

THE ROLE OF LAWYERS

IN

THE OBSERVANCE OF HUMAN RIGHTS

*THE 13TH ADVANCED COURSE
IN
PRACTICE AND PROCEDURE,
NIGERIAN INSTITUTE OF
ADVANCED LEGAL STUDIES,
AKOKA, LAGOS.*

*SUNDAY, MAY 30, TO
WEDNESDAY, JUNE 23, 1993*

BY:

**OLISA AGBAKOBA
CIVIL LIBERTIES ORGANISATION (CLO)
NO. 24, MBONU OJIKE STREET,
OFF ALHAJI MASHA ROAD,
OFF AYINDE GIWA STREET,
SURULERE, LAGOS, NIGERIA**

THE ROLE OF LAWYERS

IN THE OBSERVANCE OF HUMAN RIGHTS

INTRODUCTION:

Human rights, as we know them today, assumed formidable dimensions in the post-World War II years, catalysed by the desire of peoples and nations to redefine, reassert and restore the intrinsic worth and dignity of man after the bitter ravages and savagery of that War. This desire found expression in concrete terms on December 10, 1948 when the General Assembly of the United Nations Organisation (UNO) adopted the Universal Declaration of Human Rights.

However, the philosophical foundations of human rights are traceable to the Natural Law Theories of the early times¹. In their view, Nature endowed man with certain rights which protect and preserve the sacredness of the human person as inviolable, equal to his fellow man, free and independent. The Natural Law Theory emphasizes the universal nature of the rights of man. As NIALL MACDERMOTT puts it:

1. See generally OSITA EZE: **HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS**. (Nigerian Institute of International Affairs, Lagos, in co-operation with Macmillian Nigeria Publishers Limited, 1984). ASHILD SAMNOY: **HUMAN RIGHTS AS INTERNATIONAL CONSENSUS: THE MAKING OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**. (Thesis for the Candidate of Philosophy Degree, Department of History, University of Bergen; May, 1990).

*"Human rights are part of the common heritage of all mankind without discrimination on grounds of race, sex, religious or other differences. These rights, common to all mankind, have a long history, many of them finding their origin in Religious teachings. But now, in our lifetime, they have been formulated more fully than ever before and agreed to by all peoples from all parts of the world."*²

This viewpoint ultimately informed the evolution of the Civil and Political Rights which essentially were conceptualised as checks on the abuse of State power. These rights include the rights to privacy, movement, personal liberty, freedoms of thought, conscience and religion, equality before the Law, and freedom of association. These fundamental rights have been enthroned far above other Laws of the land and superintendent over the State machineries. According to KAYODE ESO, JSC, in RANSOME KUTI case (supra):

2. NIALL MACDERMOTT: Opening Address to the International Conference on Human Rights Education in Rural Environments, Lagos, Nigeria, 1985, Page 10. For other contributions along this line, see CHUKWUDIFU OPUTA: HUMAN RIGHTS IN THE POLITICAL AND LEGAL CULTURE OF NIGERIA, at the Second Idigbe Memorial Lectures, 1986, Page 45. CHUKWUNWEIKE IDIGBE: FUNDAMENTAL RIGHTS PROVISIONS OF THE CONSTITUTION, at the All Nigerian Judges Conference Papers, 1982, (London, Sweet & Maxwell, 1983) 41. RANSOME KUTI vs ATTORNEY GENERAL OF THE FEDERATION [1985] 2 NWLR [PART 6] 211., M. CRANSTON: "HUMAN RIGHTS TODAY", quoted from A. J. MITRE: "SHOULD WE HAVE A BILL OF RIGHTS?" [1977] 40 MLR 389 AT 392.

"A fundamental right is a right which stands above the ordinary Laws of the land and which is antecedent to the political society. It is a precondition to a civilised existence."³

However, Natural Law, as fountain of fundamental rights, has left the human rights theoretical and rhetorical doctrines. Over the years, owing to agitations for more relevant doctrines of human rights beyond the prescriptions of the Natural Law school, instigated by the tumultuous socio-political dislocation that accompanied the Industrial Revolution, the post-World War II Decolonisation Campaigns and the consequent clamour for an equitable distribution of the goods of social existence, human rights jurisprudence has undergone tremendous evolution leading to the emergence of what are referred to as economic, social and cultural rights, or the second generation human rights which have now assumed prominence in International Conventions such as the International Convention on Economic, Social and Cultural Rights; the African Charter on Human and Peoples Rights; and also Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended). The rights which come under this rubric include the right to livelihood, and to work under just and favourable conditions; the right to form and join Trade Unions; the right to social security; the right to adequate standard of living including food, shelter, clothing and leisure; the right to education; the right of the disempowered, marginalised and minority groups to affirmative action; and the right to adequate physical and mental health.

3.

At Page 229.

JUSTICE P. N. BHAGWATTI of the Indian Supreme Court, in the famous case of **MINERVA MILLS⁴**, commented on the importance of these rights as follows:

"To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured."

While Justice Bhagwatti's audience may have been the Indian society, we submit that his words are well suited to the Nigerian situation. Also emerging is what **SAMMY ADELMAN** refers to as the "third generation" rights:

4.

[1980] AIR [SC]

".....prompted by demands of the Third World in response to Colonialism and Imperialism, global interdependence and the changing nature of the world economy. "Such" rights include the maintenance of peace, the protection of the environment, and the encouragement of development."⁵

Many of the second and third generation human rights are not enforceable in the conventional sense. Nevertheless, this should not force the conclusion that they are any less human rights than those species of rights which are conventionally, legally and Constitutionally enforceable even if the situs of the struggle for the observance of these rights lies more with popular vigilance and less with Court-room procedures.

However, human rights, no matter the category or generation, are meaningful only to the extent of their enforceability. Therefore, though the bedrock of winning protection and observance of human rights is popular social action, their enforcement, more or less, lie on the legal processes and machineries. However, legal enforceability of human rights depends on their embodiment in a justiceable bills of right.

It is apposite at this juncture to inquire into the role of Lawyers in the domain of human rights whether they be those rights enforceable by judicial authority or social action. JUSTICE NNAEMEKA-AGU, JSC (as he then was) aptly captioned the role of Lawyers in Nigeria in the protection of human rights under Nigerian Constitutional framework, when he said:

5. SAMMY ADELMAN: THE RIGHT TO DEVELOPMENT: PROBLEMS AND POTENTIALS. (Human Rights Unit Occasional Paper, Human Rights in Development Series, Commonwealth Secretariat, November, 1989).

*".....it is the Lawyer in various capacities who can see that human rights provisions in the Constitution and those instruments do not simply become dead letters. The real challenge to Nigerian Lawyers is that the legal infrastructures for flourishing human rights principles and the machinery for their enforcement are clearly in place."*⁶Nigerian Bar Association.

IDENTIFYING THE LAWYER:

6. "THE ROLE OF LAWYERS IN THE PROTECTION AND ADVANCEMENT OF HUMAN RIGHTS" - A Paper presented at Law Week Celebrations, 1992 of the Imo State Branch of the

A detailed investigation and inquiry into the identity of the Lawyer is beyond the contemplation of this Paper but suffice it to mention that he is a professional who is variously referred to as "Counsel", "Advocate", "Legal Practitioner", "Attorney", "Barrister", "Solicitor" etc. The Legal Practitioners Act⁷ defines a "Legal Practitioner" as:

"A person entitled in accordance with the provisions of this Act to practice as Barrister or as a Barrister and Solicitor whether generally or for the purposes of any particular office or proceedings."

A Lawyer need not be engaged in the familiar practice of Law in terms of Court-room advocacy. He may also be productively engaged in several other spheres of human endeavour. However, the Court-room Advocate, Judges inclusive, are readily the chief image-makers of the profession and, therefore, bear a proportionately heavy burden in the context of the human rights struggle.

For our purposes, we would classify Lawyers into four main groups, namely: Lawyers on the Bench, Lawyers at the Bar, Lawyers in Public Administration, and Lawyers in the Academia. The relationship between them was aptly illustrated by OHONBANMU, thus:

7.

CAP.207 LAWS OF THE FEDERATION OF NIGERIA, 1990, S.23

*"The Law Teacher makes the Lawyer who later becomes the Judge who outstrips his two brothers because of the carefully protected eminence to which society has elevated him."*⁸

THE LEGAL PRACTITIONER AND HUMAN RIGHTS:

The "Legal Practitioner" is used in this context to refer to all Lawyers, either in Private Practice or in Public Service, other than the Judges and those in the Academia. They constitute a numerical majority in the profession and are it's Torch Bearers in terms of affluence and public visibility.

_Violation or threatened violation of mostly the civil and political rights are usually ventilated in the Courts. This task falls almost exclusively on the Legal Practitioner who, having regard to his professional calling and training, is entrusted by society with this very fundamental duty. In this capacity, he may represent either the State or a private individual or group. On whatever side of the divide he finds himself, he is obligated to further the cause of human rights. It is only natural that a Legal Practitioner who has rendered services to a client is a entitled to his professional charges. This assumes that the client has the capacity to pay fees and other incidental expenses. But in human rights practice, we deal with:

8.

O. O. OHONBANMU: "THE RULE OF LAW IN NIGERIA" in T. O. ELIAS' edition.

*"People who are poor and ignorant and who may suffer unwarranted invasions of their rights without realising it, or, realising it, are powerless to defend their rights."*⁹

Thus, the practice of Human Rights Law involves, largely, rendering humanitarian service. In such instances, the demands of justice should weigh more heavily on the mind of the Lawyer than the expectation of pecuniary benefits. Unfortunately, most Legal Practitioners are hardly persuaded by such exhortations, an inclination that is sustained by the Government's negative attitude to human rights (Advocates).

Until the emergence, recently, of organised human rights groups, human rights advocacy in Nigeria was conducted by few Lawyers who were regarded as constituting the "NUISANCE BAR". Foremost among them are MR. ALAO AKA-BASHORUN and CHIEF GANI FAWEHINMI. However, evidence in Nigeria and other jurisdictions attest conclusively to the fact that human rights work is better done by concerted efforts enjoying the capacious coverage of corporate existence.

In addition to membership of human rights organisations, other strategies for concerted action in this context include solidarity (Court) appearances networking with concerned international Governmental and non-Governmental bodies.

Another useful strategy which has not yet been embraced by human rights Advocates in Nigeria is the medium of the AMICUS BRIEF. The Amicus Brief, especially in appellate proceedings, provides a most useful weapon for concerned Lawyers to articulate their professional viewpoint.

Perhaps the most fruitful means of Court-room Advocacy for human rights is Public Interest Litigation (PIL). PIL consists in using litigation to articulate the views and demands of the poor and organised sections of the community for justice and fair play. At present, our stringent and highly individualistic rules of Locus Standi stand in the way of the development of PIL jurisprudence in Nigeria. If the Law is to become the situs of the

⁹.

REPORT OF THE AFRICAN CONFERENCE ON THE RULE OF LAW,
GENERAL (1961) P. 179.

struggle for social change in Nigeria, the concept of Locus Standi needs to be drastically re-examined. Herein also lies the necessity for Legal Aid for the benefit of indigent victims of human rights abuses. In this wise, mention may be made of Section 42(4)(b) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended) which stipulates that:

"The National Assembly shall make provisions for the rendering of financial assistance to any indigent citizen of Nigeria where his rights under Chapter 4 have been infringed or with a view to enabling him to engage the services of a Legal Practitioner to prosecute his claim."

It is sad to note that since the enactment of the Constitution of the Federal Republic of Nigeria, 1979, successive Governments have failed to make Regulations giving effect to that Section. In consequence and, as a result of wide-spread poverty and ignorance, most people now look up to God for redress whenever their guaranteed rights are unjustifiably curtailed or infringed.

Although the Constitution of Nigeria enjoins expeditious disposal of cases involving human rights violations, practice speaks differently. A major source of delay in the disposal of such matters is the lackadaisical and, sometimes, unprofessional attitude of some Counsel from the Ministries of Justice who are known to inform the Court that they have instructions to ask for a "fairly long adjournment" on flimsy and, sometimes, vexatious grounds. It is equally lamentable to hear very senior members of the Bar, in the service of the State, inform the Court, (as happened recently in a Lagos High Court), that:

".....Government frowns at the language of the Court..."

This attitude provides overwhelming evidence of the long-held view that Lawyers in the Ministry "co-operate" with Government officials to frustrate Court Orders, or, at any rate, slow down the process of human rights litigation.

Concerning the formulation and drafting of Legislation, Lawyers in the Ministries of Justice should live up to their professional callings by advising against the promulgation of Laws which tend to make a mockery of the rights and freedoms of the people. They should be bold enough to throw in the towel when the Politicians, be they Civilians or Soldiers, insist on inhuman Laws inundated with privative clauses.

Lawyers should not be content merely to go to Court to argue cases involving (perceived) violations of rights. They should be actively engaged in mass enlightenment and mobilisation with a view to sensitising the generality of the people towards the realisation of the objectives of human rights. There should also be concerted efforts by Lawyers to press, through the appropriate channels, for the elevation of the socio-economic objectives contained in Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended)¹⁰ to

justiceable rights which, to all intents and purposes, are more meaningful to our people than the class of Civil and Political rights which make little sense to the man whose lot is starvation or the University graduate who has become disillusioned and frustrated by the fruitlessness of his search for non-existent jobs. Encapsulating the duty of the Legal Practitioner to the society, Honourable Justice A. Nnamani said:

¹⁰. Indeed, the view that Chapter 2 of the Constitution is not justiceable appears untenable, for Section 6(6)(c) of the 1979 Constitution, which is relied upon for this view, deals, not with the "jurisdiction" of the Courts, but with "judicial powers". That Section does not oust the "jurisdiction" of the Courts to inquire into Chapter 2 issues. It only says that "judicial powers" shall not be exercisable in respect of that Chapter. It is, therefore, submitted that Declaratory Judgments can be sought and obtained in respect of Chapter 2.

"..... a courageous, honest, industrious, vigilant, independent, knowledgeable Bar is a necessary instrument for the protection of the rights of the society. Such protection is not only concerned with representation in Court in matters in which one right or the other has been violated or is threatened, but extends to giving legal advice which may either warn the client against embarking on a course of action which will bring him into conflict with the Law and threaten his rights, or may assist him in taking such steps as are necessary to protect his rights from violation, or to extract remedies where they have been infringed."¹¹

He further suggests that:

"Members of the Bar can, in my view, do this by setting up Legal Clinics and Legal Aid Centres. Of course, the Bar has the other duty of assisting the Courts in reaching just decisions in those matters in which fundamental rights have been infringed."

If the Legal Practitioner is to effectively and positively influence the development of human rights, there is an urgent need to review the Rules of Professional Ethics, particularly Rule 34 of

the Rules of Professional Conduct in the Legal Profession (in Nigeria) which provides, inter-alia:

"A member of the Bar may not:

- (d) answer questions on legal subjects with press or any periodical or in a wireless or television broadcast where his name or initials are directly or indirectly disclosed or likely to be disclosed;**

11. AUGUSTINE NNAMANI: "LAW AND THE LARGER SOCIETY" in THE LAWYERS JOURNAL, VOLUME 1, NO. 2, 1990, PAGE 9.

- (e) *take steps to procure the publication of his photographs as a member of the Bar in the press or any periodical.*¹²

It is my opinion that these and similar obsolete, otiose and anachronistic provisions should be done away with as they serve to hamper the Lawyer in his role as a catalyst in cause of human rights. Indeed, these Rules are of doubtful constitutionality in the light of Sections 35 and 36 of Constitution of the Federal Republic of Nigeria, 1979 (as amended). Section 35 guarantees, unto every Nigerian, a right to freedom of thought, conscience and religion, while Section 36(1) provides that:

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

On any view of the matter, it is my view that Rule 34 of the Rules of Professional Conduct cannot stand the test of these Constitutional standards.

LAWYERS IN PUBLIC ADMINISTRATION:

While the Court-room serves to ventilate proven cases of human rights violations, responsibility for the observance of these rights and even the Court Orders, lies with the Executive arm of Government. It is not in doubt that the Legal Profession boasts of more Public Administrators and Political Office Holders than any other profession. Lawyers are known to have been elected into the various Houses of the Legislature in both the First and Second Republics. In the Third Republic, Lawyers are far more in the forefront in the National Assembly and will likely play key roles in the incoming Civilian Administration.

Political giants like V. I. Lenin, Fidel Castro, Nelson Mandela, and our own Chief Obafemi Awolowo, are examples of Lawyers whose achievements in Public Service are inimitable and profound. However, this calibre of Lawyers is in short supply everywhere. In Nigeria, Lawyers were, regrettably, in some cases, direct participants in the rape of Democracy and the Rule of Law which characterised the politics of the 1st and 2nd Republics and, in other cases, were guilty of cold complicity with Politicians who ravaged the country

12.

RULES OF PROFESSIONAL CONDUCT IN THE LEGAL PROFESSION, 1980.

during those critical periods of our history. ODESANYA has this to say about Lawyers in public office:

*"Before the coup d'etat of 15th January, 1966, this country had a number of Lawyers in the Federal Cabinet holding important portfolios. Two were Regional Prime Ministers and one a Regional Deputy Premier. Many Regional Ministers were recruited from the profession. Of course, all the Federal and Regional Ministers of Justice were members of the profession. Lawyers served in many important public corporations all over the country. Unfortunately, some of them did considerable damage to the public image of the profession. They showed insufficient wisdom and woefully inadequate ethical and professional standards. Their performance certainly did not inspire confidence in the profession. The profession almost forfeited the right to be regarded by the people as the personification of all that is socially desirable and progressive."*¹³

The same can also be said of the 2nd Republic.

The Lawyer in public office may do well, in keeping with the confidence reposed in him by the public, perhaps more than his colleagues in other professions, to initiate, whether in Parliament or through appropriate Governmental channels, people-oriented policies which will further the cause of human rights. PROFESSOR CHARLES REICH wraps up the Lawyers' duties in these words:

13.

M. A. ODESANYA: "THE ROLE OF THE LAWYER IN A DEVELOPING SOCIETY" in Proceedings of the Nigerian Association of Law Teachers (NALT), March, 1967, Page 22.

*"It should range from Criminal Law to public housing; social welfare; unemployment; problem of the mentally ill; urban, town, and country planning, both local and national; civil rights, civil liberties; all forms of protest movements, and International Laws. In their private capacity, they should be available to help all those individuals and groups who come in contact with the Law. They should represent the various interest groups, constituencies and minorities in society - to help them develop points of view, speak for them and interpret the world to them."*¹⁴

THE LAW TEACHERS:

The role of Law Teachers in the promotion and observance of human rights can only be trivialised at our own peril. As a Teacher and Researcher, he occupies a unique position which enables him to chart and influence not only the opinions and perspectives of his students but the society at large. This he could do through publications in Books and learned Journals, the mass media, seminars, the class-room and, sometimes, the Court-room. His role at the Court-room is enhanced by the repeal of the Law restricting Law Teachers from private legal practice.

The Lawyer is a product of his society. His views and perception of the problems of the society are largely influenced by the content of his training. The curricula of most Law Faculties in this part of the world are unsuited to the demands of human rights jurisprudence. Very few Universities run

distinct under-graduate or graduate courses in human rights. The subject of human rights at best competes for mention with other items in the Constitutional Law curriculum. In the scheme of curriculum priorities generally, human rights in the dynamics of social engineering is postponed to such irrelevancies as the Rule Against Perpetuities. Thus, the Law Curriculum is yet to be made amenable to the exigencies and demands of the technological age and the jurisprudence of development. Our Law Teachers have a mammoth task in this direction. It behoves them to fashion out a training programme which equip the Law student with the relevant knowledge and materials needed to cope with the demands of the present day scientific world, particularly in the area of Human Rights Law and Enforcement (Practice). In this regard, STONE rightly observes that:

14.

CHARLES N. REICH: "TOWARDS THE HUMANISTIC STUDY OF LAW"
(1964-65) 74 YALE L. J. 1402.

*"..... their enforcement, their scholarly resources, their growing influence with the Bar, all indicate plainly enough that it is they who must take the more active part in solving the problems which weigh upon our profession. They, as can no others, may assemble and portray the facts so that all may see the manner in which the Bar is performing it's functions and, portraying them, stir the latent idealism of Lawyers to carry on."*¹⁵

The need to formulate and pursue relevant legal curriculum and adapt the training of Lawyers to suit our local needs was emphasised by DR. KWAME NKRUMAH, when he said:

15. See generally, HARLAN F. STONE: "THE PUBLIC INFLUENCE OF THE BAR" (1934) 48 Harv. L. Rev.

*"Africa needs many Lawyers always, provided, and, this is an essential proviso, that they are trained for the need of their people. They are needed not only on the Bench and at the Bar. They are needed in every sphere of Government, whether national or local. They are needed equally in industry and commerce, and our plans for State industrial and agricultural development will require the services, among others, of Lawyers. The subjects taught and the methods of teaching should, therefore, be positively directed towards training Lawyers to serve their communities."*¹⁶

THE BAR ASSOCIATION:

The impasse in the Legal Profession's Body which reached its peak at the 1992 Bi-Annual Conference in Port Harcourt, Rivers State, and which culminated into the promulgation of Legal Practitioners (Amendment) Decree No. 21 of 1993 that purportedly vests the Body of Benchers with the power to control the Bar has thrown into confusion the position and role of the Nigerian Bar Association. Ordinarily, The Bar Association has the foremost task of regulating the standard of professional conduct among Lawyers in Nigeria. Apart from this role, the Association should be seen to play an influential role in the defence of human rights, and it is my humble submission that the Bar Association is the Body most properly advantaged to protect human rights. Being an aggregation of Lawyers, its responsibility surpasses those ascribed to an individual Lawyer. Human rights are best promoted and defended by collective and concerted action. The Bar Association can be very effective if its Human Rights Committee which, for now, is moribund and bereft of the "breath of life" is active. Similarly, contrary to the noble provisions of its Constitution, [Article 2(d)], it has no machinery for rendering legal aid to indigent persons.

Generally, the Nigerian Bar Association's performance in uplifting human rights consciousness and observance has become a source of worry not just among Lawyers but also the general public. However, there are few instances when we witnessed an upsurge of activism of the Bar; first, under the virile leadership of MR. ALAO AKA-BASHORUN, particularly the nation-wide boycott of the Courts by Lawyers to protest the Gongola State Governor's refusal to obey an Order of Court and, second, between May 19

16.

Quoted by NNAMANI, JSC, *op cit* P. 10. See also "THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES" (1985) 16 C.I.J.L. Bulletin, 4 J at 46.

to July 29, 1992, when five human rights activists including two Lawyers, Chief Gani Fawehinmi and Mr. Femi Falana, were arrested, detained and later arraigned before a Magistrate Court at Gwagwalada in the Federal Capital Territory and the Bar Association and the Bench rose up in solidarity with the battle for their release and enthronement of the Rule of Law.

Save for these momentary intervals and short-lived solidarity, the Bar Association has consistently maintained a conspiratorial silence in matters affecting the welfare of the people. There is now a reasonable fear that the NBA has gone the way of other voices of dissent in the present dispensation, a fear made even more potent and real by the donation of ten million Naira (10,000,000:00) to the NBA by the Federal Government representing Government's appreciation of the "non-confrontational tenure" of Charles Idehen.

There is justifiably an apprehension about the withering independence and integrity of the NBA. A learned commentator¹⁷, had observed that:

"For now, the general impression is that the Nigerian Bar is a member of this Government's fraternity. No doubt the Bar is perfectly entitled to choose from the options open to it for action, and the issue whether it keep fine relations with the Government is also within it's discretion. But really, we should ask ourselves whether it is sound policy to spare the Government some hard knocks when some of it's officers derogate from and ultimately denigrate the rights of citizens, the inviolability of sacred institutions, and the Rule of Law. Should Government officials continue to comfort themselves with the thought that their rough shod drive over their subjects rights will only be discussed at cocktails and amidst the clinking of glasses, muttering and jests without non of the more vitriolic public denunciations and programmes of popular resistance? Should the Bar not assume a much more positive drive in defence of their society?"

He cautions that:

"These fears must be allayed for the Bar to regain a confidence which cost it so much to acquire, because, in the final analysis, Governments come

17.

CHUKWUMA OTTE: "THE BAR AND THE GOVERNMENT", Sunday Guardian, May 19, 1991, Page A9.

and leave, but the governed remain and the eventual judgment that will be passed on the relevance of the Bar as well as any other professional union is by the people for whom they exist to defend and protect."

There is no more realisation of the fear of withering independence of the Bar than the encroachment of Government interest in the election of National Officers of the Bar Association at the 1992 Port Harcourt National Bi-Annual Conference. Need I say that the Conference ended in chaos? The last and humiliating blow on the Century-old Association came with the promulgation of Decree No. 21 of 1993. There is urgent need to restore the confidence, integrity, unity, and independence of the Nigerian Bar Association. As long as the Bar Association remains in a crisis-ridden state and beclouded with uncertainty, so long will effective collective action for the defence and protection of human rights by the Bar be illusory. Human rights groups, though crippled by incessant Executive clampdown and harrassment and financial incapacity due to paucity of income, are the only organised bodies left for defence of human rights in Nigeria.

An organised, articulate and more forceful Bar Association can play a more concrete role in upholding and protecting human rights and welfare of citizens. This is necessary if institutional democracy must succeed in Nigeria.

Apart from collective action under the Bar Association, individual Lawyers can play active roles in protecting human rights. Litigating to redress violations, or restrain threats of violations of human rights of citizens close to them, especially of indigent ones, is a good way to start. Lawyers will do well to avoid technicalities and "delay tactics" because human rights cases deserve priority. Public Lawyers ought to bear this in mind.

THE JUDGE AND HUMAN RIGHTS:

In Nigeria, as in other Common Law countries, Judges occupy a unique position of authority. This authority emanates from wide judicial powers conferred on them by Law. Section 6 of the Constitution of the Federal Republic of Nigeria, 1979 [which is saved by the Constitution (Suspension and Modification) Decree No. 1 of 1984], vests the Judicial powers of the Federation in the Courts and extends "*to all matters between persons or between Governments 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" and by Section 236 of the same Constitution, the High Court has unlimited original jurisdiction over all matters brought properly before it.

The Judge's duty is to defend the Constitution and uphold the Rule of Law to which we all profess to subscribe. This audience is very familiar with the concept of Rule of Law.¹⁸

Resolution of conflicts between individuals, *interse*, and individuals and Governments are the cardinal functions of the Judge. In him also vests the power to interpret the Constitution and other Laws of the land. In the words of HIS EXCELLENCY, JUDGE TASLIM ELIAS:

18.

See GOVERNOR OF LAGOS STATE vs OJUKWU, [1986] 1 NWLR PART 18, PAGE 621.

"The Judge's task is that of an interpreter of the Law. In the dynamic process of interpretation, however, a Judge may modify or adapt existing norms in such a way as to make them apply to analogous situations to those hitherto contemplated, in other words, he applies the basic norms to new facts and situations as presented in litigation before him."¹⁹

19.

Quoted by NNAMANI, JSC, op cit Page 12.

This interpretative role of the Court as the watchdog of the Rule of Law and the rights of the people is the greatest weapon in the hands of the Judge, and he is expected to utilise it in such a manner as would best give effect to the intention of the Legislature in cases that come before him. In a dynamic society such as ours, Judges ought to give broad and progressive interpretations to Legislations and apply them relevantly to needs of the society particularly in situations where the fundamental human rights of a citizen have been, are being, or are likely to be infringed by consevative, limited and narrow interpretations of such Laws.²⁰

It is apposite at this juncture to consider the attitude of Judges in the task of giving meaning to Constitutionally entrenched rights and freedoms vis-a-vis legal instruments which derogate those rights. The general tendency in contemporary legal history is towards what has been termed a "generous approach" to the interpretation of fundamental rights. LORD DIPLOCK, in ATTORNEY GENERAL OF GAMBIA vs MOMODOU JOBE²¹, formulated this approach thus:

"a constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction."

20. See KAYODE ESO: "THE COURTS AS THE GUARDIAN OF THE CONSTITUTION." Paper presented at the All Nigerian Judges Conference, Abuja, 1988.

21. [1984] 1 AC 689.

Our own UDO UDOMA, JSC, (as he then was) held in NAFIU RABIU vs THE STATE²² that in the interpretation of the Constitution (which includes human rights provisions) the approach of all Courts should be that of liberalism.

JUSTICE NNAMANI had this to say on what should be attitude of the Court:

22.

[1980] 8-11 SC 130 AT 140.

"The dynamic and forward-looking interpretation is easier in the area of Constitutional interpretation. Indeed, most of the activism discernible in recent Supreme Court cases is mainly in the area of Constitutional Law. A Constitution is a political document and it would have been absurd if its provisions are not interpreted broadly, liberally, and in a way that keeps pace with the changing values of the society. It must be mentioned, even if only for emphasis, that there is nothing confrontational in activism. It aims at giving the Law a humane face. It is an interpretation that is forward-looking and progressive, ensuring that substantial justice is done between parties before the Court."²³

In this connection, mention may be made of the fact that some of our Judges have, in some cases, displayed immense courage and professional uprightness. A case in point is GLORIA MOWARIN vs THE NIGERIAN ARMY & OTHERS²⁴. In this case, HONOURABLE JUSTICE FRANCIS OWOBIYI of the Lagos

High Court declared the detention of the Applicant illegal and unconstitutional and quashed the Detention Order issued by the Vice President in purported exercise of power under the infamous State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), on the grounds that:

"Although Decree No. 24 of 1990 purports to assign to the Vice President the powers exercised by the former Chief of General Staff in Section 1 of Decree No. 2 of 1984 (as amended) as the time this was purported to be done, there was no Vice President. The situation here is anomalous and strange and I may add absurd. How could somebody perform the functions created for a post that was not in existence at the material time? It seems to me that Decree No. 24 of 1990 is a bad Legislation. It is a case of putting the cart before the horse. Counting the chickens, as it were, before they are hatched. And I will describe it as a Legislative absurdity."

24.

SUIT NO. M/348/90 OF 19TH FEBRUARY, 1991.

The Defendant appealed to the Court of Appeal and sought for an Order to stay execution of the Order of the High Court that the Applicant be released. The Court of Appeal unanimously refused the prayer for stay and held that, where a person's freedom has been deprived and an Order is made releasing the person from detention such Order or Decision cannot be stayed. The Court also reiterated the trite principle that where a party is in contempt of a Court Order, no Court can grant any Application in favour of such a contemptor as that would have the effect of legalising the contempt²⁵.

The case of MOWARIN vs THE NIGERIAN ARMY, both at the High Court and Court of Appeal, present a classic example of Judicial activism.

The Bench displayed historic courage between May - July, 1992 when some human rights activists were detained by the Federal Military Government. As a back-up to the solidarity mustered by the Bar, the Bench, especially the Lagos High Court, showed unprecedented boldness to safeguard the integrity and authority of the Judiciary and entronement of the Rule of Law.

In FEMI FALANA vs ATTORNEY GENERAL OF THE FEDERATION & 2 OTHERS²⁶, HONOURABLE JUSTICE A. A. AKA, of the Lagos High Court, ordered for the production of the Applicant from detention and that the Respondent should show cause why the Applicant should not be granted bail or released forthwith. The Respondents failed to comply with the Court Order and His Lordship, condemning such "wanton abuse of executive power" held that no citizen should be kept in custody at the pleasure of anyone in authority.

25. NIGERIAN ARMY vs MOWARIN [1992] 4 NWLR PART 235, 345. See also GOVERNOR OF LAGOS STATE vs OJUKWU [supra]; FIRST AFRICAN TRUST BANK LIMITED vs EZEGBU [1992] 9 NWLR PART 264, 132.

26. SUIT NO. M/288/92, JUDGMENT DELIVERED ON JUNE 8, 1992.

In DR. BEKO RANSOME KUTI vs THE ATTORNEY GENERAL OF THE FEDERATION²⁷ , Honourable Justice F. A. Owobiyi made similar bold pronouncements condemning unwarranted detention of citizens when he held that:

"Everything pertaining to deprivation of personal liberty of a subject must be strictly construed and must conform with the provisions of the Legislation."

²⁷. SUIT NO. M/287/92, Judgment delivered on July 1, 1992.

The Judgment of HONOURABLE JUSTICE A. F. ADEYINKA of the Lagos High Court in ATTORNEY GENERAL OF THE FEDERATION vs OGUNSEITAN & OTHERS²⁸ also deserves comment. The Attorney General of the Federation had sued the Bar Association to restrain it from boycotting the Courts in solidarity with the detained human rights activists. The Judge held that:

"I will not wait until my Order is disobeyed by the Federal Government before I protect the integrity of my Court and, indeed, of all Courts in Nigeria."

28. SUIT NO. LD/1799/92, Judgment delivered on July 2, 1992.

See also the Judgment of Honourable Justice M. O. ONALAJA in GANI FAWEHINMI vs PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA²⁹.

When the activists were arraigned before his Worship, MR. NWADA BALAMI, Chief Magistrate of Federal Capital Territory, sitting at Gwagwalada, in COMMISSIONER OF POLICE vs DR. BEKO RANSOME KUTI & 4 OTHERS³⁰, the Court granted bail to the Accused persons and, regarding the duty of the Bench in protecting the Rule of Law in Nigeria, His Worship held thus:

"I hold that the Rule of Law is higher than any body which must be upheld by the third arm of Government, the Judiciary."

The learned Magistrate further held that the mere reason that the purported investigation by the Police is still going on will not deprive him enforcing the rights of the Accused to their personal liberty.

Two significant improvements were made in these cases with respect to human rights litigations. First is that a Court can order a detaining authority to bring before it a person detained under a privative legislation and show cause why the person should not be released and, failure to comply with such Order, the Court can order the release of a such person. Second, that all papers and processes needed to be served on any Government official or agency including the Police, the State Security Service, the Armed Forces, can validly be served on the Office of the Attorney General. This second aspect has brought great relief to human rights Lawyers who have great difficulty serving processes on Security Agencies and senior Government officials.

29. SUIT NO. M/349/92, Judgment delivered on June 23, 1992.

30. CASE NO. GW/CMC/CR/151/92, Ruling delivered on June 29, 1992.

Another example of Judicial courage is the Ruling of LONGE, J., in MOHAMMED GARUBA & OTHERS vs LAGOS STATE ATTORNEY GENERAL & OTHERS³¹, popularly known as "12 Kids case". The Judge granted an Order restraining the Lagos State Government from executing the Applicants pending the hearing and determination of an Appeal filed against their

conviction. The learned trial Judge was right to wade through the privative clauses that were invoked by the State challenging the Judge's jurisdiction to hear the case at all.

In MADIKE vs THE STATE³², the Court of Appeal held that an Order of Detention under Decree No. 2 of 1984 (as amended) cannot preclude the Court from granting bail pending appeal to the Applicant under Section 29(1) of the Court of Appeal Act, 1976. This is obviously a courageous way of avoiding the ouster provisions of Decree No. 2 of 1984 (as amended) so as to enforce and protect Applicant's rights to bail.

It cannot too seriously be stressed or credibly be doubted that Judges, more than any other class of Lawyers, are bastions of fundamental rights and freedoms. And, in the hierarchy of Judges and the Judiciary, the Supreme Court has the onerous task to set the pace of development of human rights jurisprudence. This mantle of leadership thrust on the Supreme Court has been aggressively pursued in other countries, the foremost of which are India, Canada, and the United States of America. In the USA, for instance, the Supreme catalysed and kinitised the Civil Rights Movement and the struggle for racial equality. Similarly, in India, the Supreme Court has democratised access to the Courts by watering down the the rigours of Locus Standi through the medium of Public Interest Litigation. According to BHAGWATTI, J., in PEOPLES UNION FOR DEMOCRATIC RIGHTS vs THE UNION OF INDIA³³:

-
31. SUIT NO. ID/559M/90.
32. [1992] 8 NWLR PART 257, 85.
33. [1982] AIR [SC] 1473 AT 1477 - 1478.

"Public Interest Litigations, as we conceive it, is essentially a co-operative of collaborative efforts on the part of the Petitioner, the State or the public authority, and the Court, to secure observance of the Constitutional and legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them..... the State and public authority which is arrayed as a Respondent in Public Interest Litigation should in fact welcome it as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the concern of the State or the public authority. There is a misconception in the minds of some Lawyers, Journalists and men in public life that Public Interest Litigation is unnecessarily cluttering in the files of the Court and adding to the already staggering arrears of cases which are pending for long years, and it should not therefore be encouraged by the Court. This is, to our mind, a totally perverted view smacking of elitist and status quoist approach."

This is the spirit that has enabled the Indian Judiciary to brew a uniquely Indian jurisprudence completely weaned of alien inhibitions of the Common Law traditions and in which today, it is possible for a Court in India, exercising what has been described as Epistolean Jurisdiction to act on a Letter or Press reports and treat it as a Writ or petition.

In Nigeria, such a Proletarian approach to access to justice and the Court is foreclosed by the strict constructionist positivism of our Courts founded on the authority of ADESANYA vs THE PRESIDENT³⁴ which is relied on for the proposition that a general interest common to all members or some sections of the community, is not a litigable interest. This was despite the observation of then Chief Justice in his Concurring Judgment that:

"In the Nigerian context, it is better to allow a party to go to Court and to be heard than to refuse him access to our Courts. Non-access, to my mind, will stimulate the free-for-all in the Media."

34.

[1981] 2 NCLR 356.

However, the principle in ADESANYA case (supra), is being gradually relaxed. In ATTORNEY GENERAL OF KADUNA STATE vs HASSAN³⁵, the Court allowed a father to challenge the entry of Nolle Prosequi by the State Solicitor General on a charge against those standing trial for unlawfully killing his son. Also in FAWEHINMI vs AKILU & ANOTHER³⁶, the "floodgates" were thrown wider open in criminal cases on the premise that every Nigerian was his brother's keeper. Some of the learned Justices in FAWEHINMI case (supra) made it clear that they intended and were indeed changing the Law on Locus Standi. Yet a good number of Judges still feel that more could, and ought to be done with respect to Locus Standi on human rights cases.

Also in BADEJO vs MINISTRY OF EDUCATION & OTHERS³⁷ the Court of Appeal held that a person affected by an act which also affected the general public can complain of violation of his rights by such acts even though other persons affected do not complain. In ADEDIRAN vs INTERLAND TRANSPORT LIMITED³⁸ the Supreme Court hinted that it was ready to open up access to Courts by virtue of Section 6(6)(b) of the 1979 Constitution. KARIBI WHYTE, JSC, held at Page 180 that:

"The Constitution has vested the Court with the power for the determination of any question as to the civil rights and obligations between Government or authority and any person in Nigeria. See Section 6(6)(b). Accordingly, where the determination of civil rights and obligations of a person is in issue, any Law which imposes conditions that is inconsistent with the free and unrestrained exercise of that right is void to the extent of that inconsistency..... I think the high Constitutional policy involved in Section 6(6)(b) is the removal of the obstacles erected by Common Law requirements against individuals bringing actions before the Court against the Government and it's institutions."

35. [1985] 2 NWLR PART 8, 483.

36. [1989] 2 NWLR 122.

37. [1990] 4 NWLR PART 143, 254.

38. [1991] 9 NWLR PART 214, 155 AT 180.

The Court in this case held that the Common Law requirement of the consent of the Attorney General in public nuisance suits by private person is inapplicable in Nigeria being a restriction of Section 6(6)(b) of the 1979 Constitution.

It is only hoped that the Supreme Court will take the earliest opportunity to strike down the strict rule of Locus Standi in other areas of public Law. In fact, the Supreme Court should boldly and clearly overrule ADESANYA case so as to give full effect to the provisions of human rights under Chapter 4 of 1979 Constitution.

Another important area where some of our Judges have not fully optimised the potentials of their powers is in the interpretation of derogative provisions with particular emphasis on privative clauses. In spite of overwhelming and beckoning authorities to the contrary, some of our Judges have been regrettably impervious to all but what has been aptly described as the "*austerity of tabulated legalism*". They have preferred to adopt a narrow and restrictive technique of interpretation in cases where human rights infractions occur. And neither do they attempt to veil their favourable and sometimes slavish disposition to overt Government influence. In one case involving the detention of some persons ranging from one to seven years without trial, the Court has no scruples stating that:

"It looks as if the Court is being used to blackmail the Government therefore this Court will not order the prayers of the Applicants."

I cannot help but wonder what "blackmail" has got to do with the case of a man who has been in an unlawful detention for seven years without trial and has approached the Court to enforce his right to personal liberty.

For too long in the exercise of their interpretative jurisdiction, our Courts have overlooked or neglected the guidance offered by international or comparative Law sources. If this attitude

was justifiable in the days of isolationist assertions of sovereignty, it is no longer tenable today when the concept of a global village dictates a uniformity of Judicial attitudes to human rights questions. The domestic application of international human rights norms was the subject-matter of a Judicial Colloquium convened in Bangalore, India, in 1988 by

the former Chief Justice of India, P. N. BAWATTI. The Colloquium came out with a 10 point conclusion on the subject-matter now known as "THE BANGALORE PRINCIPLES"³⁹

The principles encapsulated in BANGALORE COLLOQUIUM form the basis of modern international norms of human rights and the Rule of Law. In subsequent years, they have been re-examined, re-emphasised and re-articulated, first in Harare, Zimbabwe, in 1989 in what is now referred to as "HARARE DECLARATION". Again, in 1990, they were re-affirmed in Banjul, Gambia, as the "BANJUL AFFIRMATION". Again, between December 9 and 13, 1991, they were confirmed and added to what was referred to as the "ABUJA CONFIRMATION". The most significant achievement of these subsequent Colloquies is in the area of domestication of these principles and norms of human rights. With the active involvement of the United Nations Organisation and its Agencies in human rights protection and enforcement, both at the international and national levels, and the adoption of international Charters and Declarations on human rights by national Governments and their incorporation into municipal Laws of many countries of the world, human rights enforcement has seen a brighter light especially in the Third World. The World Conference on Human Rights in Vienna, Austria, between June 14-25, 1993, focuses and emphasises on the enforcement of Universal and International Human Rights Norms at the national and local levels.⁴⁰

Secondly, the adoption by many African countries, including Nigeria, of the African Charter on Human and Peoples Rights is a positive step towards the universal application and enforcement of international human rights norms. The basic rights and freedoms declared in the Charter are founded on the UNIVERSAL DECLARATION OF HUMAN RIGHTS adopted by the General Assembly of the United Nations on December 10, 1948. They go beyond the fundamental rights provided in Chapter 4 of our Constitution and, although those rights have now formed part of our municipal Laws by virtue of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria, 1990, there is yet no clear procedure for their enforcement. However, our Courts have boldly recognised and enforced these rights despite ouster clauses in our local Laws. The Courts have held that these Laws, being part of

39. The Bangalore Principles is annexed as an Appendix to this Paper.

40. For the Agenda of the 1993 World Conference on Human Rights, Vienna, Austria, see "The Guardian" of Wednesday, June 9, 1993, Page 16.

international Law, no local Legislation can oust the jurisdiction of the Courts to enforce them. See OSHEVIRU vs THE BRITISH CALEDONIAN AIRWAYS LIMITED⁴¹, and LEKWOT vs NATIONAL DEFENCE AND SECURITY COUNCIL & OTHERS where Honourable Justice M. ONALAJA of the Lagos High Court held that the Laws in the African Charter being International Laws supercedes our local Laws and, having been ratified and incorporated into our local Laws, are enforceable by our Courts. I submit that these rights in the African Charter can be enforced through the Fundamental Rights (Enforcement Procedure) Rules, 1979.

Even outside the Court-room, a Judge still has a duty in his private life and utterances to sustain public faith in his office. Judges have a great role to play in our quest for more meaningful realisation of guaranteed freedom. The time has come when emphasis should be on substance rather than form. The Judges would do well to emulate the Indian example where the concept of public interest litigation has been used to overcome the problem hitherto posed by the doctrine of Locus Standi and poverty. The Indian Courts are now systematically turning their backs against anachronistic and rigid Court procedures and, in other cases, adapting them to meet the demands, conditions and realities of their society. Our own Supreme Court and, indeed, all cadres of the Judiciary, should follow suit.

Regarding the speedy disposal of cases of human rights violations, our Judges must live up to their Oath of Office by discouraging unnecessary adjournments. It is not unusual, at present, for a common Habeas Corpus Application to take up to two years to complete. It is also not unusual that some of our Judges, right from the start, declare their position that a case before them is frivolous and then proceed, unilaterally, without Application from either party, to adjourn them for a very long time.

This is a most unhealthy situation which, if not checked, will pose the greatest threat to the realisation of human rights. As stated earlier in this Paper, Lawyers too have a role to play in ensuring that human rights cases are disposed of with despatch.

41.

[1990] 7 NWLR PART 163, 507.

In conclusion, we would say, like the Venerable JUSTICE CHUKWUDIFU OPUTA, that:
*"When our peoples' rights are threatened and they can say with absolute confidence - "if you do this, I will go to Court", then we would have breathed new life into the dry bones of our Constitutional guarantees of human rights and civil liberties."*⁴²

CONCLUSION:

42. OPUTA, JSC, on "ACCESS TO JUSTICE" in LAW AND PRACTICE (JOURNAL OF THE NBA) VOLUME 1, NO. 1.

It is proper at this point to recapitulate on the thesis of this Paper. My thesis has been built on the unquestionable premise that the Lawyer is inextricably welded to the cause of human rights. This means that the cause of human rights gains or loses momentum in relation to the activism and consciousness, or timidity and selfishness of the Lawyer. The Lawyer, in this context, is any person who has been called to the Bar and includes Judges, Law Teachers, Lawyer-Politicians, Corporate Lawyers, Lawyers in Ministries of Justice, and other Departments of the Civil or Public Service and, of course, the Private Practitioners.

Human Rights have grown beyond it's embryonic concern with civil and political rights. Accordingly, the problem of hunger, disease, ignorance, illiteracy, protection of environment, among others, must also concern all Lawyers, especially they are the factors that predispose the society to violations of civil and political rights. Lawyers must seek viable avenues for enforcement of economic and social rights and enthronement of a stable and viable democratic State especially in the Third Republic.

Our Judges and Lawyers must also try to keep abreast of international developments in the jurisprudence of human rights. We must begin to look at international human rights norms and apply them in domestic Constitutional adjudication.

In this Paper, I have merely outlined, in summary, some of the techniques the Lawyer must use to make his contributions to the society more relevant and lasting. I can say, with some confidence, that the process has started both at the Bar and at the Bench, but a lot more requires to be done.