Balancing, Proportionality, and Human Rights Adjudication in Comparative Context: Lessons for Nigeria

Basil Ugochukwu

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/thr

Part of the Human Rights Law Commons

Citation Information
http://digitalcommons.osgoode.yorku.ca/thr/vol1/iss1/1

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Transnational Human Rights Review by an authorized editor of Osgoode Digital Commons.
BALANCING, PROPORTIONALITY, AND HUMAN RIGHTS ADJUDICATION IN COMPARATIVE CONTEXT: LESSONS FOR NIGERIA

By

Basil Ugochukwu *

Introduction

What is the nature of the role that courts perform when they evaluate human rights complaints? Answering this question engages two related but contending values in the process of protecting human rights through judicial means. The first value is that persons are entitled to certain rights and freedoms that are either completely outside the controlling power of the state, organizations and others in the society, or which when they are infringed could trigger an application for judicial protection by the victims. The second value is that the state can impose limitations on certain rights and freedoms but only if it could justify those limitations by showing how they further overriding public objectives. Among those objectives may be

---

1. David Dyzenhaus, Murray Hunt & Michael Taggart: “The Principle of Legality in Administrative Law: Internationalization as Constitutionalization” (2001) 1 OULJ 5 at 6 (describing the culture of justification as one which obliges decision-makers “to justify their decisions by showing either how the decisions conform to [some values, including
to protect the rights of others from violation or to preserve overall public order, health, safety and morality. This article discusses the evolution of comparative judicial standards for the balancing of personal rights and freedoms against the interests of the public at large.

Often, a country’s constitutional system is central to how its courts carry out this balancing exercise. While in some systems, the courts are provided guidelines for carrying out this duty, in others they have to develop those standards from scratch. In this article, I present a historical account of the constitutional and judicial practices of two countries – the United Kingdom and United States – to illustrate a significant divergence in methodology and evolution in this regard. After analyzing the principal pillars of the two systems and their differences, I will use them as standards to examine the tradition of Nigerian courts and highlight what similar or distinct methods, if any, they (Nigerian courts) apply. My goal is therefore not to conduct an inquiry into how Nigeria’s human rights limitation regime compares to other systems with similar constitutional texts, for which the jurisprudence of the European Court of Human Rights would be an appropriate comparator. My concern is more with how the constitutional models and legal systems in the US and the UK developed standards for substantive human rights review and specifically the role their courts played in that process.

I have chosen the UK because of its colonial relationship with Nigeria. British legal traditions continue to significantly influence the Nigerian legal system. While it will be seen that British standards for human rights review have evolved over time, the Nigerian system which borrows considerable doctrine from that system has shown little amenability to change. The
British system classically illustrates how judges in a regime without a written constitution were not only able to formulate standards of review but kept those standards relevant to different historical periods. The United States system is analyzed as well to show how a system with a written constitution like Nigeria’s approached similar concerns, and again how the role of the courts was central to the development of that system.

This inquiry is crucial to an understanding of Nigeria’s human rights jurisprudence and any inconsistencies that might be present in judicial treatment of human rights cases. I challenge the current methods that Nigerian courts adopt for reviewing human rights cases. My central argument is that there appears to be a degree of uncertainty regarding what standards Nigerian courts apply for adjudicating human rights complaints. I argue further that this uncertainty could to a great extent be explained by Nigeria’s legal and constitutional history and its colonial experience. I therefore conclude that for Nigerian courts to be effective in adjudicating human rights cases, they have to create a consistent standard as well as observe and adapt to comparative experiences in their methods.

Courts and the Lure of Balancing
To appreciate why balancing is important and to underscore its role in decision-making, including in adjudication by courts, it is appropriate to first clarify the doctrine. According to Aleinikoff, it could apply to all arenas where the resolution of conflict is the major issue.² He argues that in almost all conflicts, especially those that make their way into a legal

---

system, there is something to be said in favor of two or more outcomes. Whatever result is chosen, he continues, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other. Hence it is often said that a “balancing operation” must be undertaken, with the “correct” decision seen as the one that yields the greatest net benefit.³

Aleinkoff’s reference to “theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests”⁴ is especially relevant in the context of this article. He speaks, for instance, about a “balancing opinion” by which he means a judicial opinion that analyzes a constitutional question by identifying interests engaged by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.⁵ For his part, Shriffin sees balancing as no more than “a metaphor for the accommodation of values.”⁶ While all legal disputes warrant some form of balancing (for example the case of party A being balanced against that of party B in ordinary criminal or civil litigation)⁷ to work out their resolution, as a constitutional doctrine, balancing has a particular resonance in constitutional theory and adjudication. It is, however, in the process of analyzing how the doctrine applies in different constitutional systems, that divergences become obvious.

3. Ibid.
4. Ibid at 945.
5. Ibid.
7. Wallace Mendelson: “The First Amendment and the Judicial Process: A Reply to Mr. Frantz” (1963-1964) 17 Vand L Rev 479 (“[m]oreover, balancing would seem to be implicit in an adversary system which inevitably contemplates at least two sides to every case...” at 481).
In human rights cases, I have already identified the interests that courts seek to balance: individual rights versus government restrictions on those rights. I have therefore answered the question, embedded in the doctrine, of “what” courts are called upon to balance. The next question is “how” this balancing is actually implemented. Implicit in this question is an inquiry into the very method that courts adopt in carrying out the balancing act. Different constitutional jurisdictions use different balancing methods. In the next section I will analyze how these methods evolved in the practices of the British and American systems in relation to human rights adjudication as well as how Nigerian courts have struggled with such cases in the absence of a clear method.

United Kingdom: From Wednesbury “Unreasonableness” to Proportionality Analysis

The British do not operate a written constitution. Therefore, rather than constitutional law, they were more inclined to speak in terms of administrative law. But in so far as both branches of public law are concerned with evaluating the

---

8. An English writer could therefore talk about the “Europeanization of English Administrative law” rather than constitutional law. When people therefore discussed British constitutional law in the past, it passed for no more than a misplacement of terms. See Chris Hilson: “The Europeanization of English Administrative Law: Judicial Review and Convergence” (2003) 9 Eur Pub L 125 at 125; see also PP Craig, Administrative Law (London: Sweet & Maxwell, 1989) (“[f]or some [administrative law] is the law relating to the control of government power, the main object of which is to protect individual rights. Others place greater emphasis upon rules which are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others see the principal objective of administrative law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process” at 3).
actions of "public authorities"\(^9\) that do have implications for human rights, the distinction may be redundant from a strictly human rights standpoint. The British also did not have, until the coming into force of the *Human Rights Act 1998*,\(^{10}\) any document containing a list of rights to which their citizens were entitled. The enactment of the *Human Rights Act* domesticated the *Convention for the Protection of Human rights and Fundamental Freedoms*.\(^{11}\)

The fact that the British have no written constitution and no bill of human rights before 1998, is not an indication that individual rights were not legally protected. At common law, the courts developed adjudicatory standards to test the exercise of public powers against rights that had been similarly developed by common law processes. But unlike in those jurisdictions where constitutionally entrenched rights checked legislative authority, in Britain parliament is supreme and has powers by legislative means to interfere with those rights developed by common law.\(^{12}\) In reviewing actions deemed to have violated human rights under British law, the courts seemed to alternate between the principles of "unreasonableness" enunciated in the case of *Wednesbury Corporation* case\(^{13}\) and "illegality, irrationality and procedural

---


11. 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [*European Convention*]; see Jenkins, *supra* note 9 (arguing that with the enactment of the *Human Rights Act* "Parliament 'incorporated' rights enshrined in the *European Convention on Human Rights*... giving them effect in domestic law" at 183).


impropriety” as laid down in the *Council of Civil Service Unions* case.\(^\text{14}\)

These principles derived from administrative law but were used as standards for review of human rights cases as well. In *Wednesbury*, a local authority had power to grant licenses for cinematograph performances under the Cinematograph Act 1909 and could grant a license to do business on Sundays, subject to such conditions as the authority might think fit to impose. The authority granted the plaintiffs in this case leave to perform on Sundays subject to the condition that no children under fifteen years of age should be admitted to such Sunday performances with or without an adult. The plaintiffs sued on the ground that the condition was unreasonable. The court held that the local authority had not acted unreasonably or *ultra vires* in imposing the condition. The court, interpreting what was meant by unreasonableness in this circumstance, stated that:

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention

---

to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.  

This traditional principle of English public law was the only one that the system used for the purposes of substantive review but not in the absence of context since the Wednesbury standard of "[un]reasonableness" meant different things in different situations. Therefore in applying the standard, distinct judicial incarnations of it contested for recognition and priority.

In some later judicial decisions, the Wednesbury principle was contrasted with newer articulations. While Lord Greene's formulation considered an unreasonable decision to be "something so absurd that no sensible person could ever dream it lay within the powers of the authority", or "a conclusion so unreasonable that no reasonable authority could ever have come to it" Lord Cooke would later suggest that a decision would be unreasonable simply if it were "one which a reasonable authority could [not] reach." Observing these articulations, Elliot stated that although Lord Cooke's

15. *Wednesbury*, supra note 13 at 229, Lord Greene, MR.
17. *Ibid*; see also Jeffrey Jowell: "In the Shadow of Wednesbury" (1997) 2 Jud Rev 75.
formulation is as reliant as Lord Greene’s on the rather vague criterion of reasonableness, the two tests are very different in character.\textsuperscript{19}

\textit{Wednesbury} was also criticized for other reasons apart from its apparent vagueness. Not only was it historically presented as a monolithic standard of review; it was also not as structured as other comparative standards. At the same time, it established a high threshold for public interference with human rights because it accorded more intense deference to the judgments of policy makers.\textsuperscript{20} These were very significant criticisms. \textit{Wednesbury}’s flexibility would later give expression to a more structured concept of unreasonableness, which, according to Elliot, was classically illustrated by reference to the divergent modes of substantive review operating in the distinct contexts of human rights and economic policy cases.\textsuperscript{21} Matters of economic policy came to be viewed as “not justiciable” or “less justiciable”, meaning that the courts will intervene with the substance of the decision only in extraordinary circumstances.\textsuperscript{22} In contrast, when decisions

\begin{itemize}
\item \textsuperscript{19} Ibid.
\item \textsuperscript{20} Chris Hilson: \textit{supra} note 8 at 132.
\item \textsuperscript{21} Elliott: \textit{supra} note 15 at 101.
\item \textsuperscript{22} \textit{R v. Secretary of State for the Environment ex p Hammersmith and Fulham London Borough Council, [1991] 1 AC 521} (the formulation and implementation of national economic policy “is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. Both the constitutional propriety and the good sense of this restriction seem to me to be clear enough. The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their
affect human rights, the courts are more willing to review administrative decisions.  

While appearing to contain a single foundation for substantive review, Elliot argues that Wednesbury instead concealed a range of different standards. As noted above, he substantiates this claim by reference to the scale of divergence between the kinds of substantive review envisaged between, for example, economic policy cases and human rights cases. While economic policy cases involve "an unstructured and highly deferential form of review," (which could be similar to the rational basis standard in American practice discussed later), human rights cases involved the courts in a "more structured and intensive mode of review" (which could be strict scrutiny in American practice). Elliot therefore contends, as does Hilson, that it is inaccurate to suppose that English law through the Wednesbury test adhered to a single principle of substantive review. Instead he states that Wednesbury reasonableness embraced diversity at both the level of structure and the level of intensity with which different types of decisions are reviewed.

The recognition in certain quarters that Wednesbury reasonableness did not properly prescribe satisfactory standards for the review of administrative powers under British law became more noticeable after the European Convention came into effect in the UK. The British are renowned for practicing the dualist form for the reception of international

proper function if they presumed to condemn the policy as unreasonable"

Lord Bridge at 597).

23. Ibid.
24. Supra note 15 at 102.
25. Ibid.
26. Ibid.
law into the domestic legal system.27 However, in *Brind*28 the court decided that while unincorporated international treaties may not form part of British law, where either statute or common law is uncertain or ambiguous, the courts may legitimately resort to such treaties in order to resolve uncertainty or ambiguity.29

This dualist practice played quite a significant role in the procedure where by European human rights norms and jurisprudence came to permeate the British system of human rights review. The historically dualist orientation of the courts in the United Kingdom is so well settled that it is not open to debate. It could therefore be distinguished from any apparent "back-door incorporation" of the kind that the court rejected in the case of *Chundawadra v. Immigration Appeal Tribunal*.30 In that case the court foiled an attempt to invoke the administrative law doctrine of legitimate expectation, and described it as the "back door" by which the claimants sought to introduce the *European Convention* into English law. In particular the tribunal held that while the *European Convention* could be used in interpreting the law if there was any ambiguity or doubt. However, where the domestic legislation was perfectly clear, it could not provide a proportionality test as an alternative to *Wednesbury* unreasonableness. Hunt states that such statements “inspired little confidence that England’s highest courts were capable of responding with imagination to


what [at the time] could scarcely still be called English law's 'new dimension.'”

Though the above scenario presented only discouraging possibilities, it was also the case that more than a few experts in the British system retained the healthy expectation that if international treaties could be used as aid in statutory interpretation, their potential use in administrative law was still enormous.\[^{32}\] Hunt again asserts that they might offer a constraint on the exercise of broad statutory discretion, which was notoriously difficult to challenge by judicial review due to the inherently deferential *Wednesbury* standard.\[^{33}\]

The literature irresistibly points to the fact that even prior to the passage of the *Human Rights Act* in 1998, and ostensibly pushed in that direction by jurisprudence from the European Court of Human Rights (ECHR), the courts in the UK were already looking beyond *Wednesbury* as standard for substantive review. This happened at a time when the courts had also developed a new enthusiasm for interpreting domestic law more generally in the light of the *European Convention*.\[^{34}\] As such, English courts felt obliged, as Hilson expertly articulates it, to view “an old principle through a new human rights filter.”\[^{35}\] It occurred with minimal flourish in *ex parte Smith*\[^{36}\] when the English Court of Appeal attempted “to adapt the

---

32. *Ibid* at 134.
33. *Ibid*.
34. *Ibid* at 139; see also Margit Cohn, “Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the 'Administration in the United Kingdom'” (2010) 58 Am J Comp L 583 at 607 (since 1948, more than 2500 decisions in the UK have cited *Wednesbury* and used the term “unreasonable,” but of these, 2160 - more than 85% - were delivered after January 1, 1990 and 1545, or 61%, were delivered after January 1, 2000).
35. Hilson: *supra* note 8 at 131.
traditional *Wednesbury* basis to provide a standard more in line with the proportionality test used in the ECHR jurisprudence."

According to Sir Thomas Bingham in that case:

The court may not interfere with the exercise of an administrative discretion on substantive grounds save if the court is satisfied that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.

Although contested among scholars, *Smith* was positively reviewed for bringing *Wednesbury* closer to the ECHR proportionality standard. Hilson provides two justifications in support of this viewpoint even though he agrees with Elliot that *Wednesbury* is a variable rather than a monolithic standard of review. First, Hilson states that the test in *Smith* entails a more structured exercise than conventional *Wednesbury* because it invites the courts to engage in a balancing exercise between individual rights and competing policy justifications. Secondly he points to the heightened standard or intensity of review in human rights cases.

Elliot however asserts that, following *Smith*, the assumption that proportionality replaced *Wednesbury* only supports what he sees as the false premise that prior to *Smith* there was indeed a single principle of substantive review. He argues that structuring the discourse in this manner "fails to

---

38. *Supra* note 36 at 554.
acknowledge the established tradition of diversity in this area: the ‘reasonableness or proportionality?’ question overlooks the existing domestic context into which the proportionality test is being introduced.”40 Continuing, he submits that once the diversity in the pre-existing context is appreciated, the focus of inquiry shifts from the question of whether proportionality may replace reasonableness, to the relationship between those concepts and especially the way in which the former complements the latter by extending the range of options open to the reviewing courts.41

One striking feature of the British system is that it adopts a binary between judicial review of legislation and judicial review of executive action and administrative decision-making.42 To this point, I have limited my analysis to the first limb of this binary: the review of executive and administrative decisions. A different set of principles govern judicial review of legislation. In theory, under British law the doctrine of parliamentary supremacy coupled with an unwritten constitution meant that the judiciary had no role in reviewing the validity of legislation.43 This has, however, since the coming into force in the UK of the Human Rights Act of 1998,


43. Robert B Seidman: “Judicial Review and Fundamental Freedoms in Anglophone Independent Africa” (1974) 35 Ohio St LJ 820 at 826; see also Harry H Wellington: “The Nature of Judicial Review” (1981-1982) 91 Yale LJ 486 (“[w]e tend to think of courts at common law as acting because the legislature has not and as making law the legislature can unmake. When statutes are involved, we see courts either effectuating legislative will or, through an occasional misreading of legislative intent, as producing an incorrect decision that can be remedied easily by legislative reform” at 487).
given way to what some describe as “rights review” which establishes “a form of judicial scrutiny that can review democratically derived decision-making by public authorities for compliance with a set of recognized basic rights.”

As important in the British context is the distinction between strong judicial review and weak judicial review. According to Waldron, in a system of strong judicial review courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Courts here also have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of the doctrines of *stare decisis* and issue preclusion, a law that the courts have refused to apply becomes in effect a dead letter. Waldron cites some European courts that possess this authority and states that, although it appears as though American courts do not, the real effect of their authority is not far short of this.

In jurisdictions that apply the weak version of judicial review, Waldron argues, courts may scrutinize legislation for its conformity to individual rights and may decline to apply it because rights would otherwise be violated. He cites the UK as example of the weak version of judicial review since the


enactment of the *Human Rights Act*. Under the Act’s provisions, courts may review legislation with a view to issuing a ‘declaration of incompatibility” if the court finds that the provision under review is incompatible with a right protected under the *European Convention*. Under the *Human Rights Act*, such a declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and ... is not binding on the parties to the proceedings in which it is made.” Yet the declaration may have the effect of causing a minister to initiate legislative procedure to ameliorate the incompatibility. It is perhaps the influence of the *European Convention* that has impelled more intense scrutiny of executive, administrative and legislative under the rubric of proportionality.

Unlike the UK, the US operates a written Constitution. At the time of its promulgation, the US Constitution contained very minimal reference to human rights guarantees. This led some writers to argue that this was in conformity with the thinking of its Framers that the Constitution is essentially designed to protect individual rights. Ides and May contend that “many of the Framers believed that the political structure created by the Constitution was the primary and essential vehicle through

---

49. Gerald Gunther: *Constitutional Law* (New York: The Foundation Press, Inc., 1985) (”[t]here were relatively few references to individual rights in the original Constitution: its major concern was with governmental structure” at 406).
which to protect the liberty of the people.” A textual reference to limitations on the authority of state in the Constitution is, however, commonly traced to Article IV (the Privileges and Immunities Clause) as well as Article 1, paragraph 10 (the Contracts Clause). This is aside from the prohibition placed on state bills of attainder and ex post facto laws.

But later in its development and having regard to the particular conditions of that period, specific human rights guarantees were added to the US Constitution by way of amendments in 1791. However, unlike contemporary understandings of these rights, which qualify them in light of overriding public interests, the amendments seemed to have granted these rights in absolute terms without any limiting possibilities. For example, the First Amendment, which established freedom of religion, speech and assembly, provided that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

This provision seemed not to leave any room for the legislature to control or place limitations on the enjoyment of the rights guaranteed. “Congress shall make no law...” could therefore legitimately be interpreted, given its unambiguous mandatory appearance, as absolutely prohibitive of any legislative regulation of the freedoms mentioned. The analysis I shall make in this section is not however limited to the First Amendment. It will include subsequent amendments incorporating what is commonly referred to as the American Bill of Rights. Black describes the Bill of Rights as “any

51. Ibid.
document setting forth the liberties of the people”, 52 thereby referring to all provisions of the original Constitution and Amendments that protect individual liberty by barring the government from acting in a particular area or from acting except under certain prescribed procedures. 53 Among these, he mentions provisions that safeguard the right of habeas corpus; those that forbid bills of attainder and ex post facto laws; those that guarantee trial by jury, and strictly define treason and limit the way it can be tried and punished. 54

Does the US Bill of Rights contain absolute or qualified rights? The answer to this question is obviously consequential for how courts approach judicial enforcement. Writing in the 1960s, Black recognized “a sharp difference of views as to how far its provisions should be held to limit the lawmaking power of Congress.” 55 While one tendency (the “non-absolutists,” “balancers,” or “operationalists”) 56 saw in the constitutional prohibitions mere admonitions which Congress need not always observe, the other, of which Black himself was an important interlocutor, believed that “there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant

53. Ibid.
54. Ibid.
55. Ibid at 866.
56. Alexander Meikiejohn: “The First Amendment is an Absolute” (1961) Sup Ct Rev 245 at 248; see also Konigsberg v. State Bar, [1961] 366 US 36 (rejecting the absolutist theory “[a]t the outset we reject the view that freedom of speech and association..., as protected by the First and Fourteenth Amendments are ‘absolutes,’ not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk...” Harlan J at 49-50).
their prohibitions to be ‘absolutes.’”57 With such divergent viewpoints, it will be understandable why still others believed the First Amendment to be ambiguous.58

The text of the First Amendment, coupled with its differing interpretations, made it difficult for the courts to respond to claims of violations of the amendment principles. If the absolutist argument prevailed, the legislature would not have the power to curtail rights thereby enshrined and the courts would not have a balancing role to perform. If the non-absolutists had the upper hand, the courts would be called upon to perform the same duty of balancing rights against higher societal interests in those situations where the two interests are in contention. But even if that duty existed, the Constitution itself, quite significantly, did not provide any guide or clues to the courts as to how it could be performed.

Fair enough, the American courts did not have much to do in the early stages of constitutional review because as important as the absolutist and non-absolutist debate was, a different controversy raged among the interlocutors on the spread of the principles enunciated in the amendments within the US federal structure. The question at issue was whether the provisions of the Constitution and the amendments on individual rights limited the powers of the state governments as it did those of the federal government. It was widely believed in the 19th century that the Bill of Rights did not limit the

57. Black, supra note 52 at 867.
power of the states. This view was given a judicial stamp of approval in the case of *Barron v Baltimore*. However, with the passage of the Fourteenth Amendment in 1868 there was an opportunity to extend the application of the Bill of Rights to the states. Yet this expectation was scarcely met. According to Epp, "the Fourteenth Amendment remained notoriously unclear, for the amendment referred only in relatively vague terms to the privileges or immunities of the citizens of the United States, life, liberty, or property, due process and equal protection of laws." An acceptable interpretation of these broad terms could not be agreed upon by the courts and was disputed well into the 20th century.

In addition to these controversies, neither the Constitution nor the Bill of Rights contained in the amendments provided the courts with any procedural resources for scrutinizing the impact of official actions on human rights with a view to offering protection to victims. It was therefore left to the courts to develop standards for substantive analysis. Historically speaking, though the equal protection clause of the Fourteenth Amendment was important in articulating the US rights tradition, it had only a limited impact for a considerable time after its passage. Pettinga states that in the first eighty years following its enactment, the US Supreme Court believed that it protected only racial and ethnic minorities from discrimination through overt or covert classifications which disadvantaged them. Continuing, he argues:

62. Ibid.
Because the Court believed the scope of protection was so narrow, it interpreted the equal protection clause as scarcely limiting state power. State governments were essentially free to benefit or burden groups within their borders in any way they saw fit. At times, the equal protection clause hardly protected anyone; ethnic and racial minorities could rarely get relief from discrimination with an equal protection challenge, and other groups could never get relief at all. 64

This situation would later give way in the late 1930s and early 1940s, Pettinga recounts, starting with the famous Footnote Four of Justice Stone in the Carolene case. 65 In that case Justice Stone called for more intense judicial inquiry to protect discrete and insular groups that do not have the ordinary protection of democracy and therefore are incapable of any meaningful or effective engagement with that process. However, in spite of this, the court in the Carolene held that a piece of economic regulatory legislation was entitled to a presumption of constitutionality.

Stone’s court also decided that the legislation in question should be upheld so long as the government could show a rational basis for enacting it. The onus was on the party challenging it to show that there was no rational connection between the government objective that the law purported to serve and the restriction itself. Applied in practice, almost all government objectives succeeded on the rational basis justification. There was therefore insufficient protection for human rights, particularly the rights of minorities under this

64. Ibid at 781.
standard. This led to the development of what has been described as “suspect classification” in American constitutional practice, following Justice Stone’s view in *Caroline*. By this classification, “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] courts must subject them to the most rigid scrutiny.”

Through the doctrine, the courts “concentrate on devising complex categories and subcategories for identifying the kinds of rights infringement that merit constitutional review and the level of scrutiny that should apply to each one.” Therefore the suspect classification doctrine presumed a law unconstitutional if it used certain classifying traits. Unlike in rational basis analysis, in suspect classification cases, in order to survive such rigid or strict judicial scrutiny, the impugned legislation or action must be necessary to the accomplishment of a compelling state interest. Here, unlike with rational basis doctrine, the onus was on the government to show that compelling interest.

Legislation that demanded strict scrutiny, Gunther states, require a far closer fit between classification and statutory


68. Margaret Bichler: “Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights” (2008) 28 BC Third World LJ 167 (“[r]acial classifications have consistently been regarded as suspect because racial minorities have historically been disenfranchised from the political process and have a signifying trait (skin color) that is immutable and readily visible” at 170); see also Joseph Tussman & Jacobus ten Brock, “The Equal Protection of the Laws” (1949) 37 Calif L Rev 341 at 344; R Richard Banks, “Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse” (2001) 48 UCLA L Rev 1075.

purpose than the rough and ready flexibility traditionally tolerated by the old equal protection.\textsuperscript{70} In his words:

[M]eans had to be shown “necessary” to achieve statutory ends, not merely “reasonably related” ones. Moreover, equal protection became a source of ends scrutiny as well: legislation in the areas of the new equal protection had to be justified by “compelling” state interests, not merely the wide spectrum of “legitimate” state ends.\textsuperscript{71}

The US Supreme Court with Earl Warren as Chief Justice would soon kick-start an ambitious policy of identifying new areas appropriate for strict scrutiny. The court did so by searching for two major characteristics: the presence of suspect classification or the impact of legislation on fundamental rights and interests.\textsuperscript{72} While racial discrimination maintained its significance as grounds for intervention based on the established suspect classification rule, and fundamental rights could be identified by recourse to the amendments to the Constitution, what constituted fundamental interests was far less clear. While the list of such interests developed by the Warren court were modest to say the least (including voting, criminal appeals and the right to interstate travel\textsuperscript{73}), commentators searched for justifications for including analogous situations of which “welfare benefits, exclusionary

\textsuperscript{70} Gunther, supra note 49 at 588.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
zoning, municipal services and school financing came to be the most inviting frontiers."  

Yet there were those who reasoned that the Supreme Court’s analytical position in human rights cases defied an easy categorization into situations requiring rigid scrutiny and those warranting only deferential rational basis considerations. Such persons argued that a variety of standards had been applied to resolve equal protection cases. For example, in *San Antonio Independent School District v. Rodriguez* 75 Justice Marshall rendered a dissenting opinion where he observed that the Supreme Court apparently seeks to establish how equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. On the contrary, he stated, the Court’s decisions defy such easy categorization. Justice Marshall held that a principled reading of what the Supreme Court had done revealed that it had applied a spectrum of standards in reviewing discrimination claims under the Equal Protection Clause. This spectrum, he continued, clearly comprehended variations in the degree of care with which the Court would scrutinize particular classifications, depending on the constitutional and societal importance of the interest adversely affected and the invidiousness of the basis upon which the particular classification is drawn. 76

Such thinking later produced a third standard described as “intermediate” level scrutiny or “rational basis scrutiny with a

74. Ibid.
76. Justice White adopted this position in, for example, *Vlandis v. Kline*, [1973] 412 US 441 (stating that “it is clear that we employ not just one or two, but, as my Brother Marshall has ably demonstrated, a ‘spectrum of standards’” at 458).
bite."\(^{77}\) This standard is clearly more intensive than the deferential or rational basis review yet less demanding than the rigidity of strict scrutiny. The level of scrutiny protects persons within a quasi-suspect classification system and is associated with sex discrimination cases like *Craig v Boren*\(^{78}\). In that case, the court majority held that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.

Pettinga identifies three major reasons why the Court created this third category. First, many scholars criticized the human rights doctrine. Second, growing public awareness of discrimination against groups other than racial groups had increased demands for judicial protection. Finally, the advent of legal aid for disadvantaged constituencies influenced the development of creative judicial intervention on behalf of indigents.\(^{79}\) Under this intermediate analytical standard, the court may look more closely at the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under traditional analysis.\(^{80}\) The Court stated that it "does not accept every goal proffered by the state, and if an alternative means exists which does not disadvantage the protected group, the Court can prompt the legislature to employ the alternative means by invalidating the legislation."\(^{81}\)

A comparison of contemporary British and American standards of review reveals certain clear points of interest.

\(^{77}\) See Pettinga: *supra* note 63 at 784. See also Jeremy B Smith: "The Flaws of Rational Basis with Bite: Why the Supreme Court should Acknowledge its Application of Heightened Scrutiny to Classification based on Sexual Orientation" (2005) 73 Fordham L Rev 2769.


\(^{79}\) *Supra* note 63 at 784.

\(^{80}\) *Ibid*.

\(^{81}\) *Ibid* at 785.
Perhaps most relevant is that while British practice is based on proportionality (though they are loathe to so describe it), in the US the standard tilts towards balancing. The question then is whether a real difference exits between “proportionality” and “balancing.” To the extent that under both systems serious efforts are made to actually strike a balance between individual rights and governmental interests, one might conclude that no real difference exists between them. Under both approaches, when governmental action affects the human rights of individuals, the governmental interest warranting such effect must be compelling and the means chosen must be necessary to achieve that purpose.

But Chaudhry believes there is actually a difference between American balancing and British proportionality by reference to what he calls “decisional deference” particularly in the context of American practice. He notes that in most jurisdictions (particularly those applying the proportionality model), rights adjudication consists of a two-stage process that determines first whether a right is violated and second whether that violation is justified according to a proportionality analysis. In these systems, he continues, rights are generally given a broad interpretation, and countervailing interests are addressed exclusively under the rubric of proportionality. 82 This contrasts to “definitional balancing” as he calls it in the context of the American system. This, he says, is a mere one-stage approach “which conflates the scope of a right with its strength.” 83 What is not contested, however, is that at this point in both the American and the British systems, once a governmental action or legislation engages a recognized human right, a greater burden is placed on the government official or

83. Ibid at 314.
institution to justify that action or law. In deciding whether or not that burden is discharged, the right in question and the governmental interest justifying its restriction are balanced through a structured process.

Nigeria: Struggling for Justification; Inverting the *in Favorem Libertatas*
While in both the UK and US, the courts have applied judicial tools to demarcate rights and governmental interests, and weigh them on the balance; Nigeria has adopted a different approach. Rather than allow the courts to strike the balance from scratch, the constitution provided a rather rough outline of how the courts could perform that function. Section 45 of the 1999 Constitution provides that:

45(1) Nothing in sections 37 [privacy], 38 [conscience, thought and religion], 39 [expression], 40 [assembly] and 41 [movement] shall invalidate any law that is reasonably justifiable in a democratic society – (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:
Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36(8) of this Constitution.

This provision sets out the general limitation on the human rights provisions of the Nigerian Constitution. Noticeably, the limitation applies to specific guarantees. This supports the proposition that it does not apply to all of the rights that the Constitution enshrines. In addition, some of the guarantees contain independent limitation clauses. For example, while section 33(1) of the Constitution guarantees the right to life in general terms (save in the execution of a death sentence), sub-section (2) thereof qualifies the right by delimiting situations where life may be taken. Such situations include defending another person from unlawful violence, in defense of property, death arising while someone is carrying out a lawful arrest, to prevent the escape of a person lawfully detained, or for the purpose of suppressing a riot, insurrection or mutiny.

It is equally worth noting that the limitation clause is not applicable to section 34 of the Constitution which places an absolute prohibition on the use of torture and other inhuman or degrading treatment. The section also disallows slavery and servitude absolutely as well as the performance of forced and compulsory labor barring the exceptions highlighted.

84. Nigeria is among several African countries where the death penalty is still applied as a criminal sanction. However, some countries on the continent such as South Africa have abolished the practice. See Dirk van Zyl Smit, "The Death Penalty in Africa" (2004) 4 Afr Hum Rts LJ 1; Lilian Chenwi, Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective (Cape Town: ABC Press, 2007).
Furthermore, the right to liberty, guaranteed under section 35, may be restricted under certain circumstances and in accordance with certain procedures. Where these are invoked, the Constitution contains ample provisions for securing humane treatment, including prompt and expeditious trial, the right to silence and legal consultation, a right to a written explanation of the reasons for arrest or detention, and the right to bail.85

Finally, the right to fair hearing in section 36 is placed outside both the reach of the general limitation provisions in section 45, and any specific limitation for that matter. Not even emergency considerations could place this guarantee at risk. Rather the proviso to subsection 45(2) captures the well-known principle of nullum crimen sine lege – that only offenses in existence at the time of an accused person's offending action can be prosecuted (that is, there should be no retroactive criminalization) and that no heavier punishment should be imposed than was in force at the time that the offence was allegedly committed.

For the purposes of analyzing the limitations in the Nigerian Constitution, one might group the rights into three distinct categories. The first category consists of those rights that are exempted from any restrictions in the interest of defence, public safety, public order, public morality, public health or the protection of the rights and freedoms of others persons. In this category are freedom from torture and other similar freedoms. The other category consists of those rights that could be restricted on the basis of these justifications but only in times of emergency. Captured here are the rights to life, freedom from forced labor, personal liberty and freedom from discrimination. Rights in the third and final category are

those that could be derogated from at any time on the basis of public order, morality, health, etc.

As in the two jurisdictions already examined, the role of Nigerian courts in cases alleging human rights abuses is to read the guarantees relied upon in those cases and then decide if the abuses complained of could be justified under any of the limitations allowed by the Constitution. It is by no means a light duty. When constitutional terms are as open-textured as they often are, courts interpreting them must scrutinize whether they are liberal (in favor of rights i.e. acting in favorem libertatas) or conservative (expanding the limitations to the detriment of rights). Apart from the words of the Constitution itself, the Nigerian courts do not have any further resources that might guide their interpretive orientation. The task is therefore a complex one, especially since, according to Okonkwor, the Nigerian Bill of Rights differs from the rest of the Constitution because it is a statement of principles that involves the application of non-legal criteria. 86

He argues further that when interpreting these human rights provisions, the courts should consider the reasonableness and justifiability of legislative and executive acts. This, he says, compels a subjective, rather than a purely objective approach that adheres to strict statutory construction. Therefore, he asserts, the subjective approach involves the measurement of reasonableness and justifiability in terms of the historical setting, the local political and social conditions and local standards of acceptability. 87 Though writing in the context of the human rights provisions of the Nigerian Independence Constitution of 1960 and the Republican Constitution of 1963, Okonkwor’s argument is, however, also

87. Ibid.
appropriate for this analysis of the human rights behavior of the courts under the 1999 Constitution. The human rights and the limitation provisions in Nigerian constitutions since 1960 have all been quite similar.

Regarding the general limitation clauses, Okonkwor, as well as Nwabueze, have described them as manifestly vague and flexible. This is ostensibly because it cannot be stated with any degree of certainty what the Constitution means by the phrase "reasonably justifiable in a democratic society." This would seem to be the bane of all efforts to expand judicial protection of human rights in Nigeria by judicial means. Yet this has not elicited as much academic attention as is seriously needed. In this regard, one might notice how different the Nigerian limitation regime is from its South African counterpart, for example. The Nigerian Constitution does not have an equivalent to section 36(1) of the South African Constitution that points toward the development of standards of human rights adjudication analogous to proportionality balancing.

The Nigerian rights limitation regime therefore does not allow the same structuralism and the development of clear, standard steps for effective balancing of rights against

88. Ibid; see also B O Nwabueze, A Constitutional History of Nigeria (London: Longman Inc., 1982) at 118.

89. This provision essentially entrenched the proportionality standard of human rights analysis by providing that: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." In the succeeding subsection it is provided that: "(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."
governmental interests. A literal reading of the Constitution, a tradition which Nigerian courts have largely adopted in the context of its limitation regime, renders the possibility of effective judicial affirmation of rights illusory. This is not only true of situations where the courts render positive judgments in human rights cases, but also in those cases where the outcomes are negative. Because these decisions are arbitrary and devoid of clear standards and tests for justifying governmental intrusions on rights, there is a strong likelihood for them to be inconsistent and contradictory.

In the circumstances, the distinction that Alexy draws between the construction of rights as rules and the construction of rights as principles is especially relevant to the Nigerian practice. Rather than construct rights as principles, the dearth of analytical resources equivalent to what is available under the South African constitution has foisted on Nigerian courts a situation in which all rights are construed merely as rules. But not all rights may be interpreted as rules. According to Alexy, rules are norms that require something definitively. They are *definitive commands* (his emphasis) of which their form of application is subsumption. Alexy argues that “[i]f a rule is valid and applicable, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with.”

On the contrary, principles, according to Alexy, are norms requiring that something be realized to the greatest extent

---

90. Cohen-Eliya & Porat, *supra* note 67 at 266 (suggesting that the balancing mechanism which in more ways than one resembles proportionality analysis was devised by the United States Supreme Court to overcome an excessively literal reading of the constitutional text).
93. *Ibid*. 
possible, given the factual and legal possibilities at hand. These, he argues, are *optimization requirements* (his emphasis). He states that “[t]hey are characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.” 94 Alexy argues that when human rights are conceived as rules rather than principles, balancing is eschewed. Of this situation, which he refers to rather pejoratively as “freedom from balancing” there is positivist ingredient which makes all questions connected with the application of constitutional rights resolvable only by traditional canons of interpretation. This is done by appealing to the wording of the constitutional rights provisions, to the intentions of those who framed the Constitution, and to the systematic context of the provision being interpreted. 95

Applied to the Nigerian context, Alexy’s double-headed theories of “subsumption” and “optimization” have stark significance. While those provisions in the constitution that contain non-derogatory rights could be interpreted as rules, the rights to which the limitation provisions are applicable would be construed as principles. The first category of rights function like rules because they express imperatives that are boundless and limitless. For example the constitutional prohibition of torture and other cruel and inhuman treatment can only be implemented by an absolute prohibition of those practices. The prohibition is either honored or it is not. There are no two ways and no short cuts. There is therefore no room for the application of balancing and proportionality, or in Alexy’s

95. *Ibid* at 22.
words, "freedom from balancing" applies. Nothing is available to balance or to render proportional.

On the other hand, those constitutional rights provisions that are derogable constitute principles to the extent that they can be limited. What the constitution mandates regarding this category of rights is that they be protected or, as Alexy would argue, optimized to the greatest extent possible. For the simple reason that in this case there are two competing values – the rights of individuals and government restrictions on them in the name of the public good – a balancing process is warranted. What the proportionality doctrine accomplishes in this regard is to ensure that a fair balance is struck between these two values and especially that the means used to restrict the right in question is not more than what is necessary to accomplish the stated governmental objective.

Since the majority of the rights enshrined in the Nigerian Constitution fall within the latter category, they should attract the application of the balancing scheme. But the words "reasonably justifiable in a democratic society," are far too vague to provide an objective guide for balancing. Nwabueze also claims that the introductory phrase "Nothing in this section shall invalidate any law..." seems to imply a presumption in favor of the validity of a law imposing a restriction.96 Other commentators share Nwabueze's position.97

96. Nwabueze, supra note 88 at 118.
97. Okonkwor, supra note 86; see also Kenneth Robert-Wray, "Human Rights in the Commonwealth" (1968) 17 Int'l & Comp LQ 908 (noting that the Nigerian human rights provisions had been informed largely by the European Convention and stating that "[t]he point has more than once been made that Articles 8 to 11 of the [European] Convention, which corresponds to sections 23 to 26 [sections 37 to 40, 1999 Constitution] of Nigeria's Constitution, permit such qualifications as are 'necessary in a democratic society'; and that by substituting 'reasonably justifiable' for 'necessary' the Constitution permits greater latitude. It does. What is 'reasonably justifiable' may not be 'necessary.' Article 15 (emergencies) is even tighter; the
The statement “Nothing in this section shall invalidate any law...” seems to cast the onus on the person challenging a human rights abridging law to show that it is not reasonably justifiable. Nwabueze suggests that the Constitution could have taken a more favorable approach to the rights in question and placed a greater burden on governmental justification if it had read instead: “any law derogating from a guaranteed right shall be invalid unless it is reasonably justifiable...”

Nwabueze’s suggestion tallies substantially with Taiwo’s position on the same issue. The latter observes that framers of successive Nigerian constitutions have always concluded that it is appropriate to include this clause in the constitutional text. This, he argues, leads to a conclusion that “such clauses express attitudes that cut across time periods and individual preferences among the framers.” He therefore asks the question that the constitutional provision points inexorably to but only in reverse order: “Do Nigeria’s constitutional framers mean to suggest that a democratic society, so-called, may interfere with an individual’s right to [for example] respect for his private and family life, home and correspondence, if such interference is ‘in the interest of defence, public safety, public order, public morality, public health or economic well-being of the community?’” Taiwo concludes that if this question yields a positive answer, then that is a sure sign that the framers of relevant words being ‘strictly required’; and Article 1 (the right to life) goes even further with ‘absolutely necessary,’ whereas section 18 of the Constitution dilutes this to ‘reasonably justifiable.’ But in my submission, if the validity of measures adopted by Parliament or the Government is liable to be canvassed in a court of law, this change of wording is, to say the least, most desirable.” at 922).

98. Ibid.
100. Ibid.
the constitutions did not take rights seriously, [and] left no room for doubt that they were aware of the many philosophical conundrums that their proposal might generate and seemed to have adopted a crude utilitarian approach in which the rights of an individual may be sacrificed for the welfare of the many.\textsuperscript{101}

Among the earliest cases of relevance when analyzing the attitude of Nigerian courts with regard to what it means for legislation to be reasonably justifiable in a democratic society is that of Cheranci.\textsuperscript{102} It is important to note that this was a decision of the Northern Region of Nigeria High Court written by a non-Nigerian judge, Justice Bates. In the judgment, Bates stated that there was a presumption that every law made by parliament was constitutional and that the courts should recognize this fact, and therefore apply restraint in deciding whether a particular law is reasonably justifiable or not.\textsuperscript{103} He

\textsuperscript{101} Ibid.
\textsuperscript{103} It is unclear how this presumption of constitutionality differs from the doctrine of parliamentary sovereignty. Canada, for example, which also practiced the British system prior to adopting the Canadian Charter of Rights and Freedoms, 1982 knew better than to continue with the British human rights tradition once the Charter was promulgated. See Hon. Justice JC Macpherson, “The Impact of the Canadian Charter of Rights and Freedoms on Executive and Judicial Behaviour” in Gavin W Anderson ed, Rights & Democracy: Essays in UK-Canadian Constitutionalism (London: Blackstone Press Limited, 1999) (“[o]ur Constitution Act 1867 states in its preamble that Canada is to have a Constitution ‘similar in principle to that of the United Kingdom.’ Of course, the anchor of the Constitution of the United Kingdom is the principle of parliamentary supremacy. That principle was also central to the Canadian Constitution for 115 years. Moreover, the courts adopted principles of interpretation which tended to respect the role and laws of government – e.g. the presumption of constitutionality, the principle of strict construction, the aspect doctrine and functional concurrency. Those principles are simply irrelevant in Charter litigation. Government lawyers now must expect to defend their laws on the merits. In so doing, they must be prepared to argue civil liberties doctrine at a sophisticated level and to articulate candidly and persuasively the policy factors underlying the challenged law. Moreover, in some aspects of the
seemed to suggest that judges “should not lightly disregard the voice of the people expressed through their legislators.” Justice Bates also held that to be reasonably justifiable, a restriction on a fundamental right must be necessary for the relevant purposes (set out in the Constitution) and must not be excessive or out of proportion to the objects it seeks to achieve. Finally, he held that the presumption places the burden of showing that the law is not reasonably justifiable on the complaining party.

Perhaps in one view it is not worthwhile to spend a lot of time on the Cheranci judgment because it was delivered by a regional High Court and is therefore of insignificant precedential value in Nigeria’s common law setting. Yet it is an important decision because had Nigerian courts maintained some parts of the structure it laid out, there could have been better prospects for a more effective judicial approach to the enforcement of rights and to the conception of acceptable limitations on those rights in the country. There are two observable parts to the court’s reasoning in Cheranci. On the one hand, it presumes the constitutionality of every law passed by parliament. On the other hand, the judgment set out a structure, which it would apply to every decision regardless of whether or not a particular law restricting constitutionally guaranteed rights is reasonably justifiable in a democratic society. I will proceed to examine the justification offered in favor of the presumption of constitutionality. Next, I will

---

Charter analysis, there is a presumption against the government. For example, when a law has been found by a court to violate a Charter right, the onus shifts to the government to demonstrate that it should be saved as a ‘reasonable limit...’” at 131-132).


105. Ibid.
show why the court’s approach to reasonable justifiability in Cheranci offers a yet to be realized opportunity for expanding human rights protection.

The justification offered for the presumption that the legislature always acts constitutionally is that law-making is a policy function and that elected representatives are better placed to decide matters of policy than an unelected judiciary. In other words this assertion concerns the supposed counter-majoritarian nature of judicial review.\(^\text{106}\) According to Roberts-Wray, the primary responsibility for governing the country rests with the legislature and the executive, and it is neither the function nor the wish of the judiciary to hinder or interfere more than necessary.\(^\text{107}\) He argues further that if the law requires the courts to review legislation and discretionary administrative action, it should not be incumbent on judges to substitute their own view of how the discretion should be exercised for the views of those primarily responsible, provided that what has been done is reasonably justifiable.\(^\text{108}\)

As in Cheranci, the court in \textit{Director of Public Prosecutions v. Chike Obi}\(^\text{109}\) came to the conclusion that the mere fact that a law has been made with the approval of the

\(^{106}\) See Mark A Graber: “Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power” (2006) 65 Md L Rev 1; Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 NYU L Rev 333 at 335; Samuel Issacharoff, “Constitutionalizing Democracy in Fractured Societies” (2004) 82 Tex L Rev 1861 (equating judicial review with constitutionalism which “exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities”).

\(^{107}\) Roberts-Wray, supra note 104 at 922.

\(^{108}\) Ibid.

\(^{109}\) \textit{Director of Public Prosecutions v Chike Obi}, [1961] 1 All NLR (Pt. 2) 186.
legislature, representing the people, is sufficient to trigger judicial restraint. To further this restraint, the courts have adopted a practice that has been variously characterized. Yusuf and Ogbu-Nwobodo call it a “plain fact” jurisprudential approach.\(^{110}\) Okere refers to it as literalism or mechanistic interpretation borne out of political expediency.\(^{111}\) Another commentator has described the Nigerian Supreme Court’s approach to human rights adjudication as austere and as discounting the normative force of the explicit language of the human rights guarantees of the Constitution.\(^{112}\) It is also suggested that this court minimally considers the general or specific context or structure of the Bill of Rights.\(^{113}\)

This is in part traceable to the history of the Supreme Court as well as the training and process of recruiting judges. It is worth underscoring that Nigerian courts have totally lacked a reasonable opportunity to develop a human rights adjudicatory philosophy suitable to Nigeria’s specific constitutional history. In this regard, British practice, although in many respects now divergent from the constitutional course Nigeria chose at independence, continues to lurk in the


\(^{113}\) Ibid.
background like a dead hand from the past. It is significant that the problematic limitation clause was a British invention. The constitution the British delivered on the eve of Nigeria’s independence marked the introduction of this clause into Nigerian constitutional practice. That clause, and the interpretation Justice Bates gave it in *Cheraneci*, demonstrates its bold British footprints.

It suggested that legislative power loomed over the Constitution’s human rights guarantees. Justice Bates called this the presumption of the constitutionality of statutes. But this presumption is only of limited significance to the broader issue. It exists in one form or another in most constitutional systems. However, it is not cast in concrete, rather, it is rebuttable. The bigger obstacle then is to adopt an interpretation of this presumption in line with that of Justice Bates in *Cheraneci*. Not only did he view this presumption as a form of restraint on judicial activity, he further interpreted it as placing the onus of proving that a law is not “reasonably justifiable in a democratic society” on the party alleging that such a law curtails constitutionally entrenched rights. This looks very similar to the American rational basis doctrine, which was found to insufficiently protect human rights. But in the British practice prevailing in that Nigerian context, parliamentary supremacy was dominant and actually qualified

114. Sandra Fullerton Joireman: “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy” (2001) 39 J Modern Afr Stud 571 (“[i]ndeed, in Nigeria and Kenya at independence, the courts and legal systems became closer to English common law than they had been under British colonial rule” at 577); see also Robert Seidman, “The Reception of English Law in Colonial Africa” in Yash Ghai, Robin Luckam & Francis Snyder, eds, *The Political Economy of Law: A Third World Reader* (New York: Oxford University Press, 1989) (“all the judges in Colonial Africa were non-African until the tag end of the imperial era, when a few West African judges were appointed, all of whom, however, were trained and qualified in England. This was hardly accidental...” at 111).
the rights recognized at common law. Legal education and judicial experience revolved around this tradition.

In Nigeria, the limitation clause from which this tradition was derived was repeated in the 1979 Constitution and again in the 1999 Constitution. Nwabueze observes that Nigerian judges are handicapped by their English education and judicial techniques that insulate them from the values and needs of the Nigerian people. He asserts that:

Their [Judges’] minds have become imbued with ideas about the unquestionability of parliamentary legislation under English law and about the perfection and symmetry of the common law as to render them almost incapable of performing effectively the more creative role demanded of them by constitutional adjudication under a written constitution. They are unfamiliar with the constitutional decisions of courts in the U.S. and with the vast literature of American constitutional law, which have greater relevance to the problems that are presented to them than the English decisions which are their stock-in-trade.

I now turn my attention to those portions of the decision in Cheranci that could have made judicial protection of human rights in Nigeria more robust and effective, had the courts followed and developed them. I take this approach, not only because Cheranci remains the only Nigerian court decision that

116. Ibid at 311.
offers an expanded definition and explanation of “reasonably justifiable in a democratic society”, but also because it clearly introduced the element of balancing and proportionality that is now the hallmark of acceptable reviews of laws and actions that restrict human rights. As surprising as it may be, Justice Bates, the author of the judgment, was in fact an English judge. In Cheranci, Justice Bates decided that a reasonably justifiable restriction on human rights “must not be excessive or out of proportion to the objects which it is sought to achieve.” He introduced the element of “proportion”, which if maintained at that time would have established a departure from Nigeria’s dependency on unhelpful English case-law and practice and the development of jurisprudential principles flowing directly from the very text of the Constitution.

There is therefore a relationship between the failure to consolidate on the proportionality part of the Cheranci decision and the persistence of what I identified earlier as “adhocism”, “plain factism” and “literalism.” If Nigerian courts had followed the proportionality reasoning behind the Cheranci decision, it would have been wrong to argue that the Constitution’s limitation provision placed the burden on the individual challenging a law or executive action to prove that such law or action is not reasonably justifiable in a democratic society.117 Proportionality analysis and the balancing of rights and interests usually proceeds in stages with specific questions asked at each stage.

One major question that usually arises within the proportionality/balancing matrix is: what legitimate governmental objective is a particular restriction on a

117. Okonkwor, supra note 86 (arguing that “the words ‘nothing in this section shall invalidate any law....’...seem to be tilted in favor of the derogatory law, which thereby shifts the onus to the challenging person to prove that the law is not reasonably justifiable” at 263).
constitutionally guaranteed right serving? It would appear improper to place the burden of identifying and justifying the objective on the party challenging the restriction. The rationale for this position is simple: who better than the government to convince the court of the legitimate goal of a challenged law or other governmental action and, in the Nigerian context, how such a law or action could be reasonably justified in a democratic society. In fact, it is a contradiction to require that the restriction on a right be proportionate while at the same time placing the burden of proving proportionality on the person challenging the restriction.

The failure to stand by the Cheranç proportionality formula has only led to a hazy and fragmented judicial landscape in which courts reach decisions without offering any coherent explanation for doing so. As a result, the legal problems are dealt with on a case-by-case basis often with the instant case benefitting little or not at all from previous cases by way of a structured process. In historical terms, two cases illustrate this situation. In Williams v. Majekodunmi (No. 3), the plaintiff who happened to be a prominent lawyer challenged a restriction order placed on him by the government. While he argued that the order was not reasonably justifiable, the government argued otherwise. In its judgment, the Supreme Court held that the restriction order was not reasonably justifiable. When interpreting the words “reasonably justifiable in a democratic society,” the court stated:

Those words...must be read in the context of the Constitution, and more particularly in the context of Chapter III in which they occur. The

Chapter confers certain fundamental rights which are regarded as essential and which are to be maintained and preserved; and they are to serve as a norm of legislation under majority rule, which is the form or rule pervading the constitutions. If they are to be invaded at all, it must be only to the extent that is essential for the sake of some recognized public interest, and may not be farther.\textsuperscript{119}

Quite surprisingly, in \textit{Adegbenro v. Attorney General of the Federation},\textsuperscript{120} which arose from similar facts as the Williams' case, the Supreme Court held that the restriction order placed on the plaintiff was reasonably justifiable. The court in this case reasoned that:

\begin{quote}
[T]here has in this case before us been shown to be ample grounds for the restriction placed on the movements of the plaintiff in the interest of peace and avoidance of bloodshed as deposed to by the defendant's witness. We have it before us that before the purported appointment of the Plaintiff there was a Premier of the Western Region who is alleged to have been removed from office; that as a result there were two factions in the party in power in that Region; that the plaintiff's attempt to hold a meeting of the House of Assembly...sparked off the disturbance which has led to the restriction order served on the Plaintiff; and finally, that the plaintiff desires to return to the duties of Premier
\end{quote}

\textsuperscript{119} \textit{Ibid} at 426.

\textsuperscript{120} \textit{Adegbenro v. Attorney General of the Federation} [1962] 1 ALL NLR 431.
of that Region. In my judgment the steps which have been taken are reasonably justifiable as a preventive measure to attain peace and order.121

Invoking only a couple of British authorities by way of rationale, one author has argued that the court was right to reach two contradictory judgments in these cases with similar facts.122 I am reluctant to agree with his conclusion. While the two cases did have some distinct facts, which may have played a role in the position adopted by the court, the judgments, especially in the latter case, could be rightly questioned. In both cases the court appeared more desperate to justify the restriction than to strike a balance between the restriction and the rights of the individuals concerned. Even while ruling in favor of the challenger in the earlier case, the court did not develop any helpful standards that could have benefitted subsequent litigation. For all intents and purposes, the court simply said that the restriction was not reasonably justifiable.

A critic of the court’s position could reach the exact opposite conclusion much in the same manner as the court itself. That is why justification is crucial. And it does not seem likely that any such justification could be advanced without at

121. Ibid at 439; see Chukwuma & Others v. Commissioner of Police. [2005] 8 NWLR (Pt 927) 278 [Chukwuma]; and see Inspector General of Police v All Nigeria Peoples Party & Others, [2007] 18 NWLR (Pt 1066) 457 [ANPP] (for more recent examples of this degree of inconsistency in decision-making. Both cases were delivered by the Nigerian Court of Appeal. They had similar facts and concerned the same provision of the Nigerian Constitution. Yet in the latter decision, the court did not even as much as acknowledge that a similar decision had been rendered in the past on same legal provision and similar facts).

least attempting some balancing activity. It is a balancing process such as this that leads to the development of a structure and therefore a standard. Thus, absent any clear structure from which justification could be deduced in a logical fashion, it was not that surprising that the court in each case reached opposite conclusions.

More recent court decisions, especially since the 1999 restoration of civil rule in Nigeria, suggest that the culture of lack of balancing in human rights analysis is now firmly rooted in its judicial practices. In this regard, the cases of *Chukwuma and Others v. Commissioner of Police*\(^\text{123}\) and *Inspector General of Police v All Nigeria Peoples Party and Others*\(^\text{124}\) decided between 2005 and 2007 by the Nigerian Court of Appeal, are relevant to this analysis. In both cases, the question was whether it is constitutional, given the right to association and assembly in the 1999 Constitution, for the *Public Order Act* 1990 to require a police permit to properly and peacefully conduct public assemblies, meetings and processions. Both were decided by the Court of Appeal though at two different divisions.

The police in the *Chukwuma*, the first case, had invaded a private hotel where some Nigerian citizens belonging to a socio-cultural organization were gathered for a meeting. They broke up the gathering and sealed off the venue on the pretext that no police permit had been obtained for the meeting. The Court of Appeal held that the police were right to disband the meeting because the organizers did not obtain the required permit. In the *Chukwuma* judgment, the court did not even as much as recognize the constitutional right of assembly and its relationship to the *Public Order Act*, particularly with regard

---

123. *Chukwuma*, supra note 121.
124. ANPP, *ibid.*
to balancing the right against the social good of maintaining public peace.

In ANPP, the second case, twelve registered Nigerian political parties commenced the legal action requesting the Court of Appeal to determine whether a police permit or any other similar written official authority is required to hold a rally or procession in any part of Nigeria. They also sought to know whether the provisions of the Public Order Act which prohibit rallies or processions without a police permit are illegal and unconstitutional in light of the guarantee of the right of assembly under section 40 of the 1999 Constitution.

In my opinion the Court of Appeal in ANPP correctly identified the main question for consideration which was whether the provisions of the Public Order Act, particularly those which required conveners of meetings or political rallies to obtain police permits in the exercise of their constitutional rights to freedom of assembly and expression, is reasonably justifiable in a democratic society. It came to the conclusion that the police permit requirement cannot be used as a camouflage to stifle the fundamental rights of citizens. On this basis it deemed several sections of the Public Order Act to be inconsistent with the Constitution and declared them null and void.

Why would the court reach contradictory decisions in two cases with clearly similar facts? In ANPP, the latter case, the court referred to Chukwuma but was ambiguous about whether or not it was overruling this older judgment. Though the court attempted to distinguish the two cases, it did so in a manner that is, in my view, harmful of the right rather than protective of it. I say "harmful" because the court in ANPP, after

125. ANPP, supra note 121.
recalling that Chukwuma had preserved the Public Order Act, stated:

[T]he court never decided that the Inspector General of Police [IGP] was empowered to issue police permit or disrupt any public gathering for which no license has been issued by the Governor of a state or his authorized agent. Superior police officers referred to under section 4 of the Police Order Act means the Commissioner of Police or any of the senior police officers under the state police command. The [IGP] has no statutory backing to usurp the powers of the governor to issue license for public meetings or delegate such powers to the Commissioner of Police. The appellant has failed to appreciate the trend in all democratic countries whereby the right to hold meetings and assemblies is no longer subject to the whims and caprices of the government or security agents. 126

This reasoning shows considerable hesitancy at both ends of the justification spectrum. It did not overrule the earlier decision. Yet it did not preserve it in the manner it was initially rendered. The court’s difficulty in ANPP appears to be a reluctance to act decisively by overruling the earlier decision. By trying to distinguish between the IGP and the State Commissioner of Police in terms of who has overall competence over the issuance of licenses for meetings and assemblies, it avoided the larger question of whether the Public Order Act can possibly co-exist with the rights enshrined under the Constitution. Although the court in the ANPP reached the

126. Ibid, at 490.
correct verdict overall, its failure to reject and nullify the *Chukwuma* verdict leaves far too much uncertainty in the jurisprudence.

But beyond the contradiction in the overall outcome of both cases, there is the larger issue of the absence of any structured justification in either of the decisions. This further strengthens my contention that Nigerian case law lacks clear judicial standards for justifying intrusions on constitutionally protected rights. Evidence discussed above of how such questions are dealt with in other jurisdictions shows that it is insufficient to skirt around the issues and draw a conclusion without laying out the standard by which that conclusion was reached. There is therefore an element of reflexivity and arbitrariness in the approach of the highest courts which inevitably sips down the lower judicial cadres. By this, I mean the tendency among Nigerian judges to rely on open-ended rationalizations in their judgments that make it hard to pin them down to any discernible analytical pattern. Could this be a deliberate ploy by judges to create an environment that justifies their decisions without regard to consistency or integrity? If this is the case, what reasons could be adduced for it?

Karibi-Whyte, a retired Judge of the Nigerian Supreme Court offers what would seem to be an insider's explanation for the ambivalent posture of the court. He states that in coming to these decisions the court applied ordinary rules of construction of statutes. The constitutional provisions were construed, he continued, as though they were ordinary statutes of the imperial Parliament or the local legislature as the case may be. No special emphasis, he said, was laid on the fact that the liberty of the citizen was involved and that in such cases the benefit of doubt in a decision between the executive and
the citizen should be given to the citizen. In conclusion, he advised that, in construing the provisions of statutes which infringe upon human rights guarantees, the court should in all cases lean towards the liberty of the subject but should be careful by not to go beyond the natural construction of the statute. 127

This is a clear indication of the court’s failure to carry out any balancing scheme, which significantly differentiates the Nigerian courts’ approach to human rights from the practices of the other jurisdictions analyzed in this paper. I had shown how American balancing is generally similar to the proportionality analysis that is a feature of both British and South African contemporary constitutional cultures. In these jurisdictions, the courts have developed standards of analysis that guide any court faced with a human rights case, regardless of the nature of the right involved. In all three jurisdictions, the questions asked at each stage of the analysis are similar. It is, however, difficult to point to comparable standards in the practices of Nigerian courts. This has telling consequences for uniformity in court practices as well as for the objectivity of decisions rendered. It must be clear that the approach of the courts is consistent, otherwise precedent is of minimal benefit and there is an increased chance that courts faced with similar facts will reach contradictory decisions, as is currently the case.

**Why Nigeria Needs a Proportionality Template**

Given the points I have made in the above sections, it seems the Nigerian judiciary can no longer avoid a proportionality-based system of constitutional rights review. This is

imperative, not only because the constitutional provision that governs the limitation of human rights in Nigeria warrants doing so, but also because the proportionality-based system has many inherent advantages, which explain why it is widely adopted by constitutional regimes around the world in contemporary times. Among other jurisdictions, it is used by the European Court of Human Rights, the United Kingdom, South Africa, India, South Korea, Germany, Canada, New Zealand, and Brazil. The


proportionality principle does not appear to discriminate in terms of the legal systems to which it might apply. This conclusion is supported by the fact that the above-mentioned countries comprise common law as well as civil law jurisdictions. Moreover, not only in multiple domestic legal arena, but also transnational courts and institutions, have adopted the proportionality principle.  

Furthermore, it is as equally present among countries whose constitutional traditions allow the courts to discover the limitations of rights through practice and experience, such as for example the United States and United Kingdom, as it is
in other jurisdictions like South Africa and India whose constitutions prescribe a range of permissible limitations to constitutionally enshrined human rights. Therefore, Nigeria might adopt the proportionality standard for the simple reason that it offers a more consistent mechanism for justifying governmental abridgment of human rights and also because a large number of states have already embraced it. As such, Nigeria would not be doing anything extraordinary in looking that direction as well.

The adoption of a proportionality mechanism by Nigerian courts would also free the courts from the rules versus principles difficulty that Alexy identified. With a balancing regime in place, the Nigerian courts will rely less on traditional constitutional canons of interpretation that they have hitherto used but which have in no way deepened the understanding and enforcement of rights in the county. Moreover, balancing ensures that the burden of proof is properly fixed. It places the onus on the government to justify a restriction on the basis of compelling objectives for which there are no alternative options. A proportionality mechanism would also have significance for uniformity in the judicial construction of rights and for certainty in legal outcomes. Moreover, a proportionality-based system of rights review

balancing - that it embraces discourse and practice of balancing - is no exaggeration). Indeed, constitutional law is now firmly settled in this age: for example the Canadian scholar David Beatty maintains that proportionality is an ‘essential, unavoidable part of every constitutional text’ and ‘a universal criterion of constitutionality’; German scholar Robert Alexy, for his part, maintains that balancing ‘is ubiquitous in law’ and that, in the case of constitutional rights, balancing is unavoidable because ‘there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right’ at 179).
seems more impartial and neutral\textsuperscript{140} than the current standard-free mechanism that Nigerian courts operate. It offers a more coherent justification of court judgments because there is an opportunity in the balancing process to weigh all of the values implicated, rather than simply reaching a decision in a capricious fashion.

Deciding human rights cases arbitrarily has consequences for the courts and the judge as Wechsler expertly articulated several decades ago.\textsuperscript{141} He was of the view that both the judges who decide human rights cases and non-judges who criticize those judgments are under an obligation to indicate the standards by which they arrive at their choices and positions. Wechsler's position bears being reproduced extensively:

If courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have attempted to describe, you will not doubt the relevancy and importance of demanding what, if any, are the standards to be followed in interpretation. Are there, indeed, any criteria

\textsuperscript{140} See Webber, \textit{ibid} (underscoring one of the major contentions of proportionality proponents, that the system "attempts to depoliticize rights by purporting to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance" though he questions this same contention when arguing that "the attempt to evade the political and moral questions inherent in the process of rights reasoning is futile [because] identifying the interests that are to count and determining their weight cannot proceed apolitically and amoralistically" at 188); see also Stavros Tsakyrakis: "Proportionality: An Assault on Human Rights?" (2009) 7 Int'l J Const L 468 (stated that "balancing, in the form of proportionality, is nothing but a manifestation of the perennial quest to invest adjudication with precision and objectivity" at 469).

\textsuperscript{141} Herbert Wechsler: "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv L Rev 1.
that both the Supreme Court and those who undertake to praise or to condemn its judgments are morally and intellectually obligated to support? Whatever you may think to be the answer, surely you agree with me that I am right to state the question as the same one for the Court as for its critics. An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant? That is, of course, not only true of a critique of a decision of the courts; it applies whenever a determination is in question, a determination that it is essential to make either way. 142

Wechsler added that a judge's decision should not "turn on the immediate result" 143 because that would then imply that "the courts are free to function as a naked power organ, that it is an empty affirmation to regard them...as courts of law." 144 Otherwise courts would only be doing "ad hoc evaluation" (of the kind that I think Nigerian courts are guilty) which Wechsler believes poses the deepest problem for American constitutionalism "not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics." 145

142. Ibid at 10-11.
143. Ibid at 12.
144. Ibid.
145. Ibid.
In spite of its global appeal, proportionality analysis is also often criticized. Among these criticisms is the lack of clarity as to “what is weighed (interests, principles, rights, considerations); how it is weighted (with what metric); and who is doing – or should do – the balancing (judges or legislators”).\textsuperscript{146} Arguably, the goal of human rights is not only to protect certain individual fundamental interests from arbitrary state power but also from collective interests.\textsuperscript{147} It follows therefore that any document for the protection of human rights already gives priority to rights. This, it is further argued, already reflects a balance, the outcome of which must be that human rights are to be protected before other interests are even taken into consideration.\textsuperscript{148} As such, Tsakyrakis asks the question, “[i]f that is so, what does it mean to say that the issue is to strike a further balance between the general interest of the community and individual rights?”\textsuperscript{149}

As significant as this question is, it ignores an important fact that comparative constitutional rights enforcement must grapple with. The understanding of the value of rights in a constitutional system is not uniform across all jurisdictions. While in some jurisdictions it is taken for granted that rights will always prevail over governmental and collective interests; and that the individual deserves protection from the invasive activities of these social actors, in other jurisdictions, like Nigeria, the reverse appears to be the case. Not only are individual rights subordinated to governmental and collective interests; in fact some in Nigerian society believe that it is the government that should be protected from the individual in spite of its awesome powers. Societies like Nigeria cannot

\textsuperscript{146} Tsakyrakis, supra note 140 at 470.
\textsuperscript{147} Ibid at 475.
\textsuperscript{148} Ibid at 476.
\textsuperscript{149} Ibid.
ignore the imperative of balancing and proportionality because the level of tension between the interests involved suggests no better or more appropriate means of resolving of them.

Conclusion
I end this article where it started: serious interests are in contention in every effort to protect human rights by judicial means. Most legal systems recognize this fact. They therefore have devised mechanisms and methods that enable the courts to carefully balance those interests in order to reach the most appropriate and objective decisions. Because a variety of rights are often at risk of infringement and litigation to remedy this can come in large numbers, there is a need for a balancing mechanism which ensures that regardless of the nature of the right involved, the questions surrounding it are answered in such a manner that the decision in any given case lays a foundation upon which similar cases could be approached in future. This ensures that decisions are not reached arbitrarily. It also ensures that subjectivity does not trump objectivity given that when there are clear standards for balancing the interests in contention in human rights cases, it does not matter much who the judge is. The same standard governs all similar cases. The law is more certain and precedent is more meaningful.

From every indication, the Nigerian judiciary does not seem to have established objective standards by which to decide human rights cases. This creates a situation where such cases are approached on an ad hoc case-by-case basis with the possibility that contradictory decisions could be delivered in cases with similar facts. Because of the lack of objectivity in such decisions, the courts are often accused of having rendered them for less than honorable calculations. The practices of
some of the jurisdictions discussed in this article indicate that this is a concern that must be grappled with in order to breathe confidence into the human rights adjudication process. There seems to be a convergence around establishing relatively clear standards for resolving the questions which human rights cases present to a legal system. Such standards can be established through balancing or proportionality analysis.

In Nigeria’s case, dealing with the challenge has not been helped by the country’s legal history and the doctrines of the British legal system that a colonial relationship fostered after independence. While the British system from which the Nigerian equivalent was based has gone through various phases culminating in the passage of the 1998 Human Rights Act and the movement of British courts towards a substantive standard of human rights review based on proportionality, the Nigerian system remains rooted in its immediate post-independence traditions. This tradition, which has not helped the legal protection of human rights, cannot be reformed soon enough. Legal education which inculcates these concerns (and in particular comparative doctrine) is therefore necessary at this point.