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Preface

It is with great pleasure that we publish this paper by Professor Proehl in the series which he himself started when he was Director of the African Studies Center at UCLA. This paper, prepared for presentation at a Seminar on Constitutional Problems of Federalism in Nigeria, admirably expresses his interests in constitutional law, and his desire to contribute to the processes of institutional development and innovation in Africa.

Fundamental questions of human rights are raised by Professor Proehl in his analysis. If liberty lies in the hearts of men and women, what is the role of constitutions, laws and courts? How can they sustain liberty, giving it reality and dimension in organized society? Should fundamental rights be incorporated into a constitution as explicitly stated ideals or as general principles, susceptible of adaptation and growth through the creative use of judicial review? And what should be the relationship between the courts and the legislature, so that the courts may protect human rights, without usurping legislative functions?

In the process of answering these questions, Professor Proehl relates constitutional statements of rights to the structure of power in the society, differentiating between decentralized agrarian societies, and urbanized, technologically developed societies with centralized structures of power. He analyzes theories of judicial review in the United States, as a basis for the examination of decided cases in Nigeria, involving constitutional interpretation. Developing a comparative approach to these problems, he is concerned throughout with the role of law, as a great creative force in building a just society; and he concludes that law can be effective if it rests on the peoples' tenacious and uncompromising insistence on fundamental rights and if the judiciary assists the people to an understanding of the full meaning and importance of human rights.

June, 1970

Leo Kuper

Paul O. Proehl is Professor of Law at UCLA where he has also served as Director of the African Studies Center and Vice-Chancellor. Professor Proehl received his Doctor of Jurisprudence degree at the University of Illinois in 1948 and his Master of Arts degree at that University in 1949. He is the author of *FOREIGN ENTERPRISE IN NIGERIA: LAWS AND POLICIES* (University of North Carolina Press, 1965) and the editor of *LEGAL PROBLEMS OF INTERNATIONAL TRADE* (University of Illinois, 1959), as well as numerous articles on both domestic and international law. Professor Proehl teaches courses on International Law and Legal Aspects of International Development.

Because most of the cases cited refer to sections of the (1960) Independence Constitution, references herein are to that document, rather than to the (1963) Republican Constitution. It was hoped thus to avoid confusion; additionally, in many instances, the number of the corresponding section in the Republican Constitution follows.

FUNDAMENTAL RIGHTS UNDER THE NIGERIAN CONSTITUTION, 1960-1965

Nigeria, some four years ago, was characterized by Colin Legum as being “the only really ‘open society’” in all of Africa.¹ And so it was: nowhere in Africa did reality so approximate the constitutional ideal. Nigerians enjoyed more freedoms--what one writer aptly refers to as “convenient social disorderliness”²--than the citizens of other African nations.

But we should not deceive ourselves. That free Nigerian society did not derive from, nor rest wholly on Chapter III of the Nigerian Constitution. No constitution or bill of rights could have had such an effect within the space of five years. The Nigeria which Legum described in 1965 was a reflection of what Willie Abraham has termed “the egalitarian and humane mentality of traditional African social organisation.”³ During the colonial era, administrative structure had been imposed, new norms adopted, some ancient practices wiped out, but so far as human liberty is concerned, Nigeria essentially was and is the product of its own culture. This, I believe, is what one should postulate and it is where one must begin in any assessment of fundamental rights in Nigeria, or in any nation, for that matter, as indeed, where one must also end. “Liberty lies in the hearts of men and women,” said Learned Hand; “when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no

¹ Legum, Colin, “What Kind of Radicalism for Africa?”, *43 Foreign Affairs* 244 (1965)

² Bickel, Alexander, *The Least Dangerous Branch* (New York, 1962), p. 143

³ Abraham, W.E., *The Mind of Africa* (Chicago, Phoenix ed. 1966), p. 178

court to save it.”⁴

This is indeed a ringing statement, and there is much truth in it; but it is not all truth. Judge Learned Hand spoke those words at a public ceremony in New York's Central Park. It is not taken from one of his decisions. Liberty must be in the hearts *and* minds of the people, and if it dies there, it cannot be saved by legal devices or constitutions. But constitutions, laws, and courts can do much to sustain it; and even when it does lie in hearts and minds, only constitutions, laws, and courts can give the spirit of liberty reality and dimension in organized society.

We begin our examination of fundamental rights under the Nigerian Constitution,⁵ then, with the premise that the idea of individual liberty was rather generally implanted in the Nigerian spirit and was also generally realized, at least (in some areas) within the limits to which it existed as a conscious demand on authority, given the colonial precedent of authoritarian government, certain inexorable parameters of customary society, and the fragmented nature--ethnically and linguistically--of the Nigerian peoples. We know, of course, that in many remote areas, among illiterate and uneducated peoples, it would have been, and still may be, difficult if not impossible to square some customary practices with the language of Chapter III. And we cannot deny that tribal and regional discriminations existed. They did. So did arbitrary police action.⁶ There were politically motivated harassments and suppression of the free expression of

⁴ Hand, L., *The Spirit of Liberty* (New York, 1952), p. 190. See also Frankfurter, J., concurring in *Dennis v. U.S.*, 341 U.S. 494, 555-56 (1951): 'Civil liberties draw at best only limited strength from legal guarantees... Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes en-slaved...'

⁵ Indeed, it must be remembered that the Nigerian Constitution itself does not prohibit discrimination against women

⁶ From what I know, I would say that police officiousness and capriciousness were the chief incidents of arbitrary action. I do not mean to imply that such offenses were widespread; they tend to be most common in all societies. The arbitrary demands imposed by corrupt officials are another thing: two parties are required to make a transaction, including a corrupt one.

opinion, particularly in 1962. But I believe it is fair to say that, by and large, the individual Nigerian living under the 1960 Constitution, while not able to boast that he enjoyed Holmes' "right to be let alone"--since neither communal life in the bush nor life in Nigeria's crowded urban centers permits that--was far less arbitrarily imposed upon than many of his African brethren. There was, as Simmel put it, a kind of reciprocity between government and citizen with respect to the observance of rules.⁷ What better evidence is there of this than that in a nation of 55 million the coercive apparatus available to reinforce government consisted of some thousands of police (mostly unarmed) and a few battalions of troops, one of which was on United Nations duty in the Congo until 1963?

The 1960 Bill of Rights of the Nigerian Constitution came about because the Minorities Commission Report of 1958 had recommended that the fears of minorities, into which the Commission had inquired, would be allayed by express constitutional guarantees of rights.⁸ These were to follow the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ The convention had already been adhered to by the British Government on behalf of Nigeria, but to have the force of law in Nigeria, it had first to become part of Nigerian municipal law.

This is well known, but it is worth noting that the traditional British reserve against the inclusion of express fundamental rights in the constitutions of its colonial or former colonial territories¹⁰ was now laid aside in favor of such incorporation, but not

⁷ Quoted in Fuller, The Morality of Law (New Haven, 1964), p. 39.

⁸ Cmnd. 505 (1958).

⁹ Cmnd. 8969 (1953); also in Robertson, Human Rights in Europe (Manchester, 1963), pp. 179-95.

¹⁰ See Dicey, Introduction to the Study of the Law of the Constitution (London, 9th ed., 1959), pp. 198-99; Jennings, The Approach to Self-Government (Oxford, 1956), p. 20; in 1930, The Simon Commission recommended that a bill of rights be omitted from the Indian Constitution

without misgivings:

Provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless, we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights.¹¹

This view represented a change of policy, first demonstrated in the Malaya Constitution of 1957,¹² although, curiously, the Ghanaian Constitution of 1957 contained no Bill of Rights as such.¹³ Once the decision was made to incorporate a Bill of Rights in the Nigerian Constitution, it was done in elaborate fashion. The provisions were set forth in great detail, enumerating rights specifically listing exceptions, providing for the suspension of some under an automatic or declared emergency, and for derogation of others by laws “reasonably justifiable in a democratic society.” In the desire for preciseness and clearness, Chapter III emerged as something more like a statute, rather than an organic charter broad enough to encompass immediate and future needs, flexible enough to bend and enlarge to change, yet containing the essentials that would provide a constant frame of reference.

That this was the intention of the draftsmen was reflected in the most important decision of the Judicial Committee of the Privy Council--and the last, it is to be noted--made with respect to independent Nigeria. As unnamed commentator, writing in the *Nigerian Bar Journal* of the Board's decision in Adegbenro v. Akin-Lafisaid:¹⁴

Thus the Privy Council...reiterated the principle generally adopted by

¹¹ *Supra* note 8, p. 97.

¹² Constitution of Malaya, Part II.

¹³ The Ghana (Constitution) Order in Council (1957).

¹⁴ 119637 A.C. 614.

Commonwealth courts that a constitution is to be construed like an ordinary statute. That attitude is often criticised by admirers of the supposedly "liberal" interpretation by the U.S. Supreme Court...It should, however, be remembered that the U.S.A. Constitution is a comparatively short document which would scarcely work at all without a good deal of creative assistance and interpolation from the judges.¹⁵

That, in the English view, judges are not to interpolate I to act creatively is well known. For example, speaking in 1955 of English post-war rent tribunals, Sir Raymond Evershed, Master of the Rolls, said:

As the present Lord Chief Justice of England observed in one of the cases (which came to the Queen's Court by prerogative writ), the proceedings of the tribunals and the methods whereby they reach their conclusions are entirely at variance with the accepted principles of regular trials before the Judges. But the tribunal had acted within the powers contemplated and conferred by the Act. It is not the function of the courts to suggestion the wisdom of Parliamentary policy...¹⁶

In other words, no judicial concept of "due process" could invalidate a procedure which Parliament had ordained.

With reference to Nigeria itself, where a written constitution governs, and to the constitutional cases which arose out of the 1962 crisis, a former member of the law faculty of the University of Lagos had this to say:

My general view of Section 65(3)(b) is not altered by the suggestion that Parliament may abuse the procedure contained therein in order to establish and maintain dictatorial powers of government. It is to me an unacceptable constitutional doctrine that violence may be done to the clear wording of the Constitution in order to permit a non-elected and largely irremovable group of five judges to inquire into allegations of bad faith on the part of a majority of the elected representatives of the Nigerian people.¹⁷

Section 65 is, of course, the authority in the In-dependence Constitution¹⁸ under

¹⁵ "Recent Cases on the Constitution", 1 Nigerian Law Journal 103, at 106 (1964).

¹⁶ Evershed, Sir Raymond, "Government Under Law in Post-War England," in Government Under Law, Sutherland (ed.), (Cambridge, Mass., 1956, pp.159-60.

¹⁷ Park, 1 The Lawyer 89 (1963).

¹⁸ §70 of the Republican Constitution, 1963.

which an emergency may result in the attenuation of certain fundamental rights: the right not to be deprived of life or liberty, the right to judicial determination of one's civil rights and obligations, and the right to freedom from discrimination.¹⁹ If there is a declaration of war, a state of emergency automatically exists under Sub-section 3(a). Sub-section 3(b) and (c) provide for the declaration of a state of emergency, first when “there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists,” and second, when “there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions are threatened by subversion.” This power of Parliament to declare an emergency under either §3(b) or (e) has not been challenged by the Nigerian Supreme Court. In considering §3(b) in *Williams v. Majekodunmi* no. 27, Ademola, C.J., by way of dictum stated:

That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this Court to decide.²⁰

This may well be the correct view, although the question remains open, and it is to be noted that the Chief Justice used the word “apparently.” Whether or not an emergency exists may be a political question into which the courts are not to venture. As an American commentator said of the *Dred Scott* case,²¹ “A question which involved a Civil War can hardly be proper material for the wrangling of lawyers.”²² However, it is submitted that the primary purpose of a written constitution and of judicial review is

¹⁹ ss 17, 20, 21, and 27 (now H 18, 21, 22, and 28).

²⁰ (1962) All N.L.R. 328, 336. There are three cases styled *Williams v. Majekodunmi*. No. 1 (June 1, 1962) granted a variance in the restriction order on Chief Williams, to enable him to argue his subsequent cases (Nos. 2 and 3) in which the court refused to grant plaintiff an injunction prohibiting defendant from enforcing the restriction order against plaintiff, pending its decision on the substantive question of the validity of the restriction order, which was handed down in No.3, July 7, 1962.

²¹ *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 1857

²² Maurice Finkelstein, quoted in Bickel, *supra* n.2, p. 185.

precisely to prevent bad faith actions on the part of the legislative or executive branches, and neither §3(b) nor §3(c) on its face precludes the possibility of judicial review.

On the other hand, the Supreme Court has assumed the burden of judging whether laws in derogation of certain other fundamental rights²³, which may not be derogated from in an emergency, are “reasonably justifiable in a democratic society”, as such laws must be, to be valid. In the Williams case No. 37, Bairamian, J. said:

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 of rule pervading the Constitution. If they are to be invaded at all, it must be only to the extent that it is essential for the sake of some recognize public interest, and may not be farther.²⁴

There is no doubt that the question of whether an emergency exists is a larger question of policy than whether a specific piece of legislation derogating from fundamental rights is “reasonably justifiable in a democratic society.” The latter is obviously a standard intended to regulate ordinary, or non-emergency, legislation made under the general legislative powers of Parliament contained in R64. It provides for the continuing oversight of legislation in normal times. Of course, measures that are responsive to the needs of control in a peaceful democratic society may similarly serve in an emergency. But an emergency situation may, and usually does, require more stringent controls. The question remains, however, whether, if a government is predicated on a democratic ideal, the “fact” of an emergency should not be open to question by the court. If judges can be entrusted with the task of balancing societal or governmental needs with respect to some civil rights, why not all?

²³ §5R522-26 (now H23-27).

²⁴ Williams v. Majekodunmi (No.3) (1962) 1 All N.L.R. 413, 426.

First, it should be noted that one check has already been exercised with respect to §65. In contrast to R28, whose standard of permissible derogation from H22-26 is that a law must be “reasonably justifiable in a democratic society,” the standard stated in §65 is that measures in derogation of H17,20,21, or 27 (now H18,21,22, and 28) need only be “reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency.” The Court has held that it has the power to determine whether an emergency measure comports with the “existing situation” in an emergency,²⁵ that is, whether an act is excessive, even though an emergency exists.

The above-noted standard contained in R65 implies that legislation required for an emergency is not compatible with a “democratic society.” In fact, H17, 20, 21, and 27 may not be derogated from except under an emergency proclaimed under R65. They may not be tampered with in the name of a law proposed as being “reasonably justifiable in a democratic society,” as may the rights contained in H22-26.

On the other hand, it seems quite clear that an emergency, as such, can affect only those rights whose derogation is specifically authorized by §65. The permissible derogation from the civil rights contained in ER 22-26—“reasonably justifiable in a democratic society”—is not enlarged by the declaration of an emergency. The standard of §§22-26 cannot be made to read “reasonably justifiable in a democratic society *undergoing an emergency.*” Thus derogation from §§22-26 must be accomplished under 64, the general legislative power of the Nigerian Houses of Parliament, and such derogations pass into the general body of Nigerian law. They do not expire after twelve months, as does emergency legislation under §565 (unless a shorter term is specified). The standard of what is reasonably justifiable in a democratic society should not, indeed

²⁵ Ibid.

cannot, be strained to serve the perceived or felt needs of an emergency, which go beyond the general police power and which can-not be subsumed under the criteria of “public safety” and “public order” of a democratic society. Yet this is precisely what happened in 1962, during the Western Region crisis, in the restriction of the movement of certain political personages.

Under §26(1), every citizen of Nigeria is guaranteed the freedom of movement and residence except that, as §526(2) provides: “Nothing in this section shall in-validate any law that is reasonably justifiable in a democratic society--(a) restricting the movement or residence of any person within Nigeria in the interest of defence, public safety, public order, public morality or public health.” A special provision for the review of such restriction or detention is to be found in §29(1)(b): “The necessity or expediency of continuing the detention or restriction” is to be considered by “a tribunal established by law” which has recommendatory powers only unless otherwise provided by law. It should be noted that the word “detention” refers not to §526, but to §20, concerning freedom from deprivation of personal liberty. Thus, it is clear that “detention” is not authorized under the words “restricting...movement or residence” found in §526.

What, then is the purpose of §26? Derogation from it is permitted by a law “reasonably justifiable in a democratic society,” but it is not contained in the four specifically enumerated sections which may be derogated from in an emergency under §65. Legislation in derogation of §26 must be passed as general legislation, under §64, and does not expire after twelve months. It specifies “any person” may be restricted; it does not speak of classes of persons, as does §20(1)(c), which provides for the detention of “persons of unsound mind, persons addicted to drugs or alcohol or vagrants..“and so

on. The review provided in §29 is non-judicial, and recommendatory only.

Clearly, the following types of restrictions on “movement or residence” are contemplated: unauthorized civilians must be kept out of military areas, and nomadic peoples may not take up residence within one; persons may be prevented from moving into places of danger, crowds may be controlled, limitations placed on processions or parades, all in the name of public safety or public order; prostitutes may be prohibited from residing elsewhere than in a particular quarter in the name of public morality; persons may be prevented from moving in-to quarantined areas for reasons of public health. Just so, under the derogations permissible under the fundamental rights in the four sections just anterior to §26, government may regulate the sanitation and construction standards of private homes, impose zoning limitations, require inoculations despite religious objections, control the use of public address systems in the streets. and regulate the capacity of meeting halls, notwithstanding the guarantees of privacy of family life (§22), freedom of conscience (§23), freedom of expression (§24), or the right of peaceful assembly and association (E25). Whatever is “reasonably justifiable in a democratic society” will be permitted to stand. Whatever exceeds this standard, even though it may be thought to be required by an emergency, will not.

Thus, it does not help the case to say, as did Mr. Justice Bairamian, in the third Williams case, that “If Parliament can make a law to restrict movement which has effect at all times, it can make one which restricts movement only during periods of emergency.” This does more than beg the question, it ignores the fact that what suits an emergency does not necessarily suit "a democratic society." The question is, could Parliament have made such a law absent a state of emergency? Does anyone suppose that,

drawing its power solely from §64, Parliament could pass general legislation authorizing the restriction of movement of members of a particular political party and that this could be held to be "reasonably justifiable in a democratic society?" As previously noted, the declared state of emergency could not enlarge the power of Parliament with respect to §§22-26.

This may all appear too obvious. The reason for concern is this: We may recall that it was apparently argued by Government counsel in Williams that "the power derived from section 65 is plenary and unfettered,"²⁶ suggesting that all rights could be swept before an emergency, depending solely on what government believed necessary. The Court has not ruled explicitly on this matter, and it is one which requires clarification.

Perhaps the matter is now settled by the statement of the Attorney-General in his volume of last year. There he stated:

Under section 29 (previously §28) certain of the foregoing fundamental rights may be derogated from in the event of war, or on the declaration of a state of emergency or when democratic institutions are threatened by subversion in any part of Nigeria. The particular rights...are the right to life, the right to personal liberty, rights concerning civil and criminal law, and freedom from discriminatory legislation.²⁷

Finally, on this point, we come full circle. We must again ask, considering measures which are alleged to derogate from §§22-26 in the name of public order and

²⁶ Davies, "Nigeria--Some Recent Decisions on the Constitution," II Int. and Comp. Law Q. 919 (1962).

²⁷ Elias, Nigeria, The Development of its Laws and Constitution (London, 1967). I am bothered by the fact that in a subsequent discussion of "Emergency Powers of Legislation", at pp. 284ff., the Attorney-General makes the statements without reference to limitations imposed by consideration for fundamental rights: "Under section 70 [formerly §653... Parliament has power at any time to make such laws for Nigeria or any part of it with respect to matters not included in the legislative lists *as may appear to Parliament to be necessary and expedient* for the purpose of maintaining or securing peace, order and good government during any period of emergency." (Italics added.) At p.284. And again, "Parliament is expressly made the sole judge of the kinds of law that it may consider necessary or expedient for maintaining or securing peace, order and good government of Nigeria or any part of it [during a period of emergency]." At p.286. 27a. That the court has to so judge was decided in Williams Case No.2, supra, n.20. see Davies, supra, n.26, id.

public safety, how is the Court to determine what is constitutional, i.e., is “reasonably justifiable in a democratic society” and what is not? More to the point, how is it to judge whether emergency legislation authorized by §28 and derogating from §§17,20,21, and 27 is "reasonably justifiable" for the purpose of dealing with the situation that exists during that period of emergency (§28)27a, or, under §29, that it is "necessary and expedient" for a restriction to continue, if §26 is to be interpreted as permitting specific individual restrictions during an emergency?

The Court cannot do so without qualitatively examining the situation which has occasioned the alleged need or the state of emergency and determine whether the "police" or emergency legislation, as the case may be, meets the situation or is excessive if no need or emergency exists. In short, the need to apply standards to emergency laws necessarily incorporates the power to determine whether an emergency exists.

If indeed sweeping controls are needed and intended in an emergency, and they may well be, then the language should be reworked. In such case, one might better subject all fundamental rights to qualified derogation and perhaps recast the qualification thusly: “reasonably justifiable for the purpose of dealing with the emergency situation that in fact exists and *conducive to the rapid return to normal, democratic procedures and rights.*”

It is doubtful if any formulation of language can settle definitively that the courts cannot decide whether the facts justify an emergency and, at the same time, give them the power to judge whether emergency measures constitutionally meet the situation or are excessive. A flat declaration in the Constitution denying the Court the power to decide the former might do, if fiat can substitute for logic. However, if it were done, this would

focus the court's power on the individual case before it--the emergency as applied to the individual, as in the Williams case--rather than on the dangerous and perhaps unmanageable political question.

Let us turn now to examine an example of how the Court has considered the standard of what is "reasonably justifiable in a democratic society" with respect to "police" legislation derogating from the right to freedom of expression, not subject to derogation under "emergency" powers as such.

I refer you to §50 of the Nigerian Criminal Code,²⁸ which incorporates the crime of sedition. This ancient offense, carried over from colonial days, was used to silence several critics of the government during the Western Region Crisis of 1962. But this was not emergency legislation: it was on the statute books when Nigeria became independent and the Constitution became operative, nor did its initial confrontation with the new Constitution come during an emergency.

Although the crime of sedition survives in England, it is to be noted, first, that in England incitement to violence must be shown and, second, the crime is triable there by a jury. In Nigeria, neither obtains.²⁹ Also, truth is no defense if seditious intent is established.³⁰ Is such a statute, thus applied, "reasonably justifiable in a democratic

²⁸ 2 Laws of the Federation of Nigeria and Lagos c.43, 1958 The crime of sedition is defined, inter alia, as "to bring into hatred or contempt or to excite disaffection" against the Government of Nigeria or that of any region, "or against the administration of justice in Nigeria." Sedition is not committed if the intent is "to point out errors or defects in the Government or constitution ...or in legislation or in the administration of justice with a view to the remedying of such errors or defects." Ibid., §50(2)(d)(ii).

²⁹ In *Wallace-Johnson v. Rex*, 5 W.A.C.A. 54(1940), the Privy Council ruled that incitement to violence is not an essential ingredient of the crime of sedition; this was adopted in Nigeria under the decision in *I.G.P. v. Adabogu*, 21 N.L.R.26 (1954); see Okonkwo,— A Note on the Reform of the Nigerian Criminal Code", 1 Nigerian Law Journal 293, 295 (1965). As to jury trials see Brett and McLean, *The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria* (London, 1963), p. 179: "Trial by jury only takes place in Lagos and only on a charge of committing, aiding and abetting, attempting to commit, or being an accessory after the fact to an offence punishable with death or the offence of rape." The Minister of Justice may, in his discretion, direct that "any offence or class of offences" shall be tried by jury, §335.

³⁰ *Services Press Ltd. v. Attorney-General*, 14 W.A.C.A. 176 (1952)

society”?--for that is the standard that had to be, and was, applied.

On the face of it, while by reference to England it may be concluded that the law of sedition, as qualified there, may be characterized as "reasonably justifiable in a democratic society" as a derogation from the right of freedom of expression, it is impossible for me to accept that its mode of application in the colonial era is similarly acceptable in independent Nigeria. The 1962 emergency had not yet arisen when the question of whether §50 was constitutional was raised in the Chike Obi case.³¹ (Obi was arrested in August, 1960, and this decision handed down in 1961.) However, the court brushed aside the argument that §50 applied only to acts likely to lead directly to disorder. Is not the pre-independence mode of application of sedition more suited to an emergency situation than to the general governance of a democratic people? Might this not have been the occasion, since no emergency obtained, for the court to have aligned the definition and application of sedition with that of England?³²

Rather, in the Obi case, §50(2) was described as containing exceptions that “form enough protection to a charge of sedition and...offer enough freedom of expression to anybody in our democratic society.”³³ In another prosecution for sedition decided the same day, The Queen v. Amalgamated Press, Ltd.,³⁴ the fundamental right of freedom of

³¹ Director of Public Prosecutions v. Chike Obi, (1961) 1 All N.L.R. 186.

³² Certainly nothing was added to clarification of the standard by the suggestion that the Court, in considering whether §50 was reasonably justifiable in a democratic society, should weigh the adoption by the legislature in the Northern Region Penal Code of 1960 of a provision similar to §50 as evidence of the legislature's belief that such a law comports with the standard. Brett, J., dissenting, Ibid., p.197.

Cf. Director of Public Prosecutions v. Efunkoya (High Court of Lagos 30/63), summarized and discussed in 1 Nigerian Law Journal 112-113 (1964), where a cartoon showed two figures carrying a third, all representing political parties, toward a fire, with the caption "They want to throw him into the fire!" This was published during the 1962 emergency. It was held by de Lestang, C.J., not to be seditious.

³³ Supra, n.31, p.196.

³⁴ 1 All N.L.R. 199 (1961).

expression was held to guarantee “nothing but ordered freedom.”³⁵ The line between frank and fair criticism and the crime of sedition is a very narrow one. A conservative approach may be desirable in a given democratic society, depending on its political development, but ordered freedom should not, it is submitted, permit the threat of sedition to hang over the head of every critic of public action. Corruption festers in such an atmosphere; more so, perhaps, than rebellion.

In this connection, it is worth noting how readily the existing sanction of §50 of the Criminal Code has been supplemented in the anxiety to stifle criticism. Thus, during the Western Region Crisis there was promulgated, among other emergency regulations, one entitled “Misleading Reports.”³⁶ This provided that anyone who published, in print or by broadcasting, anything “refer-ring to or likely to be understood as relating directly or indirectly to any person in respect of whom a detention order or restriction order has been made or, in fact, referring to the emergency regulations themselves in any manner whatsoever”, was guilty of an offense unless such matter had been previously cleared by Federal authority. It mattered not whether the statement was true or false, or what the intent of the publisher was in disseminating the information.

Although, of course, the regulations were lifted after a few months, thus clearly indicating their “emergency” character, it would seem the taste for censorship had been acquired. On October 12, 1964, the Newspaper (Amendment) Act³⁷ was passed by the Federal Parliament, following the pattern of a similar law passed in Western Nigeria a few days earlier.³⁸ These acts make it an offense, punishable by fine or imprisonment, to

³⁵ Ibid., p.201.

³⁶ (1962) Laws of Nigeria.

³⁷ See 1 Nigerian Law Journal 306 (1965).

³⁸ Newspaper (Amendment) Law--No.V 1964, §4(2). See 1 Nigerian Law Journal 306 (1965).

publish false statements. It is no defense that the publisher did not know or did not have reason to believe that the statement, rumor, or report was false unless he proves that prior to publication, he took reasonable measures to verify the accuracy of such statement, rumor or report.³⁹ Punishing the intentional publication of false-hoods, as §4(1) provides, is certainly justifiable, but the task of verification, as required by the quoted language of §4(2), places an impossible burden on the Nigerian press and must, consequently, limit the printing and dissemination of news, more often the true than the false, one suspects.

As has already been suggested, the "Misleading Re-ports" regulation could not be subsumed under the applicable criteria contained in the right guaranteeing freedom of expression. in my view, there is no authority for derogating from §25 in an emergency. We do not yet know whether §4(2) of the Newspaper (Amendment) Act is "reasonably justifiable in a democratic society."

The fact that one desires precise language in de-limiting the manner in which fundamental rights may be attenuated is not inconsistent with the view that fundamental rights should be stated with some generality, to permit flexibility and adaptation in their application. If rights are to grow and flower, incursions on them are to be sharply and precisely restricted.

A sense of pragmatic relativism has generally displaced the dogma of absolutes. While "All rights tend to declare themselves to their logical extreme", said Mr. Justice Holmes, "...all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."⁴⁰ There may, first of all, be a

³⁹ Newspaper (Amendment) Law--No.26, October 8, 1964, §2. See 1 Nigerian Law Journal 328 (1965).

⁴⁰ Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908). Cf. Black, J., "The Bill of Rights", 35

conflict between fundamental rights, as between one man's freedom of expression and another man's freedom of conscience. There are conflicts between the exercise of fundamental rights and the larger rights of society, moving across a spectrum, from those which are subsumed under the American doctrine of the police power--tested by the standard of legitimate end and reasonable means--the equivalent of the Nigerian standard of "reasonably justifiable in a democratic society," to those exercised by the government on behalf of the organized state and, we would hope, on behalf of the society itself, in an emergency situation. This is the wide range of policy decisions which a supreme court, under a written constitution must make.

Judges, said Learned Hand, in considering legislation are more apt than legislators to take the long view,⁴¹ since the judiciary is "an agency made irresponsive to the pressure of public hysteria, public panic, and public greed."⁴² Yet Hand had great difficulty in reconciling judicial review to the democratic process. Where, as he said, value and sacrifice choices are at issue in considering whether or not a statute is to be pronounced constitutional or not, Hand could not see how a court could invalidate the statute without putting itself in the position of the legislature, and substituting for it and declaring "what the court would have coined to meet the occasion."⁴³ The court's choice, Judge Hand thought, could not disguise the fact that "its choice is an authentic exercise of

N.Y.U. Law Review 865, 866-67, where he criticizes "the premise that there are no 'absolute' prohibition in the Constitution, for whom all constitutional problems are questions of reasonableness, proximity, and degree. This view comes close to the English doctrine of legislative omnipotence, qualified only by the possibility of a judicial veto if the Supreme Court finds that a congressional choice between 'competing' policies has no reasonable basis. I cannot accept this approach to the Bill of Rights. It is my belief 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 their prohibitions to be absolute.

⁴¹ Hand, supra n.4, p.69

⁴² Hand, supra n.4, p.68

⁴³ Ibid., p.39.

the same process that produced the statute itself.”⁴⁴ Yet surely he knew well that the process of ratiocination is quite different when the problem is considered apart from public hysteria, panic, and greed. Hand was, of course, primarily concerned with a court which “does not accord with the underlying presuppositions of popular government... unaccountable to anyone but itself, 1-with7 the power to suppress social experiments which it does not approve.”⁴⁵ No doubt he had in mind the Supreme Court of the United States in the decades just prior to 1937, which had frustrated social reform by narrow interpretations of due process and of the Commerce Clause as a basis for federal regulatory legislation. These attempted reforms were in the economic realm, as you recall, and the court's preoccupation, so far as rights were concerned, was with property rights and states' rights rather than civil or personal rights. There is an essential difference, as Paul Freund and others have long since pointed out,⁴⁶ although Hand questioned that, too.⁴⁷ Hand lingered yet in the shadow of Kent, Webster, and others, such as Paul Elmer More who, as late as 1915 could say, “To the civilized man the rights of property are more important than the right to life.”⁴⁸

And yet civil and personal rights--the idea of freedom of the individual--have an ancient history. They, more than property or economic rights, which have ebbed and waned, have that “tendency toward the absolute [which] constitutes the essential meaning of 'a right', whether it be legal or moral.”⁴⁹

They constitute “canons of decency and fairness”⁵⁰ “deeply rooted in reason”⁵¹

⁴⁴ Id.

⁴⁵ Hand, *supra*, no.40, p.73.

⁴⁶ Freund, *On Understanding the Supreme Court* (Boston, 1949), p. 9ff.

⁴⁷ Hand, *supra* n.40, p.45-46.

⁴⁸ More, *Shelburne Essays*, 9th Series (Boston, 1915), p.136.

⁴⁹ Fuller, *supra* n.7, p.29

⁵⁰ Frankfurter, J., concurring in *Adamson v. California*, 332 U.S. 46, 67 (1947).

and “implicit in the concept of ordered liberty.”⁵² There is today certainly less conflict as to what constitutes civil rights than there is with respect to the definition of economic rights, whether these relate to laws respecting property or to more advanced reformulations of Aristotle's distributive justice. Except for the right to adequate compensation for the compulsory acquisition of property,⁵³ the Nigerian fundamental rights are civil or personal rights. It is a fact that extensive individual economic rights, which would be affirmative rights against the state, such as the right to work, rather than a right to be protected from interference with the possession of property, are beyond the resource capabilities of present-day Nigeria.

If civil or personal rights tend toward the absolute, how are they to be defined by a court? Mr. Justice Black, dissenting in Braden v. U.S.⁵⁴ said:

As I understand it, this Court's duty is to guard those liberties the Constitution de-fined, not those which may be defined from case to case on the basis of this Court's judgment as to the relative importance of individual liberty and governmental power.⁵⁵

But the United States Constitution is not that explicit, and the extension of safeguards of certain civil rights from the federal domain to that of the states, for example, has been an evolutionary process--a gradually enlarged interpretation of the First and Fourteenth amendments. While framers of the American Constitution were doubtless quite clear in what they sought to protect, by some perverse wisdom they refrained from placing the original Bill of Rights into a procrustean bed of specific and detailed language

⁵¹ Rochin v. California, 342 U.S. 165, 171 (1952).

⁵² Ralko v. Connecticut, 302 U.S. 319, 325 (1937).

⁵³ §31 (formerly §30).

⁵⁴ 365 U.S. 431 (1961).

⁵⁵ Ibid., page 445

in the hope that this would preserve them inviolate,⁵⁶ as indeed they refrained from doing with the Constitution as a whole. The important thing is that they did not foreclose the growth and adaptation of what they perceived specifically, to the needs of a society they could not predict.⁵⁷

Perspective can be gained by viewing the purpose of a constitutional statement of rights against the power which it is to regulate and the dangers against which it is intended to guard. At a time when government is weak and decentralized, in an agrarian society, there is less danger to abuse of personal freedom, given a democratically oriented society. With centralization of power, urban migration and the growth of large cities, the development of organized industrial life, and the advance of technology, the apprehended or felt needs of social control lead government to seek to attenuate those "civil liberties which point to insurgency."⁵⁸ Indeed, these factors lead also inexorably to more frequent violations of one individual's rights by other individuals simply through the multiplication of contacts and the increase in competition for wealth and status.

In both societies--agrarian and industrialized--and in the intermediate stages, personal rights persist as fundamental attributes of the democratic society. Although their specific content and application may vary, usually in the direction of growth, to meet the new encroachments of what we loosely call civilization, they can be described as "persisting quasi-absolutes", which is my term, "deduced from the nature of free government," as Roscoe Pound put it. These began, as Pound points out in his

⁵⁶ "Thus, for example, freedom of speech and of press, as stated in the First Amendment, was aimed at the common law crime of sedition, to make further prosecutions for criticisms of the government, without any incitement to law breaking, forever impossible in the United States of America." Chafee, Free Speech in the United States (Cambridge, 1948), p.21.

⁵⁷ See Bickel, supra n.2, p.103.

⁵⁸ Freund, supra n.46, p.24.

Introduction to the Philosophy of Law, as American variants of natural law, whose interpretation involved “questions of the meaning of the document, as such, only in form. In substance they were questions of general constitutional law which transcended the text; of whether the enactment before the court conformed to principles of natural law 'running back of all constitutions' and inherent in the very idea of a government of limited powers set up by a free people.”⁵⁹

These principles survived the various schools of jurisprudence--even the legal positivists--and we do not question their place as Grundnorm, as the very predicate of law as “a social institution to satisfy social wants--the claims and demands involved in the existence of civilized society.”⁶⁰

The *essence* of human rights partakes of an absolute nature. Democratic-minded persons may debate the virtues of property rights, but they do not debate the essential validity of the right to freedom of conscience. The function of courts, as I see it, is to extend and expand the essence of fundamental rights to meet the new thrusts of power from the state or to counter the inexorable demands of technology and urban life, which may come in the name of efficiency, or expediency, or ideology, or emergency. Thus, the freedom of speech and press in the First Amendment of the United States Constitution, aimed at the colonial heritage of government's power to prosecute for seditious libel,⁶¹ has been advanced, over the years and by imaginative judges, to embrace the enlightened idea that “Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government,

⁵⁹ Pound, Introduction to the Philosophy (Haven, 1922). [The gift of this book was my father's response to my announcement that I wanted to study law.

⁶⁰ Ibid., p.51.

⁶¹ Ibid., p.99

deliberative faculties should prevail over the arbitrary.”⁶² And more recently, “The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields... Its aim was to unlock all ideas for argument, debate, and dissemination,”⁶³ Thomas Jefferson may have had this vision of the First Amendment, but I dare say it would have taken most of the founding fathers by surprise. Indeed, its application in modern obscenity cases would have confounded even Jefferson.

Thus it appears desirable that each fundamental right be incorporated into a constitution not as an explicitly-stated ideal, but as a principle, generally stated, that is susceptible of adaptation and growth through the creative uses of judicial review.

Fundamental rights should, in the apt words of one American writer, read “more like chapter headings than anything else.”⁶⁴ As Mr. Justice Franfurter said:

...In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regret-table attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content... on the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges...⁶⁵

A constitution, too, has symbolic purpose, if the people are “to pour into it and

⁶² Brandeis, J., in *Whitney v. California*, 274 U.S. 357 375 (1927).

⁶³ Douglas, J., dissenting in *Times Film Corp. v. Chicago*, 365 U.S. 43, 84 (1961).

⁶⁴ Curtis, "A Modern Supreme Court in a Modern World", 4 *Vanderbilt Law Review* 427, 428 (1951). "A specious clarity can be more damaging than an honest open-ended vagueness." Fuller, *supra* n.7, p.64.

⁶⁵ *Rochin v. California*, 342 U.S. 165, 169-70 (1952).

draw from it the sense of union of purpose, past and future.”⁶⁶ Surely this objective is enhanced by a document that states its fundamental rights, not as a formal statute does, but as a general declaration which is easily understood, easily remembered--and easily quoted.

If a constitution purports to settle, in detail and for all time, most of the issues that are likely to be the grist of the political mill, it invites either abandonment or frequent amendment... Constitutions have tried to settle too much, promptly became and remained the focal point of political controversy, lasted for a turbulent day, and passed, taking the 'regime' with them.⁶⁷

It might be useful at this point to quote the full language of the First Amendment of the United States Constitution:

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.

The first sixteen words might have been made to read like this:

Neither a state nor a Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or a disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa.⁶⁸

⁶⁶ Bickel, supra n.2, pp.105-106.

⁶⁷ Id.

⁶⁸ Black, J., in Everson v. Board of Education, 330 U.S.1, 15-16 (1947) (dictum).

That comprehends only the first two clauses of the Amendment, and, since that is taken from a U.S. Supreme Court decision handed down in 1947, does not take us as far as we have come since then, in the interpretation of what is meant by those first sixteen words!

Of course, in the process of interpretation, the court may well be usurping a function of the legislature, as Learned Hand suggested. Conceivably the cited dictum of Justice Black might have been drafted by Congress. Perhaps it should have been. But it has been the Supreme Court of the United States which, in this fashion, has nurtured the growth of our fundamental rights to meet the times--through decisions and dicta which are the "deposit of history" or which the Court brings to bear gradually and inexorably on behalf of the individual.

Had the Court followed Professor Thayer's view of judicial review, we might not have arrived at Black's dictum by 1947. Thayer thought that the U.S. Supreme Court should declare statutes unconstitutional only in cases of "clear mistake"--i.e., what is irrational is unconstitutional; and that the Court, by presuming to stand guard, had weakened the Congress' concern for constitutionality in legislating.⁶⁹ While a court may move beyond this theory of judicial review, as ours has done, Thayer's doctrine is a wholesome ambit for a court in a system of government where the tension between judiciary and executive or legislature runs high, or where the principle of judicial review is new and not well understood by politicians and people, in short, where it is wise for the court to eschew the large creative role.

Thayer's approach is not as limited as that given expression by Mr. Justice

⁶⁹ Thayer, "The Origin and Scope of the American Doctrine Constitutional Law," 7 Harvard L.R. 129, 144ff. (189)

Roberts in 1936, that is, “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”⁷⁰

The examination of legislative acts for constitutionality by the judiciary, according to Thayer, must combine “a lawyer's rigor with a statesman's breadth of view”; “pedantic and academic treatment of texts” and “narrow and literal methods “are to be avoided.”⁷¹

It is “a policy-making process, in which judges engage after the legislators have, for their part, made a choice.”⁷² It is a somewhat narrow role, but a critical one in keeping government within bounds without the court assuming the power of revision over that “vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body.”⁷³

This cautious role, it seems to me, is a salutary one for the Courts of Nigeria. As Dr. Odumoso said of a number of critical comments by Nigerian politicians concerning constitutional cases arising out of the Western Region crisis, “There seems to be a dangerous misconception among these leaders of governments in the Federation about the role of the Supreme Court under a federal system.”⁷⁴

What politicians often tend to forget, in the chagrin that overtakes them when the court has declared an act beyond the power of government and therefore unconstitutional,⁷⁵ is the legitimating function which the court, usually more often than

⁷⁰ U.S. v. Butler, 297 U.S.1, 62 (1936).

⁷¹ Bickel, supra n.2, p.36.

⁷² Bickel, supra n.2, p.36

⁷³.Thayer, supra n.68, p.135.

⁷⁴ Odumoso, The Nigerian Constitution: History and Development (London, 1963), p.301.

⁷⁵ Cf. the statements of the late Prime Minister with respect to the National Bank cases, which ran against him (Doherty v. Bale.a, 1 All N.L.R. 604 [196]:), to those made with respect to a case which he considered it in government's interest to be then sub judice (Akintola v. Governor of Western Nigeria and Adegbeuro, 3 All N.L.R. (1962). Cf. Lagos Daily Express, May 4, 1962, cited in Odumoso, supra n.73, p.301, with

not, performs in pronouncing acts constitutional, by which it can “generate consent and may impart permanence.”⁷⁶ The court cannot effectively exercise this creative power, in the legitimating sense, on behalf of government, if it does not have the countervailing power to exercise *on behalf* of the people *against* the government.

There will always be criticism of a court exercising its function of judicial review, for not all will agree with the principle, not all will understand it, and some will simply disagree with the court's decision as to what is, and what is not, constitutional. The Court has no weapons or forces of its own to make its judgment effective. It depends for this on the executive, on the legislature, and on the people. Thus it cannot move too far ahead of any of them. While it must draw on a general consensus for its strength, a court, in deciding constitutional issues, can lead, as “teachers to the citizenry... [who] mould the people's view of durable principles of government,”⁷⁷ in Judge Wyzanski's words. And, as Mr. Justice Frankfurter said on the same occasion, “[T]he standards of what is fair and just set by the courts in controversies appropriate for their adjudication are perhaps the single most powerful influence in promoting the spirit of law throughout government. These standards also help shape the dominant civic habits and attitudes which ultimately determine the ethos of a society.”⁷⁸

How flexible can a court be in exercising its function of judicial review? Until the function is better understood and judges accepted as “teachers to the citizenry” in constitutional matters, we must be prepared for challenges to the court coming from

[Nigerian] Parliamentary Debates, House of Representatives, May 29, 1962, p.23.

⁷⁶ Bickel, *oa.cit.*, supra n.2, p.129.

⁷⁷ Wyzanski, "Constitutionalism: Limitation and Affirmation," in Sutherland (ed.), supra, note 16 at 486.

⁷⁸ Frankfurter, "John Marshall and the Judicial Function," in Sutherland (ed.), supra note 16, at 31. But earlier in the same address, Mr. Justice Frankfurter said, "Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility in a people." *Ibid.*, p.20.

governments, politicians, political parties, and interest groups that are frustrated by court decisions. Should the court stand fast and go down on principle? Can it retreat in the face of a hostile political climate? Should it do so, in order to conserve itself, to return to do battle another day?⁷⁹

Where the process of judicial review is new and not well understood, the danger that the court will be viewed as usurper of the legislative power is greater than where it acts with cumulative effect, as glossator, relying on the “deposit of history” in its assaults upon unconstitutionality. With little precedent on which to rely, judges who overturn legislation will appear as self-willed judges, “the least defensible offenders against government under law.”⁸⁰

There will be times when a court must yield to political power on constitutional issues. There is no doubt that it is more important to preserve the institution--provided it remains viable--than to sacrifice it to its particular view in a particular case or line of cases. That is not to say that the court should share the guilt by approving unconstitutional action. “If the political institutions at last insist upon a course of action that cannot be accommodated to principle,” as Bickel says, “it is no part of the function of the Court to bless it, however double-negatively.”⁸¹

There are means, as Bickel points out, by which the court can hold its function in abeyance. These are various devices—“the passive virtues”, as Bickel refers to them; “the passive vices” as others term them--which the United States Supreme Court has used, and still uses, to avoid deciding a constitutional issue. It now employs them rarely in cases

⁷⁹ In the United States, cf. the Supreme Court decisions on the wartime (emergency) exclusion from the West Coast of Japanese-Americans, Korematsu v. U.S., 323 U.S. 214 (1944), and the curfew applicable to Japanese-Americans, Hirabayashi v. U.S., 320 U.S.81 (1943).

⁸⁰ Id.

⁸¹ Bickel, supra n.2, p.188.

involving civil rights, but it did so in what, only a short time ago, were still formative years, when the court was still defining its place and power. I am sure these devices are known to you: denial of certiorari; characterizing a question as political and therefore not appropriate for judicial review; lack of plaintiff's standing (the matter of locus standi); lack of "ripeness" of the issue submitted; in the American system, the lack of "a case or controversy";⁸² settling on some other mode of deciding the case, on the facts, for example, or for lack of evidence, rather than meeting the constitutional issue head on; where a delegation of power is involved, to invalidate by finding the delegation vague or otherwise unsatisfactory. The last two have the virtue of putting the decision on a technical, rather than a value-judgment basis.

These techniques of "not-doing", as Bickel terms them, are frankly for disposing of a case while avoiding judgment on the constitutional issue it raises,⁸³ affording "intrinsic but non-constitutional grounds which deflect the problem in one or more initial cases, for there is much to be gained from letting it simmer, so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion."⁸⁴

Such evasive tactics, dictated by political realities, may indeed be dangerous. They may even be offensive to some, but they accord with practice, and we should acknowledge that they can and may be used. Thomas Reed Powell, a half-century ago, said as much:

It may shock some reverential person to hear that law, and especially constitutional law, is not an impersonal and majestic power which moves in some mysterious way its wonders to perform. Those imbued with proper

⁸² See *infra*, n.89.

⁸³ Bickel, *supra* n.2, p.169.

⁸⁴ *Ibid.*, pp. 171, 176.

legal piety may think it unbecoming in a great jurist to tell us in a judicial opinion that constitutional law is a human contrivance that has to take chances.⁸⁵

To “take chances”, it is submitted, means both leading the citizenry, when the time is propitious, or when action is necessary but not without risk, but not to take unwise risks that may subvert the system.

Of course, in this context, one is thinking of a supreme court whose judges have life tenure and who are dedicated to the advancement of human rights, and who, as has been suggested, conserve the function of the court in adverse times. “It argues well for the grant of security of tenure,” said Powell, “to all who have the vision and the courage to do something more than echo the platitudes that find acceptance in high places.”⁸⁶ It is difficult to understand why, in 1963, Nigeria eliminated its Judicial Service Commissions and put its judges at the mercy of its legislatures.

The Nigerian Supreme Court has already employed at least one of the "passive virtues" which can widen or narrow recourse to judicial remedies for the vindication of fundamental rights. This is in the application of the principle of locus standi. The first case was Olawogin v. Attorney General of the Northern Region.⁸⁷ There the plaintiff contested the validity of the Children and Young Persons' Law⁸⁸ of the Northern Region, which makes it a crime to induce young persons and children to engage in political activities. Plaintiff claimed that the act infringed his freedom of private and family life, guaranteed him under §22 of the Constitution, as well as his right of free expression (§24),

⁸⁵ Powell, "The Logic and Rhetoric of Constitutional Law," 15 J. of Philosophy, Psychology and Scientific Method 654, T1918) reprinted in McCloskey (ed.), Essays in Constitutional Law (N.Y., 1957), p.100.

⁸⁶ Ibid., p.95.

⁸⁷ (1961) All N.L.R. 269. This case arose under the 1954 Constitution, which contained certain fundamental rights in the Sixth Schedule.

⁸⁸ Laws of the Northern Region, No.28, H33-35 (1958).

for he could not instruct his children in civic and political affairs without fear of violating the act.

The case also raised the question of whether the Nigerian Courts could issue advisory opinions on the validity of statutes alleged to be in conflict with the Constitution. It held that they could do so, reversing the Northern Region High Court and declaring that the High Court “has power to make a declaration, whether there is a cause of action or not, at the instance of a party interested in the subject matter.”⁸⁹

But then the Court held that the plaintiff in this case had failed to show a sufficient interest: “There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there had been any real or direct interference with his normal business or other activities.”⁹⁰ With all respect, it is submitted, in as much as the statute is reprehensible--or irrational--on its face, or, at the very least, highly questionable, the matter of standing would have been cap-able of more liberal treatment, especially after the principle of the advisory opinion had been allowed, a principle which Americans would say is more liberal than ought to be in constitutional cases since there was no “case and controversy.”⁹¹ Certainly, the reference to a standard of "direct interference with normal business" is inappropriate to the test of a claimed civil or

⁸⁹ (1961) All N.L.R. 269, 273, following Guaranty Trust Co. v. Hannay, (1915) 2. K.B. S36.

⁹⁰ Id., at 274. The Court cited Massachusetts v. Mellon, 262, U.S. 447, 488 (1923): "The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

⁹¹ The United States federal courts may not issue advisory opinions. This principle was established very early in United States history, Hayburn's Case, 2 U.S. (2 Dallas) 409 (1792). See Frankfurter "Advisory Opinions," in Encyclopedia of the Social Sciences, (N.Y., 1930) Vol. I, 475: "Every tendency to deal with constitutional questions abstractly, to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities," and Bickel, supra, n.2, 113-18. The Court derived the power of the Northern High Court to issue a declaratory judgment from §11 of the Northern Region High Court Law, 1955, "which provides that the Court shall possess and exercise all the jurisdiction, powers and authorities which are vested in or capable of being exercised by Her Majesty's High Court of Justice in England." The English court has that power, Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1958) 1 Q.B. 554, 567.

political right, and, in the light of the particular facts of Olawogin's case, it appears gratuitous.⁹²

This seems to me to have been a missed opportunity. Could not the Court have accepted the case as falling within the ambit of §22, and could it not have laid down some useful rules whereby the need for political education of the young in a new nation could have been enunciated without licensing the incitement and agitation of the young to “participation in political activities”, if indeed that is a danger?⁹³

The matter of locus standi came up again in a more significant case which arose out of the Western Region Crisis, that of Adegbenro v. Attorney-General of the Federation.⁹⁴ Chief Adegbenro, who was appointed by the Governor General to succeed Premier Akintola, sought to invalidate the entire emergency rule that obtained in the then Western Region, including the Emergency Powers (Detention of Persons) Regulations.⁹⁵ Citing Olawogin, the Court held that since plaintiff was not detained or threatened with detention under the regulation, his rights had not been invaded or threatened and consequently he was not entitled to be heard on this matter.

The judge in a Lagos High Court case that year passed what appears to have been the opportunity to use locus standi to avoid the more difficult problem of passing on the constitutionality of the Immigration Act--1961. In Awolowo v. Federal Minister of

⁹² It is to be noted that subsequently, the Court held that a right or license to engage in the business of banking under the Banking Ordinance is not a "civil right" in the constitutional meaning, and may therefore be administratively revoked and the revocation is not subject to judicial review. Merchants Bank Ltd. v. Federal Minister of Finance, (1961) All N.L.R. 598. This holding was sharply attacked by Professor Seidman in "Constitutional Standards of Judicial Review of Administrative Action in Nigeria," 1 Nigeria Bar Journal 233, 240-43 (1965).

⁹³ In the earlier case of Cheranci v. Cheranci (1960) N.L.R. 24, the High Court of Northern Nigeria had upheld the conviction of the defendant for inciting a boy to participate in politics. The court, per ate, J., held the statute was reasonably justiable in the interest of public morality and order.

⁹⁴ (1962) 1 All N.L.R. 431.

⁹⁵ (1962) Laws of Nigeria, L.N. 64, B105.

Internal Affairs and the Attorney General,⁹⁶ Chief Awolowo was seeking to enjoin the Minister of Internal Affairs from refusing entry into Nigeria to the British Queen's Counsel whom Chief Awolowo had selected to defend him against charges of treasonable felony. As Professor Seidman has pointed out, "The right infringed (i.e., the right to a hearing on the exclusion) would seem rather his counsel's than Chief Awolowo's."⁹⁷ In general, looking at all aspects of the case, especially those discussed elsewhere, this is an example of a matter that would have been well disposed of by denying the plain-tiff's locus standi, to leave the delicate matters involved, arising at a delicate time, to another day and to a higher court. While no fundamental right was involved here,⁹⁸ it will be remembered that this is the case where the judge pronounced the Nigerian Constitution to be one "meant for Nigerians in Nigeria." This statement is plainly erroneous, as reference to all but two of the Nigerian Constitutions fundamental rights will show.⁹⁹ It seems important not to attenuate the full scope of stated fundamental rights by gratuitous dicta. The majority of Nigerian fundamental rights run to aliens in Nigeria also.

Any review of constitutional interpretation by Nigerian courts in the period 1960-65 is circumscribed by the paucity of decided cases over that period of time. There are perhaps no more than twenty which have been reported, hardly enough for generalization, particularly since this small number deals with a number of different issues. Several have already been discussed; only a few remain, some of them from regional high courts, and

⁹⁶ (1962) L.L.R. 177.

⁹⁷ Supra n.90, p.251 (n.96).

⁹⁸ While an alien outside Nigeria may be a "person" within the meaning of §22(1) formerly §21(1), of the Fundamental Rights provisions, which states the procedural safeguards for the judicial vindication of civil rights, the alien has no civil right to enter Nigeria.

⁹⁹ Of the fundamental rights, only H27 (freedom of movement and residence) and 28 (freedom from discrimination, based on membership in a particular community, tribe, place of origin, religion, or political opinion) are limited to citizens of Nigeria. All others, including §21 (personal liberty), specify only "person," "any person," "no per-son;" in §531 (compulsory acquisition of property) there is again no limitation of its benefits to Nigerians alone.

these fall principally into two categories: (1) The right to a judicial remedy, and (2) the fair hearing, or what Americans would call “due process” in criminal cases, as guaranteed by §21 of the Nigerian Constitution.

The most famous case falling under the first head is that of Doherty v. Balewa, decided on appeal from Lagos High Court by the Federal Supreme Court in 1961¹⁰⁰ and upheld with modification, by the Privy Council in 1963.¹⁰¹ There, plaintiff challenged the authority of a tribunal appointed) under the Commissions and Tribunals of Enquiry Act, 1961,¹⁰² to conduct an inquiry of his conduct as managing director of the National Bank of Nigeria, which was under investigation. Plaintiff claimed that the Act was *ultra vires*, in that Parliament had purported to grant greater rights to a tribunal constituted under the Act than the Constitution permitted, and that the Act further infringed on the rights guaranteed under (then) §20,21, and 31 of the Constitution. While finding the Act *ultra vires* with respect to the Federation as a whole, but not with respect to the Federal territory, the Court held that the Act did oust the jurisdiction of the courts contrary to H21, 31, and 108. It also held that the Act, in permitting a tribunal to impose imprisonment or a fine enforceable by imprisonment to compel attendance of witnesses was in violation of §20.¹⁰³ The judgment was subsequently affirmed by the Privy Council, but on a narrow technical ground not even raised before the Nigerian Supreme Court, and the technicality upon which the Privy Council's finding of *ultra vires* was grounded was cured by amendment of the Legislative Lists in the 1963 Constitution.¹⁰⁴ The Supreme Court decision nevertheless stands as a milestone: it asserted itself against both executive

¹⁰⁰ (1961) All N.L.R. 604.

¹⁰¹ (1963) 1 W.L.R. 949.

¹⁰² (1961) Laws of the Federation of Nigeria A251.

¹⁰³ See the discussion of the case in Ezejiofor, Protection of Human Rights (London, 1964), pp. 198-200.

¹⁰⁴ See Comment, "Recent Cases on the Constitution," 1 Nigerian Bar Journal 103, 107-09 (1964).

and legislature, which had specifically passed the 1961 Act at the government's behest after the preceding act had been called into question on similar grounds.

In Burma v. Sarki,¹⁰⁵ a 1962 case involving the authority of the Minister of Interior to deport aliens, it was alleged that the lack of a prescribed procedure for contesting an administrative decision infringed (then) §21(1) of the Constitution, guaranteeing a fair hearing within a reasonable time. Although the court held that §21(1) did not require the legislature to prescribe a procedure for questioning an administrative or executive act, it made this important statement, per Udoma, J.:

Section 21, subsection (1) of the Constitution is important in that it confers on every person with a grievance the right of access and recourse to the courts. The section makes it practically impossible for the doors of the courts to be shut against anyone desiring to take his grievances there.... It [Acts] as a bulwark against the tendency to prohibit or oust the jurisdiction of the courts where there has been either an infringement of a civil right or an imposition of civil obligation.¹⁰⁶

The right to counsel in a criminal trial was raised, it will be recalled, by Chief Awolowo in the case previously discussed.¹⁰⁷ That proceeding involved the right of a British barrister to enter Nigeria in fulfillment, as Chief Awolowo claimed, of his right under (then) §21(5)(c) that “Every person who is charged with a criminal offense shall be entitled to defend himself in person or by a legal representative of his own choice.” The latter clause was held to give a right only to counsel in Nigeria or to counsel who had a right to enter Nigeria. To include the right to foreign counsel, Udo-Udoma, J., held, “would be to strain the language.” In Gopka v. Inspector-General of Police,¹⁰⁸ when appellant, after many adjournments, was finally brought into court on a bench warrant, he

¹⁰⁵ (1962) All N.L.R. 62.

¹⁰⁶ Ibid., p.69.

¹⁰⁷ Supra n. 94.

¹⁰⁸ (1961) 1 All N. L .R. 423. This decision is from the High Court of Eastern Region.

had no counsel with him, and none could be readily secured, the trial proceeded and appellant was tried, convicted, and sentenced to two years at hard labor. The appeal was allowed, and Mbanefo, J., said simply that the appellant had been denied “the opportunity of a fair trial by depriving him of the right he had of being defended by counsel.” It should be noted that this is qualified by the circumstances: neither the appellant nor his counsel knew when the warrant was issued, and appellant had not had adequate time to notify counsel. Another interesting aspect brought out by this case is that the High Court Law, §28(1)(d) permits a re-trial of a criminal case; freedom from double jeopardy is not within the Nigerian fundamental rights.

In the only other case found which was reported in full,¹⁰⁹ which came before the High Court of the Northern Region,¹¹⁰ the defendant alleged lack of fair hearing in that he was not represented by counsel at his criminal trial. There had been a series of continuances. When the case was finally called, counsel was not in court, but the trial proceeded nevertheless. It was held that the absence of counsel at a criminal trial, occurring through counsel's fault, had not denied defendant a fair trial. The reasoning here is slim. The decision, it seems to me, is insupportable.

Two cases involving the application customary law and "due process" are worthy of note. One-La' arose prior to the 1960 Constitution, but provides "due process" standards for criminal trials in customary courts:

A procedure is not contrary to natural justice merely because it is foreign to English Law, so long as it is clear that substantial justice is done... [N]atural justice requires that an accused person must be given the opportunity to put forward his defence fully and freely, and to ask the

¹⁰⁹ Umaru Cham v. Gombe N.A., Crom. App. JD/95CA/62 (28th September, 1963), reported in 1 Nigerian Bar Journal 123 (1964) appears to be the same effect.

¹¹⁰ Shemf v. Commissioner of Police, (1962) N.R.N.L.R 87.

court to hear any witnesses whose evidence might help him...¹¹¹

In Aoka v. Director of Public Prosecutions,¹¹² applicant had been convicted and sentenced to pay a fine, or to go to prison for one month, by a Grade “D” Customary Court for committing the alleged offense of living in adultery. She sought to quash the conviction and have the fine and costs remitted (although she had pleaded guilty at the trial) because no written law existed which she had violated. Thus, her conviction was in contravention of §21(10) of the Constitution: “No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.”¹¹³ Of course, her application was favorably received. What is noteworthy about the case is the procedure employed before the High Court. Appellant did not seek an order of certiorari, but simply an order to quash the customary court's conviction. The court acted with admirable dispatch, creatively and effectively, relying on the broad terms of §31:

Since no law with respect to practice and procedure has, as yet, been passed by Parliament, I am of the opinion that the procedure adopted in the present application is in order. To my mind, the whole purpose of a special procedure for the enforcement of fundamental human rights, the essence of which is to provide for easy and speedy access to courts, will be defeated if the slow and sometimes cumbersome procedure, which an application for an order of certiorari will involve, is adopted.¹¹⁴

Finally, a case coming up from a customary court, although not involving criminal procedure, provides further insight into the status of customary law under the Nigerian Constitution. The case is Pawa v. Akangbe¹¹⁵ and was a claim by the Head of Hausa cattle traders in Oyo to collect the customary tribute ("ladas") from the sale of each

¹¹¹ Ibid., p. 47

¹¹² (1961) 1 All N.L.R. 400. This decision is from the High Court of the Western Region.

¹¹³ The paragraph immediately following excepts punishment for contempt of court.

¹¹⁴ Supra n. 111, p. 403.

¹¹⁵ (1961) W.N.L.R. 268. High Court, Western Region. Reported in 1 Nigerian Bar Journal 105 (1964).

cow. A defense was that the custom denied Hausa cattle traders “their fundamental right to choose their own hosts or middle-men,” and so infringed their rights under (then) §25 of the Constitution to freedom of association. The judge, however, found the custom not to be detrimental to the traders and held it to be “reason-ably justifiable in a democratic society.” While it is doubtful that §25 was intended to or should be interpreted to prohibit restrictive trade practices, the court's conclusion rests on the assumption that §25 was infringed, although permissibly. The case is of interest also because of the standard enunciated, i.e., “when a court has to consider what is meant by a ‘democratic society’, it should take local circumstances into consideration, rather than envisage a completely hypothetical society or, in this case have regard to the condition of the whole of Nigeria.”¹¹⁶

In the speech of Judge Wyzanski previously cited, and following hard on the earlier quotation, he says something of great importance to the judges of any supreme court who, as he puts it, are “teachers to the citizenry”, and which may be usefully quoted to make a final point:

[C]onstitutional law (says Judge Wyzanski) does not rest on the ordinary type of Austinian sanction. It rests upon the reverence people show and the obedience they give to rules which they regard as obligatory. And such reverence and obedience flow in no small part from an awareness of basic principles concretely illustrated in court decisions and constantly explained in opinions circulating among a wide audience.¹¹⁷

Courts must be constantly mindful of their roles as teachers. This means that they must deliver carefully reasoned opinions which speak not only to the immediate issues and to lawyers in the case but to a much enlarged audience: the judiciary and the bar as a

¹¹⁶ Id.

¹¹⁷ Wyzanski, supra n. 76, p. 486

whole, to the executive and to the legislature, and to the nation at large. Extended opinions which relate the instant decision to precedent or experience, that reason by analogy, that draw on the writings of known and respected thinkers and statesmen, that--in short--fulfill the obligation of the court to do more than explain, but to justify its decision, create understanding and a sense of empathy with the business of the court.

Opinions must be published, of course,--not only in the daily press, but in official reports which are readily, and quickly available. Thus the public and symbolic role of the court is realized.¹¹⁸ Unless it is heard in the land, its opinions are written on the wind. But, short of that, opinions must at least be available to other courts, to lawyers, to law students, not five years hence, but immediately, or surely within a year.

Decisions must be discussed and commented upon, in the press and, more responsibly, one would like to think, in law journals. Creative writing by judges and lawyers on fundamental rights issues, apart from actual decisions, should be encouraged. Incidentally, the dissenting, or specially concurring opinion, should not be discouraged by courts sitting en banc. In the United States, we have found that dissents are very often the harbingers of future decisions. As Mr. DeWinton said at the Constitutional Seminar held in Lagos in 1960, the rule of stare decisis has a limited place in American constitutional law.¹¹⁹ Perhaps that is one reason the American Constitution has survived so long!

The public must be educated to the governmental and constitutive sides of the law,

¹¹⁸ "The success of the [U.S.] constitution as a symbol has been possible only by the functioning of the Supreme Court." Sutherland, Constitutionalism in America (NY, 1965), p. 203. Fuller, supra n. 7, p. 81, says that the function of judicial review "has the advantage of placing the responsibility [of preventing a discrepancy between the law as declared and as actually administered] in practiced hands. Subjecting its discharge to public scrutiny and dramatizing the integrity of law."

¹¹⁹ De Winton, "Fundamental Rights in Nigeria," Constitutional Problems of Federalism in Nigeria (Brett, ed.) (Lagos, 1961), p. 47

beyond the litigious; that is, the people must be brought to see law as more than restraint, so they view it as the great creative force it is in building a society and a nation, and a just one at that.¹²⁰ Elementary and secondary schools should be provided with materials and programs, not elaborate, that make easily understandable the system of government, the contribution of law and the judiciary, and particularly the importance of fundamental rights. We have such a program in the United States, begun only a few years ago, but it has met with marked success.¹²¹

For--and here we return to our beginning-- in the first and final analysis, the observance of fundamental rights rests on the people and the people's acceptance and ultimately the people's tenacious and uncompromising insistence on fundamental rights. Unless this is so, indeed, no constitution, no legal devices, no court can save them.

I think that dark days are ahead. Everywhere unrest, stemming from various quarters and most recently particularly the young, will tend to raise demands for greater restrictions on personal liberties in the name of controlling challenges to authority. There will be, as always, the tendency to press for more stringent controls than the occasion warrants, or the application of measures, designed for more critical conditions, to what should be permissible as "social disorderliness" in a democratic society. Thus, dissent may be categorized with sedition, and honest criticism with treason. I do not think that any of us is wise enough to foreclose discussion of alternatives in the governmental decision-making process. The free but orderly exercise of human rights may be a creative

¹²⁰ See Fuller, The Law in Quest of Itself (New Haven, 1940), p. 137: "The judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will define the good man."

¹²¹ See A Program for Improving Bill of Rights Teaching in His Schools, The Report of the Williamstown Workshop, (Civil Liberties Educational Foundation, NY, 1962). Over the several summers, summer courses in teaching civil rights for elementary teachers, financed by the U.S. Government, has been conducted at UCLA.

force; it is too often viewed as a threat to the security of leadership.

I do not think that the totalitarian model is unavoidable. I do not agree with those who say that democracy, justice, and the enjoyment of human rights are not compatible with the urgent needs now before the new nations, not only in Africa but elsewhere. I do agree with Gunnar Myrdal in his concern for what he calls the “soft state”,¹²² where corruption and ineptitude sabotage the nation-building and economic development process. I would hope that authoritarian government is not to be the answer.

If it is, the burden resting on the judiciary is a heavy one. If individual rights are to be sacrificed to real or felt governmental needs, the wisest course, it seems to me, is to establish a base for a skilled and in-dependent judiciary to act as conservators of the people's natural and constitutional heritages, to protect the individual and gradually to enlarge the application of human rights within the realistic limitations imposed by political conditions and popular consensus. In this fashion the ideal may be approximated, the people raised to the full meaning and importance of human rights, and democratic resilience nurtured and preserved for a later day.

¹²² See Myrdal, “The ‘Soft State’ in Underdeveloped Countries,” 15 *UCLA Law Review* 1118-34 (1968). This was presented as an address delivered Feb. 17, 1968, at the dedication of new wing of the UCLA Law School.