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HUMAN RIGHTS DISCOURSES IN NIGERIA ACROSS TIME: TRAJECTORY, SUCCESSES AND POTENTIALS FOR CANADIAN-NIGERIAN ENGAGEMENT

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Abstract

Canada has, for decades, been actively involved in funding and providing support for the development of legal and political institutions and rights advocacy activities in Nigeria. A careful documentation and assessment of this support will likely show that its impact has been significant and perhaps critical in some areas. This article, however, considers a different form of engagement, or rather, a possible engagement. Although Canada's human rights jurisprudence, especially the Charter of Rights case law, is highly regarded the world over, its influence on Nigerian courts has been limited. Yet, there is a great opportunity for meaningful engagement here, especially as Canadian universities are increasingly a preferred destination for graduate training by Nigerian lawyers and legal scholars, and knowledge of Canadian legal resources is disseminated through other engagement projects between the two countries. This article therefore considers the potentials for judicial engagement between Nigerian and Canadian courts on human rights. Part I provides a brief background. Parts II and III map the deferential and activist phases of the trajectory of human rights discourses in Nigeria, respectively. Part IV considers some possible sites of judicial engagement as between Nigerian and Canadian courts. In conclusion, Part V identifies certain inherent limits of this possible engagement.

1. LIKE THE TYPICAL COMMONWEALTH COURTS of its time, when the Supreme Court of Nigeria heard its first rights cases at the beginning of the 1960s, it was very unfamiliar with the concept of a constitutional bill of rights. In fact, before Nigeria adopted its bill of rights, there were only three constitutional bills of rights in the entire British Commonwealth¹ (which is constituted largely of Britain and almost all of its former colonies).² Of the three countries that possessed these bills of rights, only India had a sizeable (though then largely

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¹ There is no attempt here to explore the subject in the general context of the borrowing and migration of constitutional ideas. See *e.g.* Vlad Perju, "Constitutional Transplants, Borrowings, and Migrations" in Michel Rosenfeld & Andras Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1304; Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

² See Charles OH Parkinson, *Bill of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford: Oxford University Press, 2007) at Chapter 6; Solomon Ukhuegbe, "The Formal Evolution of the Nigerian Bill of Rights: From the Willink Commission Proposal to the 1999 Constitution" in Epiphany Azinge, ed, *Nigeria: A Century of Constitutional Evolution 1914-2014* (Lagos: Nigerian Institute of Advanced Legal Studies, 2013) 620.

formalistic) rights jurisprudence accreted by 1961. The other two countries offered almost nothing in the form of precedent to the Nigerians (Pakistan's constitution was suspended, and Malaysia's was practically contemporaneous with Nigeria's). Beyond these there was the quasi-constitutional Canadian Bill of Rights of 1960, this Canadian legislation also did not add significantly to the pre-existing body of precedent. It was not until 1963, two years behind the Nigerian Supreme court, that the Supreme Court of Canada first considered any provisions of the Canadian Bill of Rights the Canadian Charter of Rights and Freedoms came much later³). Even so, over the following two decades, the Supreme Court of Canada produced highly deferential, legalistic, rights-related case law.⁴ However, it must be noted that Canada also possessed a small but quite impressive "implied bill of rights" jurisprudence that it developed in the 1950s,⁵ which could have provided a valuable resource for Nigerian courts.

II. THE INITIAL PATH: THE TEPID RECEPTION OF CONSTITUTIONAL RIGHTS IN NIGERIA

A. HUMAN RIGHTS AND JUDICIAL POLICY

The initial judicial encounter with the Nigerian bill of rights was anything but encouraging. Indeed, this experience minimized this bill of rights as a site of public policy-making for several years to come. By the 1960s, observers had noticed near complete absence of any successful claim against the government for the violation of human rights. BO Nwabueze, Africa's ablest

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁴ See WS Tarnopolsky, "The Canadian Bill of Rights: From Diefenbaker to Drybones" (1971) 17:3 McGill LJ 437; Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 186-224; Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982) 28 McGill LJ 31.

⁵ See e.g. *Chike Obi*, [1961] 1 SCNLR 197; *Boucher v R* [1951] SCR 265, 99 CCC 1. In *Chike Obi*, the Supreme Court of Nigeria would have benefited greatly from the solution established in *Boucher v R*, a case Paul Weiler correctly identifies as "a text-book example of judicial craftsmanship." Weiler, *supra* note 4 at 191. See also Gary Botting, *Fundamental Freedoms and Jehovah's Witnesses* (Calgary: University of Calgary Press, 1993) at 52-54. Remarkably, this case was not brought to the Court's attention. This is curious because at this time, the Supreme Court of Nigeria was already quite familiar with Canadian federalism case law. Perhaps the explanation is that the latter was largely the work of the Privy Council.

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constitutional scholar, notes that “[t]he point here is not that every one of the decisions handed down by the Nigerian Supreme Court between 1960 and 1963 was necessarily wrong in law, but that they should all have gone in favor of the government was remarkable.”⁶ This observation bears close examination.

The Court did not have the opportunity to decide any matter pertaining to the fundamental rights provisions of the Constitution until 1961. However, in that year alone, it decided about half a dozen human rights cases.⁷ The first two cases, decided on April 6th, 1961, questioned of the constitutionality of the offence of sedition under the Criminal Code in light of the constitutional protection of the freedom of expression. Under Section 24 of the 1960 Independence Constitution,

- (1) Every one shall be entitled to freedom of expression, including freedom to hold opinions and impart ideas and information without interference;
- (2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –
 - (a) in the interest of defense, public safety, public order, public morality or public health;
 - (b) for the purpose of protecting the rights, reputations and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or
 - (c) imposing obligations upon persons holding office under the Crown, members of the armed forces of the Crown or members of a police force.

The two cases were references from the High Court in the course of a criminal trial for seditious publication. In the first case, *DPP v Chike Obi*,⁸ a leader of an opposition political party was prosecuted on a charge that he distributed a pamphlet entitled: “The People: Facts that You Must Know.” As noted in the decision of the court in this case, that pamphlet contained the following allegedly seditious statement:

⁶ BO Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (London: C Hurst & Co, 1977) 242.

⁷ Some of these cases actually arose under the original provisions, the Sixth Schedule to the Constitution of 1954. But the appeals/references were filed at the Supreme Court between 1960 and 1961.

⁸ [1961] 1 SCNLR 197.

Down with the enemies of the people, the exploiters of the weak and oppressors of the poor! ... The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians.

The charge was brought under Section 51(c) of the Criminal Code, which makes it punishable for anyone to print, publish, sell, offer for sale, distribute, or reproduce any seditious publication. A “seditious intention” is defined by the Code as, *inter alia*, an intention to bring the government into hatred or contempt or excite disaffection against it. In the determination of the scope of the Nigerian provision, defendant’s counsel invited the Court to be guided by judicial approaches to similar constitutional guarantees of the freedom of expression elsewhere. Admittedly, by 1961, there were not many such constitutions in the Commonwealth. The only obvious case was India. The Court however was more eager to distinguish the Indian provision.

At the same time, the Court was not concerned with exploring the possible scope of the freedom of expression in the Nigerian Constitution. It was instead simply satisfied that, under the extant criminal law, the publication was seditious. The more appropriate course would have been to consider the extent to which the criminal law was affected by the nascent constitutional protection. It would surely be remarkable if the freedom of expression was not intended to affect the extant criminalization of political speech, especially where, as in this case, it did not involve a direct incitement of violence.⁹ How else are the democratic channels to be kept accessible unless the opposition can lawfully criticize the government, however harshly? The Court was clearly not persuaded by this consideration.

It was argued that a law is only valid if the acts prohibited are, in every case, likely to lead directly to disorder. It seems to me that this is taking too narrow a view of the provision, for it must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would

⁹ The leading authority on the point, decided by the West African Court of Appeal (WACA) *before* the adoption of the Bill of Rights, was that an incitement to violence was not a necessary element of the offence. See *R v Wallace Johnson* (1939) 5 WACA 56. For the Privy Council’s position, see [1940] AC 231, [1940] 1 All ER 241 (PC).

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not themselves do so directly. The Court must be the arbiter of whether or not any particular law is reasonably justifiable.¹⁰

The closing sentence of the foregoing passage was probably not intended to convey any assurance that the judiciary in principle intended to hold the government to the high standard implicated by the constitutional guarantees. Earlier in the same opinion, it also stated that “it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, *not to impose their own views of what the law ought to be.*”¹¹

It is noteworthy that in practically every other constitutional challenge under the bill of rights in the 1960s, the Court equally never found it, in its own words, “necessary to enter into any lengthy consideration of the question.”¹² By the end of the 1960s, the Supreme Court had so profoundly discounted the potential of the bill of rights that it was of little or no political significance. The very purpose that had justified the introduction of the bill of rights only a few years earlier, *i.e.* the protection of ethnic and political minorities, hardly featured in judicial decision-making. One interesting feature of the Supreme Court’s decision-making during this era was that the odds were often stacked against the claimant in human rights cases. The natural consequence is that the legislation or official action impugned is almost inevitably sustained. “To what purpose, people were prompted to ask,” noted Nwabueze, “were civil liberties guaranteed in the Constitution if every violation of them, however flagrant-seeming, received the sanction of the courts?”

It began to look as if the courts were actively aiding the politicians in the persecution of opponents and in the perversion of the Constitution. Confidence in their ability to decide political issues impartially was consequently undermined, and the position was

¹⁰ [1961] 1 SCNLR 197 at 207.

¹¹ *Ibid* at 208 [emphasis added].

¹² The attitude of the Supreme Court was presaged by a statement made extra-judicially by Justice Lionel Brett, a leading member of the Court in the 1960s at an international conference on Nigerian federalism in August 1960. “In cases involving the Fundamental Rights,” he said, “the Nigerian courts will have to consider what is ‘reasonably justifiable in a democratic society,’ but even here the essential word is ‘justifiable,’ not ‘desirable,’ and *the role of the courts is to preserve certain standards, not dictate policy.*” See Lionel Brett, “The Role of the Judiciary in a Federal Constitution with Particular Reference to Nigeria” in Lionel Brett, ed, *Constitutional Problems of Federalism in Nigeria* (Lagos: Times Press, 1960) 12 at 22 [emphasis added].

eventually reached where there was a general disinclination to take political complaints to them. To go to court on such matters was felt to be a vain effort; from past experience, a decision in favor of the government was considered a foregone conclusion. Moreover, the overconfident way in which the ruling politicians sometimes challenged opponents to take their complaints to court, as if to say they had been assured the courts would never decide against them, helped to sap public confidence in the courts still further.¹³

A number of studies of the judiciary in post-colonial Africa have also confirmed this. For instance, in his study of what he called the “illiberal and restrictive” practices of judicial interpretation of the Nigerian Constitution between 1960 and 1965, Gaius Ezejiiofor highlighted the significance of this factor on judicial decision-making. The judges, he wrote,

probably feared that an active interventionist policy of interpreting the Constitution in a liberal spirit would lead to open confrontation with the politicians and the consequent weakening of judicial authority. Consequently most of them were anxious to render decisions favorable to the government and its supporters. Indeed they behaved as if it was their duty to adopt challenged measures of the authorities as valid and to find arguments to justify them. ... One of the very few occasions in which there was a departure from the literal and strict approach to interpretation was when it was necessary to hand down a decision not inconvenient to the Federal Government and its allies.¹⁴

Therefore, in the 60s, the Supreme Court of Nigeria lost the opportunity to apply emerging constitutional standards to the Criminal Code, a colonial statute reflecting, almost wholesale, Victorian-inspired criminal justice and values. The Court’s reticence effectively legitimized a Code which had been designed and implemented during colonial rule to stifle political dissent.

B. LEGALISM

Even the most able observers, including Nwabueze, were inclined to rationalize the problematic judicial practice principally as a condition fostered by, if not the direct result of, the received tradition of British positivism.

[T]he *primary* reason seems to be the inherited common law attitude towards the judicial function; it is an attitude that requires literalness and analytical positivism in

¹³ Nwabueze, *supra* note 6 at 242-43.

¹⁴ G Ezejiiofor, “A Judicial Interpretation of Constitution: The Nigerian Experience During the First Republic” in AB Kasunmu, ed, *The Supreme Court of Nigeria, 1956-1970* (Ibadan: Heinemann, 1977) 67 at 87-88 [footnotes omitted].

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the interpretation of the law, enforces a narrowness of attitude towards the questions presented for decision, and discourages creative activism.¹⁵

As a result, Nwabueze argues that, unlike their US counterparts, Commonwealth judges generally (and until lately at any rate) missed the opportunity for judicial creativity and failed to acknowledge the question of choice involved in the balancing of liberty against public order and the crucial judicial role implicated in the process.

American bill of rights jurisprudence and creative constitutional interpretation was practically unknown to the Supreme Court of Nigeria until much later. Except to the limited extent of the Canadian implied rights jurisprudence, a legal resource of comparable quality to that of the United States was not yet available from British and other Commonwealth courts. In the absence of a constitutional charter of rights, most of the Commonwealth courts developed very limited rights jurisprudence.

The Court constantly fixed its gaze on and loyally took its direction from the British courts, despite the fact that until very recently they generally had no cognate experience in bill of rights decision-making. However, the attraction came naturally. Until less than two decades ago, all Supreme Court Justices received their legal training partly or, in most cases, wholly in England, where they were immersed in the doctrine of the supremacy of Parliament and British skepticism of a constitutional bill of rights.

Looking beyond the United Kingdom, the institutions of the European Court of Human Rights began developing in the 1970s and 80s from a significant, and soon to become highly influential, jurisprudence. It is remarkable that, even today, the Supreme Court of Nigeria still does not pay any serious attention to this or other similar sources.

¹⁵ Nwabueze, *supra note* 6 at 310 [emphasis added].

III. RIGHTS ACTIVISM: LOOKING BEYOND DOMESTIC NORMS

A. DICTATORSHIP AND THE LIMIT OF LAW

For most of the period between the mid-1960s and 1999, democratic governance in Nigeria was replaced with military rule. One obvious characteristic of such regimes was normalization of extra-constitutional powers and legislative absolutism.¹⁶ The judiciary initially responded adroitly. On April 24th, 1970, the Supreme Court, in *Lakanmi v Attorney General*,¹⁷ took the unprecedented step of voiding certain legislation¹⁸ that purported to forfeit the assets of certain persons specifically named by statute. This, according to the Court, amounted to a legislative judgment, and was therefore ultra vires the lawful powers of the military government as an interim government of necessity. The government would have none of this. Within days, it promulgated appropriate legislation, in effect, nullifying the decision.¹⁹ It is a matter for regret that, at the earliest opportunity the Court (although quite understandably) quickly pulled back from a confrontation with this first military regime.²⁰

B. 1980s-1990s: OPPORTUNISTIC CO-OPTATION OF INTERNATIONAL LAW

It became clear during the decades following this development that domestic legal norms could no longer be deployed to effectively restrain the excesses of the regime. By the 1980s, human

¹⁶ See Constitution (Suspension and Modification) 1984 (Decree No 1), s 6 (“No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria”).

¹⁷ [1970] NSCC 143, (1971) 1 UILR 201.

¹⁸ The Public Officers and Other Persons (Investigation of Assets) 1967 (Edict No 5); The Forfeiture of Assets etc (Validation) 1968 (Decree No 45). Two years earlier the Supreme Court had resolved the problem of conflict between legislation of the federal government (“Decree”) and of the state government (“Edict”) under the military dictatorship by assuming competence to set aside the latter in that event. See *NK Adamolekun v Council of the University of Ibadan*, [1968] NMLR 253. Prior to this decision, this competence was doubtful given the absolute prohibition of judicial review of legislative powers by extant Decree.

¹⁹ See Federal Military Government (Supremacy and Enforcement of Powers) 1970 (Decree No 28).

²⁰ See *Adejumo v Governor of Lagos State* [1972] 1 ALL NLR 159. The Court also considered the same issue in the context of a subsequent military dictatorship in Nigeria. See *Attorney General of the Federation v Guardian Newspapers Ltd*, [1999] 9 NWLR 187. The Court of Appeal decision in this case is probably more instructive, see *Attorney General of the Federation v Guardian Newspapers Ltd*, [1995] 5 NWLR 703 (CA).

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rights litigators turned to international law instead, seizing the opportunity of the *African Charter on Human and Peoples' Rights*.²¹ In 1983, while Nigeria was in the midst of a democratic interregnum from its long period of military rule, it became one of the first parties to this Charter to implement it through local legislation.²² There was thus the remarkable situation of the African Charter becoming enforceable as domestic law in Nigeria almost three years before it entered in force as a treaty. With the re-emergence of military dictatorship soon after the domestication of the treaty, the courts accorded the Charter legislation an extraordinary quasi- or super-constitutional status. The purpose was to make the Charter rights inviolable and superior to any act of a supposedly absolute military dictatorship.²³ This was possible only because the African Charter had become a formal source of law within Nigeria's domestic legal order, a status that the two UN human rights Covenants, for example, while also ratified by Nigeria, do not enjoy. When Frans Viljeon completed a survey of the application of the Charter by African courts by the end of the 1990s, he observed,

[i]t is ironic, but perhaps predictable, that the clearest illustration of the potential effect of the African Charter in domestic law is found in Nigeria under a military regime at a time of severe repression....²⁴

²¹ 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (entered into force 21 October 1986).

²² *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, Laws of the Federation 1990, Chapter A9 (Nigeria).

²³ See *Chima Ubani v Director of State Security Services*, [1999] 11 NWLR (Pt 625) 129 (CA) ("In questions or issues concerning the fundamental rights protected under the African Charter, the provisions of the African Charter are superior to the decrees of the Federal Military Government."); *Fawehinmi v Abacha*, [1996] 9 NWLR (Pt. 475) 710 (CA), aff'd [2000] 6 NWLR (Pt 660) 228 (SC). The Supreme Court was divided on the extraordinary status accorded to the *African Charter Act* by the Court of Appeal in both cases. In principle, from the perspective of the law of treaties and state practice, a statute implementing a treaty, such as the *African Charter Act*, is legally no different from any other legislation. See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 151 ("With dualism the provisions of a treaty which have been incorporated into domestic law have the status only of domestic law, and can be amended or repealed by later legislation. If such action were to result in breach of the treaty, there would be no remedy in domestic law since there would have been no violation of it.") [emphasis in original].

²⁴ See Frans Viljeon, "Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa" (1999) 43:1 J Afr L 1 at 7. For a discussion of the use of the Charter by Nigerian courts, see Dele Peters, "The Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria" (2000) 18:3 Neth Q Hum Rts 357 at 368-72.

The impact of this development was huge. Academia, like the judiciary, experienced a significant shift as they joined in taking advantage of this resource.

C. IMPACT ON ACADEMIA

The drift to international law captured the attention of academic commentators. Law review articles and textbooks began to explore and emphasize international human rights norms. The impact may be measured by the exponential growth of law review articles exploring international dimensions of human rights as well as subjects rarely discussed in the literature, such as the right to sustainable development, environmental rights, socio-economic rights, and women's rights. At the same time, law review titles grew rapidly, not just in number but in specialization. The Nigerian Institute of Advanced Legal Studies, for example, launched the *Journal of Health Law and Policy*, the *Journal on the Rights of Persons with Disabilities*, the *Journal on Law and Development*, the *Journal on the Right of the Child*, the *Journal on Administration of Justice and Good Governance*, and among others.

D. JUDICIAL ACTIVISM

With this new resource, the judiciary began to experiment with activist decision-making, advancing human rights protection in Nigeria to novel areas. This was thanks in large measure to the effort of public interest lawyers and human rights advocacy groups to place these matters on the judicial agenda and canvass international norms in support of their arguments. This is also important because foreign donors, presumably including Canadian agencies, funded the work of most of these advocacy groups. This activism created dynamics whereby lower courts sometimes feel unconstrained by the fact that the highest court had previously reviewed a subject. To give an example, even though the Supreme Court had ruled the death penalty constitutional,²⁵ the Court of Appeal entertained the possibility that the so-called death row

²⁵ *Kalu v State*, [1998] 13 NWLR 531.

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phenomenon was a viable basis for a constitutional challenge of the death penalty.²⁶ Although this practice may appear to weaken the precedential status of Supreme Court decisions, it was simply a creative use of the common law tool of “distinguishing” precedents in order to narrow their application. The point is that the zeal to do so was energized by new possibilities opened by international law.

IV. LOOKING TO CANADA

A. PRIORITY OF RIGHTS

An important challenge for the judicial application of constitutional rights in Nigeria is the provision of justifications for the imposition of limitations on the enjoyment of rights. The structure of the limitation of rights under the Nigerian Bill of Rights is structurally very similar to that under the European Convention on Human Rights. Nigeria’s bill of rights includes both specific and general restrictions of rights. Thus, on the one hand, several provisions have their internal modifiers (definitional limitations) that qualify specific right guarantees. Additionally, there is a derogation clause that allows the suspension of a few rights during war and emergencies. On the other hand, this bill of rights contains a general limitation clause,²⁷ applicable to most rights, that permits restrictions by laws that are reasonably justifiable in a democratic society for certain public interests or for the purpose of protecting the rights of other persons. This part of the rights limitation regime under the Nigerian Bill of Rights effectively requires an end-means justification. The end or purpose of restricting rights is the promotion or protection of the public interest or the protection of the rights of other persons; the means

²⁶ *Peter Nemi v Attorney General of Lagos State & Comptroller of Prisons*, [1996] 6 NWLR (Pt 542) 42.

²⁷ The European Convention, like the *International Covenant on Civil and Political Rights*, does not contain a common limitation clause separate from the limitation clauses appended individually to the separate provisions. This was the model followed in the original Nigerian Bill of Rights. With the Nigerian Constitution of 1979, however, a common limitation clause was introduced to the Nigerian text, replacing the separate limitation clauses. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

chosen to attain that end must be reasonably justifiable, or proportionate, and acceptable in a democratic society.²⁸

What is remarkable about the public interest limitation under the European Convention model, which was followed by Nigeria, is the specification of legitimate public purposes (defense, public safety, public order, public morality, and public health are the ones mentioned in the Nigerian text). However, the Nigerian Bill of Rights departs from the European text by substituting “reasonably justifiable” for the latter’s “necessary.” There was much concern among early critics that this semantic switch weakened the protection provided by the former, as “reasonably justifiable” was seen as less definitive than “necessary.” It seems, in fact, that the purpose of this editorial gloss was precisely to create some flexibility to enable government actions pass muster.

If constitutional rights could simply be overridden at will by the majority, there would hardly be any point in specially securing rights.²⁹ Similarly, gratuitous or excessive interference with the exercise of rights cannot be reasonably justifiable, certainly not in a democratic society. This indicates that a norm of proportionality, or a reasonable balance, must guide the relationship between public interests and the means chosen to protect them. Originally a concept of German and European law, proportionality has emerged as a universal principle of public law;³⁰ a standard for justification (as “reasonableness,” the specific standard of the Nigerian bill of rights) of the restriction of rights and, in general, moderation in exercise of the

²⁸ See David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 68.

²⁹ Ronald Dworkin put it quite starkly: “The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.” See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 194.

³⁰ See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013); N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Dordrecht: Kluwer, 1996) at Chapter 2.

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public power.³¹ Accordingly, proportionality tests are widely applied by national courts, from Australia³² and Canada³³ to South Africa,³⁴ Tanzania, Zambia,³⁵ and elsewhere. They are also applied by the European Court of Human Rights³⁶ and the African Commission on Human and Peoples' Rights,³⁷ among other international tribunals. In fact, proportionality is broadly embraced by courts around the world.³⁸

Proportionality adjudication positions courts to exercise dominance over policy making,³⁹ and since it shifts the focus from authority (formal constitutional or statutory power, authorization, etc.) to justification, the government is required to justify its actions on substantive grounds,⁴⁰ thereby engendering a culture of accountability. Judicial review in Nigeria has traditionally focused more on the formal validity of government actions.

B. WOMEN AND MINORITIES PROTECTION

Statutory and constitutional protections of women's rights have increased in recent years in Nigeria. Several national and sub-national legislation address the prevention and punishment of physical, sexual, and psychological violence against women, including, notably, the recent Violence against Persons (Prohibition) Act 2015, which implements the *UN Declaration on*

³¹ Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J Transnat'l L 72.

³² See Jeremy Kirk, "Constitutional Guarantees, Characterization and the Concept of Proportionality" (1997) 21 Melb UL Rev 1.

³³ See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321 (stating that "a form of proportionality test" is required to assess whether the means chosen to achieve government objectives are reasonable). See especially *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 (establishing the definitive proportionality test for application of section 1 of the Canadian Charter of Rights). It has been said, the *Oakes* proportionality test "has taken on some of the character of holy writ." PW Hogg, *Constitutional Law of Canada*, student ed (Scarborough, ON: Carswell, 2002) at 779.

³⁴ *State v Makwanyane*, [1995] 3 SA 391 at para 104 (CC).

³⁵ *Pumbun v Attorney General*, [1993] 3 LRC 317 at 323 (Tanzania CA); *Mulundika & ors v People*, [1995-1997] Zambia LR 20 at 27 (Zambia SC).

³⁶ See *Sunday Times v United Kingdom* (1979-80), 2 EHRR 245.

³⁷ See *Media Rights Agenda & Constitutional Rights Project v Nigeria* (2000), 7 IHRR 265 at para 42. For discussion, see Gino Naldi, "Limitation of Rights under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights" (2001) 17:1 S Afr J Hum Rts 109.

³⁸ The notable exception is the United States. See Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere but Here?" (2012) 22:2 Duke J Comp & Intl L 291; Jud Mathews & Alec Stone, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60:4 Emory LJ 797.

³⁹ Sweet & Mathews, *supra* note 31 at 78.

⁴⁰ Cohen-Eliya & Porat, *supra* note 30 at 111.

the Elimination of Violence against Women.⁴¹ Currently, the National Assembly is considering the Gender and Equal Opportunities Bill 2016. Yet, the jurisprudence of women's rights is not well developed. Minorities protection in Nigeria focuses mainly on *ethnic* minorities in practice although the Constitution expressly protects other discrete disadvantaged groups, *e.g.* by forbidding unequal treatment on account of sex, religion, political opinion, etc. Canadian jurisprudence offers valuable resources to advance legal protection in these areas.

C. COURT-ACADEMY CO-OPERATION

The channeling of inputs from the academy into the judicial process in Nigeria is far from satisfactory. The experience of the Supreme Court of Canada in this respect is quite instructive. James Snell and Frederick Vaughan have observed that judicial appointment to the Court, especially since 1970, of judges with strong scholarly background “accounts for the greater willingness of the Court to assume a more creative role.”⁴² This is interesting because although there is in fact a definite ascendancy in intra-judicial recruitment,⁴³ at least 70 per cent of the justices appointed to the Supreme Court of Canada since 1970 previously held an academic position in a university, many of them being full-time law professors. This is a strong indication that academic reputation is an important consideration in recruitment to the Canadian Supreme Court. It has indeed been claimed for a fact that “the modern criteria for service on the Supreme Court include either academic reputation or appellate judicial experience or both.”⁴⁴ While this pattern of recruitment may partly explain why academic citations have become an important

⁴¹ GA Res A/RES/48/104, UNGAOR, 48th Sess (1993).

⁴² James G Snell & Frederick Vaughan, *The Supreme Court of Canada* (Toronto: Osgoode Society, 1985) at 231.

⁴³ Some observers have suggested that a rule has crystallized already that at any given time the Court includes seven members elevated from the provincial courts of appeal, one from the Federal Court of Appeal, and one without prior judicial experience. See Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Co., 2000) at 108 [McCormick, *Supreme at Last*]. See also Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at 101.

⁴⁴ See McCormick, *Supreme at Last*, *ibid*.

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resource in decision-making,⁴⁵ resulting in much longer opinions,⁴⁶ that may also be the result of increased participation of law clerks in the business of the Court⁴⁷ and of vigorous interest group litigation. The law clerks, it may be said, because they are fresh from the universities and mostly likely to subsequently take up an academic career, bring the law school to the Court, thereby “serving as the conveyor belt from the law schools to the inner sanctum of the Supreme Court.”⁴⁸ Their importance is underscored by the fact that, during the 80s, the number of law clerks assigned to each justice tripled.

Unlike the situation in Canada, until recently most Supreme Court justices in Nigeria did not have graduate school education, any experience in university teaching, or service in the higher echelon of the civil service outside the Legal Department or Ministry of Justice. Just over a dozen of the over one hundred justices appointed to the Court thus far need a graduate degree in law (including 7 who held PhDs), but only 6 were law school professors prior to their judicial careers. It is unlikely that this pattern will improve in the foreseeable future, because of the current practice of exclusively appointing senior justices of the Court of Appeal to the Supreme Court. As seniority comes with long judicial service, frequently running over twenty years, it must now be considered exceptional for a potential candidate for the Supreme Court of Nigeria to have had some distinguished career outside the judiciary.

⁴⁵ See Peter McCormick, “Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96” (1998) 9 Sup Ct L Rev (2d) 463 [McCormick, “Judges Read”]; Gordon Bale, “W.R. Lederman and the Citation of Periodicals by the Supreme Court of Canada” (1994) 19 Queen’s LJ 36; Vaughan Black & Nicholas Richter, “Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990” (1993) Dal LJ 377.

⁴⁶ McCormick reported that the average Supreme Court of Canada decision using academic citations (fifty pages) is more than twice the length of the average decision that did not use citations (twenty pages). See McCormick, “Judges Read”, *ibid* at 473.

⁴⁷ See Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy-Making and the Supreme Court of Canada” (1996) 30 UBC L Rev 279; Greene et al, *supra* note 43 at 109-14.

⁴⁸ Frederick Lee Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 112.

V. CONCLUSION: A RESEARCH AGENDA

A. LIBERAL RIGHTS, MODERNITY AND TRADITION

A criticism of Nigeria's constitutional bill of rights is that it was intended to replicate closely, perhaps too closely, the first section of the European Convention for the Protection of Human and Fundamental Freedoms. Except for the right to marry, practically every European Convention right is included in the Nigerian Bill of Rights, although two or three provisions come from other sources. Hence, the Nigerian Bill of Rights carries the European Convention's imprint of a "narrowly individualistic view of society."⁴⁹ The Nigerian instrument, therefore, has been correctly observed to be "the conduit for the importation of the Western articulation of the concept of human rights into modern African human rights law."⁵⁰ This is significant in itself, because the liberal assumption of moral individualism is presumably out of sync with the supposedly communitarian character of African communities.⁵¹ This may be an impediment to the reception of certain aspects of Canadian human rights jurisprudence in

⁴⁹ See Keith D Ewing & Conor A Gearty, "Rocky Foundations for Labor's New Rights" (1997) *Eur HRL Rev* 146 at 150.

⁵⁰ Christoff Heyns, "African Human Rights Law and the European Convention" (1993) 11 *S Afr J Hum Rts* 252 at 258. Cf Karel Vasak, who claims the European Convention "has found a fertile ground for its expansion in other continents, no doubt because of its intrinsic virtues, and *because it is not tied to a European concept of man*." See Karel Vasak, "European Convention of Human Rights beyond the Frontiers of Europe" (1963) 12 *Intl & Comp LQ* 1206 [emphasis added].

⁵¹ As Leopold Senghor put it, "in Europe, Human Rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his right are wrapped in the protection of the family and other communities. ...Rights in Africa...cannot be separated from the obligations due to the family and other communities." (Address to a meeting of independent experts drafting the African Charter on Human and Peoples' Rights) OAU DOC CAB/LEG/67/5, quoted in Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003) at 377-78. For a case study of communitarian-individualist elements of African bills of rights, see Adrien Katherine Wing, "Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa" (1993) 11 *Wis Intl LJ* 295. A recent forceful restatement of the case for a radical communitarian African concept of human rights is Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Va J International L* 339. See further, Ifeanyi A Menkiti, "Person and Community in African Traditional Thought" in RA Wright, ed, *African Philosophy: An Introduction*, 3rd ed (Lanham, Md.: University Press of America, 1984) 171. But the case for the ontological primacy of the community in [traditional] Africa is perhaps overstated. See Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (New York: Oxford University Press, 1997) at 35-76 (arguing that the African experience may be more accurately classified as moderate communitarian).

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Nigeria. It must be equally emphasized however that the defining mark of the Nigerian bill of rights are *individual* rights. To discount this would defeat its purpose altogether.

This understanding of constitutional rights as individual rights requires some clarification in the judicial application of African bills of rights. Although the *African Charter on Human and Peoples' Rights* introduced a paradigm shift with its inclusion of solidarity rights, duties of persons, and coupling of individual rights with claw back clauses, the African Charter jurisprudence indicates that individual rights are not expected to yield lightly to “public interest” claims. Therefore, although this is not necessarily a model similar to Dworkin’s rights-as-trumps, there is no doubt that both share a common aspiration of the priority of rights. The challenge is to develop a clear elucidation of the interaction of the individual and the community in the application of African bills of rights and hence the suitability of comparative law as a judicial resource. If the pedigree of the Nigerian bill of rights, and indeed other African bills of rights, counts for anything, it follows that there is no easy resolution of this problem.

B. INTERNATIONAL HUMAN RIGHTS NORMS

In spite of the productive deployment of international norms in human rights litigation and advocacy in Nigeria since the 1980s, the use of international law in judicial decision-making remains far from satisfactory. A possible problem is that too many Nigerian judges are not sufficiently familiar with the subject. On the surface, it may partly be because it is not a compulsory subject in the LL.B. curriculum. However, it may also be that judges are challenged as to its relevance in the daily grist of adjudication. A closer scrutiny may nevertheless uncover complex reasons for the international law gap in human rights adjudication in Nigeria.

C. JUDICIAL CAPACITY

Although the manifest judicial authority of the Nigerian courts (government compliance with specific decisions and compliance over time) is not necessarily all that weak, their latent authority (the preventive or disciplinary function of courts)⁵² remains far from satisfactory. One factor at play is that policy issues may not be accepted by the public as something to be resolved judicially as a matter of *individual* rights. Take, for example, the recent controversial school uniform policy of Osun State in southwestern Nigeria, which permits Muslim school girls to wear the hijab over school uniforms. Christian parents and organizations have persisted in rejecting the policy even after a High Court determined that the policy was constitutionally valid.

Granted that proportionality analysis is a valuable tool for transparent balancing, it is a mistake to suppose that it will by itself correct undue judicial deference in human rights adjudication to government policy choices.⁵³ Judicial assertiveness grows with institutional power. David Easton attributed this process to increasing diffuse support:

a reservoir of favorable attitudes or goodwill that helps members accept or tolerate outputs to which they are opposed and the effect of which they see as damaging to their wants.⁵⁴

Diffuse support therefore differs from the more limited support arising from satisfaction with a court's specific policy (specific support). While low diffuse support may co-exist with a high specific support, Gibson, Calderia, and Baird reported findings showing that the legitimacy of national high courts slowly evolves from the accumulation of satisfied

⁵² See Siri Gloppen, "The Accountability Function of the Courts in Tanzania and Zambia" (2003) 10:4 *Democratization* 112.

⁵³ Cf. Basil Ugochukwu, "Balancing, Proportionality, and Human Rights Adjudication in Comparative Context: Lessons for Nigeria" (2004) 1:1 *Transnational Hum Rts Rev.*

⁵⁴ David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965) 273. According to Gibson, "diffuse support emerges as the best predictor of compliance: those who are supportive of the Court are significantly more likely to comply with its decisions even when they are disagreeable" See James L Gibson, "Understandings of Justice: Institutional Legitimacy, Procedural Justice and Political Tolerance" (1989) 23 *Law & Soc'y Rev* 469 at 489.

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constituents.⁵⁵ On the other hand, prolonged dissatisfaction with decisions of a court may erode diffuse support. African courts during the first decades after colonialism would, therefore, not have had sufficient time to accumulate specific support. Rather, their generally unsatisfactory decision-making displeased many civil society constituencies.

Where the judiciary's institutional power is weak (*i.e.* low diffuse support), its output in rights cases is likely to show excessive deference to the government. We saw this with the early decisions of the Supreme Court of Nigeria. The same experience is observed elsewhere in Africa. For example, in the case of Kenya's previous constitutional bill of rights the Kenyan courts' almost extraordinary judicial reticence⁵⁶ was partly the natural result of what Makau Mutua characterized as a culture of judges thinking "like civil servants and ruling party stalwarts,"⁵⁷ fostered by a severe crisis of judicial independence. It is not surprising, as Yash

⁵⁵ For example, see *ibid.*

⁵⁶ See Yash Ghai, "The Kenya Bill of Rights: Theory and Practice" in Philip Alston, ed, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (New York: Oxford University Press, 1999) at 224; YP Ghai & JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (London: Oxford University Press, 1970) at 413-30; Gibson Kamau Kuria & Algeisa M Vazquez, "Judges and Human Rights: the Kenyan Experience" (1991) *J Afr L* 142; GK Kuria & JB Ojwang, "Judges and the Rule of Law in the Framework of Politics: the Kenya Case" [1979] *Pub L* 254; B Ojwang & JA Otieno-Odek, "The Judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya" (1988) *XXXV Netherlands Int'l L Rev* 29; M Desai, "The Presidential System in Kenya: Does it Impede the Rights of the Accused, the Detained, and the Imprisoned?" (1999) *25 New Eng J on Crim & Civ Confinement* 181; Stanley D Ross, "The Rule of Law and Lawyers in Kenya" (1992) *30 J Mod Afr S* 421; Makau Mutua, "Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya" (2001) *23 Hum Rts Q* 96; DS Days et al, *Justice Enjoined: the State of the Judiciary in Kenya* (New York: RF Kennedy Memorial Center for Human Rights, 1992); Shadrack BO Gutto, "Constitutional Law and Politics in Kenya since Independence: a Study in Class and Power in a Neo-Colonial State in Africa" (1987) *5 Zimbabwe L Rev* 142; Susanne D Mueller, "Government and Opposition in Kenya, 1966-9" (1984) *22 J Mod Afr Stud* 399; Makau wa Mutua, "Human Rights and State Despotism in Kenya: Institutional Problems" (1994) *Africa Today* 50.

⁵⁷ Mutua, "Justice under Siege", *supra* note 55 at 113. Ojwang and Otieno-Odek provided a similar explanation.

The outcome of human rights litigation in Kenya appears to turn on *four* primary considerations: (i) Is there a guiding principle on the subject matter that is of critical centrality to the operation of the executive arm of government? (ii) If there is such a fundamental policy, has it been given ultimate instrumental character through legislative action? (iii) Has the relevant act been done, or decision taken in a casual context, or at the behest of an individual officer acting purely on his own? (iv) Is the matter in question covered by an exhaustive body of constitutional or ordinary legal rules and principles?

When the subject of official action is governed by a fundamental policy consideration, the courts are likely to accord deference to the position of the State. In that case, the courts tend to show interpretative restraint in approaching the conflicting claims made by the State and the individual respectively.... Such is still more emphatically the approach of the Kenya courts where guiding government policy has crystallized into an instrumental form through the legislative act. In such a case, the court will be reluctant to uphold the individual claim that goes against the official position. Constitutional interpretation will then appear to be built around an acceptance of such a primary position. The court appears to proceed by

Ghai and McAuslan reported, as far as the bill of rights in the 1960 Constitution is concerned, “it is difficult to trace a single case in which the Bill was successfully invoked.”⁵⁸

This article has provided an overview of Nigeria’s experience with judicial application of its bill of rights. We saw that the court’s initial highly deferential approach evolved towards activism as changes in political institutions necessitated strategic uses of courts by some of its constituents. However, without a proportionality analysis firmly established in adjudication neither the quality of output nor the challenge of judicial deference can reach a satisfactory state. It is suggested that engagement with Canada can provide opportunities and possible solutions with respect to this issue.

asking: (i) is it more important to decide in a manner that respects the known position of the other institutions of government (principally the executive)?, or (ii) is it more important to be guided by, and to uphold, the established legal doctrines, principles and rules? The first alternative generally becomes the basis of decision-making. Ojwang & Otieno-Odek, *supra* note 55 at 48-49 [emphasis in original].

See PJ Kabudi, *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda* (Baden-Baden: Nomos Verlagsgesellschaft, 1995) at 348-49. Uganda had a similar experience. See J Oloka-Onyango, “Judicial Power and Constitutionalism in Uganda: A Historical Perspective” in M Mamdani & J Oloka-Onyango, eds, *Uganda: Studies in Living Conditions, Popular Movements, and Constitutionalism* (Vienna: Journal für Entwicklungspolitik, 1994) 463 at 480-500, 503-11.

⁵⁸ Ghai & McAuslan, *supra* note 55 at 413.