

THE LEGAL PROFESSION AND PROTECTION OF HUMAN RIGHTS

Bamidele Aturu

Introduction

The legal profession, comprising of lawyers¹ and judges, is in our present historical conjuncture critical to formal protection and promotion of human rights. This is the case as rights accepted by states as generally enforceable are ultimately enforced or denied in individual cases in courts of law, the primary terrain of the legal profession. It is therefore important to examine the role that the legal profession can play in the enforcement of rights. I intend to separate the roles into two broad categories, namely the roles that can be played by individual members of the profession and those that are best suited for the collective. It follows therefore that we would examine the functions of judicial institutions such as the NJC, the court as an element in the system of administration of justice and the Nigerian Bar Association on the one hand and the roles that individual judges and lawyers can play in the enforcement of rights accepted by the states on the other. Hopefully, as we proceed in this discussion it would become apparent why I use the phrase 'rights accepted by the states'.

We would not discuss all the known rights², both accepted and contested, rather the right that I consider fundamental for the intervention of the legal profession, namely the right to equality of access to court, not equality before the law (an impossibility in class divided societies). Subsequently I will justify my choosing of this right as the most fundamentally related to the legal profession. However, for the purpose of completeness, it is necessary to begin with a general, if brief, discussion of human rights.

The Concept of Human Rights

The concept of human rights is a rather controversial one³. The controversies stem from various sources. The first source has to do with the fact that politicians and states of different ideological persuasions across the globe have sought legitimacy for their actions and inactions by seeking refuge under human rights. Thus human rights play an ideological or hegemonic function. Since there are competing ideologies, it should not be surprising that there are competing definitions,

¹ Olisa Agbakoba, 'The Role of Lawyers and the Observance of Human Rights', *Journal of Human Rights Law and Practice*, Volume 5, Number 1, Civil Liberties Organisation, 1995, pp 115-150. In the paper he discussed the role of all lawyers in private and public practice in the enforcement of human rights.

² Those who are interested in the specific rights guaranteed by the Nigerian Constitution can take a look at the whole of Chapter IV of the Constitution and the whole of the African Charter on Human and Peoples' Rights which is enforceable in Nigeria by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, Laws of the Federation of Nigeria, 2004 and the decision of the Supreme Court in **Abacha v Fawehinmi**, *infra*.

³ See Osita Nnamani Ogbu's *Human Rights Law and Practice in Nigeria: An Introduction*, Cidjap Publishers, Enugu, 1999 for a general review of the controversies.

views and perspectives of human rights. Apart from the ideological function of human rights, the diversity of human needs and situations⁴ imply that people and scholars would focus on different ‘kinds’ of human rights or accord primacy to some ‘kinds’ of human rights over the others.

I do not intend to review the controversies on the concept of human rights. Nevertheless, as my aim is to look at the role that the legal profession can play in promoting and protecting human rights, a task that cannot be carried out in a theoretical vacuum, I shall briefly state my practical and theoretical understanding of human rights. In doing this I shall avoid classifying human rights. Aside from the purpose of exposition, classification has no political or even practical value. Classifying human rights in generational terms for me only relates to telling the history of when states recognise certain rights and not why. Yet ‘why’ states recognise some rights and not the others is crucial to an understanding of ‘what’ has to be done to make the unrecognised rights recognised and enjoyed by the people. In the same vein, classifying rights as civil and political, economic, social and cultural, and solidarity rights leads to a false compartmentalisation of rights which the Vienna Conference, I believe, sufficiently debunked.⁵

*The State and Human Rights*⁶

Human rights have been variously defined. It is largely seen as claims that people make or can validly make on the state and on others and their general entitlements as human beings⁷. The two dominant views of human rights in the literature and in practice are inspired by the doctrines of natural law and legal positivism. Natural law gave rise to the notion that human rights are inherent in human beings as they are divinely ordained and so are inalienable. On the other hand, legal positivism logically leads to the assertion that only those claims and entitlements recognised by the state in its laws can be properly regarded as human rights. The two theories in my view have their shortcomings. The problem with natural law inspired conception of human rights is that it does not give an indication of what rights exist at any particular point in time. It is therefore hazy and nebulous. It should also be stated that as notions of what constitutes human dignity which is central to natural law varies from culture to culture, it offers no guide as to why different cultures privilege or value some rights over others. Its crude and unhelpful universalism has been pointed out by scholars and activists who insist that human rights are culturally relative. Cultural relativity therefore speaks to the existence of diversity of culture which natural law conception of human rights fails to understand or address.

⁴ The whole idea about cultural relativity in human rights discourse and the advocacy for the recognition of solidarity rights arise mainly, in my view, from an acknowledgement of the diversity of needs and situations

⁵ The World Conference on Human Rights which took place in Vienna in 1993 reached a consensus that human rights are indivisible, interdependent, and interrelated.

⁶ See Bamidele Aturu, ‘Nigerian Labour Movement and the Making of an Authentic Constitutional Framework for the Development of Nigeria’. This segment of the paper benefits generously from the lecture I delivered on the 18th of November at the Kolagbodi Memorial Foundation Annual Lectures in Lagos.

⁷ See Osita Ogbu, op cit., for a general review of contending definitions of human rights; see also Habu Mohammed, *Civil Society Organisations and Democratization in Nigeria: The Politics of Struggles for Human Rights*, Kraft Books Limited, 2010, pp25-37.

Positive conception of human rights also provides no assistance as to why states recognise or privilege some rights over others. But beyond this, positive law conception, like natural law conception, does not focus on the relationship between the social forces that constitute states and the types of rights guaranteed by the state. Its understanding of human rights is therefore metaphysical as it is not grounded on reality but abstract and strict legalism; it cannot be a useful theory for action. Yet, without an understanding of the social roots of human rights and their abuse, it is impossible to protect them and even prevent their abuse. The implication of these shortcomings, of both natural and positive law inspired conceptions of human rights, is that our understanding of human rights must be founded on a proper understanding of the state.

The State has been a subject of broad and wide-ranging academic discourse, and expectedly, there exists a vast literature on it⁸. While, we will not review the abundant literature here, we intend to discuss briefly two theoretical perspectives on the state. The first views the state in institutional terms⁹ and focuses on the functions of its organs. Gianfranco Poggi's general definition of the state seems typical of the perspective of the institutionalists. According to him, the state is 'a complex set of institutional arrangements for rule operating through the continuous and regulated activities of individuals acting as occupants of offices'¹⁰ There is the other view, shared by scholars of the Marxist tradition, which conceives the state as the instrument of class domination of society by the capitalists or the bourgeoisie. Incidentally, there is a passage in Poggi's The Development of the Modern State that seems to corroborate this view. In describing the liberal state he made the point that it was 'constructed to favour and sustain through its acts of rule the class domination of the bourgeoisie over the society as a whole' and that 'the equality of all individuals before the law made sense as a constitutional principle because as a matter of course the legal protection of private property directed the order-keeping, law enforcement, and repressive activities of police and courts to favour the interests of the propertied groups'¹¹

Viewing the state as simply a set of institutions is rather problematic. The definition does not pose or answer the questions: Which class sets up the institutions and dominate it? What are the interests protected by the institutions?; Can the state be reconstituted? and, If so, how? et cetera. This definition which presents the state as acting on behalf of the whole society, as if the

⁸ V.I. Lenin, *The State and the Revolution*; Frank Youngman, The Political Economy of Adult Education & Development, Zed Books, London, 2000, pp 199-217; Gianfranco Poggi, The Development of the Modern State- A Sociological interpretation, Hutchinson & Co (Publishers) Ltd, 1978, London.

⁹ Dafe Ootobo pointed this out in State and Industrial Relations in Nigeria, Malthouse Press, Lagos, 1988, p.1

¹⁰ The Development of the Modern State- A Sociological interpretation, Hutchinson & Co (Publishers) Ltd, 1978, London, p.1

¹¹ *Ibid*, p.119

institutions are voluntarily set up by all, and does not indicate the specific interest(s) which it serves, contradicts our knowledge or position that society is made up of different interests and classes. If we proceed from the premise that the Nigerian society is made up of different classes¹², as I do, then one can easily appreciate that the Nigerian state does not exist and can possibly not exist to protect the interest of all the classes of Nigerians. In other words, the Nigerian state is the instrument of the dominant class, the propertied class, for the protection of the interests of that class and necessary subjugation of the interests of the working class. There are ample writings¹³ to justify my conclusion on the existence of class and the relevance of class analysis to the Nigerian polity that I do not feel obliged to furnish further elaboration as that is not my aim in this paper. Although I am not unaware of the debate as to the danger of economic determinism or reductionism if one fails to take into consideration other sources and kind of oppression in the society and the possible contributions to the struggle for social change from the new social movements (like the environmentalists, gender and cultural activists), my view is that the fundamentality of class analysis in any study of bourgeois state is not debunked by the existence of those other sources. I agree with Youngman that multiple causality ‘does not diminish the importance given to the concept of class and the methodology of class analysis. Gender, ethnic and racial inequalities may have sources and consequences independent of the relations of production, but they are not totally autonomous of economic factors. These forms of social inequality are shaped by the capitalist mode of production and by the existing class structure. They have a class character. The analytical task of political economy is to clarify the linkages between the class basis of society and these other forms of social domination’¹⁴

It has been said that ‘there is a relation of near-identity between the state and its law’ and ‘that the law is the state’s standard mode of expression, its very language, the essential medium of its activity’¹⁵ The Constitution which is the highest in the hierarchy of laws and on the basis of

¹² I adopt the arguments proffered by Claude Ake in Revolutionary Pressures in Africa, Zed Press, London, 1978. He concluded that ‘class refers to relation to the means of production and that class membership is decided in terms of ownership or non- ownership of the means of production-p.59; see also Oladipo Fashina, ‘Labour and Politics- the Challenges of Social Transformation of Nigeria, FES, 2009 for a detailed theoretical and practical discussion of the theory of classes in Nigeria.

¹³ Those who are interested in pursuing the matter further can consult Ake, *ibid*.

¹⁴ *Op cit.*, pp. 22-24

¹⁵ *Ibid*, p102

which other inferior laws are invalidated¹⁶ essentially reflects the will of the ruling class or the state. Consequently, if there is a near-identity between the state and other laws, as posited by Poggi, it can be asserted that the state and the constitution are almost one and the same. This is so as the Constitution defines the relationship between the state and the working people. Abubakar Momoh shared this position when he criticized what he referred to as the ‘uncritical and highly blurring definition of constitution by bourgeois scholars. He made the following pertinent points: ‘First, a constitution is rooted to and examined within its own history. And such history is made by people with implication for politics and economics. Second, there is the issue of the object of law, viz, is it merely to regulate activities between the rulers and the ruled? In overview, a constitution through the law, confers on a few people, the legitimacy of denying or restricting the rights of others. This is so because the essence of law is the recognition of property relations...Third, it is assumed that all citizens are equal. This equality is not defined in concrete terms. Furthermore, the constitution does not seek to explain why a particular set of people acquired power, but rather it spells out how they should exercise it’.¹⁷

The Bill of rights codified in written Constitutions or given expression in judicial decisions in countries with unwritten Constitutions reflects the social relations of production in a given state. If we take a look at Chapter 4 of the existing Nigerian state Constitution, we shall see that the only rights guaranteed are the civil and political rights¹⁸ such as the right to move freely and freedom of speech and right to liberty et cetera¹⁹. Socio economic rights like right to work, right to housing and right to health et cetera are not enforceable. Of course, the bourgeoisie do not need those rights to be enshrined in the Constitution as the existing process or mechanism of capital accumulation skewed in their favour already guarantees all of those rights to them. Also not enforceable are labour rights such as right to adequate opportunity for securing means of livelihood; just and humane conditions of work; safeguard of health, safety and welfare of persons in employment; adequate medical and health facilities for all persons; equal pay for equal work without discrimination; protection of children, young persons and the aged against

¹⁶ S. 1(3) of the 1999 Nigerian Constitution stipulates that any law inconsistent with the provision of the Constitution shall be invalid to the extent of inconsistency.

¹⁷ Abubakar Momoh, ‘The History and Politics of Constitution Making in Nigeria (1922-1999) in Path to People’s Constitution, CDHR, Lagos, 2000, p.40

¹⁸ See Chapter 4 of the Constitution of the Nigerian State, 1999

¹⁹ Chapter 4 of the Constitution

discrimination²⁰. All these are banished to Chapter 2 of the Constitution on Fundamental Objectives and Directive Principles of State Policy that are not justiciable or enforceable by virtue of section 6(6)(c) of the Constitution itself.

Regardless of the 'near-identity' of the state and the Constitution, two points can be made on the relationship between the two. First, Constitutions do not give birth to the state; but the state births constitutions. The state fashions the constitution to suit its main purpose of preserving the status quo, that is, the system of relations of production. Since the Constitution is the language of the state or of the class in power, it is the state that renders basic or fundamental workers' rights unenforceable. So it is not a moral issue. The denial is mainly political and legal only to the extent that the state employs its coercive powers (including the court system) to enforce compliance. The implication of this for the dominated classes, particularly the labour movement, is that the process of changing the existing constitutional order has to be political and can only be wrought through a sustained struggle based on the necessary consciousness and suitable strategy. Constitutions are not changed or made on the basis of articulate charter of demands or campaigns in the mass media belonging to the ruling class, but on the basis of political struggles.

Second, in real terms the state is above the Constitution as it has the power to alter it and all laws at will. Regardless of the insight drawn by political scientists in their studies of advanced capitalist societies which has led them to draw distinctions between rigid and flexible constitutions, whenever the dictates of the Constitution are outmoded or serve as cog in the wheel of capitalist progress, or as we have seen in Nigeria whenever there is need for elite consensus on intra class succession and there is need to restore a semblance of sanity and maintain stability of the class in power, the constitution can be amended in a matter of days in spite of its alleged rigidity²¹. One explanation for the constitution not containing rights which the dominating class that constitutes the state enjoys by virtue of their means is that they are above the Constitution. The lesson that can be drawn from this is that rather than focusing on the text of the Constitution the better strategy is to direct the energies of the working class or the labour movement against the class that fashions the Constitution; for if that class is overthrown its

²⁰ S. 17 of the Constitution

²¹ The National Assembly has refused to pass the Freedom of Information Bill into law as its contents are incompatible with the venal and primitive accumulation process of the Nigerian state.

constitution will crash with it. A constitution in essence, therefore, is the will of the dominant class in a given society for the perpetuation of its rule and interests and for the concomitant subjugation of the dominated class. In other words, rights guaranteed by it are those that will not structurally and fundamentally alter its dominance and accumulation. I will now illustrate this point concretely by a brief analysis of the denial of justiciability to the economic, social and cultural rights contained in Chapter II of the Nigerian Constitution. My argument is that the Chapter titled Fundamental Objectives and Directive Principles of State Policy demonstrates more than its preamble the fraudulent intent of the constitution and the ruling class. Although section 13 of the Constitution states unambiguously that ‘it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter [Chapter II] of the Constitution, section 6(6)(c) of the same Constitution also seeks to make the entire provisions in Chapter II non-justiciable, that is, incapable of judicial enforcement. For the avoidance of doubt, section 6(6)(c) provides that ‘the judicial powers vested in the courts shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution’. Thus, on the one hand the Constitution makes it a duty for all authority including the courts to enforce the fundamental objectives and on the other hand it forbids the courts from enforcing them. This Constitutional doublespeak reflects the existing relative strength as between the dominant class and the working people. The inclusion of Chapter II in the Constitution is an exercise in legitimating the existing constitutional order. We see therefore that the Nigerian ruling class is not interested in the implementation of the fanciful ideas of social justice, principles of democracy, participation of the people in their government²², just and humane conditions of work²³, adequate opportunity to secure work and means of livelihood²⁴, adequate medical and health facilities for all persons²⁵, equal pay for equal work without discrimination²⁶, protection

²² S.14, *ibid*

²³ S. 17(3) (b)

²⁴ 17(3) (c)

²⁵ 17(3) (d)

²⁶ 17(3) (e)

of children, young persons and the aged against exploitation²⁷, moral and material neglect, free education, management and control of the national economy to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice²⁸, management and operation of the major sectors of the economy²⁹, free education³⁰, prevention of the concentration of the wealth or means of production and exchange in the hands of few individuals or group³¹, suitable and adequate shelter, food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare of the disabled³².

More correctly, it is not just that they are not interested in enforcing these tantalizing ‘fundamental objectives’, they are in conflict with the objective interest of the ruling class and the logic of its accumulation of capital and so the state is incapable of enforcing them. Gye Wado captures this point when he wrote that:

‘It is the concrete material conditions of the society which give rise to the sort of rights that can be enjoyed. Therefore, there can never be the rights with divine content derived from the natural law synthesis. From this point of view, what are considered human rights in a bourgeois society is the liberty allowed for either the exploitation of the working class and peasantry by the dominant class. The very fact of inequitable social relations constitutes a bottleneck in the enjoyment of human rights’.³³

Thus, when the bourgeoisie insert rights in the constitution they do so fraudulently and to deceive the people. The courts, also part of the coercive instrument of the state, have relentlessly held that the provisions of Chapter II of the Constitution are not enforceable or justiciable³⁴. The

²⁷ 17(3) (f)

²⁸ S.16(1)(b)

²⁹ S.16(1)(c)

³⁰ S.18(3)S

³¹ S. 16(2)(c)

³²S. 16(2)(d)

³³ Quoted in Dele Peters, ‘On Human Rights in Economic, Social and Cultural Context and the Judiciary in Nigeria’ in *Journal of Economic, Social and Cultural Rights*, Volume 1 No.5, July-September, 2002, p.6

³⁴ S. 6(6)(c); The bourgeois politicians have purportedly deleted section 224 of the Constitution in the controversial amendment. The section provides that ‘the programme as well as the aims and objects of a political party shall conform with the provisions of Chapter II of this Constitution’. There is therefore a concurrence of judicial and legislative hostility to workers welfare.

only explanation for the courts affirming the validity of section 6(6)(c) over and above section 13 of the Constitution contrary to the directive of the Supreme Court that provisions of the Constitution must be holistically or liberally construed is that in so doing they take a political decision in favour of the ruling class, which decision meets the objective needs of the class at the present historical conjuncture and reflects the present balance of power between the working class and the ruling class³⁵. Ordinarily, courts give effect to later provision in a statute over and above a previous one. But our courts ignore section 13 (a later provision in relation to section 6) in cases dealing with fundamental objectives when they construe section 6(6)(c) consciously or unconsciously to deny the people of the socio-economic rights contained in Chapter II of the Constitution³⁶.

The second objection to the fraudulent objectives is that they are couched in general terms that render them practically and politically meaningless. We are told that the Federal Republic of Nigeria, for example, 'shall be a state based on the principles of democracy and social justice'.³⁷ The specific principles of democracy and the content of social justice are not identified or explained. Also, the Constitution states that 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its power and authority'³⁸. The question left unanswered is: who are the 'people'? Is the constitution referring to the working people or the people who control the means of production and as a result the state? If the 'security and welfare of the people shall be the primary purpose of government', why is it that the workers have to organize strikes or warning strikes for minimum wage to be enacted into law and enforced?

In spite of the fraudulent intent that produced Chapter II of the Constitution, they constitute a basis for campaign against the Nigerian State for failing to meet its objectives. The working people can be mobilized to see the need for state reconstitution as opposed to mere reformism if

³⁵ Decisions of courts in countries like India where the courts have also creatively affirmed similar provisions ordinarily not justiciable must be seen in the context of the concession which the ruling class in India has granted to the working class. Those decisions can only be understood in that context.

³⁶ See for example the case of **N.P.A.S.F v. Fasel Serv. Ltd** (2001) 17 NWLR (Pt. 742)261 at 284 where the Court of Appeal held that 'the constitutional rules of interpretation are that where a latter provision is inconsistent with an earlier provision of a statute, the legal presumption is that the latter has modified the latter'

³⁷ S. 14 of the Constitution, op. cit.

³⁸ S.14(2)(a)

the labor movement demonstrates to the working people that the non-enforcement of the Chapter is based on the character of the class that constitutes the state at present. True, the argument has been advanced that the reason for making the socio-economic rights non-justiciable is the unavailability of resources to discharge the obligations. Of course, that argument can be countered by the fact that members of the ruling class enjoy those selfsame rights regardless of the economic condition or situation of the country as a whole. The other argument which I do not intend to pursue here is that the foundation for the economic crisis or underdevelopment that renders the ruling class incapable of enforcing Chapter II is to be located in the peripheral role which the Nigerian ruling class or state has accepted or has been forced to play in international capitalism, aka globalization. And this, too, leads to the conclusion that the task of reconstituting the Nigerian state has to precede a just readjustment of the role and place of Nigeria in the global or globalised economy.

Equality of Access to Court as Fundamental Right

As stated earlier, rights are usually ventilated in courts of law in our present historical conjuncture. It follows therefore that if a woman cannot access the courts, then her rights can hardly be protected. But the question is, is there a right to equality of access to court? I argue that there is. First, if that right does not exist then all the other rights are meaningless in societies³⁹ that have courts as institutions for the enforcement of rights. Although the discussion of the segment of this paper on the state and human rights leads to the conclusion that in class divided societies, equality before the law is chimerical or unattainable-as the power relations are skewed against members of the dominated classes-unequal access to court on grounds of inability to afford the services of lawyers or pay the mandatory filing fees, which I call procedural inequality before the law, can be removed as the suggestions which I make subsequently shows.

Second, Articles 3 and 7 of the African Charter on Human and Peoples' Rights that is enforceable in Nigeria by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act⁴⁰ demonstrate the existence of the right to equality of access to court. The articles of the Charter do not use the phrase right to equality of access to court, but in my view they would be denuded of any practical meaning if they are not seen as protecting such a right. Article 3(2) states that 'every individual shall be entitled to equal protection of the law', while Article 7(1)(a) provides that 'every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws regulations and

³⁹ I know not of any liberal democratic society that has no court system.

⁴⁰ Cap A9, Laws of the Federation of Nigeria, 2004

customs in force..'. Equal protection of the law without equal access to the court to take the protection of the law and the right to have one's cause heard implies that there should be unimpeded access to the court for the ventilation of grievances. It is when one gets to court that the argument as to which rights are enforceable⁴¹ or not can commence. The right to appeal to competent national organs against acts in violation of fundamental rights should not be technically reduced to the municipal appeals from courts of first instance as international conventions or instruments often use 'appeal' to refer to cases before courts of first instance. If that is the case and no one can sensibly deny that courts are organs of state set up to prevent violation of fundamental rights, then the right of equality of access to court cannot be denied. The African Charter is enforceable in Nigeria as the Supreme Court of Nigeria decided in the case of **Abacha v Fawehinmi**⁴² that:

'where an international treaty entered into by Nigeria is enacted into law by the National Assembly, as was the case with the African Charter on Human and Peoples' Rights which is incorporated into our domestic law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the court'

Consequently, the provisions of Articles 3 and 7 of the African Charter should be enforced in Nigeria. In other words, there is a right to equality of access to court in Nigeria. This conclusion is supported by the obligation placed upon the National Assembly by the Constitution to make a law for the rendering of financial assistance to any indigent citizen of Nigeria whose right is infringed⁴³. Although, that obligation would be rendered otiose by our proposal for free access to court, it is an indication of the realisation by the drafters of the Constitution for encouraging access to court in order to ventilate cases related to human rights abuses. Why the National Assembly has failed or neglected to pass such a law has been partly treated in our discussion of the state and human rights.

We are now left to determine or discuss the content of the right to equality of access to court. For me, this is not a very difficult task as the right consists of no more than that no individual shall be made to pay any fee whatsoever or file any formal or informal process, if he or she chooses not to, in challenging infractions to his or her fundamental rights before courts of law and other organs of state created for the protection and promotion of fundamental rights. This is an expansion of the epistolary suits⁴⁴ developed in India where courts upon any written communication from victims of human rights abuse assume jurisdiction without any formalities. This may if you like be called a combination of epistolary and 'vocabulary' mechanisms to

⁴¹ Article 7(1)(a) of the Charter in my opinion is a warrant for the conclusion that all rights, civil and political, economic, social, cultural and solidarity rights are enforceable once the Conventions are codified as required by the Article and also by section 12 of the Constitution of the Federal Republic of Nigeria, 1999.

⁴² (2000) 6 NWLR (Pt.660) 228 at page 299

⁴³ S. 46(4)(b)(i) of the Constitution.

⁴⁴ See Olisa Agbakoba, op cit.

achieve justice. By ‘vocabulary suits’ I expect that anyone can go to the court registry and make his or her oral complaints to registrars who would reduce the complaint into writing and bring the matter to the attention of a judge and serve the complaint on the alleged abuser of rights. This should meet the needs of our largely illiterate society.

Another element of this right is that litigants are treated as equal in terms of how their cases are processed. In other words, from filing to determination of their cases no litigant shall be given preferential treatment or suffer any disability on any ground whatsoever. Thus cases should be treated in the order in which they are filed. It follows therefore that the illegal practice of calling cases handled by those conferred with the rank of Senior Advocates of Nigeria cannot stand and must be stopped by our courts and the lawyers immediately. There are no categories of litigants. I am not here interested in the debate as to whether that titular rank should be abolished or not. I am concerned that no title should stand in the way of the right to equality of access to our courts. At any rate, section 42 of the Constitution expressly forbids discrimination of any sorts, I contend. Also the Senior Advocates of Nigeria (Privileges and Functions) Rules made pursuant to section 5(7) of the Legal Practitioners Act merely permits those conferred with the rank of Senior Advocates of Nigeria to mention their cases out of turn when those cases are not for hearing. In its exact words:

‘Notwithstanding the provisions of any rules of court but without prejudice to any enactment, all courts of law in Nigeria before which legal practitioners are entitled to appear to every Senior Advocates of Nigeria the following rights and privileges, that is to say, the right to mention any motion in which he is appearing or any other cause or matter which is on the list for mention and not otherwise listed for hearing out of its turn on the cause list.’

To those who may demur or object that there would be a floodgate of suits, my response is that the floodgate is desirable and would sooner than later check abuses and there would be a reduction in such cases as the ease of approaching courts is itself a deterrence. If they are not satisfied with this answer, then I say to them, and so what? Courts are there, are we not told?, to protect rights and judges are paid for that purpose. For yet those who may object on the ground that it would be expensive for the state to maintain an all comer vocabulary mechanism for the protection of fundamental rights, the answer to them is that fundamental rights are so fundamental to development and democracy that it cannot be commercialised. To commercialise human rights protection is to trivialise it. I have no doubt that the debate will continue.

The role of the legal profession

The Bar Association

The legal profession is a stratified one⁴⁵. Thus, it is futile to recommend to it proposals that would divide it or upon which there can be no professional consensus. For example, many of our legal practitioners today are ideologically or commercially committed to commercialisation and privatisation, in spite of its unconstitutionality⁴⁶. There is no sanctimonious plea that would make those who seek to benefit or profit from an unconstitutional act change their minds. A significant role which the Association of lawyers can play in the enforcement of the right of equality of access to court is to generate a bill that will guarantee free access to all citizens in all cases for the enforcement of fundamental rights in the terms earlier highlighted. Of course the association can do all of those things that Olisa Agbakoba⁴⁷ identified such as establishment of legal aid centres, legal clinics, pro bono works et cetera. An activist bar can also engage leading institutions of the state by issuing statements regularly to condemn systemic abuses of rights and by organising protests whenever it can muster the necessary consensus and also by educating members of the public on their rights generally

The lawyer

Individual lawyers have a duty to their clients to do everything necessary to protect their rights under the existing legal regime. There is also the need for creativity on the part of the lawyer in formulating his or her client's case in human rights cases. This imposes a duty on the lawyer to update his knowledge of human rights jurisprudence (both substantive and procedural). The fact that the right to housing is erroneously held not to be justiciable in my view should not discourage lawyers from relying on cases developed in other jurisdictions that establish a nexus between right to life or right to the dignity of the human person and right to housing.

Knowledge of both substantive and procedural law on human rights is essential to a competent defence of clients' rights. The lawyer should understand that human rights is a subject with international law flavour and with relationship with other fields of study. The need to immerse himself or herself in these other disciplines cannot be over-emphasised.

We cannot tire of reminding lawyers that money is not everything. Lawyers must understand that it is in their enlightened self-interest to promote and protect human rights willy-nilly. Without a just regime of human rights protection there can be no stable society and without a stable society, there can be no legal practice. Commercialisation of human rights practice is therefore short sighted in the long run.

The individual lawyer also needs to be courageous in the protection and defence of his or her client's rights. While he cannot afford to be rude to judges, the lawyer should never allow any

⁴⁵ See Robin White, 'Lawyers and the Court' in Robert Blackburn (ed), Rights of Citizenship, Mansell Publishing Limited, London, 1993, p.244. According to the author, 'At one time the profession was homogeneous; now it is increasingly stratified. The practitioner in the large City firms has little in common with the sole practitioner in a provincial town...'

⁴⁶ See s.16 of the Constitution

⁴⁷ Olisa Agbakoba, op cit, p.127

judge to intimidate him or her. They are both doing their respective duties, one should not obstruct the other.

As has been suggested, lawyers should have resort more to public interest litigation to ‘articulate the views and demand of the poor and organised sections of the community for justice’⁴⁸. The good news is that our courts are relaxing the rigid misinterpretation of the decision of the Supreme Court in **Adesanya v President**⁴⁹ to permit suits in the face of technical objections on the ground of lack of locus standi⁵⁰.

Judges

The preeminent role of the judge in the protection of human rights goes without saying⁵¹. He or she decides human rights cases and determines if there has been a breach of a person’s right or not. This is a heavy burden. The judge needs to take human rights cases and dispose them expeditiously. A very common scenario is to get to court and find that the judge is not sitting on very flimsy grounds without any advance warning to litigants and counsel. That in itself is a breach of the right of the litigant to be heard. Justice delayed is truly justice denied. The judges also need to be conversant with the rules of procedure and the substantive provisions of the Constitution and the African Charter relating to the protection and promotion of fundamental rights. Our judges must sustain the current trend of granting standing to persons other than direct or sole victims of human rights abuse⁵².

Just as in the case of lawyers, but perhaps more so, the judge has to be creative in expanding the scope of human rights and in seeing to it that human rights litigations are not bogged down in excessive legalism. The law ultimately is what the judge says it is in liberal democracies.

Conclusion

Human rights reflect the existing relations of production in any society and the relative strength of opposing social forces in contestation for dominance. The role that judges and lawyers play in

⁴⁸ Olisa Agbakoba, op cit, p.123

⁴⁹ (1981) 2 NCLR 358

⁵⁰ This writer successfully challenged on behalf of his client the decision of the Lagos State House of Assembly to investigate the Governor of Lagos state in respect of allegations of which they were also accused by a group known as ‘the True Face of Lagos’. See **Akinnola v Lagos State House of Assembly** (Unreported) Suit No. IKD/M/134M/2010 delivered on 16th March, 2010 by H.A.O. Abiru, J; see also **Aliyu v Attorney General of the Federation** (Unreported) Suit No. FHC/ABJ/CS/754/2010 delivered on 13th of January, 2010 per Abutu, J also argued by the writer. In that case the Federal High Court ignored objection to the standing of the Plaintiff to order the Executive Council of the Federation to inquire into the health of the late President and held that Federal Executive Council is a body unknown to the Constitution. I have pending in court some cases that touch on the welfare of the people of Nigeria generally.

⁵¹ Olisa Agbakoba, op cit pp138-150 contains a sympathetic review of some of the courageous decisions by Nigerian courts in the face of brutal denial of fundamental rights of citizens by military despots. I do not wish to review those cases here.

⁵² See note 49 above. The new Fundamental Rights (Enforcement Procedure) Rules is particularly remarkable in abolishing the strict and archaic rule of locus standi in human rights litigation- see O....thereof.

defence and promotion of human rights can therefore not be understood outside the political economy of a given state. Judges and lawyers are not excluded from the relations in society and they are indeed part and parcel of it. It seems to me that a large number of them belong to the petit-bourgeoisie. This class oscillates or vacillates between support for the dominant class and the dominated classes depending on how it thinks its interest would be protected. This explains why some judges at some point in history give what observers describe as 'progressive' decisions and yet at other times even the same judges give decisions that hurt the interest of the dominated classes. It is therefore inaccurate to describe the judiciary as the last hope of the common man or woman. This is not to dismiss the fact that there are some judges and lawyers who side with the dominated classes ideologically and can therefore be referred to as progressives. The truth, however, is that at the present time the common man and woman is unable to access the courts. For the courts to be remotely described as the last hope of the common people, the people must be given free and unimpeded access to the court which I call the right to the equality of access to court. Progressive lawyers and judges must work towards the practical recognition of this right. Even if this were the only role they play, I believe history would be kind to them.