HUMAN RIGHTS JURISPRUDENCE IN NIGERIA: REFLECTING ON ITS NATURALIST ROOTS[1]*

Abstract
The subject of human rights constitutes one of the most popular discourses in our world today. It is a pervasive feature of modern constitutional and socio-political reality. The huge global interest on human rights issues has rendered and constituted the theory and praxis thereof into almost a form of 'religion in today's world.' The human rights jurisprudence especially of the post-Universal Declaration of Human Rights 1948 makes an inroad into Nigerian constitutions since independence. Like the 1963 and 1979 Constitutions, the Constitution of the Federal Republic of Nigeria 1999 (as amended) made provisions for human rights. This paper examines the claim that 'natural law' doctrine appears to be one plausible rational foundation and explanation for fundamental human rights well suited to Nigerian indigenous conceptions of man in society. The study investigates naturalism as a dependable anchor for the 'peace, order, good government and welfare of all' persons in Nigeria. It studies how naturalism forms the root and congenial explanation and basis of the fundamental and guaranteed rights entrenched in the Nigerian Constitution and other immediate associated laws.

Key words: Human Rights, Natural Law, Constitution, Jurisprudence, Nigeria

1. Introduction

Human rights jurisprudence has evolved through history. Yet, its popular conception points to the fact that everyone is endowed with certain entitlements merely by reason of being human. It is for this reason that many philosophers and jurists hold that human rights are universal and egalitarian. By this is invariably meant that human beings cannot be treated on unequal terms in the application of human rights norms. Within the legal parlance, these norms can be in the form of claim entitlements via municipal and/or international law.

However, in spite of the above universalist and naturalist perspective, positions are agog which maintain that there are no precise or specific norms to suggest what constitute human rights and what do not. As a result, the incidence of heated debates in human right issues is increasing in resonance with the growth of human rights consciousness across the world. Be that as it may, human rights awareness in the modern times seems to be the immediate effect of the enlightenment concept of natural rights evolved through mainly the philosophies of John Locke and Immanuel Kant. The main thrust of this paper is to show how the naturalist theory finds application in Nigerian human rights law and allied thinking. For a better appreciation of the subject, this study will be prefaced with an appraisal of the theory of natural law.

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2. Concept and Features of Legal Naturalism

Philosophers, in their search for a law that was higher than man made one, developed the theory of natural law. Natural law in its long history has been associated with Plato and Aristotle in ancient period; the Stoics and the Roman statesmen, Marcus Aurelius and Cicero, in the period of *Pax Romana*; Thomas Aquinas in the medieval period; and John Locke, Rousseau, Kant, Finnis, and Stammler in the modern and contemporary eras. One feature of natural law thinking is universality and objectivity. Certainly, the universalist understanding of human right stems from the naturalist perception of ancient and medieval humanism. Hence, the earliest direct precursor to human rights is found in the notions of `natural right' developed by classical Greek philosophers such as Aristotle. This concept was more fully developed by Aquinas in his *Summa Theologia*. But although natural law theory has underpinnings in Sophocles and Aristotle, it was first elaborated by the Stoics of the Greek Hellenistic period, and later by those of the Roman period. Natural law, they believed, embodied those elementary principles of justice which were right reason, that is., in accordance with nature, unalterable, and eternal. A classic example is that of Antigone who defied Creon's command not to bury her slain brother by claiming that she was obeying immutable laws higher than the ruler's command. Medieval Christian philosophers, such as Aquinas, put great stress on natural law as conferring certain immutable rights upon individuals as part of the law of God.[2] However, critical limitations in the medieval concepts that recognized slavery and serfdom excluded central ideas of freedom and equality.

However, after the decline of medieval feudalism, modern secularist theories of natural law arose, particularly as enunciated by Grotius and Pufendorf. Their philosophy detached natural law from religion, laying the groundwork for the secular, rationalistic version of modern natural law. According to Grotius, for instance, a natural characteristic of human beings is the social impulse to live peacefully and in harmony with others. Whatever conformed to the nature of men and women as rational social beings was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law simply as a 'dictate of right reason.'[3] He claimed that an act, according to whether it is or is not in conformity with rational nature, has in it a quality of moral necessity or moral baseness. Grotius was also a father of modern international law. He saw the law of nations (*jus gentium*) as embodying both laws that have as their source the will of man and laws derived from the principles of the law of nature. This theory, of course, has immense importance for the legitimacy of international law.

It goes without saying that the contribution of natural law philosophy to human rights theory is huge. It indeed represented a remarkable phase in the development of the

[2]St. Thomas Aquinas, *Summa Theologica* Bk. II, pt. II (1475).
[3]H. Grotius, *De Jure Belli et Pacis* (Book 1, 1689). *See also* H. A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (1948).

various theories on the nature of law. It did not only popularize the theological foundation of law, but also prepared a suitable background for the positivist dimensions of law which have dominated human rights theory for so many years.[4]

It is also widely acclaimed that reference to such notions as reasonable, just, fair, equitable, good faith and so on has foundations in natural law. The argument has been made however that existence of these notions or phrases in any legal system does not necessarily mean or amount to the acceptability of the existence of some higher laws, but are given in relation to the existence of a standard of behaviour legally recognized by the legal system.[5] Again, the existence of natural law has assisted contemporary societies in legislating against or prohibiting such acts such as euthanasia, suicide or abortion. Nonetheless, the extent to which natural law has propelled such legislation remains controversial and one that has been rejected in its entirety by the positivists.[6]

As a school of thought in legal philosophy, natural law has, however, been assailed by pointed attacks. Significant amongst these were the reactions against the excesses of rationalism (as a strand of natural law) in the eighteenth-century philosophy of the Enlightenment, as well as, the criticism that natural law was devoid of any scientific or empirical basis and that it ignored the vital role of historical processes in the development of law. In addition, the association of natural rights of the people with the French revolutionary upheaval gave this philosophy what may be called a 'Bolshevik' or revolutionary flavour in the thinking of the conservatives.

Perhaps, the most formidable attack against natural law is that it is more or less a formal principle without specific content or specific rules, and as such, "a bunch of ungrounded and ungroundable sentiments".[7] It is in this vein that Bentham[8]dismissed natural law not just as nonsense but as nonsense upon stilts.[9] Bentham rejected natural law in its

[4]The theological background of law provided by natural law evoked further theorizing in the realm of legal theory or philosophy especially legal positivism and its modern variants.

[5]The argument has always been that such notions are actually part of the development of any legal system that strives to do justice to the society and not necessarily because of some natural or divine laws whose contents are not widely or generally acceptable or whose existence is a subject of controversy.

[6]The acts are highly immoral acts which understandably put severe stains on any legal system and as such prohibiting such acts through legislation may be accounted for by a myriad of factors ranging from social, moral or psychological rather than attributing the societal apathy to such practices to the existence of a divinely inspired system of law.

[7] D. Lloyd, *Introduction to Jurisprudence* (London: Penguin Books, 1972), p.86.

[8] Bentham was born on February 15, 1748 in London in a prosperous middle class family. He studied Law and was called to the Bar in 1769. He never pleaded a single case and gave up the idea of practicing Law in the conviction that the whole system of Law needed overhauling.

[9]Another potent criticism of natural law lies in its inapplicability in the realm of international law where different nations with different legal system are subjects. It is argued that it is hardly conceivable that all sorts of conflicts and legal issues of the international nature can be resolved having regard to an existing higher system of law. In the ultimate analysis, natural law is said to be of little or no value in the realm of

entirety.[10] Hence, a weakness of natural law lies in its inapplicability in the realm of international law where different nations with different legal system are subjects. As argued, it is hardly conceivable that all sorts of conflicts and legal issues of the international nature can be resolved having regard to an existing higher system of law. In the ultimate analysis, natural law is said to be of little or no value in the realm of international law with the attendant problems posed by globalization.[11] Hence, natural law is regarded not only as mythical but also leads to muddled thinking by confusing legal with moral issues.

Be that as it may, it seems that no matter how potent and devastating the criticisms against natural law may be, its influence on contemporary human rights theory in the area of human and social reform cannot be jettisoned. For sure, it provided formidable bedrock for the theorizing that took place in the reality of human rights theory and philosophy which aimed at conceptualizing the very nature of man as a respectable being in the eighteenth, nineteenth and twentieth centuries.

Natural law has had a long and chequered history in the course of which it has undergone almost uncountable interpretations and re-interpretations. Nonetheless, a commonsense of natural law has crystallized from these interpretations, namely, that natural law is a body of the objective standards and principles which depend on the nature of the universe and can be discovered by reason. Thus, when an act is carried out in a manner inconsistent with what these objective standards suggest, it is adjudged an unreasonable act. If such an unreasonable act is permitted by positive law, the rule or principle of positive law on the basis of which it is carried out will be adjudged as an unjust rule or principle. The relevant inquiry, however, is to what extent has natural law jurisprudence contributed to the quest for lasting solutions to the unique legal and moral problems of the modern world.

Natural law philosophy posits that objective standards exist to direct the activities of man. Law, being a part of human activity, has to submit itself to the guidance of these

international law with the attendant problems posed by globalization. The special nature or character of international law where the subjects are in different stages of developments and subject to different legal system has called into question the applicability of natural law to international law. Yet another criticism of natural law was not only that such a law was really mythical but that it led to muddled thinking by confusing legal with moral issues. Bentham was particularly critical of natural law which he rejected in its entirety. To him, natural right was not just nonsense, but nonsense upon stilts. J. Bentham, 'Analytical Fallacies' vol. 2, p. 5011; J. Bentham, *Introduction to Principles of Morals and Legislation* (eds. Burns and Hart) (London: Penguin Books, 1970).

[10]J. Bentham, 'Anarchical Fallacies' Vol. 2 p. 501; J. Bentham, *Introduction to Principles of morals and Legislation* (1789).

[11]The special nature or character of international law where the subjects are in different stages of developments and subject to different legal system has called into question the applicability of natural law to international law.

standards. Natural law seeks to establish necessary nexus between law and justice. What this implies is that it is possible to establish a just society on the basis of law (backed by the objective standards supplied by nature). The standards exist independently of human will but can be rationally deduced by employing human reason. Natural law theory is, therefore, an idealistic one which builds on the basic assumption that, besides positive or human law, there also exists an ideal or just law to direct the human law. For human law to be adjudged as 'just', it must be in conformity with the ideal law which exists as superior normative order established by the creator. This thinking is petered out in the maxim, *lex injusta non est lex* (an unjust law is no law).[12]

Natural law has continued to have an 'inextinguishable powers of survival.' This is evidenced in the assimilation of natural law postulates into modern constitutions as pioneered by the United States' Constitution. The United States' Constitution is essentially a natural law document setting out the fundamental authority of the people under natural law and guaranteeing the natural rights of the citizens. Not only did the United States' Constitution closely associate natural law with the idea of unique liberty, it also enshrined the unique idea, .that these rights could be the subjects of legal guarantees and could also be adjudicated upon like any other rights and duties conferred by positive law. Moreover, because these natural rights have been eminently embodied in modern constitutions, the courts do treat them as superior to, and thus prevailing over, any legislation or other legal rule which may conflict with them.

More so, natural law played significant roles in drawing up bills of human rights in many parts of the world with the result that such rights have not only been given specific legal content, but also legal recognition.[13] Natural law has always been handy in the interpretation of these fundamental human rights all over the world. But as queried by Lloyds, it is difficult to see how such interpretation can be materially assisted by further references to the vague disputable content of a system of higher law whose very existence is open to question and whose actual dictates have not been universally accepted.[14] Thus, the history of 'human rights and fundamental freedoms,' especially as found in the Western conception and tradition, is traceable to the ancient theory of the natural law in Greco-Roman, Judeo-Christian teaching. Legal naturalism is refined in the more modern 'natural rights' doctrine of the 17th and 18th centuries in England, France and the United

[12] M. Ibunga, *Learning Legal Theory and Legal Method* (Calabar: Associated Publishers Limited. 1996), p.2.

[13] The Bill of Human Rights in the American constitution and the fundamental Human Rights provisions in the Nigerian successive constitutions are products of ideas of natural law jurisprudence. Also, Natural Law played significant roles in pulling down oppressive regimes or governments such as in Nazi Germany and Apartheid South Africa.

[14] See Lloyds, p. 91. He further asserted that the duty of the judges is to interpret the actual constitution and not their own conception of some higher system of law from which they may or may not believe the constitution derived from.

States particularly in the philosophic and juristic writings of Grotius, Locke, Rousseau, Montesquieu and Jefferson.[15] This has been the special tradition transmitted to and demonstrated in Nigerian human rights theory.

3. Naturalist Roots of Nigerian Human Rights Jurisprudence

Natural law is of great influence and relevance to Nigeria jurisprudence generally. It appears to be one plausible rational foundation and explanation for fundamental human rights that is well amenable to Nigerian indigenous anthropology. Naturalism seems to be a dependable anchor for the 'peace, order, good government and welfare of all' persons in Nigeria. It forms the root of the guaranteed rights, democratic ideal and social justice. Natural law tradition seems to be a congenial explanation and basis of the fundamental rights entrenched in the Nigerian Constitution. In fact, it is a potent philosophical basis reconcilable and assimilable to Nigerian jurisprudence and usages. A discernible Nigerian would adopt for the country's constitution, the observation of Nyerere, who in relation to his Tanzania, opts for the naturalist theory as the 'mainstay of the country's Basic Laws' and refers to it as the basis of the 'National Ethic'.[16]

Hence, in Nigeria, it is safe to assert that natural law is widely recognized on its merits as offering effective basis and means for ordering society, and the sound foundation for fundamental human rights. The principles of natural law are explicit in the human rights provisions of the Constitution of the Federal Republic of Nigeria 1999. These rights are inalienable, immutable and unchallengeable on human being by virtue of being human. Those rights are naturally bestowed or donated to man. In Nigerian constitution, the fundamental rights are therefore *guaranteed* and not merely *provided for*. They are not concessions by or donations from the state. They relate to all human beings in Nigeria and not merely Nigerian citizens. Examples of such rights are right to life[17] and right to personal liberty.[18] The court in *Asemota v Yesufu*[19] rightly maintained that fundamental right is a component of natural law. Legal naturalism as a philosophical foundation of human rights begins with the proposition that individuals had rights. This is why the rights are often referred to as natural rights. The theory asserts, according to Locke, that in a 'state of nature,' that is, in a society where there is no government, 'all men may be restrained from invading another's rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind . . .

[15] Rosenbaum, p. 22ff.

[16] S.A. Pollis and P. Schwab *Human Rights: A Western Construct with Limited Applicability* (For publication: Human Rights: Cultural and Ideological Perspectives), pp. 3-4. The quotation is from M. Mcdougal; H. D. Lasswell; L. Chu Chen, 'Human Rights and World Public Order: A Framework for Policy Oriented Inquiry', *American Journal of International Law* (1969), p. 237.

[17] See section 33(1) of the Constitution of the Federal Republic of Nigeria, 1999 and the case of *Adeniji v State* [2000] 2 NWLR (pt 645), p.354 CA.

[18] Section 35 of the Constitution, and also the case of *Dele Giwa* v *IGP,* Unrep. Suit No M/44/83 of 30/7/84.

[19] *Asemota v Yesufu* (1985)2 NWLR 300.

.'[20] Putting Locke's point in more modern terms, Nozick holds that 'Individuals have rights, and there are things no person or group may do to them (without violating their rights).' [21] Locke argues:

> Civil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case, since it is to be imagined that he who was so unjust as to do his brother an injury will scarcely be so just as to condemn himself for it.[22]

Indeed, government is created because it is *convenient.* It solves some difficult practical problems of enforcing one's natural rights. Government is not seen as the source of rights, but rather the legal protection of pre-existing rights is seen as the reason why a government is created. However, not just any government will do, for as Locke observes:

> If government is to be the remedy of those evils which necessarily follow from men being judges in their own cases, and the state of Nature is not to be endured, I desire to know what kind of government that is, and how much better it is than the state of Nature. . [23]

In other words, if government is a cure for some malady involving the legal protection of individual rights, it must be a cure that is better than the disease. The standard for assessing the performance of government is its efficacy in enforcing the pre-existing rights of individuals. Government is created to provide substantive due process of law and must be assessed by this standard. According to this view, then, individual rights come first and government, with all its various 'branches' and federal-state 'separations,' comes second as a means of securing these fundamental rights. This is why even government itself can be sued when it violates individual rights of the people it is meant to protect.

Again, the relevance of natural law to Nigeria legal system is felt in the doctrine of separation of powers as can be found in sections 4, 5 and 6 of the Constitution. The separation of power is aimed at checking tyranny. Similarly, natural law can also though arguably be said to be found in the ethos of democratic ideal as aimed in Nigeria. Chukwura notes that 'the idea of natural and fundamental human rights which today seems commonplace in most constitutions of modern democracies had their origin in the same considerations which ground natural law itself. Natural law is, indeed, as essential cornerstone of the Nigerian legal system and evidence of it can be found not only in our

[20] J. Locke, *An Essay Concerning Civil Government* § 7, In *Two Treatises On Government* 316 (Mentor Ed. 1960) (London 1690).
[21] R. Nozick, *Anarchy, State and Utopia*, p. ix (1974).
[22] J. Locke, p. 316
[23] Ibid.

legislations, but also in the ingredients of our customary law'. [24] This observation is corroborated by Ogwurike who argues that 'natural law is the most congenial and stable background against which our country's laws can best be studied and developed. Its concept of law is the most effective tool for a more healthy approach and interpretation of our indigenous norms'.[25] 'Human Rights' or 'fundamental rights' as a modern concept of the rights traditionally known as 'natural rights' may be defined as:

> Moral rights which every human being *everywhere*, at all times, ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral. No man may be deprived of these rights without grave affront to justice.[26]

Oputa notes of 'a minimum moral content' in the Constitution.

> We have a Constitution which accepts the sanctity of the human person and endeavours to uphold and maintain the dignity of man. Under our Constitution, the citizen is not to be subordinated to the state as in Fascism, to the race as in Nazism or to the class as in Communism.[27]

More still, under the Nigerian legal system and human rights practice, the High Court of justice controls acts of administrative bodies and inferior tribunals by means of the orders of *mandamus,* prohibition and *certiorari* whenever their decisions are contrary to the rules of natural justice. Equity is also part and parcel of Nigerian law. The right to freedom from discrimination on the basis of circumstances of birth, ethnic group, sex, or political opinion, for instance, is clearly founded on natural law and equity. Besides, the High Court applies the 'repugnancy test' based as it were on 'natural justice, equity and good conscience' to determine the validity of rules of customary law under the provisions of the various High Courts Laws in Nigeria.[28] The repugnancy test was, for instance,

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[24]*Supra;* Iwe, op. cit. passim.

[25] C. Ogwurike, *Concept of Law in English Speaking Africa* (New York, London, Lagos: Nok Publishers (Int.), 1969), p. 13, fn. 46. See in particular *Report of the Presidential Commission on the Establishment of One Party State*, (Dar-es-Salaam Govt. Printers, 1965), p. 3 'Certain ethical principles which lie at the basis of Tanganyikan Nation….they stand above the law itself, forming the basis of the existence of the constitution and the basis of its validity'. Ibid.

[26] The name 'Human Rights' is believed to have been suggested by Eleanor Roosevelt in 1947 and used in the English text of the Universal Declaration. See Rosenbaum, op. cit. at p. 9.

[27] A. O. Chukwura, 'What is Law?' in C. Okonkwo (ed.), *Introduction to Nigerian Law* (London: Sweet and Maxwell 1980), p. 417 at p. 419.

[28]Instances are S. 34 High Court Law of Northern Nigeria, Cap. 40 Laws of Northern Nigeria, 1963; S. 20 High Court Law of Eastern Nigeria, Cap. 44 Laws of Eastern Nigeria, 1963; S. 12 High Court Law of Western Nigeria No. 9 of Western Region of Nigeria, 1959; S. 13, High Court Law of Mid-West of Nigeria No. 9 of 1964; S. 14(3) Evidence Act, Cap. 62 Laws of Federation 1945, and similar evidence laws of the various States of Nigeria.

applied in *Edet v Essien*[29], *Guri v Hadejia*[30] and others. In *Edet v Essien,* the appellant had paid the customary 'bride price' on a woman. The respondent later paid another 'bride price' on the same woman and married her. The appellant claimed fatherhood and custody of the children of the union under customary law. Although the court held that the appellant failed to prove the existence of the alleged customary law, it authoritatively opined that even if such a custom were proved, it would have been repugnant to natural law, equity and good conscience. The point made here is that the idea of 'natural justice, equity and good conscience' though transmitted into the Nigerian legal system through the fortuitous agency of British colonial administration, is a veritable concept of natural law recognized by all progressive communities in the world, Nigeria not excepted.

Furthermore, the principle of federal character as provided for in the Constitution is a manifestation of the natural law features of equity and fairness. In spite of its disadvantages such as possible breeding of divisiveness rather that unity and promoting mediocrity instead of meritocracy, the principle is aimed at preservation and protection of the collective rights of the constituent units that make up the federation of Nigeria. Section 153 (1) (c) of the Constitution establishes the Federal Character Commission. Sections 7, 8 and 9 of Part 1 of the Third Schedule to the Constitution dealing with the federal executive bodies provide for the composition and appointment of the members of the Commission. For the purpose of reflecting the intended equity, section 7 (1) of the Schedule states that the Commission shall comprise of the 'Chairman and *one person representing each of the states of the federation and the Federal Capital Territory Abuja'.* No doubt, equity is what the italicized words demonstrate. Federal Character Commission is one of the few federal executive bodies in the constitution where all the states of the federation are represented in terms of composition of members.[31] The

[29]*Edet v Essien* 193211 NLR47.

[30]*Guri v Hadejia* (1959)4FSC44.

[31]Two other bodies are the National Population Commission and Revenue Mobilisation, Allocation and Fiscal Commission for which sections 23 (b) and 31 (b), respectively, of the Schedule provide that, inter alia, one person from each state of the Federation shall be a member. Although the Council of State (section 5 g), National Economic Council (section 18 b), and Nigerian Police Council (section 27 b) have all-states representations by the respective state governors, yet it seems it is merely because it is inconceivable to establish such bodies without the state governors as members. Apart from these, all other federal executive bodies do not have fair and equitable composition of their respective membership with regard to the federating units. A veritable instance is the National Judicial Council of which, among others, only five Chief Judges of states are members at a time (section 20 f). Another example is the Independent National Electoral Commission whereof the Chairman and only twelve national electoral commissioners are members, which composition does not, in the least, advert to the number of states of the federation [section 14 (1)]. Yet another is the Federal Civil Service Commission which membership comprises of the Chairman and not more than fifteen members, the criterion of which selection is nothing but the opinion of the President irrespective of which states they hail from (section 10). This inequality is replicated in many other federal executive bodies such as Code of Conduct Bureau (section 1), Federal Judicial Service Commission (section 12), National Defence Council (section 16), National Security Council (section 25),

Commission is required to give effect to section 14 (3) and (4) of the constitution which states:

> 14 (3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.
> (4) The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.

It is in view of this that section 8 (1), (2) and (3) of Part I of the Third Schedule to the Constitution empowers the Commission to:

> 8 (1) (a) work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the States, the armed forces of the Federation, the Nigeria Police Force and other government security agencies, government owned companies and parastatals of the states;
> (b) promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government;
> (c) take such legal measures, including the prosecution of the head or staff of any Ministry or government body or agency which fails to comply with any federal character principle or formula prescribed or adopted by the Commission; and
> (d) carry out such other functions as may be conferred upon it by an Act of the National Assembly.
> (2) The posts mentioned in sub-paragraph (1)(a) and (b) of this paragraph shall include those of the Permanent Secretaries, Directors-General in Extra-Ministerial Departments and parastatals, Directors in Ministries and Extra-Ministerial

Police Service Commission (section 29), and in corresponding states' executive bodies (Part II of Third Schedule).

> Departments, senior military officers, senior diplomatic posts and managerial cadres in the Federal and State parastatals, bodies, agencies and institutions.
> (3) Notwithstanding any provision in any other law or enactment, the Commission shall ensure that every public company or corporation reflects the federal character in the appointments of its directors and senior management staff.

Apart from the provisions of section 14 that clearly entrenches the federal character philosophy, many other provisions of the constitution are agog with the equity spirit of the natural law principle. Section 48 considering the equality of states provides that the Senate shall consist of the three senators from each state and one from the Federal Capital Territory. Section 49 reinforces the principle of federal character by providing that the House of Representatives shall consist of three hundred and sixty members representing constituencies of nearly equal population as far as possible, provided that no constituency shall fall within more than one State. This is founded on the doctrine of proportional representation based on population. Section 147 (2) ensures appointment of Ministers to reflect federal character, provided that the President shall appoint at least one Minister from each State, who shall be an indigene of such State. This is in accord with section 171 (5) of the Constitution which states that the President shall have regard for the federal character principle in making all presidential appointments. Similarly, section 217 (3) provides that the composition of the officer corps and other ranks of the armed forces of the Federation shall reflect the federal character of Nigeria. Section 219 (b) empowers the National Assembly to establish statutory body which shall have power to ensure that the composition of the Armed Forces of the Federation to reflect federal character.

Although the above constitutional provisions indicate clearly that the federal character principle is not about individual right per se, yet the constitutional consideration of fair and equitable distribution of federal appointments and posts in the public service as betrayed by the jurisprudence is surely a soothing palliative to individual animosities that often hover around in a country that pays mere lip-service to national unity and equal opportunity ideal in favour of socio-economic imbalance. Thus, the essence of the principle is to ensure that the indigenes of all component parts of each geo-political unit in Nigeria are fairly and equitably represented in the government bureaucracy and in the conduct of government affairs. This spirit of federal character is expected to trickle down to lower geo-political enclaves such as the states, local government areas, senatorial districts, federal constituencies, electoral wards, and so on. The principle of federal character, no doubt, affects the individual development positively and directly as it also applies to public investment in and the provision of social services, economic benefits and infrastructural facilities at all levels of government. No doubt, the above

constitutional provisions on the federal character principle constitute the source of other legislation, policies, regulations, and case law that border on the subject.[32]

Other instances of the influence of natural law in Nigerian human rights praxis are worthy of mention. Nigerian criminal law against obscenity, unnatural offences against humans and animals reflect the principles and injections of natural law. Besides, the provisions governing the Code of Conduct for public officers clearly illustrate the influence which natural law ideas and principles exert on the Nigerian legal system or the extent to which the latter may be used as a vehicle for the conveyance of the former. Besides, the establishment of several non-governmental bodies (NGOs) such as Amnesty International worldwide, and the Civil Liberties Organisation in Nigeria,[33] in pursuance

[32] For instance, Federal Character Commission (Establishment, etc.) Act, cap F7 Laws of the Federation of Nigeria 2004; Guidelines and Formulae for the Equitable Distribution of Posts in the Public Service; Circulars issued by the Commission; *Federal Character Commission v Federal Airports Authority of Nigeria & 5 Others* (Charge No. FHC/L/337C/2006), etc.

[33] The growing participation of citizens in the enforcement of international and positive human rights is already having some repercussions. For instance, Amnesty International and the International Commission of Jurists as well as the Commonwealth and the African Union *inter alia* have sent international observers to numerous political trials and have reported their findings to other States and to the international community at large. Since these proceedings and their outcome have been and continue to be widely reported and criticised, such trials appear to be far less frequent than hitherto. Thus, in 1988 alone for instance, Amnesty International observed more than 20 trials in countries as politically diverse as Poland, former Czechoslovakia, Taiwan, the Republic of China, Turkey, Italy, Greece, Spain and France. See Amnesty International Rep. 1989 App. 1 (1989). See also 11 HR quarterly (November 1989). See generally ICJ, Report on Activities, 1989. In Nigeria, the trials of political activists such as Gani Fawehinmi and Ken Sarowiwa were also observed between 1993 and 1996. And, as repressive regimes have yielded to the pressures of international opinion to hold purportedly free elections, other States have sent in teams of expert observers to assure that such elections were indeed free. For instance, when Philippines President Marcos and Panamanian Maximum Leader, Noriega tried to rig elections which they had lost, US President Carter or Senator Lugar or Elliot Richardson and their colleagues from other free democracies were on hand to expose and denounce such thefts. However, when Poland, Nicaragua, Namibia, (former) East Germany and Nigeria, under self-styled military President of Nigeria, General Ibrahim Babangida, conducted truly free and fair elections, the same or other international observers were present to attest to the fairness of the elections and, more importantly, to persuade the losers to abide by the results. (Cf. Lloyd N Culler in 'The Internationalisation of Human Rights' 3 *University of Illinois Laws Rev*. 1990, 585; See also *LA Times* Feb 25, 1990 at Al Col. 4 (Nicaragua); *Christian Science Monitor,* June 2. 1989 at 3, Col. 3 (Poland); BBC Summary of World Broadcast Oct 30, 1989 at ME/060 O/B/L7 (Namibia); Apr, Mar 18,. 1990 (NEWS Search East Germany). Regrettably though, in Nigeria's case, General Babangida arbitrarily annulled the 'freest and fairest election' in Nigerian History which was already won by Chief Moshood Kasimawo Abiola in 1993). On the whole, the idea of direct involvement of citizens and the international community in matters of human rights validates John Donne's philosophy and transforms the defence and maintenance of these rights into a categorical imperative, a right as well as an obligation conferred and imposed on all citizens where he said: 'No man is an island, entire of itself, every man is a piece of the continent, a part of the main. If a cloth be washed away by the sea, Europe is less, as well as if a promontory were, as well as if a manor of thy friend's or thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls, it tolls for thee' (John Donne, *Devotions, XIII*. Cf. Lloyd *et al* loc. cit., 575).It is, however, an irony that whilst wanton breaches

of the lofty ideals for which the social contract doctrine and the human rights movement stand, is a further testimony of the considerable influence of natural law in Nigeria and the rest of the world, as citizen/participation in the enforcement of human rights continues to be on the rise. In addition, the promulgation of an anti-corruption and anti-graft law which derives its source from the constitution illustrates forcefully the enduring and energizing influence of natural law principles in the Nigerian legal system.

Among all the fundamental rights in the constitution, anchored as it were on natural law principles, the right of fair hearing enjoys the pride of place. Thus, all the fair hearing provisions of section 36 (1-12) of the constitution, namely, publicity of trials, presumption of innocence, information to the accused of his offence, adequate time and facility to the accused in preparation of his defence, right to defence counsel, examination of witnesses, right to interpreter, prohibition of retroactive legislation, prohibition of double trial and jeopardy, and right to silence, among others are all founded on natural

of human rights frequently occur under various African regimes, the struggling masses of the people have seemingly been cowed into submission by the threat and actual use of force on civilian unarmed protesters publicly detesting gross abuses of human rights. Who would dare the guns? Guns and gunpowder which the Mongols originally introduced to the West in the 13th century A.D. were used to destroy the proverbial immunity of barons in their formerly impregnable castles and walled cities. It was guns that were used to sweep the feudalists from the face of Europe. Constantinople fell to guns. Mexico, Peru and the great African States and kingdoms were all brought down by the terror of guns (Cf. Lloyd *et al* loc. cit., *ibid,* 584.). Guns are fearful things - who does not fear them? As Nnamdi Azikiwe, the first President of Nigeria put it in 1993, 'only a fool will argue with a gun'. Little surprise then that more and more Africans under militocracies are smarting under the yoke of dictatorships and tyrannies, and seem to have now become prone to query a life of permanent conflict or confrontation with the ruling oligarchies especially when such opposition had only earned their compatriots nothing but permanent deprivations, socio-economic dehumanisation and in some cases untimely death. They asked themselves why should one fight perfidiously and not submit to the demands of the powers that be, after all, to do so would cause one no loss materially. To the contrary, it might benefit one in the short or long run, materially. This was probably why many a discontented and critical citizen seemed to consider political activism as a game not worth the candle. Despair had overtaken their hearts. Despair led to apathy, apathy led to conformity and conformity led to routine practices that characterize the political spectrum in the countries concerned. To the extent that the hope of a general improvement of the situation faded away and that the individual's grasp of universal values and objectives diminished, to the extent that his reactions to positive outside stimuli decreased, the individual tended to devote more and more of his energy where it met the least resistance, viz., internally. Thus, everyone thought increasingly of himself, his family and his house. In short, he attached only selfish material parameters not only to his private life but also to his world view. In these circumstances not much imagination was needed to understand why the situation in such countries had gradually led to the progressive erosion of all the values held high by the society, of all moral standards, and to the rapid disappearance of all notions of decency and activity to the reduction of confidence in such great values as truth and honesty, principle, sincerity, impartiality, dignity and honour, and inevitably to the suppression and relegation of merit and the promotion and enthronement of ignorance and mediocrity. Yet, reason prescribes hope, patience, perseverance and constructive action until the pendulum of time swings from the immoral and evil side to the good and moral side in these polities when human rights will become respected and observed across the world and social justice for all will prevail, particularly in Africa.

law. No wonder these elements are collectively called 'constitutional safeguards for fair hearing'. The relevance of fair hearing to administrative and judicial processes of conflict resolution is also manifest in the maxims *Nemo judex in causa sua* and *audi alterem partem. Nemo judex in causa sua* means that one cannot be a judge in one's case. These are called twin pillars of natural justice. In *LPDC v Gani Fawehinm,*[34] it was held *per* Karibi-Whyte that it is a settled law that a person cannot be a judge in his own case. On the other hand, *audi alterem partem* literally means 'hear both sides'. The implication is that no one shall be condemned unheard. In *FCSC v Laoye*[35]*,* Eso JSC delivering the judgment of the Supreme Court stated: 'The reasoning of this court in fair hearing is not only in accord with the law over the ages but agrees with common sense...'[36]It is only natural that man should have the opportunity to defend himself. Just like the Christian natural law philosopher would argue, even God required Adam to make his defence.[37] This principle of natural law was also applicable in Nigeria even prior to the British colonialism. For example in Yoruba land, which undoubtedly has its parallel in other Nigerian language, only a wicked arbitrating elder would hear only one party to a dispute and hastily rush to judgment against the unconsulted party.[38]

More still, jurisprudential reflection on the right to life offers an opportunity to critically consider natural law derogation from an individual's right to life. Right to life is guaranteed in section 33 of the Constitution as follows:

> (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.
> (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary:
> (a) for the defence of any person from unlawful violence or for the defence of property.
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or

[34]*LPDC* v *Gani Fawehinmi* (1982) 2 NCLR 419.
[35]*FCSC v Laoye* (1989) 2 NWLR (pt.106) 681.
[36]F. Adaramola, *Jurisprudence*, 4th Ed. (Durban: Lexis Nexis Burtherworths, 2008), p.67.
[37]*FCSC v Laoye* (supra). See also Nnaemeka-Agu JSC in *Wilson v AG Bendel State,* (1987) 1 NWLR (pt 53) 678.
[38]*R v Chancellor of the University of Cambridge* (1723) 93 ER 698 at 704. Also see the Holy Bible Gen 2: 16—17.

(c) for the purpose of suppressing a riot, insurrection or mutiny.[39]

A cursory look at the provision would reveal its identity, in every material particular, with the provisions of section 18(1) and section 30(1) of the Republican Constitution 1963, and the Constitution of the Federal Republic of Nigeria 1979, respectively. The provision betrays a number of naturalist principles that include death penalty, self-defence, defence of property, effecting a lawful arrest, preventing escape of a person lawfully detained, and suppressing a riot, insurrection or mutiny as provided for in section 33 (1) & (2) (a) (b) (c). A brief discussion of these may be relevant.

Death penalty is a consequence of natural law thinking in relation to right to life. It is a practice of the retributive theory of punishment. It is regarded as a just desert for one who intentionally takes another person's life or its approximation. Hence, it is a penalty for heinous offence. Death penalty had been recognized and enforced under the various constitutions that Nigeria had ever operated, whether colonial or autochthonous. Besides, in pre-independence era in Nigeria, the colonial authorities had under the operative laws recognized and executed the death penalty.[40] This legal *status quo* has remained and maintained by the 1999 Constitution. This is implicated in the wordings of section 33 (1) of the Constitution in which the death penalty is allowed as a claw back or derogation from the fundamental right to life as framed in the clause: '…save in execution of the sentence of a court in respect of a criminal office of which he has been found guilty in Nigeria'. It is equally observed that the only possible sentence of a court relating to right to life and in respect of a criminal offence, which one can be found guilty, must be that of death. Therefore, even as the expression 'death penalty' is not used, its implication is quite glaring in the provision of section 33 (1) of 1999 Constitution. No doubt, this derogation has a fundamental basis on section 45 (1) (a) & (b) which allows for a general restriction of the exercise of fundamental rights in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.[41] The constitutional legitimacy of this derogation seems necessary for, as argued, if a murderer is allowed a field day without execution of a death sentence on him as a result of his fundamental right to his life, then public safety, order,

[39]See also UDHR, 1948, art. 2; ICCPR, 1966, art 6; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF), 1950, art.2; African Charter on Human and Peoples' Rights (ACHPR), 1981, art 4; Charter of Fundamental Rights of the European Union (CFREU), 2000 art.2; American Convention on Human Rights (ACHR), 1969, art 4.

[40]*R. v. Nungu* (1953) W.A.C.A. 379; *R. v. Adi* (1955) 15 W.A.C.A. 6*; R. v. Obi* (1957) W.R.N.L.R. 19 are some of the pre-independence cases that involved death penalty.

[41] Although section 45 of C.F.R.N.1999 seems to be specific to the fundamental rights to private and family life (section 37), religion, thought and conscience (section 38), expression and press (section 39), peaceful assembly and association (section 40), and movement (section 39), for the purpose of the derogations, yet in our considered view, nothing prevents the intention of the legislature from being extended to other fundamental rights.

or rights and freedoms of other persons might well pay dearly for it. We are however not oblivious of the burning question of whether or not it is only by death penalty that the dastardly act of a particular murderer is curbed, or whether death penalty would even deter future murderers.[42] But one thing is certain, namely, if a murderer, X, who is found guilty by a court of competent jurisdiction is executed by facing the death penalty, that murderer, X, will never commit any murder again since he had ultimately been removed from his society and any other society. Therefore, in the light of the constitutional provisions and the relevant case law cited above, and many other decided cases,[43] it is crystal-clear that death penalty is still legitimate in Nigeria.

The enforcement of the rights in the African Charter on Human and Peoples Right is a result of the implementation of the provision of section 12 (1) of the Constitution, which, for enforceability in Nigeria, demands the domestication of international laws. Article 4 of the African Charter on Human and Peoples Rights[44] implicitly permits death penalty when it provides, *inter alia*, that 'no one may be *arbitrarily* deprived of his right to life'. Hence, though the Article recognizes human beings as inviolable and holds that every human being shall be entitled to respect for his person, yet its further provision that 'no one may be arbitrarily deprived of his life underscores a claw back to or derogation from the right to life under relevant situations. The express mention of the word 'arbitrarily' in the context of the Article implies that there can be circumstances in which one can be deprived of his right to life provided such circumstances are not arbitrary. Therefore, it is inappropriate for Ibidapo-Obe to regard the tone of Article 4 of the African Charter as non-derogable.[45] It has to be noted that the provisions of the African Charter on Human and Peoples Rights have now become part of the Nigerian body of laws after having been domesticated and incorporated pursuant to African Charter on Human and Peoples Rights (Ratification and Enforcement) Act[46] in line with section 12 (1)[47] of the Constitution. The net effect is that as part of Nigerian domestic laws, the provisions of African Charter can be enforced by the Nigerian courts in accordance with its judicial powers as provided for in section 6 of the Constitution, and in all other laws relating thereto.[48]

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[42]There are also utilitarian, consequentialist, deterrence, rehabilitation, reformation, incapacitation, disablement, education, enculturation, expiation reparation theories.

[43]*Musa v The State* (1993) 2 NWLR (pt 227) 550; *Ibe v The State* (1993) 7 N.W.L.R (pt 304) 185; *Odogu v A.G.F.* (1996) 6 N.W.L.R (pt 456) 508; *Okonkwo v The State* (1998) 4 N.W.L.R. (pt 544) 142; *Peter Nemi v The State* (*supra);Uzoukwu v Ezeonu II* (*supra)*, etc.

[44] 20 June 1981, entry into force on 21 October 1986.

[45] A. Ibidapo-Obe, *A Synthesis of African Law* (Lagos: Concept Publications Ltd, 2005), 137.

[46] Cap A. 9. L.F.N. 2004. The effect of this domestication has received judicial blessings in *Ogugu & Ors v The State* (1994) 9 N.W.L.R. (pt 366) 1; *Abacha v Fawehinmi* (2000) 6 N.W.L.R. (pt. 660) 228; *Nemi v A G Lagos* (*Supra).*

[47] Section 12 (1) states that 'no treaty between the Federation any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.

[48]*Ogugu & Ors v The State (supra);Abacha v Fawehinmi (supra).*

There is no doubt that death penalty as allowed by the constitution in relation to right to life is anchored on the retributive theory of punishment which ultimately derives from natural justice. Yet retributivism is one of the most controversial theories of justification of punishment. It was almost unanimously rejected by the leading jurists during the 19th century and the first half of the 20th century. For instance, Salmond states that 'it is questionable whether retribution can be justified'[49] insofar as it is for its own sake rather than for the protection of the society as maintained by the utilitarian theories. For this, opinions like Salmond's regard retribution as *prima facie* wrong and question the propriety of state involvement in penal justice:

> To force a wrongdoer to compensate his victim may be justified as a means of alienating the latter's suffering and as bringing about a more just state of affairs between the two, but to exact retribution in order to force offenders to balance the accounts of abstract justice is surely to arrogate to ourselves functions to which we are not entitled.[50]

Another major challenge faced by the retribution theory is that of explaining exactly how any positive value can be derived from inflicting suffering on the criminal just as an end in itself. Hart believes that this challenge could not be met. For him, 'it appears so be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good'.[51] Hence, regarding both the criminal act and the punishment as essentially evils, Hart argues that two evils cannot make a good. However, this Hart's view is obviously unfortunate for by regarding punishment as essentially evil, his argument flies in the face of reality and common sense as it goes to attack the very foundation on which the entire notion of punishment is built.

What perhaps is a more fundamental problem associated with retribution as a just desert is how to measure or calculate what a criminal deserves in relation to the crime he committed. In other words, how is punishment made to fit the crime? Is it by making the punishment mirror the crime itself (*lex talionis*, an eye for an eye), or by adjusting the severity of penalties according to the social harm resulting from different offences, or even by linking the penalties to the moral outrage or indignation felt by a majority of citizens?[52] The basis for the mathematical computation involved in determining what just and fair desert to a criminal had been a veritable source of controversy among scholars, and the lack of unanimity with regard thereto partly became the initial reason for the rejection of the retributive theory.

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[49] P. A. Fitzgerald, *Salmond on Jurisprudence*, 12th Edition (Bombay: N. M. Tripathi Private Ltd., 2001), 98.
[50]Ibid., p. 99.
[51]H.L.A. Hart, *Punishment and Responsibility* (London: Oxford University Press, 1959), pp.75-83.
[52] D., Barlow, *Introduction to Criminology*, Third Edition (Boston: Little, Brown and Co., 1984), pp. 478-479.

Be that as it may, the second half of the 20th century witnessed a launch back by retributivism into a considerable acceptability upon the rediscovery that utilitarian views would be unacceptable if totally divorced from the idea of retribution. For one thing, Lewis observes that retribution or 'just deserts' is the only possible link between punishment and the idea of justice.[53] Perhaps, it is the failure to take desert and justice into account that is the major problem with the utilitarian theories. No wonder Finnis approaches the problem of punishment generally from the standpoint of distributive justice which demands that there must be a fair distribution of benefits and burdens in the society.

> When a criminal commits a crime, he benefits in a certain sense, for while other people restrain their actions in order to comply with the law, he casts off his burden of self-restraints and takes into consideration exclusively his own advantage. He thereby gains an unfair advantage over the law abiding citizens. If the free-willing criminal were to retain this advantage, the situation would be as unequal and unfair as it would be for him to retain the tangible profits of his crime.[54]

Finnis, therefore, observes that when the authorities inflict punishment on a criminal, they ensure that distributive justice obtains in the society and that nobody will have been disadvantaged by observing the law.[55] According to this view, punishment, rationally justified as retribution, restores the fair balance of benefits and burdens among members of a society.[56] Besides, it is only the retributive theory that presupposes punishment as deserved only by the offender and in the measure in which the offence was committed. Inflicting harm on the innocent, even though believed to be guilty, is completely outside the scheme of retribution. For the foregoing reasons, it appears that retributive theory cannot easily be dismissed from any consideration of justification of punishment in human experience generally.

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[53] C. S. Lewis, 'The Humanitarian Theory of Punishment' in W. Hooper, (ed.), *First and Second Things* (London: Oxford University Press, 1985), p. 98.

[54] J.M.Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), p. 263.

[55] Ibid.

[56] Elegido observes that an exaggerated version of this theory is Kant's teaching that even on the last day before society is dissolved, a murderer ought to be executed so that justice be done. Elegido condemns this theory in favour of the society's exercise of mercy on the criminal [J. M. Elegido, *Jurisprudence* (Ibadan: Spectrum Books Ltd., 1994), p. 220, footnote number 18]. See also Ezorsky's critique of Kant's idea of punishment [G. Ezorsky, (ed.), *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972), p. xviii].

Again, right of killing in self-defence[57] can be excused as a natural protective reaction sequel to the natural instinctive principle of self-preservation. The principle of self-preservation is a rule of natural law consequent upon the right to life. Hobbes refers to natural law as mere law of self-preservation.[58]The golden threads of equity and reason freely run through the rules governing killing in self-defence in Anglo-Nigerian legal systems. For instance, a distinction is drawn between killing in self-defence in the course of a fight upon a sudden quarrel on the one hand, and killing in defence of person or property using 'such force as is reasonable in the circumstances', on the other.[59]A provoked assault usually arises from a sudden quarrel upon mutual provocation, and, death resulting therefrom may not be excusable depending on all the circumstances of the case.[60] Hence, in a case where a person has unlawfully assaulted another or has provoked an assault from another and that other person assaults him with such violence as to cause reasonable harm, and to induce him to believe, on reasonable grounds, that, it is necessary for his own preservation from death or grievous harm to use force in self-defence, the law's stipulation is that he is constitutionally allowed and not criminally liable for using such force as is necessary for his self-preservation. And, this is so even if death or grievous harm be caused thereby *unless* he first began the assault with intent to kill or cause grievous harm to some person,[61] in which case he will be guilty of murder or manslaughter as the case may be. Another distinction which is drawn in Nigerian law is that between the defence of a dwelling house from a forcible break-in with intent to commit a felony or a misdemeanour and the defence of other kinds of property, movable or immovable. Thus, a person is entitled to defend his dwelling house, even to the extent of killing the intruder if such act is necessary to repel him. Furthermore, the law also draws a distinction between self-defence against a provoked assault and an unprovoked one.

It follows therefore, that where an unprovoked assault causes the victim reasonable apprehension of death or grievous harm, he is entitled to use such force to defend himself as he believes reasonably necessary to preserve himself from the perceived danger. And this he is entitled to do even though such force may cause death or grievous harm, so long as the force used in self-defence is of the same quality as the one being used against him, and so long as he can show that he had reasonable grounds for believing that the only way to protect himself from death or grievous harm was to kill his assailant. It has been judicially settled that the test of reasonableness in such instances is an objective

[57]First Limb of section 33 (2) (a) C.F.R. N., 1999.
[58] T. Hobbes, *Leviathan*, Edited and Abridged by J. Plamenatz (Britain: William Collins Sons & Co. Ltd., 1976), chapters 13, 14, & 17.
[59] The Nigerian Criminal Code, sections282-294. See further Archbold, 2496-2499.
[60]C.O. Madarikan & T. A. Aguda (eds.), *Brelt and McLean's The Criminal Law and Procedure of the (Six) Southern States of Nigeria*, 2 1974, p.116, 1864.
[61]*R v Hussey* (1924) 18 Cr. App. R. 160. Followed in *R v EBI* (1936) 3 WACA 36.

one, that is, it is the test of 'the reasonable man'[62] or woman on the 'mass transit bus'. It can be seen that the principles of equity, reason and pragmatism more than any others, rule this area of the law.

The killing of a human being in unqualified defence of property appears rather disproportional. Yet, the courts have at least in one instance, in the case of *Musa v The State,*[63] upheld a homicide committed in just those circumstances. This attitude does not augur well with Nigerian and African traditional sensibilities. Onwubiko notes that 'any form of materialism which ultimately leads to the destruction of life is alien and destructive of African tradition'.[64] Happily too, the ACHPR, for one stipulates a right to property made contingent upon the general interest of the community[65] on the ground that killing in defence of property would be inconsistent with the communitarian ethics of Africa and would be promotive of materialism.

Killing for the purpose of suppressing a riot, insurrection or mutiny seems to be specie of killing in armed conflict. It has been argued that killing in armed conflict can be a killing in self-defence. But if this is so, whose is the right of self-defence in this instance, the State or society's or the soldier's? It seems reasonable to contend that killing in armed conflict should be regarded as killing in self-defence, but, this self-defence is clearly that of the State or society employing the soldier, exercised in the person of its militia man. For, as Jean Jacques Rousseau succinctly puts it, 'war…is not a relation between men, but between States; in war; individuals are enemies wholly by chance, not as men, not even as citizens, but only as its defenders'.[66]A distinction should therefore be drawn between the crime of murder (which is killing with malice afore-thought or with *mens rea)* and killing the enemy in war or armed conflict, because soldiers harbour no personal or private malice against the opponents they kill in combat. They only act as representatives of their State or society and it is the latter that must ultimately be held vicariously answerable for the killing, that is, either legally or morally answerable or both such as in cases of wars of aggression. The only exception will be instances when killings in combat amount to war crimes and crimes against humanity or genocide when not only the State or society but also the soldier himself will be liable in terms of international law. *A fortiori,* with respect to those who enroll in the fighting forces prior to any conflict, or those drafted or conscripted into the army after a conflict breaks out, there can be no

[62]*R* v *Onyeamaizu* (1958) NRNLR 93. Cf. Brett *et al* , p. 1863. See United Nations Charter, Art. 51 in favour of the right of states to self-defence.
[63]*Musa v The State* (1992) 2 All NLR 550.
[64] O. Onwubiko, *African Thought, Religion and Culture* (Enugu: Snaap Press Ltd, 1991), p. 22.
[65] U. O. Umozurike, *The African Charter on Human and Peoples Rights*, (Hague: Martinus Nijhoff Publishers, 1997).
[66]J. J. Rousseau, *The Social Contract*, Book I, Chap. IV, 56 (transl. Maurice Cranston Harmondsworths) (London: Penguin Books 1968). Cf. J. Toman, *The Protection of Cultural Property In the Event of Armed Conflict* (Dartmouth: UNESCO Publishing, 1996), p. 32 n 12.

moral reprimand. Yet the question still remains concerning those who join the armed forces voluntarily when the war has already broken out solely with the blood-thirsty desire to kill. In such cases, it will be reasonable to conclude that such persons are morally reprehensible for their subsequent killings against the opposing troops. However, it would be an uphill battle proving such intention even if the soldier concerned would have been triable under some law for his blood-thirstiness. In any case, the possibility of such an indictment is absolutely out of the question because no State would put on trial any of its *bona fide* militia except on specific charges for crimes such as treason, desertion, piracy, *jure gentium,* genocide and crimes against humanity, as it is obliged to do under international law.[67]

Again, the constitutional and other statutory leverage in connection with the power of arrest demands to be properly reviewed. Section 33 (2) (b) of the 1999 Constitution permits the killing of any person in the course of effecting a lawful arrest or preventing the escape of a person lawfully detained. It is this provision that validates section 261 of the Criminal Code which provides that the police officer or any person making an arrest may use such force as is reasonably necessary to overcome any attempt at resistance by the suspect, though the person making the arrest may be liable for any excessive use of force.[68] Often, this force has led to the death of the suspect. More poignantly, section 271 of the Criminal Code provides that where a police officer is making an arrest of a person suspected of having committed a felony and the suspected felon takes to flight in order to escape from arrest, the police officer and any other person assisting him may use reasonable force to prevent his escape. Where the offence for which the escaping suspect was to be arrested is punishable with the death penalty or imprisonment for 7 years or more, the police officer may kill him if he cannot by any means otherwise be arrested. Given these provisions, it is worrisome that one can hide under their cloaks to kill people at random. Although, in *Akpobasa v The State*,[69] the Court dismissed the appeal of the appellant who shot and killed an unarmed suspect who had a cry of 'thief' and was running away from the spot where the cry came from, yet the judicial attitude was different in *Odung v The State.*[70] In this case, Ilori J (as he then was) virtually declared that the senior police officer deserved a medal for killing an unarmed suspect in front of the African Shrine, a Night Club belonging to Fela Anikulapo Kuti, the late radical musician, on the ground that the fellow was escaping from lawful arrest. Such a decision, alarming as it were, tends to reinforce the excessive instinct of police officers. The constitutional power conferred on law enforcement agents to kill in the process of suppressing a riot may be viewed in the same vein. The wanton and unnecessary killing of unarmed youths during students' demonstrations should attract the strongest

[67]Adaramola, ''The Crime of Crimes - A Call to Arms', *loc cit.*
[68] B. Osamor, *Fundamentals of Criminal Procedure Law in Nigeria*, (Abuja: Dee-Sage Nig. Ltd., 2004), p.61.
[69] Cited in Ibid.,p. 62.
[70]*Akpobasa v The State* (Unreported) Suit No. ID/7C/88, Judgment delivered on 2/12/1989.

condemnation by society against the unlawful use of lethal weapons by the Police. It may not be uncommon for these demonstrations to be seen by those at the corridors of power as treasonable even if they are peaceful. The above constitutional provisions need to be expunged.

Furthermore, natural law constitutes the bedrock of economic rights envisaged in the constitution. Instances are galore. In the law of contract, a person who is not part of a contract, otherwise known as the third party, does not bring any legal action with respect to the contact.[71] This is technically called privity of contract. This principle is founded on natural law principles. Similarly the rule of *quantum meruit* which states that where a party has discharged a substantial part of a severable contract before the contract is determined, that party is entitled to be paid on a *quantum meruit* basis.[72] Also *Consensus ad idem* which means that before a contract is said to be valid, there must be a meeting of the minds of the two parties to it is bases on natural law principle. This principle was also observed by the early men prior to colonization in the form of trade by batter. The parties intending to exchange goods and/or services must agree on the goods or services to be exchanged. This is consequently known in modern time as the meeting of minds or *consensus ad idem.*[73]

The principles of natural law are also seen in the invalidity of contract obtained by undue influence. This means that a contract is invalid where there is any form of coercion, domination, pressure and generally bargains obtained in an unfair manner.[74] Similarly, mistake or misrepresentation vitiating contract is a natural law phenomenon. In insurance practice, the influence of natural law is seen in the doctrine of utmost good faith and disclosure. The former means that all insurance contracts must be done with utmost good faith as any display of bad faith vitiates it. The doctrine of disclosure means that a party (insured) must disclose all material facts and must not withhold any information that would have enabled the insurer to fix the risk. All these issues can only be meaningfully discussed with reference to natural law, morality, human rights and practical reasonableness.

4. Conclusion

Human rights in Nigeria are protected under the 1999 Constitution, African Charter on Human and Peoples' Rights, and under certain other laws. Most of the relevant provisions are sourced from naturalist thinking. This is consistent with contemporary notions of human rights which draw very deeply from natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially

[71]I. Sagay, *Nigeria Law of Contract,* chapter, 2nd edn, (Ibadan: Spectrum Law Ltd., 1985). See also the case of *Tweddle v Atkinson* [1861] 1 B & S 393.
[72] This means he is to be paid according to the work or quality of the work done or merited.
[73]*Tinn v Hofinan & co.* (1873) 29 LT 271.
[74]*Allcard v Skinner* (1887) 36 Ch.D 145 at p 181.

from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them is direct descendant of natural rights thinking. There is no gainsaying that naturalism generally insists on conceiving human rights as the unification of some traits inherent in human nature, metaphysical, epistemological or otherwise. True, this notion alone would be insufficient to define the source of human rights; yet it seems to preponderate over many theories.

As emerging from the military era, Nigerians are becoming aware of the value of human rights. Yet, a number of issues and abuses continue to undermine the human rights record in Nigeria. *Boko Haram* insurgency; mayhem on people's lives, property and agricultural farms by Fulani herdsmen and their cattle; unnecessary extra-judicial killings by security agencies; poverty and dearth of basic health and other facilities; violation of federal character principle; social inequality and lack of equal opportunity; religious violence; undue curtailment of fundamental rights and freedoms; and official corruption,[75] are just to say the least. This shows a caesura between theory and praxis in relation to human rights index in Nigeria today. This is evidence of the fact that legal naturalism is after all not enough to enhance human rights record in Nigeria. Positive law and realist approach, at least, are congenial for genuine protection and enforcement.

[75] The Human Rights Watch's 2015 World Report.

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