appealed to the Court of Appeal, Lagos Division. It was there seriously contended "that the Constitution is the supreme law and that no technical procedural matters should debar a remedy if there is an infringement of fundamental rights." The Court of Appeal (Ademola, Nnaemeka-Agu and Mohammed, JJ. CA.) dismissed the appeal to it against the judgment of Dosunmu, J. (as he then was). In his own concurring judgment, Nnaemeka-Agu, J.C.A. held:-

> "For a plaintiff who comes to court in reliance upon Chapter III of the 1963 Constitution to succeed, he must show that one or more of the right guaranteed by that Constitution had been infringed or threatened with infringement. That, the appellant, on the claim he brought before the Court, failed to allege or prove, assuming he relied on the provisions of Chapter III of the Constitution. This distinguishes this case from the case of *Jaundoo v. Attorney-General of Guyana* (1971) A.C. 972 so heavily relied upon."

On the issue of the liability of the State in actions for tort Nnaemeka-Agu, J.C.A held: -

> "I agree with the learned Assistant Director of Litigations that the Crown proceedings Act of 1947 is not applicable in Nigeria, more so because of Adaptation of Law (Miscellaneous Provisions) Order L.N. 112 of 1964 and Section 45 of the Interpretation Act 1958 and Section 43 of the High Court Law of Lagos State (Cap.52). I also agree that the State cannot, in Nigeria, be sued in tort."

By a unanimous verdict, the Court of Appeal, Lagos Division therefore dismissed the appellants' appeal.

The appellants have now appealed to this Court on two grounds, namely that:-

> "1. Their Lordships erred in law by holding that the appellant's claim failed due to the use of "a wrong form of action" when they had already held correctly, that "any person who alleges that his rights have been infringed in any way could invoke the jurisdiction of the court."

2. Their Lordships' decision is wrong in holding that the injuries suffered by the appellants did not come within those injuries for which redress must be provided under the Federal Republic of Nigeria Constitution, 1963."

Before the trial court, the trial judge found that "Mr. Braithwaite for the plaintiffs emphasised that this is an action in tort against the Government." There can be no doubt that as framed, the plaintiffs/appellants' action was founded on tort-trespass to property and trespass to persons. There is also a finding by the learned trial judge which has not been appealed against that:-

> "Many soldiers, a witness gave the figure of 1,000 - surrounded the entire building, hauling stones and broken bottles. Many of them inside the building, set fire to it as well as the generator in the compound ..... It was indeed a brave attempt on the part of any witness to try to identify the particular soldier doing this or that. ..... It was hell let loose. *I suppose it is the difficulty of identifying the particular soldiers who took part in the atrocities that drove the plaintiffs to want to hold the Attorney-General responsible because they were servants or soldiers of the State."* *(Italics mine)*

In the "Introduction of his Brief for the appellants, learned counsel stated fact:-

> "The appellants' case as disclosed on the pleadings was based inter alia on the Constitution - (that is to say the 1963 Constitution) with particular reference to Chapter III and section 19 of the said Constitution."

The use of the expression inter alia (among others) presupposes that the appellants' case was not only based on Cap III of the 1963 Constitution but also on the Tort of trespass to land, trespass to property and trespass to the person. In his Brief under "Question for Determination," Learned counsel for the appellants submitted that "the distinction between Fundamental Rights enshrined in the Constitution and "tort simpliciter" is immaterial for the purposes of redressing the injury complained of."

I must say that I do not agree with the above submission. The common law created certain rights-civil rights – and gave the owners such rights a cause of action if any of these rights are infringed. One of such civil rights

is *the right of quiet enjoyment of one's land or house or close.* In the eyes of the law, every man's land is enclosed and set apart from that of his neighbour either by a visible or material fence (as in the case now on appeal) or by an ideal and invisible boundary existing only in the contemplation of law. Thus trespass clausum fregit – and the ancient Writ of Trespass was a command to the defendant to show cause "quare clausum querentis fregit." The slightest crossing of this boundary, real or imaginary, the slightest intrusion, was sufficient to found the tort of trespass to land. Another right created by the common law is the right to the security of a man's person. This is almost elementary civil right. The breach of this right constitutes the tort of trespass to the persons and this tort may take the form of assault or battery or false imprisonment: There is also the tort of trespass to goods and chattels. Conversion by destruction as happened in this case is one of such trespass. From the above, it is clear that the facts of this case fully support the tort of trespass to land, trespass to the person and trespass to goods and chattels. The appellants did not in the trial court because their action did not sound in trespass. No. They failed:-

i. Because they were not able to identify and establish the necessary nexus between the acts done and the defendants sued. They were not able to prove who set fire to their buildings, their cars and vans, their generator etc; they could not identify who assaulted them etc. or who broke and enter their close.

ii. Because they sued the State which on the law as it then stood enjoyed an immunity and could not be sued in tort – see Section 3 of the Petition of Rights Ordinance Cap. 149 of 1958 as modified by Adaptation of Laws (Miscellaneous Provisions) Order L.N. No. 112 of 1964;

and as the learned trial judge rightly observed:

> "An action in tort is met by the defence that the State is not liable for the wrongs committed by its servants."

This is, but a vestige, albeit colonial, of the ancient legal fiction expressed in the maxim- Rex non potest peccare – (The King can do no wrong). Thus King Maneleus of Sparta was able to say - "when a King takes spoils, he robs no one; when a King kills, he commits no murder; he only fulfills justice." The position in England has radically changed since 1948. By the Crown Proceedings Act of 1947 which came into force on 1st January, 1948, the Crown can now be sued in England for the tort of its servants.

This is an improvement on the pre 1947 position of total immunity enjoyed by the Crown. Unfortunately the Crown Proceedings Act of 1947 does not apply to Nigeria.

Let me now consider whether the appellants are covered by Chapter 3 of the 1963 Nigerian Constitution, No.20 of 1963. This Chapter (Chapter 3 of the 1963 Constitution) deals with "Fundamental Rights." At this stage two important observations must be made:-

1. Not every civil right is a fundamental right. The idea and concept of Fundamental Rights both derive from the premise of "inalienable Rights of Man" – Life, Liberty and the Pursuit of a Happiness. Emergent Nations with written constitutions have enshrined in such Constitutions some of these basic human rights and called them Fundamental Rights or Fundamental Human Rights. Each right that is so considered fundamental is clearly spelt out.

2. The 1963 Constitution, or any other Constitution for that matter, did not set out to abolish all existing civil and common law rights. There is the presumption against changes in the Common law or the ordinary laws of the land. Admittedly the Constitution is the supreme law but it is still subject to the presumption that the makers thereof did not intend to make any change in the existing law beyond that which is expressly stated or which follows by necessary implication from the language of that Constitution.

The question that now arises is this:-

> Did any Section of the Fundamental Rights provisions of Chapter 3 of the 1963 Constitution remove either directly or by necessary implication the immunity from tortuous liability which the State enjoyed before 1963?

Chapter 3 of the Nigerian Constitution No.20 of 1963 comprises of 16 sections -18 to 33, both sections inclusive. In his Brief and in his submission in Court, Mr. Braithwaite relied on Sections 19, 22, 23 and 32 of the 1963 Constitution as entitling the appellants to damages (in spite of the common law doctrine of State immunity and the provisions of Section 45 of the Interpretation Act Cap 89 of 1958 and the Constitution of the Federation (1963 No.20) Adaptation of Laws (Miscellaneous Provisions) Order 1964 No.112 of 1964 that is). Section 19 of the 1963 Constitution stipulates:-

"19-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

In the case on appeal, what the evidence revealed and established was assault and battery. The claim before the trial court was also for assault and battery. Now assault and battery need not amount to "inhuman treatment" or "degrading punishment". The words of Section 19, namely "torture", "punishment" or "treatment" considered ejusdem generis do suggest something rather continuous and rather more permanent than an occasional assault and battery committed and done with. They envisage a situation where, on a proper application, the trial High Court may make an order under Section 32(2) of the same 1963 Constitution to stop the subsisting "torture, punishment or inhuman treatment". In any event, S.19 above did not directly or by implication repeal the Adaptation of Laws (Miscellaneous Provisions) Order No.112 of 1964. In my humble view, this section (S.19) does not help or in any way advance the claim of the appellants for N25,000,000.00 (twenty five Million naira) damages for trespass to land, conversion by destruction and assault and battery.

The next section of the 1963 Constitution heavily relied upon by Mr. Braithwaite was Section 22 which stipulated:-

"22-(1) In the determination of his civil rights and obligations *a person shall be entitled to a fair hearing* within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality". (Italics mine)

Read as a whole, it is obvious that the right guaranteed by Section 22 above is similar to the right guaranteed by Section 33(1) of the 1979 Constitution and that is – "Right to Fair Hearing". The antecedent portion of S.22 of the 1963 Constitution uses the phrase – "In the determination of his civil rights and obligations." This can only refer to civil rights and obligations existing independent of Section 22 and not created by Section 22 above. It is in the determination of such already existing civil rights and obligations that the 1963 Constitution guaranteed any aggrieved person a fair hearing of his complaint or his claim, in accordance with the rules of natural justice, namely impartiality and fairness. What S.22 of the 1963 Constitution guaranteed was fair and impartial adjudication of disputes about rights and obligations which arose aliunde. In the instant case, the dispute arose out of the breach of the common law rights of the Plaintiffs/Appellant to the quiet enjoyment of their close, to the security of their

persons and to the continued possession of their chattels. In that dispute, the Appellants had easy access to the courts which is the first step towards fair hearing. In Court, they were given audience and there was no charge against learned trial judge of bias or interest. The appellants cannot therefore found their claim for damages for the tort of trespass on Section 22 of the 1963 Constitution.

Another Section of the 1963 Constitution relied upon by learned counsel for the appellants was Section 23 which stipulated: -

> "23.(1) Every person shall be entitled to respect for his private and family life, his home and his correspondence,"

I must confess that I am unable to see how the above section 23 gave the appellants a cause of action for 25 million naira damages for trespass or how it removed the erstwhile immunity of the State in proceedings for tort committed by its servants.

Asked by the court whether his action was in tort, Mr. Braithwaite emphasised – "The distinction is immaterial. My action was for fundamental right "Of course, an application can be made to the High Court under the special jurisdiction conferred on it by Section 32(2) of the 1963 Constitution "for the purpose of enforcing or securing the enforcement ..... of any right to which the person who makes the application may be entitled to under this Chapter" namely Chapter 3 (not any right whatsoever under the sun). The right enforceable under Section 32(2) of the 1963 Constitution must be a right conferred by one of the Sections of Chapter 3. None of these sections deal with the issue for damages. Damages do not form an independent right by themselves. They flow out of and are merely consequential to the breach of known civil rights. The only section of chapter 3 of the 1963 Constitution which prescribes the payment of any monetary award is Section 31 (1)(a) decreeing the "payment of adequate compensation" for property compulsorily acquired. No other section stipulated any monetary award in the nature of compensation let alone damages. The appellants cannot therefore found their right to damages on Section 32 which merely conferred on the High Court special jurisdiction to deal with contraventions of "any of the provisions of this Chapter" – Chapter 3.

In this case, there has not been any contravention of any of the provisions of Chapter 3 of the 1963 Constitution. The learned trial judge Dosunmu, J. (as he then was) very correctly assessed the situation where he observed at p.99 and p.100 of the Records. (I will reproduce what the learned judge said even at the risk of repetition): -

> "It needs to be made clear that the present action by the plaintiffs is not one seeking redress for the violation of fundamental rights as entrenched in the Constitution. It is not an action brought under the Constitution ..... Section 32 of the Constitution vests this Court with special jurisdiction in relation to all these fundamental rights but the plaintiffs have not approached this Court under this special jurisdiction ..... No allegation of any violation of fundamental rights has been made here apart from the general reference to Sections 19(1), 22(11) and 23(1) of the Constitution but I confess that I do not see their relevance ..... All these are far from the matters of trespass to properties and persons that the plaintiffs complained about and seek damages in respect of. And after all said and done, nowhere does the Constitution provide for the award of damages, as the plaintiffs now claim, for their infringement of the provisions in relation to fundamental rights ..... It is the common law that provides for award of damages to the plaintiffs when assaulted or battered and it is the same common law that immunizes the State or its servants from liability."

I entirely agree but I will hasten to add that the common law immunity has in Nigeria been given a stamp of Statutory approval by section 3 of the Petition of Rights Act (Cap 149) as amended by the Constitution of the Federation (1963 No.20) Adaptation of Laws (Miscellaneous Provisions) Order L.N.112 of 1964.

If the appellants' action were instituted under the 1979 Constitution rather than the 1963 Constitution, then the court would have had to decide whether the erstwhile State immunity from Suits founded on tort can still be maintained in view of the rather extensive and far reaching jurisdiction conferred on the Courts of Section 6 (6) (a) of the 1979 Constitution. There is also a Chapter of the 1979 Constitution (Chapter 4) dealing with Fundamental Rights. That Chapter does not provide the answer to the problem of State immunity from tortuous claims. But Section 6 (6) (b) may. I say "may" because the Court is not here called upon to decide that issue and without the aid of legal arguments on both sides, it is safer to use the word "may".

Since learned counsel for the appellants in all three courts (the trial court, the Court of Appeal and the Supreme Court) relied rather heavily on the case *of Jaundoo v. Attorney-General of Guyana* (1971) A.C. (P.C.) 972,

it may be interesting to examine just what that case really decided and see whether the facts and circumstances of that case really help the present appellants. There are 18 Articles (3 to 20) in Chapter 11 of the Guyana Constitution. This Chapter is headed "Protection of Fundamental Rights and Freedoms of the individuals." Article 8(1) Stipulated against compulsory acquisition of property without the prompt payment of adequate compensation. It also gave to any person access to the High Court "for the determination of his interest in or right over the property and the amount of compensation." The Government proposed to construct a new road over land owned by Jaundoo representing the landowner. Fearing that her fundamental right guaranteed by Article 8(1) was threatened, Jaundoo brought an action by Originating Notice of Motion under Article 19 of the Guyana Constitution. She claimed inter-alia an injunction to restrain the Government from commencing the road building operation on the land until adequate compensation was assessed and paid to her promptly.

The fight from the Courts of Guyana to the Privy Council was over questions of procedure, questions which Diplock L.J. described as "of great importance in themselves, for Chapter 11 of the Constitution of Guyana will have a hollow ring unless the fundamental rights which it bestows upon "every person in Guyana" are buttressed by an effective legal remedy." The Privy Counsel held, allowing her appeal that:

i. The right to apply to the High Court for redress conferred by Article 19(1) in the absence of any specific Rules made in that behalf under Article 19(6) was unqualified and wide enough to cover applications by any form of procedure by which the High Court could be approached to invoke its powers, and an Originating Motion was one of the ways by which that could be done.

ii. The Court has no jurisdiction to grant an injunction against the Government.

The above was the decision in Jaundoo's case.

Contrary to what happened in the case on appeal, Jaundoo's claim was correctly brought under one of the Fundamental Rights provisions of the Guyana Constitution. The right of access to the Court as decided by the Judicial Committee of the Privy Council was circumscribed by and predicated on the peculiar facts and circumstances of Jaundoo's case. It was not a general right (as learned counsel for appellants seemed to imply) giving

the present appellants whose action sounded in tort, a right to sue under the Fundamental Rights Provision of our Constitution. We have in our 1963 Constitution (No.20 of 1963) a Section 31(1) which is in pari materia with Article 8(1) of the Guyana Constitution. The appellants' land and/or house were not compulsorily acquired. They cannot therefore rely on any ratio or even obiter in Jaundoo's case. Both the Court of trial and the court below held that the appellants did not bring their action under the 1963 Constitution at all. I agree, but I will add that they even could not bring their action under the 1963 Constitution. Thus the distinction between an action founded in tort (as the present action of the appellants) and an action founded on infringement of any of the fundamental rights provisions of Chapter 3 of the 1963 Constitution is a very important and far-reaching distinction. It cannot be so easily dismissed as "immaterial" as Mr. Braithwaite submitted.

In the final result, this appeal fails and it should be dismissed for all the reasons given above and also for the very succinct and lucid reasons given in the leading judgment of my learned brother Eso, J.S.C. I too will dismiss the appeal. The appeal is hereby dismissed. I also make no order as to costs.

Appeal dismissed
Decisions of the Court of Appeal and
High Court affirmed

ANDREW OGOR AND 5 OTHERS

V.

1. E. KOLAWOLE (CHIEF MAGISTRATE)
2. COMMISSIONER OF POLICE (OYO STATE COMMAND)

HIGH COURT, IBADAN

CITATION
SUIT NO: M/12/83

T. A. A. AYORINDE, J.

FRIDAY, 8TH JULY, 1983

Cited Cases:

1. *Bade Local Government v. Bulama Mai-Ardo* (1982) 3 NCLR 804
2. *Augustine Eda v. Commissioner of Police* (1983) 3 NCLR 219
3. *Minister of Internal Affairs v. Shugaba Abdurrahaman-Darman* (1982) 3 NCLR 915
4. *Ngelegia v. Tribal Authority Nongwa Chiefdom* (1953) 14 WACA 325
5. *Onitiri v. Ojomo* (1954) 21 NLR 19
6. *Parker v. Tribal Authority of Kagboro Chiefdom* (1953) 14 WAC·A328
7. *A. A. Sijuwade v. Alade and Others* (1975) NMLR 69 at 72
8. *Sofekun v. Akinyemi* (1981) 1 NCLR 135
9. *Uyo I v. Egware* (1974) 1 All NLR 293

Counsel:

Mr. Femi Falana, *for the Applicants*
Mr. *R. A. Ojofetimi, D. D. L. A. S., for the Respondent (Mrs. Ashaolu, S. S. C., with him).*

T. A. A. AYORINDE, J.: The substantive application was brought under section 42 (1) of the Constitution of the Federal Republic of Nigeria, 1979 and Order 1 rule 2 of the Fundamental Rights (Enforcement Procedure) Rules. In this court's ruling of 1st June, 1983 on the application it was held *inter alia*

(i) that it was wrong of the police to bring holding charges against the applicants,
(ii) that the 1st respondent should not have remanded the applicants in custody on such holding charges to enable the Police to complete their investigations into the charges; and
(iii) that the applicants having been so remanded were unlawfully detained and were therefore entitled to compensation and public apology by virtue of section 32 (6) of the Constitution.

Section 32(6) of the Constitution reads -

> "Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law."

In my said ruling, I invited counsel for parties for further addresses on "the appropriate person or authority" to offer public apology and pay compensation. Mr. Femi Falana for the applicants and Mr. R.A. Ojofeitimi- this State's Deputy Director of Litigations and Advisory Services (leading Mrs. Ashaolu, Senior State Counsel) for the respondents accordingly addressed the Court on 13th June, 1983.

In the case of *Bade Local Government v. Bulama Mai-Ardo* [1982] 3 NCLR 804 referred to by Mr. Falana, the conviction of the accused/respondent in the Bade Area Court No.1 sitting at Gwayo was set aside by the High Court, Maiduguri on the ground that there was no evidence to support the charge against him. Part of the decision of the Maiduguri High Court, as on page 806 of the report reads -

> "...: We agree that a compensation and public apology are appropriate by virtue of section 32(6) of the Constitution of the Federal Republic of Nigeria, 1979 ..... Accordingly, we allow the appellant's appeal, set aside his conviction and sentence by the Lower Court and order that Bade Local Government do pay to the appellant a compensation of N500.00 and also make a public apology to the appellant through the Borno State radio with a copy of the said apology to the appellant. These orders shall be complied within a reasonable time."

Bade Local Government subsequently appealed against the decision of the High Court, particularly against the order for compensation and public apology. It is deemed necessary to state that in the case, the Secretary of the Bade Local Government on behalf of the Local Government initiated prosecution by complaint against the accused. In consequence the latter was convicted and sentenced to three months imprisonment by the trial Court. An upper are court upheld the conviction before the Maiduguri High Court set it aside. The Federal Court of Appeal however said on the principle governing – compensation – on page 813 of the report –

> "It depends entirely on the circumstances of the case and the ultimate social justice and expediency which the provision regarding the award of compensation is aiming at. There is no doubt that the order for compensation was introduced, not to enable the wrong doers to buy themselves out of crime, hence it follows conviction. The provision was introduced as a convenient and effective rapid means of avoiding the expense of resorting to civil litigation when the wrong doer clearly has the means of making such compensation..... the range of which is a matter largely and indeed entirely within the discretion of the court."

It may be stated that the applicants in the present application before me have not been acquitted of the charges against them but as said above they were unlawfully remanded on charges which could not be said to be charges that would establish *prima facie* cases against them as they were taken to court on holding charges which the Constitution frowns against. They should therefore be compensated for being unlawfully detained as held in the substantive ruling.

Mr. Falana learned counsel for the applicants endeavoured to belabour the point that the police also unlawfully detained the applicants between Thursday 10th February, 1983 when they were arrested and 14th February, 1983 when they were taken to the court of the 1st respondent. That point was not made an issue in the substantive application. The complaints in the substantive application were in respect of the remands of the applicants from 14th February to 28th February, 1983. The detention by the police cannot therefore be considered for the purpose of compensation and offering of public apology being considered in this ruling. It should also be mentioned that the Federal Court of Appeal did not consider the liability of the police where they fail to take an accused to court on a day falling on a Saturday or Sunday in *Augustine Eda v. Commissioner of Police* [1982] 3 NCLR 219 – as Mr. Falana would want this court to understand. Mr. Falana cannot therefore be correct to say that area of the law is settled. The point is not seriously in issue in this application, anyway.

It is clear from the records of proceedings in the charges M1/163C/83 and M1/164C/83 before the first respondent on 14th February 1983 that Mr. Olakanmi, Principal State Counsel appearing for the police opposed bail to the accused on the ground *inter alia that* they might interfere with the police investigation which was then on. The 1st respondent refused them bail accordingly to allow police investigations to be completed. It is also clear from the record that learned counsel for the accused – present

applicants, referred the court to the provisions of sections 32 and 33 of the Constitution. As submitted by Mr. Falana, a court presided over by a lawyer is not bound to accept a counsel's submission, eminent as the counsel may be, if the court honestly holds the opinion that the submission of counsel does not reflect the correct state of law .....See *A. A. Sijuwade v. A. Alade & Others* 1975 NMLR 69 at 72. The *fides* of the learned Chief Magistrate in this application who has been held to have decided countrary to established principles of law would be called to question only if he could be said to have acted outrageously, perversely or demonstrably bad. See page 73 of the report in *Sijuwade v. Alade* case.

I do not however agree with Mr. Falana that the position of things in this application calls for an award of exemplary compensation as in the *Minister of Internal Afairs v. Shugaba Abdurrahaman – Darman* 1982 3 NCLR 915. The police and the 1st respondent did not appear to have stubbornly decided contrary to Law in the present application. In the case of *Uyo I v. Egware* [1974] 1 All NLR 293 – a case of libel – referred to by Mr. Falana on the question of damages to be paid to a successful plaintiff, the Supreme Court held at page 297 of the report

> "..... but the entire exercise must at all stages have reference to the evidence in the case and the subject-matter of the action. Such an award must be adequate to repair the injury to the plaintiff's reputation which was damaged; the award must be such as would atone for the assault on the plaintiff's character and pride which were unjustifiably invaded; and it must reflect the reaction of the law to the imprudent and illegal exercise in the course of which the libel was unleashed by the defendant".

The award of damages being akin to the award of compensation, the Supreme Court's statement above is instructive and will be considered with the principle enunciated by the Federal Court of Appeal in the *Bade Local Government* case (above). Therefore to do social justice, i.e. justice according to law, I have to consider -

(1) What is adequate to repair the injury to each of the present applicant's reputation, -
(2) what will atone from the assault on his character and pride for his unlawlful detention, and
(3) the circumstances leading to his remand.

In these considerations, I must have in mind that they are all students, and that they are yet being regarded as suspects in a criminal case. The question of "the appropriate authority or person" to pay the compensation and offer public apology is yet to be answered. In *Eda v. Commissioner of Police* (above) the Federal Court of Appeal held at page 223 of the report that the Commissioner of Police was such appropriate "authority" or "person" by virtue of section 195 of the said 1979 Constitution. Mr. Falana has contended impliedly that the first respondent is also such a "person" by virtue of section 7 of the Magistrates' Courts Law Cap.74 of the Laws of former Western Nigeria yet applicable in this State as amended up to 1977 and section 274 of the Constitution.

Section 195 of the Constitution enables a Commissioner of Police for each State to be appointed. Section 7 of the Magistrate's Courts Law enables Chief Magistrates, Senior Magistrates and Magistrates to be appointed in this State. Section 274 of the Constitution validates all existing Laws as at 1st October 1979 when the Constitution came into force. The Magistrates' Courts Law will be such a law in the circumstances. A. persons so appointed under the Law will therefore be an appropriate person. There is also the provision of section 57(1) of the Magistrates' Court Law. It reads:-

> "No magistrate, justice of the peace or other person acting judicially, shall be liable to be sued in any civil court for any act done or ordered to be done by him, in the discharge of his judicial duty whether or not within the limits of his jurisdiction:
>
> Provided that he at the time, in good faith believed himself to have jurisdiction to do or order that act complained of"

Mr. Falana has submitted in a way that that provision of section 57 (1) of the Magistrate Courts Law cannot be brought in conformity with the provision of section 32(6) as contemplated in section 274(1) and therefore void by virtue of section 1(3) of the Constitution. Learned Counsel held the view that the two respondents were to be regarded liable in this application being appropriate persons as the second respondent brought the applicants before the first respondent, opposed bail for the applicants and before the first respondent remanded them in custody.

Mr. Ojofeitimi, the learned Deputy Director of Litigations and Advisory Services agreed with Mr. Falana that both respondents can be regarded as appropriate persons or authorities but submitted that the second respondent should not be held liable to pay compensation or offer public apology as the first respondent made his two orders of remand of 14th February, 1983

independently of the second respondent. I agree with both learned counsel that as the Constitution enables both parties to be appointed, they are to be regarded as appropriate persons.

As regards the first respondent, it is the contention of Mr. Ojofeitimi that the first respondent would not be liable as the case of *Sofekun v. Akinnyemi* [1981] 1 NCLR 135 would not be applicable because the decision of the Public Service Commission of which the respondent chairman in that case was held to be wrongful and perverse. I do not however agree with Mr. Ojofeitimi that the case of *Bade Local Government* above is inapplicable to the present case. The point in *Bade Local Government* being complainant, it should pay compensation and offer public apology. The Police being complainant in the present case should in my ruling pay compensation and offer public apology, as they brought into action the chains that led to the custody of the applicants.

Mr. Ojofeitimi has also submitted that the intention in section 32 of the Constitution is to prevent detentions of persons as done during the Military Regime. Learned Counsel did not give an example of such detention but on the contrary there is the case of the *Bade Local Government* where the detainee was prosecuted for a criminal offence and convicted before he was later released on appeal. He was later compensated for his detention. The Federal Court of Appeal upheld the compensation. There was also the *Eda* case (above) where the detainee was held by the police for a longer period than the "reasonable period" allowed under section 32(5) of the Constitution. The Federal Court of Appeal in that case also held that the Police could be called upon to pay compensation or offer public apology.

Learned Counsel is however correct to submit that for a Magistrate to be liable for an act done in the performances of his judicial duties, he must have acted in bad faith and that it is for the applicants to prove bad faith and not for the Magistrates to prove his good faith. These submissions are supported by a line of authorities on former section 61(1) of the Magistrates Courts Ordinance Law of the Federation 1948. The sub-section is *ipsissima verba* with the provision of section 57(1) of our present Magistrates Courts Law. These statements are yet good law even if a Magistrate exceeds his jurisdiction provided he honestly believed he was exercising his judicial powers when he did the act being called to question. See *Onitiri v. Ojomo* (1954) 21 NLR 19, *Parker v. Tribal Authority of Kagboro Chiefdom* (1953) 14 WACA 328 and *Ngelegia v. Tribal Authority of Nongowa Chiefdom* 1953 14 WACA 325. These authorities cannot be said to have been eroded by section 1(3) of the Constitution above as section 57(1) of the Magistrates Courts Law was an existing law on 1st October, 1979, when

the Constitution came into force and therefore valid law by virtue of section 274(1) of the Constitution. If this were not so every mistake of law by a Magistrate leading to a conviction and sentence will result in compensation to the convict who succeeds on appeal. To ask a Magistrate to pay compensation in this type of application will amount to holding that a civil action would succeed against him for sentencing a convict, who later succeeds on appeal, to a term of imprisonment.

The final point is yet to be made that the issue of a contravention of any of the fundamental rights protected by the constitution can be raised at any time even on appeal, without a recourse to a fresh application under the Fundamental Rights (Enforcement Procedure) Rules. See *Bade Local Government case* at page 818. The issue has been validly raised in this application where there was clearly a complaint of contraventions of the applicants' Fundamental rights. When the issue of compensation and public apology was raised in the address of counsel for the applicants when he was on the omnibus prayer for "other further order or orders" that the Court might deem fit to make, he was perfectly in order. I hold that on the authorities, the second respondent – the Commissioner of Police as complainant in this case should therefore be called upon to pay compensation to the applicants. The *quantum* of compensation is at the discretion of the Court. He should pay, considering the circumstances of this case the sum of N300.00 to each applicant for his unlawful detention from 14th to 28th February 1983. He is also to offer public apology in the Radio Nigeria within a reasonable time and a copy of the apology is to be served on each of the applicants through his counsel.

JOHN FOLADE

V.

1. **ATTORNEY-GENERAL OF LAGOS STATE**
2. **INSPECTOR-GENERAL OF POLICE**
3. **COMMISSIONER OF POLICE LAGOS STATE**
4. **THE DIRECTOR OF PRISONS**
5. **ATTORNEY-GENERAL OF THE FEDERATION**

HIGH COURT, IKEJA

CITATION
SUIT NO. 1D/14/M/81

BALOGUN J.

16th MARCH, 1981

SUMMARY

The applicant was arrested and detained by the Police on the 8th September 1980 and charged before a Chief Magistrate Court on 27th October with an offence for which that court has no jurisdiction. The court did not grant him bail. The applicant brought an application ex parte for leave to apply for an order releasing him on the ground that his continued detention was a violation of Section 32(4) and (5) and Section 33(1) and (4) of the Constitution.

Held:

1. On an application for leave to seek an order to enforce a fundamental human right guaranteed under the Constitution, the court must rely on the legally admissible affidavit evidence relied upon by the applicant in support of that application, and on nothing else.
2. Reasonable time' under Section 32 and 33 of the Constitution must depend on the peculiar facts of each case.
3. An application by a person who is detained, for leave to apply for an order to be released from his detention is in strict terms an application for leave to apply for a Writ of HABEAS CORPUS. Such an application by a person who is detained and who complains that his detention is unlawful is therefore not a method to test any procedural errors which may occur at a trail, but only to challenge alleged errors which if established, will go to make the entire detention unlawful.
4. The court is always prepared and will be quick to give relief against any improper use of power or any abuse of power by any member of the Executive, the police or any other person which results in unlawful detention of an applicant.

Cited Cases:

1. *Baker v. Wingo*, 407 US 1514, 530 (1972)
2. *Beavers v. Hanbert* (198) US 7787 (1905)
3. *Ex-Parte Corke* (1954) 2 AER 440
4. *Ex-Parte Huids* (1961) 1AER 707
5. *Ex-Parte Watkins* 3 Pet 28 US 193, 210 (1830)

6. *Klopfer v. North Carolina* 386 US Part 1, 213 (1967)
7. *R. v. Governor of Brixrn Prison Ex-parte Minervini* (1959)1 QB155
8. *R. v. Homes Secretary ex parte O'Brien* (1923) 2 KB 361; (1923) AC 603
9. *R. V. Putckney* (1904) 2 KB 84
10. *R. v. G. Secretary of State for Home Affairs, Ex-Parte Green* (1942)
11. *State v. G. Nathenical Nasamu Charge No. L.C.D./I/76 unreported) ruling dated* 10/12/76
12. *Tafa Adeoye v. Commissioner of Police* (1971) 1 NMLR 172
13. *The Head of the Federal Military Government and Commander in Chief of the Armed Forces v. The Assistant Director of Prisons, Benin City, Ex-parte Okafor Nwanji,* Suit No. B/11M/69 (Un-reported)

Counsel:

Dr Olu Onagoruwa (with him Mr. Kehinde Oshinowo) for the applicant

BALOGUN, J.: I have before me an applicantion by way of motion *ex-parte* dated 13th March 1981, brought under Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979, praying for an order for leave to apply for an order releasing the applicant, conditionally or constitutionally from detention, on the ground that his detention is unlawful in that it is in violation of the fundamental human rights of the applicant guaranteed under the provisions of Section 32(4) and (5) and Section 33(1) and (4) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as 'the 1979 Constitution') which reads as follows:

> '32. (4) Any person who is arrested or detained in accordance with Subsection (1)(c) of this Section shall be brought before a Court of Law within a reasonable time, and if he is not tried within a period of:
>
> (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
>
> (b) three months from the dated of his arrest or detention in the case of a person who has been released on bail,
>
> he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.
>
> (5) In Subsection (4) of this Section the expression "reasonable time" means:-

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and
(b) in any other case, a period of 2 days or such longer period as in the circumstances may be considered by the court to be reasonable.

33 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal.'

Under Section 32(1)(c) aforementioned, it is provided that: -

'32 (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law:-

(a) .....
(b) .....
(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of having committed a criminal offence, or to such extent as may be necessary to prevent his committing a criminal offence.'

I heard arguments on the application on Monday 16th March 1981 and reserved ruling thereon for today.

It seems to me to be clear from the provisions of Section 32(1)(c) and (4) of the 1979 Constitution that a person may be deprived of his personal liberty (i.e. arrested or detained) as provided under that Section, if he is reasonably suspected of having committed a criminal offence, but he must be taken before a court within the period specified in Subsection (4) aforesaid.

In the statement in support of the application before me, the grounds upon which the relief claimed is sought are as follows:

'The arrangement of the applicant before the Chief Magistrate, M. O. Kotun, on the 27th October 1980; the failure of the court to take the applicant's plea, and the subsequent remand of the applicant into prison is a violation of the fundamental rights of the applicant under Section 32 Subsection (4) and (5) and section 33 subsection (4) of the Constitution of the Federal Republic of Nigeria ....'

In the affidavit in support of the application sworn to by one Ganiyu Elegbede, a first cousin of the applicant, it is deposed materially as follows in paragraphs 12, 13, 14, 15, 16, 17, 18 and 19 thereof:-

'12. That some days after the incident the applicant was confronted with the idea that he was a party to the robbery by some of the residents of the street.
13. That the matter was reported at the Ikeja Police Station and the applicant was arrested.
14. That the applicant was locked up at the Ikeja Police Station for the duration of two weeks from 8th September 1980.
15. That the applicant was subsequently transferred to Panti Police Station, Yaba, where he was locked up for over a month without being taken to court.
16. That the appellant was charged to Yaba Chief Magistrate Court on the 27th October 1980. A copy of the charge sheet is hereby attached and marked Exhibit A.
17. That no plea of the applicant was taken and he was not granted bail
18. That the applicant was remanded to prison custody and he is now at Ikoyi Prison.
19. That the applicant is now of very poor health and has been receiving medical attention in the prison.'

Exhibit A, the charge sheet, attached to the affidavit in support of the application reads as follows:

'Charge No.A/189/80

THE STATE
V.

1. Lasisi Adesanwo (m) 49 years
2. John Folade (m) 40 years
3. Abiodun Jongbe (m) 15 years

1st Count: That you Lasisi Adesanwo (m), John Folade (m), Abiodun Jongbe (m) in the month of September, 1980, at Agboye Street, Ketu, Lagos, in the Lagos Judicial Division, did conspire with others now at large to commit felony to wit, Armed Robbery and thereby committed an offence punishable under Section 3(a)(b) & 3A(b) of the Robbery and Firearms (Special Provisions) Decree No. 47 of 1970, as amended by Decree No.48 of 1971.

2nd Count: That you Lasisi Adesanwo (m), John Folade (m), Abiodun Jongbe (m) on the 5th day of September, 1980, at about 2 a.m. at No.53 Agboye Street, Ketu, Lagos, in the Lagos Judicial Division, armed yourselves with offensive weapons to wit, matchets, daggers, saw, digger, trowel, hammer, and shovel and robbed one Yemi Alausa (m) of his cloths worth ₦200.00, ₦5.00k in cash and trinkets worth ₦800.00k total value N6,200.00 (Six thousand two Hundred naira) property of the said Yemi Alausa and thereby committed an offence punishable under Section 2(2)(a) of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970, as amended by Decree No.48 of 1971.

3rd Count: That you Lasisi Adesanwo (m), John Folade (m), Abiodun Jongbe (m) on the same date, time and place in Lagos Judicial Division, did arm yourselves with offensive weapons to wit, matchets, dagger, saw, digger, trowel, hammer, and shovel and robbed one Ofuani Jeffery (m of his ₦20.00k in cash (Twenty naira) property of the said Ofuani Jeffery (m) and thereby committed an offence punishable under Section 2(2)(a) of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970, as amended by Decree No.48 of 1971.

Signed
POLICE OFFICER
27th October 1980

Date of Arraignment
Plea N/T
Finding:
Sentence:
Chief Magistrate Grade 1: M O Kotun
Prosecutor: Adewusi
Court: No.1, yaba
Adjournment: 6th January 1981
Order:
Bail:

It is apparent from the said Charge Sheet (Exhibit A) that on 27th October 1980, the applicant, John Folade (m) and two other accused persons appeared before Chief Magistrate M O Kotun, sitting at the Yaba Magistrate Court, Lagos, charged with the offences of assault with intent to commit armed robbery and conspiracy to commit armed robbery, contrary to Section 2(2)(a) and 3A(b), of the Robbery and Firearms (Special Provisions) Decree 1970 respectively. The provisions of sections 1, 2, 3, 34 and 5 of that Decree of 1970 (as amended and modified) are as follows:

'1. (1) Any person who commits the offence of robbery shall upon trial and conviction under this Decree, be sentenced to imprisonment for not less than twenty-one years.

(2) If: -

(a) any offender mentioned in Subsection (1) above is armed with any firearms or any offensive weapon or is in company with any person so armed, or

(b) at or immediately before or immediately after the time of the robbery the said offender wounds any person the offender shall upon conviction be sentenced to death.

(3) The sentence of death imposed under this Section may be executed by hanging the offender by the neck till he be dead or by causing him to suffer death by firing squad as the Governor may direct.

2. (1) Any person who, with intent to steal anything, assaults, uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen shall upon conviction under this Decree be sentenced to imprisonment for not less than fourteen years but not more than twenty years.

(2) If:-

(a) any offender mentioned in Subsection (1) above is armed with any firearms or any offensive weapons or is in company with any other person so armed, or

(b) at or immediately before or immediately after the time of the assault the said offender wounds or uses any other personal violence to any person, the offender shall upon conviction under this Decree be sentenced to imprisonment for life with whipping in such manner and to such extent not exceeding twenty-four strokes as the court may decide.

(3) Any person found in any public place in possession of any firearms whether real or imitation and in circumstances reasonably indicating that the possession of the firearms is with intent to the immediate or eventual commission by that person or any other person of any offence under Section 1 above or under the foregoing provisions of this Section shall upon conviction under this Decree be sentenced to imprisonment for not less than fourteen years but not more than twenty years

3. Any person having a firearm in his possession or under his control in contravention of the Firearms Act or any order made thereunder shall be guilty of an offence under this Decree and shall be liable upon conviction under this Decree to a fine not exceeding five hundred pounds or to imprisonment for a period not exceeding seven years, or to both.

3A. Any person who:-

(a) aids, counsels, abets or procures any person to commit an offence under Section 1, 2, or 3 of this Decree, or

(b) conspires with any person to commit such an offence whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offence as a principal offender and shall be liable to be proceeded against and punished accordingly under this Decree.

4. .....

5. Offences under this Decree shall be triable in the High Court of the State concerned.'

Dr. Onagoruwa, in arguing this application for leave, invited my especial attention to all those provisions of the Robbery and Firearms (Special Provisions) Decree 1970, as amended down to the 28th day of September 1979, by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals, etc.) Decree 1979 (1979 No. 105) under which provisions were made in relation to the trial of offences under the said Decree of 1970 and to the very material amendment effected under Schedule 3 of the Amending Decree (1979 No. 105) as follows:

'1970 No.47
Decree
Robbery and Firearms (Special Provisions) Decree 1970
Extent of Amendment

1. For Section 5 there shall be substituted the following Section
Trial of Offences
5. Offences under this Decree shall be triable in the High Court of the State concerned.'

From these premises, learned counsel for the applicant contended strenuously that in order to comply with Section 32(4) of the 1979 Constitution which required that any person who is arrested or detained in accordance with Subsection (1)(c) of this Section shall be brought before a Court of Law within a reasonable time ....., it was necessary for the authority who arrested or detained the accused person to bringing him, on the facts of this particular case, before 'the High Court of the State concerned' within the meaning of Section 5 of the Robbery and Firearms (Special Provisions) Decree 1970 (being the only court which has jurisdiction to try the accused persons for the offences Charged) and not any other court; and accordingly, that in taking the applicant before the Chief Magistrate's Court on 27th October 1980 (after he had been arrested and detained since 8th September 1980) there was a violation of the fundamental right of the applicant guaranteed by and under Section 32(4) and (5) of the 1979 Constitution.

It is trite law, I think, that on an application for leave to seek an order to enforce a fundamental human right guaranteed under the Constitution, the court must rely on the legally admissible affidavit evidence relied upon by the applicant in support of that application, and on nothing else. The *Prima facie* evidence disclosed on this application on the evidence before me are as follows: (a) on or about 8th September 1980, the applicant was arrested and detained by the Police on reasonable suspicion of having committed the offences set out in Exhibit A; (b) on 27th October 1980 (that is to say, Forty-eight days after his arrest and detention by the Police) the accused was charged before a Chief Magistrate's Court for the offences set out in Exhibit A (the charge sheet) being offences under the Robbery and Firearms (Special Provisions) Decree, 1970 as amended; (c) under Section 5 of the Decree of 1970, as amended, it is provided that offences under that Decree shall be triable only in the High Court of the State concerned; (d) the Chief Magistrate before whom the accused was arraigned on 27th October 1980, did not take any plea form the accused persons so charged,

but merely remanded them into prison custody to await trial and adjourned the trial to 6th January 1981; (e) on 6th January 1981 the applicant/accused person was not taken back to that court or any other court for trial for those offences charged or any other offences and the accused has not been taken before any court after 27th October 1980; (f) the accused is still in prison custody at Ikoyi Prison awaiting trail and (g) the applicant is now in very poor health but has been receiving medical attention in his prison custody.

On those material facts, learned counsel for the applicant (but without conceding that the applicant was arrested and detained on reasonable suspicion of having committed those offences charged or any other offence) submitted that there has been an infringement of the fundamental rights of the applicant guaranteed under Sections 32(4) and 33(1) and (4) of the 1979 Constitution, and urged me to make an order, on this *ex parte* application for leave, for the immediate release of the applicant from detention, as his detention was clearly unlawful and unconstitutional.

It seems to me that there are some merits in the submissions of learned counsel for the applicant as would justify this court to require the person or persons who have custody of the applicant or who are responsible for his detention to come to this court to show cause why the relief for which the applicant seeks leave of court should not be granted.

In arguing the motion for leave, Dr Onagoruwa learned counsel for the applicant referred me to the American case of *Klopfer v. North Carolina* 386 US Part 1 213 (1967) and urged me, on the principle of that decision to make an order releasing the applicant from detention forthwith. In *Klopfer* case the speedy trial guaranteed under the Sixth Amendment to the American Constitution (which by and large correspondents to the speedy trial guaranteed under Section 33(1) and (4) of the Nigeria 1979 Constitution) was enforced by the Supreme Court of America. The court held that the fundamental right of speedy trial so guaranteed under the American Constitution had been violated by a State which preferred a criminal charge against the accused who had already been incarcerated in prison of another jurisdiction following a conviction on another offence where the State ignored the accused request to be given a prompt trial and made no effort though requests to prison authority to obtain custody of the prisoner for purpose of trial. The court also condemned, as a violation of the fundamental right of speedy trial so guaranteed, the State practice of permitting the prosecutor to take a *nolle prosequi* with leave (i.e. conditional) and under which the accused was discharged from custody but left subject at any time thereafter to prosecution at the discretion of the prosecutor. Learned counsel for the applicant, relying on the American decision, with understandable enthusiasm,

urged me, on the facts of this case that there has been an infringement of the fundamental right of speedy trial guaranteed to the applicant under Section 33(1) and (4) of the 1979 Constitution to warrant an order by this court discharging or releasing the applicant from detention forthwith, conditionally or unconditionally; and to leave it to the prosecutor to rearrest and charge the applicant for appropriate offence (and bring him up for trial) if and when the prosecutors are fully ready and prepared to prosecute the applicant for such offences. While I agree with the principles of speedy trial enunciated in the decision, I think it is right to observe that the facts of the present case are distinguished from those of *Klopfer* case (supra), in that in the present case before me there is no entry of 'a *nolle prosequie* with leave' by the prosecutor and that procedure is, I think, not provided for under our Criminal Law and Procedure.

It ought, I think, to be borne in mind by every one who has to construe the meaning of Section 33(1) and (4) of the 1979 Constitution (which provides, *inter alia,* for 'a fair trial within a reasonable time' that the expression 'reasonable time' is not defined for the purposes of that Section, and that expression must bear its ordinary grammatical meaning in the context in which it is used. It has been held by the courts (including the Supreme Court of America) that the right to speedy trial (a fair trial within a reasonable time) guaranteed under the Constitution of American and of Nigeria is necessarily relative. 'It is consistent with delays and depends upon circumstances: It secures rights to the defendant. It does not preclude the rights to public justice'.
See *Beavers v. Haubert* (198) US 77, 87 (1905); and *State v. Nathenical Nasamu;* Charge No. LCD/1/76 (unreported) ruling dated 10th December 1976 (High Court of Lagos State).

In the case of the *State v. Nathenical Nasamu* (supra) the facts were briefly as follows:-

> "The accused who was charged for murder complained to the High Court of Lagos State about the delay in his trial for that offence. He brought an application before that court by way of motion seeking to enforce his fundamental rights of speedy trial guaranteed under the Constitution of the Federation 1963 and praying that he 'be released on bail unconditionally or upon such condition as are reasonably necessary to ensure that he appeared for his trial on the charge against him.' The application was on notice to the respondent who detained him. In giving his ruling on that application Bakare, J, after setting out the relevant

provisions of Section 21(3) and 22(2) of the Constitution of the Federation 1963 observed *inter alia,* as follows:-

> 'The provisions of the Constitution on which this application was based did not define the expression "reasonable time". Each case must therefore depend on its own facts. The accused has now been in custody for a year. The prosecution knew all along the witnesses to be called and the case (to) be brought against him ..... In my judgment, the accused has not been brought to trial within a reasonable time having regard to the facts of the case and the provisions of Section 21(3) of the Constitution must apply.'

The learned judge then made an order, *inter alia,* releasing the accused person on bail.

I agree with those observations relating to the meaning to be attached to the expression 'reasonable time' used in Section 33(1) of the Constitution of the Federation 1979 (which expression is also not defined for the purposes of that Section). It has also to be remembered that each case of this nature must depend on its own peculiar facts; and that no length of time is *per se* too long to pass scrutiny under the right guaranteed under Section 33(1) and (4) of the Constitution of the Federation of Nigeria, 1979 (which relates to speedy trial). On the other hand neither has the accused to show actual prejudice by the delay before he would be entitled to complain about it and seek relief against any delay in his fair trial for any offence for which he is charged. The court must therefore not adopt an *ad hoc* balancing approach in this matter. As was said in this connection in the case of *Baker v. Wingo,* 407 US 1514, 530 (1972):

> 'We (the judges) can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right (to a speedy trial). Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'

I respectfully agree with those observations. They make it clear, I think, that the fact of delay of a trial of an accused person triggers an inquiry and it is dependent on a number of factors and the particular circumstances of each case. Reasons for delay of a trial must therefore

vary, but a deliberate delay for advantage will weigh heavily; whereas the absence of a witness could justify an appropriate delay. It must be emphasised that it is the duty of the prosecutor to bring the accused person to speedy trial, and that the failure of an accused person to demand that right cannot be construed as a waiver of his fundamental right to a speedy trial. Finally, a court will look to the possible prejudices and disadvantages suffered by an accused during a delay in his trial.

It is important to bear in mind that an application, by a person who is detained, for leave to apply for an order to be released from his detention is in strict terms an application for leave to apply for a writ of habeas corpus. Such an application by a person who is detained and who complains that his detention is unlawful is therefore not a method to test any ordinary procedural errors which may occur at a trial, but only to challenge alleged error which, if established, will go to make the entire detention unlawful. The guilty or innocence of the person so detained (if he is detained for an alleged offence) is irrelevant to the proceedings seeking to obtain his release from detention. It is only the legality of the detention that is in issue. See *Ex parte Corke* (1954) 2 AER 440;

Ex parte Watkins 3 Pet 28 US 193, 201 (1830); and

Ex parte Hinds (1961) 1 AER 707.

In *Ex parte Corke* (1954) 2 AER 440, It was held that a writ of habeas corpus cannot be used as a means of appeal from a sentence passed by a competent court of summary jurisdiction, that the writ is a writ of right and not a writ of cause, and that before the writ can be issued or before leave can be given to apply for the writ an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. Lord Goddard, CJ, in delivering the judgment of the court said at page 440:

> "It is well that persons serving sentences passed on them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal. If they complain that they are wrongly convicted, they should appeal to quarter sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of habeas corpus, and the affidavit here shows that William Corke is in prison serving a sentence passed at the Bow Street Magistrate's Court, under the Vagrancy Act, 1824. It has always been the law since it was laid down by Wilmot, J, in giving his opinion on the writ of habeas corpus, in answer to questions proposed to the judges by the

judges by the House of Lords in 1758, that a writ of habeas corpus is a writ of right and not a writ of course: before a writ can be issued or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. In this case, it is perfectly clear that, unless the conviction was set aside by a court of appeal (and the time for appeal has long gone by), he is lawfully in custody, serving a lawful sentence, and his application for a writ of habeas corpus is, therefore, refused.'

(The italics are his). I agree with every word of those observations.

It is settled law, I think, that a writ of habeas corpus should always be directed to the officer or person in whose custody the prisoner is detained. This is important in determining the jurisdiction of the court before whom the applicant is brought, because a court will lack jurisdiction (a) if the prisoner is detained outside the jurisdiction of the court or (b) if the person detaining him is not within the jurisdiction of the court. This is very clear from the recent decision of the former Court of Appeal Western State in the case of *Tafa Adeoye v. Commissioner of Police* (1971) 1 NMLR 172. See also *R. v. Pinckney* (1904) 2 KB 84.

In *Tafa Adeoye* case (supra) the facts as set out in the Head Notes were as follows. The appellant, Tafa Adeoye appealed to the Western State Court of Appeal against the order of dismissal by the High Court, Ibadan, of an application for a writ of habeas corpus brought by him against the Commissioner of Police Western State, the Respondent to the Appeal. The applicant by a motion *ex parte* dated the 21st day of September 1970 had moved the High Court, Ibadan, on the 22nd day of September, 1970, 'for an order nisi and/or leave for a writ of habeas corpus to compel the Commissioner of Police , Western State ..... to produce', the appellant before that court. It was alleged that the appellant was being held in custody by or on the order of the Commissioner of Police, Western State, who was made the respondent to the motion. The purpose of the application was to secure the release of the appellant from the said police custody. The grounds for the application were set out on the motion paper and there were six grounds in all; one of which stated that the appellant had 'spent more than forty-eight hours in police custody without an offence or charge being preferred against him and without being brought before any Court of Justice.'

The appellant in fact was not in the custody of the respondent and the respondent had informed the court of the whereabouts of the appellant as at the date on which the application was made, which fact showed that

five days before the making of the application for the writ to issue on the respondent in Ibadan, the appellant was in fact in Jos Civil Prison – a place outside the jurisdiction of both the respondent and of the learned judge. It was held on the appeal that:-

(1) It is settled law that a writ of habeas corpus should always be directed to the officer or person in whose custody the prisoner was detained.

(2) Therefore, the issue in this case was really the question who had custody of the body of the appellant (for it was to that person that the writ should have been directed) and the trial judge was bound to have resolved this issue first.

(3) On a finding of fact, the appellant was not in the custody of the respondent in any police station in Ibadan and the respondent had not only consistently maintained this from the beginning of the proceedings, but had informed the court of the whereabouts of the appellant – at the date on which the application was made as being the Jos Civil Prison.

(4) By abstaining completely from considering the issue of who had custody of the body of the appellant and from adverting to the fact that the appellant was never, at all material time, in the custody of the respondent, the trial judge failed to make a finding on the question which alone mattered in the case.

(5) On the evidence, the High Court of the Western State had no jurisdiction to entertain the matter.

In delivering the judgment of the court, Ademola, J. A. (as he then was) observed at page 117 (after setting out the Ruling of the learned judge ordering the respondent to be put on notice):

> 'In our view, it was from this stage that the learned judge started to go wrong. Having himself ordered the respondent to be put on Notice, the respondent having filed that counter-affidavit of the 25th September 1970; and having been informed in open court by learned Senior State Counsel that the appellant was Not in the custody of the respondent BUT in Jos Prison, the learned judge obviously must have overlooked the fact that, at that stage of the proceedings, an important issue had been joined as to where (IN whose Custody) the appellant was. If the appellant was Not in the custody of the respondent THEN it meant that the WRONG RESPONDENT had been brought to the

court and the further question as to the AUTHORITY for the detention of the appellant could not arise in this matter as, THAT question could ONLY be asked from ONE WHO HAD CUSTODY of the appellant. The question therefore, at the stage was NOT the production of the ORIGINAL order of detention of the appellant BUT whether, as a matter of fact, the appellant was in JOS CIVIL PRISON OR IN THE CUSTODY of the respondent. It was Not what was written and contained in the ORIGINAL ORDER of detention that was in issue at that stage, but WHERE, as a matter of fact, the appellant was detained - in WHOSE CUSTODY was he? That was the question.

In our view, the issue OUGHT to have been resolved as soon as it arose because it would have put the learned judge in a position either to stop the matter there (if he found that the appellant was in fact in JOS PRISON) or continue the hearing (if he found that the appellant was in police custody in Western State). In the first alternative (if the matter were to be stopped) then the appellant realising that he had brought a wrong respondent to court and probably to a wrong court anyway, would have had the opportunity of going quickly to take proceedings against the right respondent and in the right court.

It would be seen from what the learned judge said in his ruling that he obviously over-looked the fact that the question of 'justification to support the detention' could ONLY have been asked from ONE WHO HAD CUSTODY of the appellant at the time. Therefore, the question of WHO HAD THE CUSTODY of the appellant at the time should have been settled FIRST.....'

I respectfully agree with every word of those observations and I will bear them in mind in determining the application now before me. Those observations make it clear, I think, that, as a general rule, the respondent to an application for a writ of habeas corpus or to an application for leave to apply for the writ of habeas corpus (or to an application of the present nature brought for the enforcement of fundamental rights of liberty of movement of an applicant) must be the person who has custody of the applicant at the time the application is brought e.g. a prison governor, the officer in charge of a police station, the commandant of an interment camp, the Superintendent of a mental hospital, where the applicant is in custody. In special circumstances, one who has custody of the prisoner detained but who has passed the prisoner to another custodian (but in circumstances

that the original detain or could resume control of the person detained may be the only proper respondent, but the general rule is that habeas corpus is not to be issued as a penalty for a detention which had been discontinued. It seems however that there is no reason of principle why a Minister or other person who has ordered the detention of the prisoner (and has power to countermand the detention order) should not be made a co-respondent to the application, along with the person who has actual custody of the prisoner or alone. Nor is there any rule of law precluding the award of a write of habeas corpus being made against such a Minister, acting as officer or servant of the State.

> See *R. v. Home Secretary ex parte O'Brien* (1923) 2 KB 361; (affirmed on appeal in *Home Secretary v. O'Brien* (1923) AC 603); *The Head of the Federal Military Government and Commander-in-Chief of the Armed Forces v. The Assistant Director of Prisons, Benin City, Ex parte Okafor Nwanji,* suit No. B/11M/69 (unreported); *R. v. Governor of Brixton Prison ex parte Minervini* (1959) 1 QB 155; and *Rex v. Secretary of State for Home Affairs, Ex Parte Green* (1942) AC 284 (HL).

Accordingly, in this present case where the applicant has shown an arguable case at this *ex parte* stage of the proceedings, and has brought his application against the Director of Prisons (Ikoyi), the third respondent, who has his actual custody along with other respondents, being persons who are or appears to be connected with or responsible for the arrest and prosecution of the accused/applicant (and therefore who have power to countermand his arrest or detention or stop his prosecution), I cannot see any reason of principle why those other respondents could not be made parties/respondents to the application. I will therefore grant the leave sought by the applicant to apply for an order releasing him from detention under the provisions of Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 1979. Under those Rules, provisions are made, *inter alia,* as follows: -

'Application for leave

2 (1) 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 is likely to occur, for redress.

(2) No application for an order enforcing or securing the enforcement within that State of any such rights shall be made unless leave therefore has been granted in accordance with this rule.

(3) An application for such leave must be made *ex parte* to the appropriate court and must be supported by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on.

(4) The applicant must file, in the appropriate court, the application for leave not later than the day preceding the date of hearing and must at the same time lodge in the same court enough copies of the statement and affidavit for service on any other party or parties as the court may order.

(5) The court or judge may, in granting leaves, impose such terms as to giving security for cost as it or he thinks fit.

(6) The granting of leave under this rule, if the Court or Judge so directs, shall operate as a stay of all actions or matters relating to, or connected with the complaint until the determination of the application or until the court or judge otherwise orders.

3. (1) Leave shall not be granted to apply for an order under these Rules unless the application is made within twelve months from the date of the happening of the event, matter or act complained of or such other period as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made.

(2) Where the event, matter or act complained of arose out of a proceeding which is subject to appeal and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.'

The language of those rules are very clear and there is no doubt that the powers vested in the court or judge thereunder are very great. It is also clear that those wide powers are intended to be exercised judiciously, not capriciously, and as the circumstances of each case warrant. In granting leave the court may impose such terms and conditions as it thinks fit. I do not think that the facts disclosed by affidavit evidence at this *ex-parte* stage

warrant the making of an order for the immediate release of the applicant conditionally or unconditionally. It seems to me that the proper order is simply to grant him leave to bring his formal application for his release and allow him to name all the said respondents, as respondents to that application. This will enable all or any of those respondents to appear at the full hearing of the formal application and to file affidavit evidence in opposition to an order for the release of the applicant stating the ground for the detention of the applicant and the reason for the delay in his trial, by a court of competent jurisdiction. It must not be though that a mere explanation by the executive or police, as such respondent, that the reason for the delay in bringing up the accused/applicant for trial is because investigation into his case has not been completed by the police, or that the whereabouts of some likely witnesses at the time are unknown, would necessarily be satisfactory explanation of the delay in the trial of the accused. Therefore, it seems to me, that it would be necessary for the respondents to file a full and detailed affidavit setting out the material facts, that is, the reason for the detention and the grounds for the delay in the trial of the accused/applicant. It will then be a question for the court to determined on those facts whether the reasons are sound in law or are bad. If the court is of the opinion that the reasons are bad in law it will make such order as the justice of the case requires including an order for the release of the applicant, conditionally or unconditionally and/or for the speedy trial of the accused/ applicant by a court of competent jurisdiction. It will all depend on the particular circumstances of each case what the appropriate order should be.

So in this present application, and although the applicant has satisfied me that he has an arguable case to justify me in granting him the leave sought on this application, I do not think that it would be right or proper for this court, at this *ex parte* stage of the proceedings (and on the particular circumstances) of this case to make an order for the release of the applicant conditionally or unconditionally from detention. It seems to me that the proper order to make is an order granting leave to the applicant to bring a formal application seeking his release from detention on the grounds set out in his present application for leave and to allow the applicant to join the persons named as respondents on this application as respondents to his formal application when brought.

It is perhaps right that I should add that the court is always prepared and will be quick to give relief against any improper use of power or any abuse of power by any member of the executive, the police or any other person which results in unlawful detention of an applicant, when the fact

are fully brought before the court. The court will however, be very careful to ensure that its power to order the release of an applicant is properly exercised, as in a case where the unlawful detention of the applicant has been clearly established. The court, as a general rule, will make an order for the release of a person who is alleged to be unlawfully detained only after the court has heard all the parties concerned and adjudicated thereon either upon a return to a writ of habeas corpus or in any other case upon affidavit evidence having been filed and/or oral evidence given (when necessary). This attitude of the court could hardly be faulted as a principle of fairness and justice to both the accused/ applicant and the society. Indeed, it is in complete harmony with common sense and the notions and standards of justice in our society where no one is to be oppressed and where an accused person must face his trial, which must be fair and which must take place within a reasonable time.

In the end therefore, and for those simple reasons which I have given, and without dealing at this stage with the several other issues raised by learned counsel for the applicant in his submissions before me, I hereby make an order granting leave to the applicant to apply under the Fundamental Rights (Enforcement Procedure) Rules 1979, for the redress specified in his present application for leave and on the grounds therein set out. I also order that a copy of the formal application for which leave is hereby granted (together with the said application for leave and the statement and affidavit in support thereof) shall be served on each and every person named as respondent in the present application, and who shall also be made respondent to the formal application for the release of the applicant. I further order that the formal application shall be filed and served timeously, so as to enable the hearing of that application to come up before me on Monday 30th March 1981. Liberty to apply.

BADE LOCAL GOVERNMENT

V.

BULAMA MAI ARDO

FEDERAL COURT OF APPEAL, KADUNA

CITATION
SUIT NO. FCA/K/87/81

ABUBAKAR BASHIR WALI, JCA
UMARU MAIDAMA, JCA
ADOLPHUS GODWIN KARIBI-WHYTE, JCA

1ST APRIL 1982

SUMMARY:

The High Court in its appellate jurisdiction in a criminal matter set aside the conviction and sentence of the appellant (now the respondent in this appeal). The court further ordered that compensation be paid and public apology made to him by the Bade Local Government Authority. The constitutional issues that arose in this case are: -

(1) Whether or not an Appellate Court could invoke a Fundamental Right (this time Section 32(6) of the Constitution) which was not originally raised by the court of first instance.

(2) Whether or not it could do so without complying with the prescribed rules made under Section 42 of the Constitution.

Held: 1. (Following *Shofekun v. Akinyemi* (1981) 1 NCLR 135 at 147, an Appellate Court like a court of first instance can enforce a Fundamental Right entrenched in the Constitution.

2. An Appellate Court need not comply with the prescribed rules made pursuant to Section 42 of the Constitution in giving effect to a right entrenched under Chapter IV of the Constitution.

Cited Cases

1. *Akwule & Others v. The Queen* (1964) NRNLR 105
2. *Attorney-General v. Awoyele* (No.2) (1950) 19 NLR 52
3. *Attorney-General v. Tomline* 7 CH D 388
4. *Attorney-General for Bendel State v. Attorney-General for the Federation & 22 Others* (1981) 10 SC 1
5. *Ainsworth v. Wilding* (1896) 1 CH 673
6. *Colledge v. Horn* (1825) 3 BNG 119 at 122
7. *Dr G O Sofekun v. Chief N O A Akinyemi & Others* (1980) 5-7 SC 1
8. *Enahoro v. The Queen* (1965) NMLR 265 at 283
9. *H Clark Ltd v. Wilkinson* (1965) 1 All ER 934
10. *Huddersfield Banking Company Ltd v. Henry Lister & Son Ltd.* (1895) 2 CH 273
11. *Marsden v. Marsden* (1972) 2 All ER 1162
12. *Nwafia v. Ububa* (1966) NMLR 219
13. *R. v. Hall* (1968) 2 QB 787

14. *R. v. Inns* (1975) CRIM LR 182
15. *R. v. Inwood* (1975) 60 CR APP R 70 CA
16. *R. v. Resident Ijebu Province* (1959) WRNLR 87
17. *R. v. Turner* (1970) 54 CR App R 352
18. *Thanni & Lemonu v. Adegboyega & Odulaja v. Williams* (1941) 6 WACA 198

COUNSEL:

Mr. L O *Sanyaolu, Hon Attorney-General Borno State (with him Ibrahim Gamduwa D P P and Baba Kura Ba'Aba)* for the appellants

Mr. *Femi Okunnu (with him Mr. O P Popoola)* for the respondents.

A. G. KARIBI-WHYTE, JCA: This is an appeal against the decision of the High Court of Borno State, delivered on the 8th July 1980 sitting at Maiduguri in its appellate jurisdiction. The High Court, allowing the appeal of the accused/respondent, who was convicted in the Bade Area Court No.1 sitting at Gwayo, for an offence under Section 152 and punishable under Section 152(b) of the Penal Code, and sentenced to three months imprisonment. His appeal to the Gashua Upper Area Court against both conviction and sentence was dismissed by Gashua Upper Area Court. On a further appeal to the Maiduguri High Court, counsel for the Bade Local Government, who were the respondents in that court, but are appellants in this court, told the court, that he was not supporting the conviction of the appellants ..... because the evidence led against him does not support a charge under Section 152 of the Penal Code' (see page 12).

Thereupon, Mr. Popoola for the appellant, who is now the respondent in this court applied to the court 'for compensation and public apology to the appellant by the Bade Local Government Authority'. What follows next is very significant and appears to be the basis of the appeal before us. I therefore am quoting verbatim from the record of proceedings at pages 12 to 13, what the learned senior state counsel for the respondent said in answer to Mr. Popoola's application, and the judgment of the court.

X X X

ALKALI I ask for a substantial compensation to the appellant and public apology in order that they serve as deterrent to others.

'COURT' We agree with the learned senior state counsel that there was no evidence in the Lower Court of Appeal to support the charge framed against the appellant. His service of three months jail term was an insult added to injury. It is a matter for regret that people's liberties should be so much trifled with by Constituted Authorities who have or should have persons qualified in law to advise them at all times in order to ensure regularity and

legality in all they do. Defence counsel and state counsel have both asked that the appellant be compensated and that a public apology be made by the authority concerned so that as the learned state counsel put it, others may be deterred from future unwarranted conduct such as exhibited in the present case. We agree that a compensation and public apology are appropriate by virtue of Section 32(6) of the Constitution of the Federal Republic of Nigeria, 1979.

Accordingly, we allow the appellant's appeal, set aside his conviction and sentence by the Lower Court and order that Bade Local Government do pay to the appellant a compensation of N500.00 and also make a public apology to the appellant through the Borno State radio with a copy of the said apology to the appellant. These orders shall be complied with within a reasonable time.

(sgd.) W O Kuyatsemi)
Judge
8th July 1980

(sgd.) (A M Kida)
Judge
8th July 1980

(sgd.) (K O Anya)
Chief Judge
8th July 1980)

It is relevant to state here, that the first ground of appeal in the High Court was founded on the provisions of Section 33(6)(c) of the Constitution of the Federal Republic of Nigeria, 1979, namely a provision of the Fundamental Rights in Chapter IV of the Constitution 1979. It reads as follows: -

> '(1) The refusal of the trial court to allow the appellant the service of a counsel is unconstitutional, and a violation of Section 33(6)(c) of the Constitution of the Federal Republic of Nigeria 1979.'

An important factor of the appeal is that the High Court before which the appeal was heard, was spared the necessity of any decision on the merits of the case, because there were no arguments addressed to them by either of the parties. The judgment delivered and orders made were as a result of the agreement of counsel to both appellants and respondents, who regarded the orders as the proper orders to be made in the circumstance. It is relevant to point out that the learned Hon Attorney-General for Borno State, who argued the appeal for the appellants has stated before us that they were not appealing against the part of the Judgment allowing the respondent's

appeal against the conviction. The appeal is against the Order for compensation and for public apology. This is clearly brought out in the four grounds of appeal of the appellant which are as follows: -

'1. The learned Judges of the court below erred in law in ordering the Bade Local Government to pay compensation of ₦500, and make public apology to the respondent under Section 32(6) of the Constitution of the Federal Republic of Nigeria, 1979 when the matter before the court was not one for enforcing or securing the enforcement of Fundamental Rights guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979.
2. The learned Judges of the court below erred in law in making orders under Section 32(6) of the Constitution of the Federal Republic of Nigeria without the respondent (Bulama Mai Ardo) complying with the provisions of Section 42 of the Constitution of the Federal Republic of Nigeria and the Fundamental Rights (Enforcement procedure) Rules 1979.
3. The court below exceeded its powers in its appellate jurisdiction by awarding compensation and ordering public apology relying on Section 32(6) of the Constitution when the court was not exercising its original jurisdiction as provided by Section 42(2) of the Constitution of the Federal Republic of Nigeria read in conjunction with Section 15 and 16 of the High Court Law of Borno State (1963, Laws of Northern Nigeria Cap. 49) and the Area Courts Edict No. 1 of 1968, Section 58.
4. The decision of the court below relating to compensation and the order for public apology was not based on any evidence.'

Before the appeal was argued, Mr. Femi Okunnu, learned counsel for the respondent, by motion raised a preliminary objection seeking this court to dismiss the appeal *in limine,* because the order appealed against is a consent order, which is not subject to appeal; and that the appeal was only against part of a consent order.

Before this objection was argued, the Hon Attorney-General, raised objection to the Rule, Order 3 Rule 15, relied upon for bringing the motion for preliminary objection, as governing only applications in respect of civil cases. He contended that this was inapplicable to the appeal before the court which was in all respects a criminal matter. We over-ruled the submission, for the simple reason that we would not allow mere procedural

technicalities to inhibit us from going into the merits of this case. Further Order 4 of the Federal Court of Appeal (Civil Procedure) Rules, 1981 do not contain any provisions for raising preliminary objection in criminal appeals. We therefore resorted to the provisions of Order 6 Rule 3, and in the interest of justice to waive the non-compliance.

This initial little skirmish in this appeal between counsel for the appellant and of the respondent, reminds one once more of the common origin of actions at law and the unity of the law in the provisions of rights and remedies to the aggrieved. It also raised the perennial difficulty of making a clear distinction between criminal and civil wrongs. It is occasionally necessary, as in this case, to have an authoritative definition in order to clarify hybrid cases rendering uncertain whether a criminal or a civil process is required for the purpose of enforcing infraction of the particular provision of the law. Mr. Okunnu's contention was that the appeal before the court was in essence a civil proceeding and that the judgment entered by the court was a consent judgment which was not subject to appeal. Mr. Sanyaolu, the Hon Attorney-General has taken the opposing view that where there was a trial which ended in a conviction and sentence, the fact that there was compensation as an additional award did not alter its essentially criminally character. Apart from the necessity of the distinction raised in this appeal, the distinction is also relevant in order to determine the law making powers of the component governments of the Constitution in the light of the National Assembly's powers to make laws for the peace, order and good government of the Country. See *Akwule & Others v. The Queen* (1964) NRNLR 105. For the purposes of this judgment, I shall discuss only the two cases of *Attorney-General v. Awoyele* (No.2) (1950) 19 NLR 52, and *R. v. Resident Ijebu Province* (1959) WRNLR 87, to show the attitude of our courts towards the effect and nature of the distinction.

In *Attorney-General v. Awoyele* (No.2) 19 NLR 52, the question which was to be determined was whether the liability to pay a fine under Section 89(i) of the Stamp Duties Ordinance was a civil liability, and whether it would be erroneous to proceed against the defendant by way of criminal summons. In the Magistrate's Court, the trial Magistrate held that liability under the Stamp Duties Ordinance was civil and that criminal summons was inappropriate and dismissed the complaints which were made on a criminal form. The Attorney-General appealed to the High Court, where Ames Ag. J. allowed the appeal and held that the Section created an offence punishable on conviction by the imposition of a penalty. The learned Judge relied on other provisions of the Stamp Duties Ordinance such as Sections 107, 108 which provided in Section 107 that -

'107 ... proceedings for the recovery of any duty imposed by this Ordinance or for the recovery of any debt to Her Majesty under this Ordinance may be included in any proceedings for the recovery of a fine or penalty under this Ordinance.'

'108. ..... all duties, fines, penalties and debts due to Her Majesty imposed by this Ordinance shall be recoverable in a summary manner in the name of the Attorney-General.'

In this case, Ames Ag. J held that where the phrase 'by fine or imprisonment' is used in the Stamp Duties Ordinance, it means that it says namely that if the infraction is enforceable either by fine or imprisonment, it is excluded from civil proceedings - (see *ibidem* at page 54). Thus according to Ames Ag J, in *Attorney-General v. Awoyele,* and offence is criminal if punishment prescribed for the offence is either a fine or imprisonment.

In *R. v. Resident Ijebu Province* (1959) WRNLR 87, the court was faced with the problem of determining whether a fine and payment of costs imposed on a person for breaking an order which prohibited him from holding and performing the duties of a chieftaincy was a criminal or a civil contempt. In the High Court during argument and on appeal, in the Supreme Court, it was initially assumed by all the parties that the case was one of civil contempt. Doubt whether that was a correct view was raised in the Supreme Court, when after adjournment for judgment, the court re-opened the hearing and invited counsel for argument as to the nature of the contempt. The Supreme Court in their judgment finally came to the decision that the contempt was criminal. Their reason for so holding was as they stated, because 'the appellant was ordered to pay a fine and costs for the alleged contempt for disobeying an order of the High Court. It then seemed to us, subject to any further argument that might be addressed to us, that this concluded the question and put it beyond doubt that this alleged contempt was in fact criminal in nature'. See *ibidem* (at page 88).

It is obvious from the view expressed in the cases that the court relied on the nature of the remedy as a determinant of the character of the wrong. Notwithstanding the uncertainty and difficulty in distinguishing in borderline cases between criminal and civil cases, the determining factors have oscillated between the procedure prescribed for seeking redress and the nature of the sanction attached to the infraction of the conduct prohibited.

In the case before us, action was initiated by complaint against the respondent in the Bade Area Court 1, by the Secretary of the Bade Local Government on behalf of that Local Government, that the respondent who

was the former Ward Head of Gwayo, and occupying an official house, had refused to vacate the house after he ceased to be the Ward Head. He said that a formal notice to vacate had been given to the respondent who refused to comply. The trial Area court Judge heard the evidence of one witness and the complaint, and then framed a charge under Section 152 of the Penal Code for the respondent to defend himself.

The respondent denied the charge and called one witness. His defence was that 'about as far as the question of the house is concerned, it was the people who allowed me to occupy it and that they will be the right persons to ask me to vacate it'.

The trial Area court Judge, then delivered his judgment and found the respondent guilty of the offence and sentenced him to three months imprisonment. This sentence was affirmed on appeal to the Gashua Upper Area Court on the 22nd May 1980. It was from this judgment that the respondent appealed to the High Court of Borno State, and the subject matter of the appeal before us.

It is clear on the above facts that whether on the procedure adopted for seeking redress or on the sanction imposed by the court on adjudication, the matter on appeal before the High Court was a criminal matter. Accordingly, in my view, it cannot change its criminal character merely because an additional sanction in the nature of compensation was added in the form of a remedy. In the appeal before us, it is particularly instructive to refer to Section 166(4) of the Criminal Procedure Code which provides -

> 'any person directed to make payment of compensation under this Section may appeal from the direction as if he had been convicted after trial by the court.'

I am of the opinion therefore that the appeal before us arose *stricto sensu* from a criminal matter.

I must also advert to the preliminary objection raised by Mr Okunnu founded on the argument that the appeal before us is a civil matter; and therefore the judgment being a consent judgment was not subject to appeal, and secondly that since appellant was appealing only against part of the order, the appeal is incompetent and should therefore be dismissed. I have to point out that having decided that the matter is criminal, it is no longer necessary to discuss the submissions of counsel on this leg. Be that as it may, it is necessary to dispel some of the fallacies in the argument of counsel for the respondent. It is clearly not the law that no appeal lies against a consent order or judgment, I agree that a consent order or judgment is one entered in the records of the court on the agreement of

the parties, is a creature of the agreement and do not involve the opinion of the court. It forms part of the record of the court and is entered for the purposes of effecting enforcement. Hence it is a valid judgment but can be set aside if either of the parties can show that consent was given under a mistake. See *Ainsworth v. Wilding* (1896) 1 Ch. 673. In *Huddersfield Banking Company Ltd. v. Henry Lister & Son Ltd.* (1895) 2 Ch. 273, the Huddersfield Banking Company Ltd in a mortgage deed dated in and prior to 1889, became mortgagees of certain lease-holds mills near Huddersfield, and all the fixed plant and machinery then or thereafter to be brought on and affixed to the mortgaged premises belonging to Henry Lister, a manufacturer. In May 1890, Henry Lister incorporated a limited liability company and transferred to it his business and assets and his equity of redemption. On 16th January 1892, in a debenture holders action, an official receiver was appointed on behalf of the debenture holders and also to manage and work the company's business. The Banking Company were not parties to this action. On 30th January 1892, a winding-up order was made and the official receiver became the liquidator. Thereupon the banking company claimed to be entitled to certain machinery in the mortgaged premises. By the mistake of both its agent and of the representative of the liquidator, the Banking Company described in the affidavit filed in support of the summons referred to the items in the schedule seeking approval for the sale of the machinery as 'admittedly loose machinery.' An order was made in terms of the summons for the sale of the machinery and plant with the consent of the Banking Company.

The Banking Company subsequently discovered that thirty-three fast power looms were purchased and ought to be part of the items for sale to their benefit but was wrongful loosened and served from the premises. They thereupon brought this action against the liquidator to set aside the consent order which was given under a mistake as to material facts.

Vaughan Williams J in setting aside the consent order said *(ibidem* at page 276) -

> 'The real truth of the matter is that the order is a mere creature of the agreement, and to say that the court can set aside the agreement and it was not disputed that this could be done if a common mistake were proved - but that it cannot set aside an order which was the creator of that agreement, seems to me to be giving the branch an existence which is independent of the tree. Under the circumstances, I have come to the conclusion that I can set aside the order and give effect to what are the true rights of the parties.'

On appeal by the Company in the Court of Appeal, Lindley, Lopes, Kay LJJ unanimously dismissed the appeal.

Apart from the proof of a common mistake, a consent order can also be set aside on the ground of fraud –
See *Attorney-General v. Tomline* 7 Ch. D. 388. The law seems to be that a consent judgment or order may be set aside for the same reasons as those on which an agreement may be set aside. This view applies to the further submission that there cannot be an appeal against part of a consent judgment. See also *Marsden v. Marsden* (1972) 2 All ER 1162.

In this appeal, the Hon Attorney-General arguing all the grounds of appeal together seems to be attacking the judgment also on other grounds, which if successful will be equally effective. His argument is that there cannot be a consent order as to punishment, since this will tantamount to compounding. Citing *Enahoro v. The Queen* (1965) NWLR 265 at page 283, he submitted that a state counsel cannot tell the court the sentence to impose or the order to make, and that there cannot be any consent order in this case. He submitted that the High Court of Borno State, in its appellate jurisdiction has no powers to award compensation under Section 32(6) of the Constitution and submitted that the order for compensation and apology made by the court is void. Reliance was placed on the proposition that, an agreement to do a thing which cannot be done without the violation of the law is void – *Attorney-General for Bendel State v. Attorney-General for the Federation & 22 Others* was relied upon as authority for this proposition. In elaborating on the proposition the Hon Attorney-General submitted that the matter before the High Court was an appeal from an Area Court which is governed by Section 58(2) of the Area Courts Law No.1 of 1968 of Borno State. Under this Law, the High Court had no more powers than the lower court could have made. Reference and reliance was made to Section 59 of the Area Courts Laws, 1968, and to Sections 15 and 16 of the High Court Law. The Hon Attorney-General cited Section 166 of the Criminal Procedure Code, and to the limits of the powers of the Area Court and submitted that the High Court in the exercise of its appellate jurisdiction possesses no greater powers than that court.

It was also submitted that the compensation was awarded by virtue of Section 32(6) of the Constitution. The argument here was that the provisions of Chapter IV of the Constitution, and Section 32(6) is one such provision, can only be enforced by the High Court, in the exercise of its original jurisdiction, and by the procedure prescribed by rules made under Section 42 of the Constitution. It was therefore submitted that the Order of the High Court was made neither in its original jurisdiction nor under the

procedure prescribed by the Fundamental Rights (Enforcement Procedure) Rules 1979. It was contention that the provision of Section 32(6) do not apply when a person has already been tried by a competent court.

Finally, the Hon Attorney-General submitted that the decision of the court with respect to compensation and apology was not based on any evidence, and that the provisions of Section 42 of the Constitution and the rules made thereunder contemplates the taking of evidence. It is only after the taking of evidence that an award of compensation and apology can be said to be appropriate. It was submitted that the award of N500 even if the court had the power was arbitrary and not based on any evidence.

The Hon Attorney-General submitted that the order affected a third party not in the litigation. We were urged to allow the appeal. On the preliminary objection raised as to the competence of this appeal. It was contended this was too late, and that the proper time was when leave to appeal was being sought.

Mr. Femi Okunnu replying to the respondent referred to Section 6(5) of the Constitution in support of his submission that the court has the requisite jurisdiction to make the order. On the contention that there was no evidence upon which the court can make the order for compensation and apology, Mr. Okunnu, submitted that there was sufficient evidence of unlawful arrest and detention by the court as a result of the complaint made by the Bade Local Government. On the contention that the order could not be made in the appellate jurisdiction of the High Court, Mr. Okunnu submitted that any issue falling within Chapter IV of the Constitution can be canvassed before the High Court at any stage of the courts' proceedings, whether at first instance or on appeal. He relied on Dr G O *Sofekun v. Chief N O A Akinnyemi & Others* (1980) 5-7 SC 1 at pages 20-21. Mr. Okunnu submitted that *Enahoro v. The Queen* is different, in that case the state counsel was calling for maximum penalty to be imposed after proof of guilt. In this case, both counsel were agreed that both compensation and apology were appropriate for the type of conduct.

Citing *Thanni & Lemonu v. Adegboyega and Odulaja v. Williams* (1941) 6 WACA 198, it was submitted that preliminary objection can be raised at any stage of the proceedings.

I have set out above the grounds of appeal and the appellants in this appeal. The biped on which the arguments of the Hon Attorney-General can be said to rest can be reduced to the major contention (1) that the High Court has no jurisdiction and power to make the orders for compensation at apology because, its jurisdiction and powers to make such

orders is limited to the exercise of its original jurisdiction; and that the procedure appropriate for the enforcement of the provisions of Section 32 (6) under which the order was made has not been followed.

The other major contention is that (2) since the matter is a criminal matter, even if the High Court had jurisdiction, the parties cannot by consent determine the nature of the remedy which the court will impose.

I shall begin my analysis of the contentions by a consideration of the submission that in a criminal proceedings the parties cannot by consent determine the nature of the remedy the cou5rt will impose. Although this is a plausible contention, and in this case raised the point to what extent, counsel for the accused can exercise his mandate to represent his client, there is no doubt that the Hon Attorney-General has misconceived the essential similarities and differences in the nature of actions whether civil or criminal. It is well settled and is not now open to reasonable argument that in all civil actions judgment may be entered by the court on the agreement of the parties as to its terms and conditions.

It is also well settled, that in criminal cases, a plea of guilty, by the accused, who rightly comprehends the effect of his pleas and this to the satisfaction of the Judge, is accepted and appropriate sentence passed forthwith. It is the clear duty of counsel to such an accused to assist him to make up his mind as to the consequences of his plea. *R. v. Hall* (1968) 2 QB 787. See also *R. v. Turner* (1970) 54 Cr. App. R. 352; *R v. Inns* (1975) Crim L.R. 182. Hence where counsel to the Bade Local Government, the prosecution in this case, submitted before the High Court on appeal that he did not support the conviction, the irresistible inference is an acquittal on a plea of not guilty of the respondent, of the charge in the court of first instance. The admission by counsel to the Bade Local Government, who was exercising his authority to speak for the appellant, and the declaration before us by the Hon Attorney-General that they were not appealing against the setting aside of the conviction are cumulatively eloquently unequivocal that the appellants, Bade Local Government is not challenging the part of the judgment setting aside the conviction, and declaring the arrest and detention of the respondent unlawful. Concisely stated, the prosecution has admitted the unlawfulness of the action resulting in the arrest and detention in prison for three months of the respondent; and are therefore subject to civil liability.

In principle, having been convicted or acquitted by a court exercising its jurisdiction validity, it is somewhat naïve to contend that the complainant and the accused cannot agree within the limits allowed by the law as to the severity of the punishment or the amount of compensation which the trial

judge can impose. Admittedly, the trial judge or court is not bound to accept the suggestion flowing from the agreement of the parties, in my opinion, there is nothing illegal in the accused making a plea of mitigation in respect of compensation to be awarded to him, or the complaint offering to make substantial compensation to assuage his victim, appreciating the unconstitutional nature of his conduct. It depends entirely on the circumstances of the case and ultimate social justice and expediency which the provisions regarding the award of compensation is aiming at. There is no doubt that the order for compensation was introduced, not to enable the wrongdoers to buy themselves out of crime, hence it follows conviction. The provision was introduced as a convenient and effective rapid means of avoiding the expense of resorting to civil litigation when the wrongdoer clearly has the means of making such compensation. See Scarman LJ in *R. v. Inwood* (RJ) (1975) 60 Cr. App R. 70 CA. I agree with Mr. Okunnu that the case before us is clearly distinguishable from that of *Queen v. Enahoro* (1965) NMLR 265, at page 283 where the State Counsel was demanding maximum sentence, which is prescribed by statute and if accepted is not within discretion of the court. In this case counsel asked for substantial compensation, the range of which is a matter largely and indeed entirely within the discretion of the court.

In this case, the liability of the appellants to pay the compensation to be awarded having been accepted was not in doubt. I am of opinion that there is all the difference in law between compounding an offence that has been committed without trial, and agreeing after acquittal, to the amount to be awarded the victim of crime or an oppressive conduct. Whereas it is illegal to do the former, the later is clearly within the law. In the appeal before us, the order was made to obviate inevitable subsequent civil litigation between the parties and in keeping with the age old formula *ut sit finis litium interest reipublicae.*

On the first question arising from the grounds of appeal and arguments in this appeal the following questions must be answered in order to determine the contentions relied upon by the Hon Attorney-General for the appellants. These are, whether the power to enforce the provisions of Chapter IV of the Constitution is limited to the exercise of its original jurisdiction. Again, whether the provisions of Chapter IV of the Constitution cannot be enforced in the High Court except by means of rules of procedure made under Section 42 of the Constitution, i.e. Fundamental Right (Enforcement Procedure) Rules 1979.

On a careful examination of the law relied upon and the authorities cited to me in argument, I am unable to find any real merit in any of these

contentions. The propositions are not valid in principle, and acceding to them will raise so much inconvenience in the administration of justice and will result in the doing of so much injustice as to defeat the real purpose of the provisions relied upon. In his argument before us, the Hon Attorney-General submitted that reading Section 58 of the Area Court Law, Section 15 to 16 of the High Courts Law, it was clear to him that the High Court in its appellate jurisdiction can exercise no more powers than the Area Court from which the appeal emanates. It is difficult to accept such a preposterous construction of the meaning of these Sections. The absurdity of the contention can be demonstrated by the proposition which reflects it that a court will lose its inherent and original jurisdiction merely because it is exercising its appellate jurisdiction. The true powers of an Appeal Court is that in addition to its original jurisdiction it also exercises all the powers of the courts from which it hears appeals. In my opinion, if all it has are the powers of the court from which the appeal emanates, it is merely another of that court with equal jurisdiction which *stricto sensu* cannot sit on appeal over the other court. This is clearly not the case.

Section 58 and 59 of the Area Courts Law relied upon deal with the powers of appellate courts in civil and criminal cases emanating from Area Courts. The relevant parts of the Sections provide as follows -

'58 (1) Any court exercising appellate jurisdiction in criminal matters under the provisions of this law, may, where the appellant is the person who was the person accused before the court of first instance, in the exercise of that jurisdiction

(a) X X X X

(b) If such court considers that there is sufficient ground for interfering with the decision appealed against, set aside the decision, and either -

(i) acquit the appellant;

(ii) order the retrial of the appellant before a court of competent jurisdiction on the same charge or accusation, or any charge or accusation which might have been laid on the facts as disclosed by the evidence; or

(iii) X X X

'59. (1) Any court exercising appellate jurisdiction in civil matters under the provisions of this law may in the exercise of that jurisdiction -

(a) after rehearing the whole case or not, reverse, vary, or confirm the decision of the court from which the appeal is brought and *may make any such order or exercise any such power as the court of first instance could have made or exercised in such case or as the Appeal Court shall consider that the justice of the case requires;*

(b) quash any proceedings and thereupon where it is considered desirable, order such case to be tried before the court of first instance or before any other court of competent jurisdiction.'

I have put in italics the above sentences in Section 59(a) to emphasise the scope and content of the appellate jurisdiction. These Sections are similar to Sections 48 and 42 of the High Court Law, Cap. 49 in respect of criminal and civil appeals in the High Court respectively. An important factor common to Section 58 of the Area Courts Law, and Section 42 of the High Court Law is that the High Court may on appeal make a final or other order on such terms as it thinks proper to ensure the determination on the merits of the real question in controversy between the parties.

It seems to me that the Hon Attorney-General, who relied on the provisions of Section 59(1)(a) to argue that since the Area Court could not have by virtue of Section 166(i) of the Criminal Procedure Code awarded more than N50 as compensation, the High Court on appeal had no jurisdiction, to award N500, ignored that part of Section 59(i)(a) of the Area Courts Law, reproduced above which provided an alternative, namely, 'or as the Appeal Court shall consider that the justice of the case requires.' Thus in addition to the exercise of the powers of the court of first instance, the Court of Appeal may resort to its original jurisdiction in the exercise of such powers which it considers the justice of the case requires. It is therefore proper for the appellate High Court to have ignored the provisions of Section 166(i) of the Criminal Procedure Code under which in the circumstances only a payment of N50 compensation could have been awarded, and resorted to the award of compensation and apology as provided under Section 32(6) of the Constitution 1979. Ground 1 of the Grounds of appeal therefore fails.

The Hon Attorney-General has contended, with considerable force and animated conviction that since the High Court was in this case sitting in its appellate jurisdiction, it had no power to exercise its original jurisdiction conferred on it by Section 42 of the Constitution and apply the provisions of Section 32(6). The other contention was that enforcement of breach of fundamental rights guaranteed under Chapter IV of the Constitution must

be initiated under rules appropriate for such proceeding and made by the Chief Justice of the Federation of Nigeria, and referred to as the Fundamental Rights. (Enforcement Procedure) Rules, 1979.

I am convinced that both submissions are clearly misconceived. It is a misconception of the scope and content of the jurisdiction and power of appellate Courts, and a regrettable misunderstanding of the need for the provision of the fundamental rights in the Constitution. Because of the over-riding and general nature of the proposition, I do not consider it necessary to state the facts of the case in *Dr. O G Sofekun v. Chief N O A Akinyemi & 3 Others (Consisting the Public Service Commission)* (1980) 5-7 SC 1 at page 20-21, where the learned Chief justice of the Federation, A Fatayi-Williams C J rejecting the submission that a defence of breach of Section 22(4) of the 1963 Constitution, now Section 33(4) of the 1979, fundamental Rights was not pleaded in the lower Court but now raised on appeal said:

> 'In any case, I take the view that, because it is so fundamental to the life, liberty and well-being of the individual, it should be possible for any person who complains about an alleged infringement of any of his Fundamental Rights as entrenched in our Constitution, to canvass the issue of such infringement at any stage of any Court proceedings, whether in the trial Court or on appeal'.

In my view, this dictum sufficiently answers the argument of appellants Counsel in grounds 2, 3 of the grounds of appeal. The suggestion that a person relying on the provisions of Fundamental Rights in his grounds of appeal, should abandon the appeal *pro tempore,* and resort to the procedure under the Fundamental Rights (Enforcement Procedure) Rules 1979 to conclusion before returning to the appeal sounds too preposterous and at variance with the ordinary course of litigation to deserve consideration.

Even if it is contended that in the appeal before us, the effective was the enforcement of the provisions of Section 32(6) which is different from raising the provisions in defence, I am unable to find any material difference. The provision is a right entrenched in the Constitution and available to the respondent which was infringed by the complainants; and the matter for determination is before a Court of competent jurisdiction. It is irrelevant whether or not the point came up for determination in the High Court in its original or appellate capacity. See *Dr. O G Sofekun v. Chief N O Akinyemi & Others* (supra). An important consideration in the exercise of jurisdiction is

whether the subject matter of the *lis* which is outside the jurisdiction of the Court is a matter fundamental for determination, or one incidental to the dispute before the Court. It has been decided in *Nwafia v. Ububa* (1966) NMLR 219, that were the subject matter is the substantive action and a fundamental issue before the court to be determined, the jurisdiction of the court is undoubtedly excluded. Where however, the matter outside the jurisdiction is merely incidental to what was to be decided then the jurisdiction of the court cannot be excluded.

In *Nwafia v. Ububa,* cited above, the respondent claimed in the High Court of Eastern Nigeria that he was entitled to occupy and possess the house known as Uno Obu and surrounding premises called Obu in accordance with customary law. It was agreed by the parties that in accordance with the customary law of Enugu Ukwu people to which the parties belong, the eldest surviving male child in the line of descent of the eldest male son was entitled as a matter of right to occupy and possess the property in dispute. It was contended by the respondent that this raised a matter of family status which by Section 14 of the High Court Law of Eastern Nigeria, was excluded from the original jurisdiction of the High Court, and is within the original jurisdiction of the Customary Courts by virtue of the Customary Courts Law, Section 19(a) of Eastern Nigeria. The trial learned High Court Judge rejected the submission and ruled that the High Court had jurisdiction. The ruling of the learned trial Judge contains the questions material to the point before us. He said -

> 'In my view, the first question I have to ask myself is whether the issue as to who is the Okpala or the first son of the plaintiff's father is the *cause or matter* before this court .... In my view the cause before me is declaration that the plaintiff is entitled to possession of the Obu and the Ilo Obu according to the Native Law and custom of the parties.
>
> It would be a different thing if the Section 13 had included the words 'which raised an issue' between the words 'in any cause or matter' and the words 'relating', *because the declaration which is sought by the plaintiff raises an* issue as to who is the 'Okpala' or the first son and this issue *relates* to family status. In my view therefore the omission of the words 'which raises an issues in Section 13 *makes it clear that although the court has to deal with an issues relating* to family status or inheritance in order to arrive at a decision in the cause or matter before it, that does not oust the jurisdiction of the court.'

In allowing the appeal, and reversing the views of the learned trial Judge Idigbe JSC reading the judgment of the Supreme Court said at page 222 -

> 'The italic words in the ruling of the learned trial judge set out above undoubtedly recognises the fact that an issue relating to family status arises in the case in hand; and it is in our view a fundamental (not incidental) issue which must be resolved by the court before it can adjudicate on the claim before it.'

This case supports the proposition that where the issue to be decided by the case before the court is fundamental to the determination of the case before it and subject matter of the issue is excluded from the jurisdiction of the court, the jurisdiction of the court is ousted. However, where the subject matter is merely incidental, the jurisdiction of the court is not ousted.

Applying this proposition to the case before us, subject matter fundamental to the determination of the appeal before the High Court was not the question of compensation and apology under Section 32(6) of the Constitution, 1979 but whether the conviction of the appellant was lawful. The subject matter of compensation and apology was merely incidental, and in my opinion the High Court had jurisdiction.

Finally, it was submitted that the decision relating to compensation and the order for public apology was not based on any evidence. On the facts before us which are clearly stated in the record pf proceedings as to what transpired in the High Court on appeal, it is fairly difficult to conceive of such a criticism of the judgment as valid. As I have pointed out earlier that the state counsel representing the appellants has a general authority to conduct the case of his client.

In Halsbury's *Laws of England,* (3rd Edition) Vol. 3, at page 52, paragraph 76, the following statement of the law appears -

> 'The statements of counsel, if made on the trial of an action or in the course of any interlocutory proceedings in the presence of the client or his Solicitor or someone authorised to represent the Solicitor, and not repudiated at the time, bind the client, and may be used as evidence against him.

This statement has the support of the dictum of Burrough J in *Colledge v. Horn* (1825) 3 Bng 119 at page 122. In *H Clark Ltd v. Wilkinson* (1965) 1 All ER 934, Lord Denning MR, observed that the statement was too wide, pointing out that an admission made by counsel in an interlocutory

proceeding could be withdrawn. In the same case in a separate judgment, Salmon LJ at page 937 stated what is now generally regarded as the true position. He said -

> 'No doubt a statement made by counsel, just like a statement made by the client, if acted on by other side to their prejudice, cannot be withdrawn. This is because an estoppel would then arise. Further counsel is the ostensible agent of his client to make an agreement during the course of a trial settling the case. If he does so, his client is bound by the agreement, just as anyone is bound by an agreement made on his behalf by another who is ostensible his agent to make the agreement.'

Hence, the agreement of Mr. Alkali that his client the Bade Local Government should be made to pay substantial compensation and render public apology to the respondent, was made on behalf of the Bade Local Government, and they are clearly bound. In the circumstances, I do not think it was necessary for the court to look for any evidence *aliunde* in support of the order made on the agreement of the parties. Ground 4 of the grounds of appeal therefore fails.

I have dealt with the nature of consent orders, and as applicable to the appeal before us. I do not consider it relevant to discuss in depth the submission whether a party to a consent order can appeal as to part of it. There is no doubt that the authorities support the view that where there is fraud or a mistake as to the order made, it could be set aside on proof of such fraud or mistake. See *Ainsworth v. Wilding* (1896) 1 Ch. 673. It is irrelevant whether the fraud or mistake is as to the whole or part of the order made.

In view of what I have said above, and the fact that all the grounds of appeal have failed, I hereby dismiss the appeal of the appellants.

Appellant shall pay to respondent the sum of ₦300 as costs in respect of this appeal.

A. B. WALI, JCA: I have been privileged to read in advance, the judgment of my learned brother Karibi-Whyte, JCA and which has just been read on his behalf by Maidama JCA and to say that I agree with the elaborate reasonings and the conclusions arrived at.

The question for the award of compensation and public apology is not the substantive case before the learned judges of the High Court sitting on appeal but is merely incidental to the substantive matter, and since the

High Court is conferred with the jurisdiction to enforce such rights, it is immaterial whether in a situation like this one, such a High Court is sitting in its original or appellate jurisdiction. The purpose of Section 32(6) of the Constitution is both to compensate 'the person who is unlawfully arrested or detained' by 'the appropriate authority or person' to make 'public apology' to that person.

Having nothing more to add to what was said in the leading judgment I shall dismiss the appeal and affirm the award and order made by Borno High Court. The appellant will pay cost of this appeal assessed at ₦300.00

U. MAIDAMA, JCA: I am in complete agreement with the views expressed in the judgment of my learned brother Karibi-Whyte, JCA which has just been read. I agree that there is no merit in this appeal and it is hereby dismissed with ₦300.00 costs.

EXPERIENTIAL QUESTIONS

EXPERIENTIAL QUESTIONS

1. Assess the recently upgraded Fundamental Rights (Enforcement Procedure) Rules 2009 and comment on its significance and likely area for improvements.

2. National Human Rights Commission has been described as the crusader of the common man in the fight against injustice: Highlight its jurisdiction, achievements, limitations and restrictions if any as it affects the common man.

3. Order. 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009 provides: "An Application for the Enforcement of the Fundamental Right shall not be affected by any limitation statutes whatsoever". In the light of limitations of actions generally, comment on the significance of the above rule.

4. The African Charter on Human Rights as envisaged by the African Community has embedded in its enactment; aspirations, purpose and correction of perceived anomalies in the human relations. Comment on these aspirations and reasons behind the enactment of the Charter.

5. Consider the following cases and discuss how they have aided the development and repositioning of the Fundamental Rights in the country:

   Abacha v Gani Fawehinmi
   Komolafe v SSS
   Olisa Agbakoba v SSS

6. Inspite of the Constitutional guarantee of freedom from discrimination on grounds of sex (section 42, 1999 Constitution), it is a fact that women in Nigeria are still substantially discriminated against so that it can be said the freedom is more of a mirage to them.

   Discuss with the aid of illustrations from practical life experiences, legislations, policies and judicial decisions.

7. "NGOs have a significant role to play in the advancement of human rights".
   Examine some of the ways NGOs encourage the enforcement of human rights standards in Nigeria and comment on some of the difficulties they encounter.

8. Assess the Constitutional right to freedom of thought, conscience and religion and comment on the scope of enjoyment of this right by Nigerians within Nigeria.

9. Argue a case for a Constitutional amendment to the free speech provisions which would enhance the role of the press in a democrati society under the 1999 Constitution.

10. Bankole is a night guard working in a high density area of Lagos. During the night a thief is accosted by the local vigilante group and lynched in front of the house which Bankole is guarding. Bankole has now been arrested and detained for two years on suspicion of murder of the alleged thief.
His relatives have approached you to file for bail on his behalf, *argue a case for Bankole's bail.*

Dr. Mark is President of the Nigerian Human Rights League (NHRL). On his way to attend a conference in Copenhagen, he is arrested by the State Security Services (SSS) at the Airport. Mark passport is seized and he is taken to be detained at the headquarters of the SSS. In detention, Mark is chained hand and feet and made to lie in a pool of dirty, slimy water. He is later charged before a Special Task Force with "embarrassing the life President of Nigeria". The Task Force is composed of three members of the Police Force with Inspector Damage as the chairman. The proceedings of the Task Force are held in camera: Dr. Mark is refused legal representation on the grounds that lawyers will unduly protract the trial with technicalities. When Dr. Mark pointed out that there is no offence like embarrassing the life President of Nigeria, the Government hurriedly sent a bill to that effect to the National Assembly and backdated it by one year. It is now fifteen months since the Task Force concluded its hearing and it is yet to deliver its judgement. Mrs. Mark has approached you for advice on the human rights implication of her husband's travails. *Advise her bearing in mind that Nigeria operates a democratic constitution.*

11. Giving the high level of corruption in high places, how far can the anti-corruption agencies go without breaching the human right provisions under the 1999 Constitution while prosecuting the war against corrupt officials.

12. If a right is a privilege granted by Government to an individual how far can it then be said that there is fundamental human right?

13. "The State must kill to survive" *Discuss* this topic in relation to fundamental human right.

14. Inspite of the noise by the United States of America, on human right and freedom, comment on their role in keeping detention camps outside the US under the cover of war against terror.

15. Is there anything fundamental in human rights?


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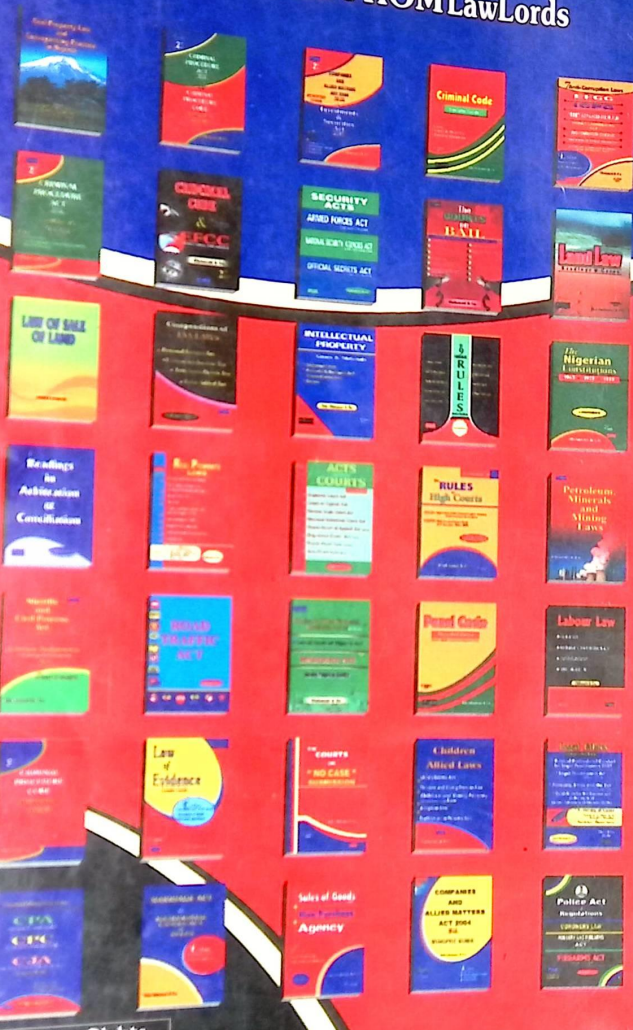

ISBN 978-978-48749-8-0

LawLords Publications