**HUMAN RIGHTS DISCOURSES IN NIGERIA ACROSS TIME: TRAJECTORY, SUCCESSES AND POTENTIALS FOR FOREIGN ENGAGEMENT**

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Canada has been actively involved in funding and providing critical support for the development of legal and political institutions and advocacy activities in Nigeria for decades. A careful documentation and assessment of this support will likely show that its impact has been significant, and some areas, perhaps critical. This paper, however, considers a different form of engagement. Although Canada’s human rights jurisprudence, especially the Charter of Rights[[2]](#footnote-2) caselaw, is highly regarded the world over, its influence on Nigerian courts has been limited. Yet, there is a great opportunity for a meaningful engagement here, especially as Canadian universities are a preferred destination for graduate training by Nigerian lawyers and academics and knowledge of the Canadian legal resources is disseminated through other engagement projects. This paper considers the potentials for judicial engagement between Nigerian and Canadian Courts.[[3]](#footnote-3) The focus is on human rights.

I. INTRODUCTION

Like the typical Commonwealth court at the time, the Supreme Court of Nigeria was very unfamiliar with constitutional bills of rights when it heard its first rights cases at the beginning of the 1960s. In fact, there were only three other constitutional bills of rights in the entire Commonwealth before Nigeria adopted one.[[4]](#footnote-4) Of these other countries, only in India had a sizeable, though then largely formalistic, rights jurisprudence accreted by 1961. The other two countries offered nothing. (Pakistan’s constitution was suspended, while Malaysia’s was practically contemporaneous with Nigeria’s.) Beyond these there was the quasi-constitutional Canadian Bill of Rights 1960, but it did not add significantly to existing resources. It was indeed not until 1963, two years behind the Nigerian court, that the Supreme Court of Canada first considered any of its provisions. Even so, over the following two decades that court produced a highly deferential, legalistic rights caselaw.[[5]](#footnote-5) However, there was already a small but quite impressive “implied bill of rights” jurisprudence that it developed in the 1950s.[[6]](#footnote-6)

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

**2.1 Human Rights and Judicial Policy**

The initial judicial encounter with the Nigerian bill of rights was anything but encouraging. Indeed, this experience minimized the bill of rights as a site of public policy making for several years to come. By the 1960s, observers had noticed a pattern of an almost complete absence of any successful claim against the government for the violation of human rights. “The point here,” noted Nwabueze, Africa’s ablest constitutional scholar, “is not that every one of the decisions handed down by the Nigerian Supreme Court between 1960 and 1963 was necessarily wrong in law, but that they should all have gone in favour of the government was remarkable.”[[7]](#footnote-7) This observation bears close examination.

The Court did not have the opportunity to decide any matter pertaining to the fundamental rights provisions of the Constitution until 1961. However, that year alone, it decided about a half dozen human rights cases.[[8]](#footnote-8) The first two cases, decided on 6 April 1961, raised the question of the constitutionality of the offence of sedition under the Criminal Code in the light of the constitutional protection of the freedom of expression. Under Section 24 of the 1960 Independence Constitution,

(1) Every one shall be entitled to freedom of expression, including freedom to hold opinions and impart ideas and information without interference;

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

1. in the interest of defence, public safety, public order, public morality or public health;
2. for the purpose of protecting the rights, reputations and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or
3. imposing obligations upon persons holding office under the Crown, members of the armed forces of the Crown or members of a police force.

The two cases were references from the High Court in the course of a criminal trial for seditious publication. In the first case, *D.P.P. v Chike Obi*,[[9]](#footnote-9) a leader of an opposition political party was prosecuted on a charge that he distributed a pamphlet entitled: “The People: Facts that You Must Know,” which contained the following allegedly seditious statement:

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

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

At the same time, it was also not concerned at all with exploring the possible scope of the freedom of expression in the Nigerian Constitution. It was instead simply satisfied that under the extant criminal law, the publication was seditious. The more appropriate course would have been to consider the extent to which the criminal law was affected by the nascent constitutional protection. It would surely be remarkable if the freedom of expression was not intended to affect the criminalization of political speech, especially where, as in this case, it did not involve a direct incitement of violence.[[10]](#footnote-10) How else are the democratic channels to be kept accessible unless the opposition can lawfully criticize the government however harshly? The Court was clearly not persuaded by this consideration.

It was argued that a law is only valid if the acts prohibited are, in every case, likely to lead directly to disorder. It seems to me that this is taking too narrow a view of the provision, for it must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly. The Court must be the arbiter of whether or not any particular law is reasonably justifiable.[[11]](#footnote-11)

The closing part of the foregoing passage was probably not intended to convey any assurance that the judiciary in principle intended to hold the government to the high standard implicated by the constitutional guarantees. Earlier in the same opinion, it also stated that “it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, *not to impose their own views of what the law ought to be*.[[12]](#footnote-12)

 It is noteworthy that in practically every other constitutional challenge under the bill of rights in the 1960s, the Court equally never found it “necessary to enter into any lengthy consideration of the question.”[[13]](#footnote-13) By the end of the 1960s the Supreme Court had so profoundly discounted the potential of the bill of rights that it was of little or no political significance. The very purpose that had justified the introduction of the bill of rights only a few years earlier, the protection of ethnic and political minorities, hardly featured in judicial decision-making. One interesting feature of the Supreme Court’s decision-making during this era was that the odds are stacked against the claimant in human rights cases. The natural consequence is that the legislation or official action impugned is almost inevitably sustained. “To what purpose, people were prompted to ask,” noted Nwabueze, “were civil liberties guaranteed in the Constitution if every violation of them, however flagrant-seeming, received the sanction of the courts?”

It began to look as if the courts were actively aiding the politicians in the persecution of opponents and in the perversion of the Constitution. Confidence in their ability to decide political issues impartially was consequently undermined, and the position was eventually reached where there was a general disinclination to take political complaints to them. To go to court on such matters was felt to be a vain effort; from past experience, a decision in favour of the government was considered a foregone conclusion. Moreover, the overconfident way in which the ruling politicians sometimes challenged opponents to take their complaints to court, as if to say they had been assured the courts would never decide against them, helped to sap public confidence in the courts still further.[[14]](#footnote-14)

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

probably feared that an active interventionist policy of interpreting the Constitution in a liberal spirit would lead to open confrontation with the politicians and the consequent weakening of judicial authority. Consequently most of them were anxious to render decisions favourable to the government and its supporters. Indeed they behaved as if it was their duty to adopt challenged measures of the authorities as valid and to find arguments to justify them. … One of the very few occasions in which there was a departure from the literal and strict approach to interpretation was when it was necessary to hand down a decision not inconvenient to the Federal Government and its allies.[[15]](#footnote-15)

 In conclusion, in the sixties, the Supreme Court lost the opportunity to apply emerging constitutional standards to the Criminal Code, a statute reflecting, almost wholesale, Victorian criminal justice and values. The Court’s reticence effectively legitimized a mechanism whose objective and practical effect during colonial rule was to stifle political dissent.

**2.2 Legalism**

Even the most able observers, including Nwabueze, were inclined to rationalize the problematic judicial practice principally as a condition fostered by, if not the direct result of, the received tradition of British positivism. “[T]he *primary* reason seems to be the inherited common law attitude towards the judicial function; it is an attitude that requires literalness and analytical positivism in the interpretation of the law, enforces a narrowness of attitude towards the questions presented for decision, and discourages creative activism.”[[16]](#footnote-16) As a result, argues Nwabueze, Commonwealth judges generally, until lately at any rate, unlike their U.S. counterparts, have missed the opportunity for judicial creativity, by failing to acknowledge the question of choice involved in the balancing of liberty against public order and the crucial judicial role implicated in the process.

American bill of rights jurisprudence and creative constitutional interpretation was practically unknown to the Supreme Court of Nigeria until much later. Except to the limited extent of the Canadian implied rights jurisprudence, a legal resource of comparable quality to the American was not available from the British and other Commonwealth courts. In the absence of a constitutional charter of rights, most of these courts developed very limited rights jurisprudence. Looking beyond the United Kingdom, the institutions of the European Court of Human Rights began developing from the 1970s and 80s a significant, and soon to become highly influential, jurisprudence. It is remarkable that the Supreme Court does not pay any serious attention to this or other similar sources.

The Supreme Court of Nigeria constantly fixed its gaze on and loyally took its direction from the British courts, even though they generally had no cognate experience in bill of rights decision-making. However, the attraction came naturally. Until very recently, all Supreme Court Justices received their legal training partly or, in most cases, wholly in England, where they were immersed in the doctrine of the supremacy of Parliament and British scepticism of constitutional bills of rights.

III. RIGHTS ACTIVISM: LOOKING BEYOND DOMESTIC NORMS

**3.1 Dictatorship and the Limit of Law**

From the mid 1960’s democratic governance in Nigeria was replaced by military dictatorships. One obvious characteristic of the regime was the normalization of extra-constitutional powers and legislative absolutism.[[17]](#footnote-17) The judiciary initially responded adroitly. On 24 April 1970, the Supreme Court, in *Lakanmi v Attorney General*,[[18]](#footnote-18) took the unprecedented step of voiding certain legislation[[19]](#footnote-19) that purported to forfeit the assets of certain persons specifically named by statute. This, according to the Court, amounted to legislative judgment, and was therefore ultra vires the lawful powers of the military government as an interim government of necessity (as the Court found). The government would have none of this. Within days, it promulgated appropriate legislation, in effect, annulling the decision.[[20]](#footnote-20) It is a matter for regret that at the earliest opportunity the Court, although quite understandably, quickly pulled back from confrontation.[[21]](#footnote-21)

**3.2 1980s-1990s: Opportunistic Co-optation of International Law**

It became clear after this development that domestic legal norms could no longer be deployed to effectively restrain the excesses of the regime. By the 1980s, human rights litigators turned to international law instead, seizing the opportunity of the African Charter on Human and Peoples’ Rights.[[22]](#footnote-22) In 1983, Nigeria was one of the first parties to the Charter to implement it through local legislation.[[23]](#footnote-23) There was thus the remarkable situation of the Charter being enforceable as domestic law in Nigeria almost three years before it entered in force as a treaty. With the emergence of a military dictatorship soon after the legislation was enacted, the courts accorded the Charter legislation an extraordinary quasi- or super-constitutional status. The purpose was to make the Charter rights inviolable and superior to any act of a supposedly absolute military dictatorship.[[24]](#footnote-24) This was possible only because the African Charter had become a formal source of law by legislation, a status that the UN Covenants, for example, although also ratified by Nigeria, do not have. When Frans Viljeon completed a survey of the application of the Charter by African courts by the end of the 1990s, he observed,

[i]t is ironic, but perhaps predictable, that the clearest illustration of the potential effect of the African Charter in domestic law is found in Nigeria under a military regime at a time of severe repression….[[25]](#footnote-25)

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

3.3 **Impact on the Academy**

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

**3.4 Judicial Activism**

With the new resource, the judiciary experimented with activist decision-making advancing human rights protection in Nigeria in novel areas, thanks to the effort of public interest lawyers and human rights advocacy groups to place these matters on the judicial agenda and in particular canvassing international norms in support. This is important also because the work of the advocacy groups was funded by foreign donors including Canadian agencies. This activism created dynamics whereby lower courts sometimes feel unconstrained by the fact a subject has been previously reviewed by the highest court. To give an example, even though the Supreme Court had ruled the death penalty constitutional,[[26]](#footnote-26) the Court of Appeal entertained the possibility that the so-called death row phenomenon was a viable basis for a constitutional challenge of the death penalty.[[27]](#footnote-27)

IV. LOOKING TO CANADA

**4.1 Priority of Rights**

An important challenge of judicial application of constitutional rights in Nigeria is justification of limiting rights. Limitation of rights under the Nigerian Bill of Rights is structurally very similar to the European Convention’s. Nigeria’s includes both specific and general restriction of rights. Thus, on the one hand, several provisions have their internal modifiers (definitional limitations) that qualify specific right guarantees. There is a derogation clause allowing suspension of a few rights during war and emergencies. On the other is a general limitation clause,[[28]](#footnote-28) applicable to most rights, permitting laws reasonably justifiable in a democratic society in the public interest or for the purpose of protecting the rights of other persons. This part of the limitation regime effectively requires an end-means justification. The end or purpose of restricting rights is the promotion or protection of the public interest or the protection of the rights of other persons; the means chosen to attain that end must be reasonably justifiable, or proportionate, and acceptable in a democratic society.[[29]](#footnote-29)

 What is remarkable about the public interest limitation under the European Convention model, followed by Nigeria, is the specification of legitimate public purposes (defence, public safety, public order, public morality, and public health are mentioned in the Nigerian text). However, the Nigerian Bill of Rights departs from the European text by substituting “reasonably justifiable” for the latter’s “necessary.” There was much concern among early critics of the Nigerian bill of rights that this weakened the protection provided by the former.

If constitutional rights could simply be overridden at will by the majority, there would hardly be any point in specially securing rights.[[30]](#footnote-30) Similarly, gratuitous or excessive interference with the exercise of rights cannot be reasonably justifiable, certainly not in a democratic society. This indicates a norm of proportionality, or a reasonable balance, between the public interests and the means chosen to protect them. Originally a concept of German and European law,[[31]](#footnote-31) proportionality has emerged as a universal principle of public law, a standard for reasonableness of restriction of rights and, in general, moderation in exercise of the public power. Accordingly, proportionality tests are applied by national courts, from Australia[[32]](#footnote-32) and Canada[[33]](#footnote-33) to South Africa,[[34]](#footnote-34) Tanzania, Zambia[[35]](#footnote-35) and elsewhere. So also are the European Court of Human Rights[[36]](#footnote-36) and the African Commission on Human and Peoples’ Rights,[[37]](#footnote-37) among other international tribunals. In fact, proportionality is broadly embraced by courts around the world.

**4.2 Women and Minorities Protection**

Statutory and constitutional protection of women’s rights have increased in recent years in Nigeria. Several national and sub-national legislation deal with prevention and punishment of physical, sexual, and psychological violence against women, including, notably, the recent the Violence against Persons (Prohibition) Act 2015, which implements the UN Declaration on the Elimination of Violence against Women.[[38]](#footnote-38) Currently, the National Assembly is considering the Gender and Equal Opportunities Bill 2016. Yet the jurisprudence of women’s rights is not as developed. Minorities protection focuses mainly on *ethnic* minorities. In these two areas, Canadian jurisprudence offers valuable resources.

**4.3 Court-Academy Co-operation**

Channeling inputs from the academy into the judicial process in Nigeria is far from satisfactory. The experience of the Supreme Court of Canada is quite instructive. Snell and Vaughan have observed that the appointment to the Court, especially since 1970, of judges with strong scholarly background “accounts for the greater willingness of the Court to assume a more creative role.”[[39]](#footnote-39) This is interesting because although there is in fact a definite ascendancy in intra-judicial recruitment,[[40]](#footnote-40) twenty-three of the thirty-one justices appointed to the Supreme Court of Canada since 1970 previously held an academic position in a university, many of them full-time law professors. This is a strong indication that academic reputation is an important consideration in judicial selection. It has indeed been claimed for a fact that “the modern criteria for service on the Supreme Court include either academic reputation or appellate judicial experience or both.”[[41]](#footnote-41) While this pattern of recruitment may partly explain why academic citations have become an important resource in decision-making,[[42]](#footnote-42) resulting in much longer opinions,[[43]](#footnote-43) that may also the result of increased participation of law clerks in the business of the Court[[44]](#footnote-44) and of vigorous interest group litigation. The law clerks, it may be said, because they are fresh from the universities and mostly subsequently take up an academic career, bring the law school to the Court, thereby “serving as the conveyor belt from the law schools to the inner sanctum of the Supreme Court.”[[45]](#footnote-45) Their importance is underscored by the fact that during the eighties the number of law clerks assigned to each justice tripled.

 Unlike Canada, Supreme Court justices in Nigeria rarely have graduate school education or any experience in university teaching, or service in the higher echelon of the civil service outside the Legal Department/ Ministry of Justice. Just over a dozen have a graduate degree in law (including seven PhDs), but only four of whom were law school professors prior to their judicial careers. It is unlikely that this pattern would improve in the foreseeable future, because of the current practice of practically exclusively appointing senior justices of the Court of Appeal to the Supreme Court. As seniority comes with long judicial service, frequently running over twenty years, it must now be considered exceptional for a potential candidate for the Supreme Court to have had some distinguished career outside the judiciary.

V. CONCLUSION: A RESEARCH AGENDA

**5.1 Liberal Rights, Modernity and Tradition**

A criticism of Nigeria’s constitutional bill of rights is that it was intended to replicate closely, perhaps too closely, the first section of the European Convention for the Protection of Human and Fundamental Freedoms. Except for the right to marry, practically every Convention right is included in the Bill of Rights, in addition to two or three provisions from other sources. Hence it carries the Convention’s imprint of a “narrowly individualistic view of society.”[[46]](#footnote-46) The Nigerian instrument, therefore, it has been correctly observed, was “the conduit for the importation of the Western articulation of the concept of human rights into modern African human rights law”[[47]](#footnote-47) This is significant in itself, because the liberal assumption of moral individualism is presumably out of sync with the supposedly communitarian character of African communities.[[48]](#footnote-48) This may be an impediment to the reception of certain aspects of Canadian human rights jurisprudence in Nigeria.

**5.2 International Human Rights Norms**

In spite of the productive deployment of international norms in human rights litigation and advocacy in Nigeria since the 1980s, the use of international law in judicial decision-making remains far from satisfactory. A possible problem is that judges are not quite familiar with the subject. This may partly be because it is not a compulsory subject in the LL.B. curriculum. But it may also be because judges are challenged as to its relevance in the daily grist of adjudication.

**5.3 Judicial Capacity**

Although the manifest judicial authority of Nigerian courts (government compliance with specific decisions and compliance over time) is not necessarily very weak, their latent authority (the preventive or disciplinary function of courts)[[49]](#footnote-49) remains far from satisfactory. One factor at play is that policy issues may not be accepted by the public as something to be resolved judicially as a matter of *individual* rights. Take as an example the recent controversial school uniform policy of Osun State in southwestern Nigeria, which permits Muslim school girls to wear the hijab. Christian parents and organizations have persisted in rejecting the policy even after a High Court determination that the policy was constitutionally valid.

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2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Ac*t* 1982 (U.K.), 1982, c. 11. [↑](#footnote-ref-2)
3. There is no attempt here to explore the subject in the general context of the borrowing and migration of constitutional ideas. See, e.g., Vlad Perju, “Constitutional Transplants, Borrowings, and Migrations” in Michel Rosenfeld & Andras Sajo, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford Univ. Press, 2012) 1304; Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (2006). [↑](#footnote-ref-3)
4. See Charles O.H. Parkinson, *Bill of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain’s Overseas Territories* (Oxford Univ. Press, 2007), c. 6; Solomon Ukhuegbe, “The Formal Evolution of the Nigerian Bill of Rights: From the Willink Commission Proposal to the 1999 Constitution,” in Epiphany Azinge, ed., *Nigeria: A Century of Constitutional Evolution 1914-2014* (Nigerian Institute of Advanced Legal Studies, 2013). [↑](#footnote-ref-4)
5. See W.S. Tarnopolsky, “The Canadian Bill of Rights: From Diefenbaker to Drybones” (1971) 17 McGill L.J. 437; Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Carswell, 1974) at 186-224; B. Hovius, “The Legacy of the Supreme Court of Canada’s Approach to the Canadian Bill of Rights: Prospects for the Charter” (1982) 28 McGill L.J. 31. [↑](#footnote-ref-5)
6. In *Chike Obi*, [1961] 1 SCNLR 197, for example, the Supreme Court of Nigeria would have benefited greatly from the solution established in *Boucher v. R* [1951] S.C.R. 265, a case Paul Weiler correctly identifies as “a text-book example of judicial craftsmanship.” See Weiler, *In the Last Resort*, ibid. at 191. See also G. Botting, *Fundamental Freedoms and Jehovah’s Witnesses* (University of Calgary Press, 1993) at 52-54. Remarkably, this case was not brought to the Court’s attention. This is curious because at this time, the Supreme Court of Nigeria was already quite familiar with Canadian federalism caselaw. Perhaps the explanation is that the latter was largely the work of the Privy Council. [↑](#footnote-ref-6)
7. B.O. Nwabueze, *Judicialism in Commonwealth Africa: the Role of the Courts in Government* (C. Hurst & Co., 1977) 242 [hereinafter Nwabueze, *Judicialism*]. [↑](#footnote-ref-7)
8. Some of these cases actually arose under the original provisions, the Sixth Schedule to the Constitution of 1954. But the appeals/ references were filed at the Supreme Court between 1960 and 1961. [↑](#footnote-ref-8)
9. [1961] 1 SCNLR 197. [↑](#footnote-ref-9)
10. The leading authority on the point, decided by the West African Court of Appeal (WACA) *before* the adoption of the Bill of Rights, was that an incitement to violence was not a necessary element of the offence. See *R. v. Wallace Johnson* 5 W.A.C.A. 56. This was also the Privy Council’s position: see [1940] A.C. 231 (PC). [↑](#footnote-ref-10)
11. [1961] 1 SCNLR 197 at 207. [↑](#footnote-ref-11)
12. Ibid., at 208 [emphasis added]. [↑](#footnote-ref-12)
13. The attitude of the Supreme Court was presaged by a statement made extrajudicially by Mr. Justice Lionel Brett, a leading member of the Court in the 1960s, at an international conference on Nigerian federalism in August 1960. “In cases involving the Fundamental Rights,” he said, “the Nigerian courts will have to consider what is ‘reasonably justifiable in a democratic society,’ but even here the essential word is ‘justifiable,’ not ‘desirable,’ and *the role of the courts is to preserve certain standards, not dictate policy*.” See L. Brett, “The Role of the Judiciary in a Federal Constitution with Particular Reference to Nigeria” in L. Brett, ed., *Constitutional Problems of Federalism in Nigeria* (Lagos: Times Press, 1960) 12 at 22 [emphasis added]. [↑](#footnote-ref-13)
14. Nwabueze, *supra* note 6 at 242-43. [↑](#footnote-ref-14)
15. G. Ezeijiofor, “A Judicial Interpretation of Constitution: The Nigerian Experience During the First Republic” in A. B. Kasunmu, ed., *The Supreme Court of Nigeria, 1956-1970* (Ibadan: Heinemann, 1977) 67 at. 87-88 [footnotes omitted] [↑](#footnote-ref-15)
16. Nwabueze, *supra note* 6 at 310 [emphasis added]. [↑](#footnote-ref-16)
17. See the Constitution (Suspension and Modification) Decree No. 1 of 1966, section 6 (“No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria”). [↑](#footnote-ref-17)
18. [1970] N.S.C.C. 143, (1971) 1 UILR 201. [↑](#footnote-ref-18)
19. The Public Officers and Other Persons (Investigation of Assets) Edict No. 5 of 1967; and The Forfeiture of Assets etc. (Validation) Decree No. 45 of 1968. Two years earlier the Supreme Court had resolved the problem of conflict between legislation of the federal government (“Decree”) and of the state government (“Edict”) under the military dictatorship by assuming competence to set aside the latter in that event. See *N.K. Adamolekun v. Council of the University of Ibadan* [1968] N.M.L.R. 253. Prior to this decision, this competence was doubtful given the absolute prohibition of judicial review of legislative powers by extant Decree. [↑](#footnote-ref-19)
20. See Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. [↑](#footnote-ref-20)
21. See *Adejumo v. Governor of Lagos State* [1972] 1 ALL NLR 159. The Court also considered the same issue in the context of a subsequent military dictatorship in Nigeria. See *Attorney General of the Federation v. Guardian Newspapers Ltd* [1999] 9 NWLR 187. But the Court of Appeal decision in this case ([1995] 5 NWLR 703) is probably more instructive. [↑](#footnote-ref-21)
22. O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58. [↑](#footnote-ref-22)
23. African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, cap. 10 Laws of the Federation 1990. [↑](#footnote-ref-23)
24. See *Chima Ubani v. Director of State Security Services* [1999] 11 NWLR (Pt. 625) 129 [Ct. of Appeal] (“In questions or issues concerning the fundamental rights protected under the African Charter, the provisions of the African Charter are superior to the decrees of the Federal Military Government.”); and *Fawehinmi v. Abacha* [1996] 9 NWLR (Pt. 475) 710 [Ct. of Appeal], aff’d [2000] 6 NWLR (Pt. 660) 228 (S.C.). The Supreme Court was divided on the extraordinary status accorded the African Charter Act by the Court of Appeal in both cases. In principle, from the perspective of the law of treaties and state practice, a statute implementing a treaty, such as the African Charter Act, is legally no different from any other legislation. See A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) at 151 (“With dualism the provisions of a treaty which have been incorporated into domestic law *have the status only of domestic law*, and can be amended or repealed by later legislation. If such action were to result in breach of the treaty, there would be no remedy in domestic law since there would have been no violation of it.” [emphasis in original]). [↑](#footnote-ref-24)
25. See F. Viljeon, “Application of the African Charter on Human and Peoples’ Rights by Domestic Courts in Africa” (1999) 43 J. Afr. L. 1 at 7. For a discussion of the use of the Charter by Nigerian courts, see D. Peters, “The Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria” (2000) 18 Neth. Q. Hum. Rts. 357 at 368-72. [↑](#footnote-ref-25)
26. *Kalu v. State* [1998] 13 NWLR 531. [↑](#footnote-ref-26)
27. *Peter Nemi v. Attorney General of Lagos State & Comptroller of Prisons* [1996] 6 NWLR (pt. 542) 42. [↑](#footnote-ref-27)
28. The European Convention, like the International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), 999 UNTS 171, reprinted in (1967) 6 ILM 368, does not contain a common limitation clause separate from the limitation clauses appended individually to the separate provisions. This was the model followed in the original Nigerian Bill of Rights. With the Nigerian Constitution of 1979, however, a common limitation clause was introduced to the Nigerian text, replacing the separate limitation clauses. [↑](#footnote-ref-28)
29. See D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 68. [↑](#footnote-ref-29)
30. Ronald Dworkin put it quite starkly: “The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.” See R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 194. [↑](#footnote-ref-30)
31. See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Dordrecht: Kluwer, 1996) c. 2. [↑](#footnote-ref-31)
32. See J. Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 Melb. U. L. Rev. 1. [↑](#footnote-ref-32)
33. See *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295 at 352 (stating that “a form of proportionality test” is required to assess whether the means chosen to achieve government objectives are reasonable); and especially *R v. Oakes* [1986] 1 S.C.R. 103 (establishing the definitive proportionality test for application of S. 1 of the Canadian Charter of Rights). It has been said, the *Oakes* proportionality test “has taken on some of the character of holy writ.” See P.W. Hogg, *Constitutional Law of Canada* student ed. (Ont.: Carswell, 2002) at 779. [↑](#footnote-ref-33)
34. *State v. Makwanyane* [1995] 3 SA 391 at para. 104 (CC). [↑](#footnote-ref-34)
35. *Pumbun v. Attorney General* [1993] 3 LRC 317 at 323 (Tanzania Ct. of Appeal); *Mulundika & ors v. People* [1995-1997] Zambia L.R. 20 at 27 (Zambia S.C.). [↑](#footnote-ref-35)
36. See *Sunday Times v. United Kingdom* (1979-80) 2 E.H.R.R. 245. [↑](#footnote-ref-36)
37. See *Media Rights Agenda & Constitutional Rights Project v. Nigeria* (2000) 7 IHRR 265 at para 42. For discussion, see G. Naldi, “Limitation of Rights under the African Charter on Human and Peoples’ Rights: The Contribution of the African Commission on Human and Peoples’ Rights” (2001) 17 S. Afr. J. Hum. Rts. 109. [↑](#footnote-ref-37)
38. UN Gen. Assembly Res. A/RES/48/104 (23 February 1994). [↑](#footnote-ref-38)
39. J.G. Snell & F. Vaughan, *The Supreme Court of Canada* (Osgoode Society, 1985) at 231. [↑](#footnote-ref-39)
40. Some observers have suggested that a rule has crystallized already that at any given time the Court includes seven members elevated from the provincial courts of appeal, one from the Federal Court of Appeal, and one without prior judicial experience. See P. McCormick, *Supreme at Last: the Evolution of the Supreme Court of Canada* (James Lorimer & Co., 2000) at 108. See also I. Greene, et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at 101 [↑](#footnote-ref-40)
41. See McCormick, *Supreme at Last*, ibid. note 108. [↑](#footnote-ref-41)
42. See P. McCormick, “Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96” (1998) 9 Supreme Court L.R. (2d) 463; G. Bale, “W.R. Lederman and the Citation of Periodicals by the Supreme Court of Canada” (1994) 19 Queen’s L.J. 36; V. Black & N. Richter, “Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990” (1993) Dal. L.J. 377. [↑](#footnote-ref-42)
43. McCormick reported that the average Supreme Court of Canada decision using academic citations (fifty pages) is more than twice the length of the average decision that did not use citations (twenty pages). See McCormick, ibid at 473. [↑](#footnote-ref-43)
44. See L. Sossin, “The Sounds of Silence: Law Clerks, Policy-Making and the Supreme Court of Canada” (1996) 30 U.B.C. L. Rev. 279; Greene, et al. *Final Appeal*, supra note 39 at 109-14. [↑](#footnote-ref-44)
45. F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Broadview Press, 2000) at 112. [↑](#footnote-ref-45)
46. See K.D. Ewing & C.A. Gearty, “Rocky Foundations for Labour’s New Rights” [1997] Eur. H.R.L. Rev. 146 at 150. [↑](#footnote-ref-46)
47. C. Heyns, “African Human Rights Law and the European Convention” (1993) 11 S. Afr. J. Hum. Rts. 252 at 258. Cf. Vasak, who claims the European Convention “has found a fertile ground for its expansion in other continents, no doubt because of its intrinsic virtues, and *because it is not tied to a European concept of man*.” See Vasak, “European Convention of Human Rights beyond the Frontiers of Europe,” (1963) 12 Int‘l & Comp. L.Q. 1206 [emphasis added]. [↑](#footnote-ref-47)
48. As Leopold Senghor put it, “in Europe, Human Rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his right are wrapped in the protection of the family and other communities. …Rights in Africa…cannot be separated from the obligations due to the family and other communities.” (Address to meeting of independent experts drafting the African Charter on Human and Peoples’ Rights) OAU DOC. CAB/LEG/67/5, quoted in F. Ouguergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003) at 377-78. For a case study of communitarian-individualist elements of African bills of rights, see A.K. Wing, “Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa” (1993) 11 Wis. Int’l L.J. 295. A recent forceful restatement of the case for a *radical* communitarian African concept of human rights is M. Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1995) 35 Va. J. Int. 339. See further, I.A. Menkiti, “Person and Community in African Traditional Thought” in R.A. Wright, ed., *African Philosophy: An Introduction* 3rd ed. (Lanham, Md.: University Press of America, 1984) 171. But the case for the ontological primacy of the community in [traditional] Africa is perhaps overstated. See K. Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (New York: Oxford University Press, 1997) at 35-76 (arguing that the African experience may be more accurately classified as moderate communitarian). [↑](#footnote-ref-48)
49. See S. Gloppen, “The Accountability Function of the Courts in Tanzania and Zambia” (2003) 10:4 Democratization 112-36, [↑](#footnote-ref-49)