

ANTI COMMUNITARIAN CONSTRUCTION OF HUMAN RIGHTS PROVISIONS AND SOCIAL DEVELOPMENT IN COMMONWEALTH AFRICA: RIPPLES FROM THE NIGERIAN CASE OF AGBAI V OKOGBUE*

Abstract

In most countries of the world, socio-economic rights are now concrete and enforceable. In Nigeria however, chapter II of the 1999 Constitution has remained non-justiciable, irrespective of the adoption and ratification of the African Charter on Human and People's Rights, which contains replica of these socio-economic rights. In countries like South Africa, India and some Latin American countries, the socio-economic rights have been given full force of enforcement either by composite construction of constitutionally guaranteed rights to encapsulate socio-economic rights or by expansive interpretation of the Constitution by the courts. Enforcement of socio-economic rights has nonetheless remained a mirage in Nigeria. Successive governments have hidden under the non-justiceability of chapter II of the constitution to evade accountability and responsibility especially in provision of life changing infrastructure. This has impelled communities to engineer their own social development via self-help. Enforcement of compliance towards these self-help measures usually clash with the perceived rights of individuals. This paper therefore raises concern on the construction of the rights provisions to stifle communitarian philosophy enhancing social development via communal self-help projects by revisiting the case of Agbai v. Okagbue. It is posited that with recent dwindling government responses especially in rural infrastructural development, the court has to re-engineer communal development by superimposing communal interest over personal interest especially where such communal interest will also further full realization of personal rights.

Keywords: Human Right Provisions, Anti Communitarian Construction, Social Development, Commonwealth Africa, *Agbai v Okagbue*

1. Introduction

Oliver Wendell Holmes of the realist school of law insists that nothing pretentious is law than the prophecy of what the court would do to a set of facts placed before them.¹ Judges over the years have played significant roles in institutionalizing order and progressive development in every commonwealth society, Nigeria inclusive, via judicial precedent. Sequent to the Berlin Accord, Africa fell for partitioning and colonization in the later part of 18th Century. Britain gained suzerainty, established colonial government and transposed English law in the colonies under their control, Nigeria inclusive. The establishment of courts based on the English law also predicated the legal culture on the commonwealth jurisprudence. Accordingly, case law became, and still is, one of the decisive sources of Nigerian law.² Unfortunately, law in post colonial Nigeria has continued to wear the European cloak. Apart from legislative transplantation of laws from other commonwealth jurisprudence having significant disparate socio-economic and political culture, literacy quotient and level of development;³ the judiciary has interpreted these imported legislations leaning heavily on the English ideology of statutory interpretation, in most cases, the application of persuasive foreign precedent intractably in a totally disparate clime, oftentimes obviates the mischief intended to be cured. Human rights, on the other hand, attach the human person from conception and birth. Arguments still trail whether human rights are natural or products of positive law in modern societies.⁴ Because of its nature and demands, the whole world has globally endorsed human rights as the *raison d'être* of every human being. Though socio-economic rights are couched into chapter II of the Nigerian constitution, they have been held non-justiceable.⁵ Fundamental rights could be inflected to obviate absurdity where strict construction would occasion one, especially where the chapter provided limitation in the interest of public order, health, morality, etc.⁶

The nature and peculiarity of every society, including the value system and predominating social problems, should modulate the contents of its *corpus juris* vis-à-vis the underlying philosophy of interpretation. It is stating the obvious that the post independence Africa, has been characterized by economic chaos and woes orchestrated by either dearth or mismanagement of national resources resulting from corruption and selfish aggrandizement of political officials. This has colossally eroded the passion of state towards bringing to bear such developmental facilities that are imperative for survival. In most African communities today, there are manifestly in dearth such vital resources as water; health, electricity, roads and bridges, educational and recreational facilities, etc. In such communities, community development efforts⁷ come in to assuage the plights of the people, who could scarcely feel the impacts of the government. The concepts of human rights and community development, though not Siamese twins,⁸ are however linked by a common denominator, that is, the enhancement of the living conditions of mankind as a sacrosanct entity. Most times, however, in a bid to deliver on their respective mandates, there occurs a fissure in the interface of the two concepts which demands proper bridging and channeling, especially in Africa, for harmonious as against dissonant co-existence for positive results; since development facilities enhance the enjoyment of human

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¹O. W. Wolmes, *The Path of Law* cited in D. I. Njoku and P. Nwodeh, 'An Expository Dialysis of the Basis of African Customary Law in the Jurisprudence of Law' *IDOSR Journal of Banking, Economics and Social Science* vol. 7 iss. 1 (2022) pp. 83 – 100 at p. 85.

²J. N. Egwummuo, *Dynamics in Nigerian Legal System* (Enugu: Academic Pub. Ltd., 2003) pp. 1-2

³This explicates the Siamese identity of the rights provisions in chapter IV of the constitution of the Federal Republic of Nigeria 1999 (as amended) with rights provisions of most international and foreign legislations

⁴Constitution of the Federal Republic of Nigeria 1999 (as amended), S.. 45

⁵*Okogie & Ors v. AG Lagos State* (1981)2 NCLR 337.

⁶Section 46 of the CFRN 1999 (as amended).

⁷This requires the conscious and co-operative efforts of civic-minded people living within a given geographical area and who feel that their energy, finance and cognition are vital and should be pulled together to enhance their well-being has as well become both important and inevitable.

⁸The concept of Human Rights is related to Law while the concept of Community Development is related to the socio-economic discipline: I. U. Uwazie and others, 'Human Rights, Democracy and Community Development: The Need for a Nexus of the Concepts in Nigeria's Development Process' [2015] *Developing Country Studies* Vol. 5, No. 18, p. 43.

rights while a robust climate of human rights culture is indispensable for bringing development facilities to bear. It is against this background that this paper seeks to x-ray the implications of anti-communitarian construction of rights provisions focusing on the precedent of *Agbai v. Okogbue* – a *locus classicus* in this area of law.

2. Conceptual Clarifications

Rule of Law

Bannister et al., define Rule of Law as ‘the rule by law not by men’⁹ The World Justice Project addresses the rule of law within the following universal principles:

- a. The government and its officials and agents as well as individuals and private entities are accountable under the law.
- b. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
- c. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
- d. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.¹⁰

A strong rule of law is nourished by a strong legal base, that is, the constitution which provides the framework for a system of government. The constitution in that regard establishes and maintains a system of public power, regulates and control public power by delineating boundaries and imposing limits.¹¹ Rule of law entails:

- a. Accountability: all actors – government and private are rendered accountable by the law;
- b. Just Laws: clear stable, and just laws which are well publicized and evenly applied to protect fundamental rights, including the security of persons, contract and property rights, etc;
- c. Open Government which is accessible, fair and efficient enacts, administers, and enforces the law objectively;
- d. Accessible and Impartial Dispute Resolution Body manned by competent, incorruptible, ethical and independent officials, who have adequate resources and reflect the structure of the communities they serve, deliver justice timely to litigants.¹²

Igwenyi notes that rule of law is the most cited concept in constitutional theory owing to the fact that the decency or otherwise of a system of government depends on the degree of observance of the tenets of rule of law by such government.¹³ Rule of law envisages the prevalence of law and nothing else in a particular society.¹⁴ The rule of law may be approached either as a philosophy or political theory which lays down fundamental requirements for law, or as a procedural device by which those with power rule under the law.¹⁵ The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person – irrespective of rank and status in society – be subject to the law. On the part of the citizen, the rule of law is both prescriptive; that is, dictating the conduct required by law and protective of citizens; that is, demanding that government acts according to law. This central theme recurs whether the doctrine is examined from the perspective of philosophy, or political theory, or from the more pragmatic vantage point of the rule of law as a procedural device. The rule of law underlies the entire constitution and, in one sense, all constitutional law is concerned with the rule of law. The concept is of great antiquity and continues to bear legal and political relevance today.

The rule of law cannot be viewed in isolation from political society.¹⁶ The emphasis on the rule of law as a yardstick for measuring both the extent to which government acts under the law and the extent to which individual rights are recognized and protected by law, is inextricably linked with Western democratic liberalism.¹⁷ In this respect, it is only meaningful to speak of the rule of law in a society which exhibits the features of a democratically elected, responsible and responsive government and a separation of powers, which will result in a judiciary which is independent of government.¹⁸ In liberal democracies, therefore, the concept of the rule of law implies an acceptance that law itself represents a ‘good’; that law and its governance is a demonstrable asset to society.¹⁹ A.V. Dicey was popular for expounding on the principle of rule of law as propounded by Aristotle around 2000 BC.²⁰ According to Aristotle:

It is preferable that law should rule other than any single one of the citizens... he who asks law to rule is asking God’s intelligence and not others to rule while he who asks for a rule of human beings is bringing in a wild beast, for human passion are like wild beast and strong feelings lead astray rules and the very best of men. In law you have the intellect without passion.²¹

⁹J. Bannister, G. Appleby, and J. Howe, *Government Accountability, Australian Administrative Law*, (Melbourne (Australia): Cambridge University Press, 2015) p. 15; D. Hussein, K. Jermsttiparsert and P. Ahmad ‘The Importance of the Rule of Law in Governance’ *Journal of University of Raparin*, Vol. 6, Iss. 1, (2019) pp. 73 – 90.

¹⁰Juan Carlos Botero and Alejandro Ponce, *The World Justice Project: Rule of Law Index* (World Justice Project, June 2010) available online at: <http://worldjusticeproject.org/what-rule-law>, or <https://www.oecd.org/mena/governance/45447873.pdf>; accessed on 23rd March, 2023 by 8:31 am.

¹¹P. Cane, *Controlling Administrative Power* (Cambridge (United Kingdom): Cambridge University Press, 2016) p. 4

¹²P. Cane, *op cit*

¹³B. O. Igwenyi, *op cit.*, p. 36.

¹⁴*Ibid*

¹⁵Hilaire Barnett, *op cit.*, p. 44.

¹⁶Ese Malemi, *Administrative Law*, 4th edn (Lagos: Princeton Pub. Co., 2012) p. 86.

¹⁷Hilaire Barnett, *op cit.*, p. 44; B. O. Igwenyi, *op cit.*, p. 36.

¹⁸Hilaire Barnett, *op cit*

¹⁹*Ibid*

²⁰B. O. Igwenyi, *op cit.*, p. 38.

²¹Aristotle, cited in B. O. Igwenyi, *op cit*.

Perhaps drawing from Aristotle's position above, Bracton emphasized that 'the King himself ought not be subject to man, but subject to God and to the law because the law makes the King'²² Locke was even more prescriptive when he noted that 'freedom of men under government is to have a standing rule to live by, common to everyone of that society and made by the legislative power created in it and not to subject the inconstant unknown arbitrary will of another man.'²³ A summary of Dicey's postulation trifurcates the principle of rule of law, to wit: supremacy of the body law, equality before the law and fundamental human rights.²⁴ In Dicey's exact words:

The rule of law means the absolute supremacy of predominance of regular law as opposed to the interference of arbitrary powers or excludes the existence of arbitrariness or prerogative or even of wide discretionary authority on the part of the government... a man may be punished for a breach of the law but he cannot be punished for nothing else.²⁵

In communitarian ideology, the rule of law does not deviate from its popular meaning and tenets. It is rather more homogenous, especially given that individuals are fused with the community and somehow lost their personal identity to the communal identity and eventually enjoys a more robust personal identity within the framework of the general communal identity.²⁶ In a communitarian sense, the group pronoun 'we' dominates the personal pronoun 'I' both in reasoning, in actions, in works and in sharing benefits of works. By so doing, every member of a communitarian society is carried along in everything and thus finds protection, faith, fulfillment and self realization in the communal whole. The Yoruba Ifa Literary Corpus aptly captures the foundation of African *communitarianism* thus: 'Let us all come together as one so that we all can become rich together, let us all put our resources together so that we will become wealthy. Let us site our towns near each other and relate with one another'.²⁷

In *Agbai v. Okogbue*, Karibi-White JSC took time to x-ray the doctrine of rule of law and distilled the African view of the doctrine from the European perspective. Illustrating the underlying philosophy of the doctrine across differing legal and cultural jurisdictions, he said:

... The rules enunciated by Dicey were formulated in contrast with the situation in foreign countries. Our circumstances in this country are not identical. They are peculiar. We have adopted English law as the general law. We did not abolish all our own laws and customs which govern our ways of life in many important respects. ... Undoubtedly, these principles adopted must be applied with necessary modification and adaptation within the context of the laws adopted, recognized and applicable in our communities. Of course where any such laws are incompatible with our democratic values, they are by our Constitution to be rejected. Hence the Court of Appeal ought to have shown which of the rules of law or its variant is inconsistent with the custom being rejected. The custom applies uniformly only to defaulting members of the Age grade society. It is the law as accepted by them. It is, on the evidence, the law recognized by the community.

Human Right

Ascertainment of the meaning of 'right' has degenerated into jurisprudential theorisation.²⁸ The etymology of the word 'right' is however traceable to the Latin word '*rectus*' denoting 'correct', 'straight' as opposed to 'crooked'.²⁹ Thus, whatever is right is in concord with law, morality and justice. Anything below this standard is wrong.³⁰ The Lord of legal erudition - Hon. Justice Oputa espousing the meaning of right, quipped:

A right, in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or abstain from doing a particular thing.... A right therefore, is, in general, a well-founded claim; and when a given claim is recognized by civil law, it becomes an acknowledged claim or legal right enforceable by the power of the state.³¹

The Supreme Court of Nigeria lent credence to the above in *Uwaifo v. Attorney-General, Bendel State & Ors*;³² where legal right was defined as any advantage or benefit bestowed upon a person by a rule of law. The court was realistic in approaching the meaning of right in the Nigerian case of *Afolayan v. Ogunride & Ors*,³³ where right was conceived as an interest recognized and protected by the law. In the *Hohfeldian*³⁴ sense, effective delineation of 'right' could be located in its correlative 'duty' Hohfeld emphasises that a set of rights create duty and vice versa was alluded to by the court in *Lake Shore & M. S. R. Co. v.*

²² *Ibid*

²³ *Loc cit*.

²⁴ See generally, B. O. Iluyomade and B.U Eka, *Cases and Materials on Administrative Law in Nigeria*, (2nd edn, Ife: OAU Press Ltd., 1992); M.C. Okany, *Nigerian Administrative Law*, (Onitsha; Africana First Pub Ltd, 2007); Ese, Malemi, *Administrative Law*, 3rd Edn, (Lagos, Princeton Pub. Co., 2008),

²⁵ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th Edn, London: Macmillan, 1915)p. 202.

²⁶ For example, the Ubuntu Principle of 'I am because we are'.

²⁷ O. Adigun, 'Conversation between Two Generations: the Relationship between Ifa and the Law' A Paper Delivered at the Faculty of Law Seminar, University of Lagos, Nigeria; 1992, p.8

²⁸ E. A. Udu, *Human Rights in Africa* (Mbeyi & Associates Nig. Ltd., 2011) p. 1.

²⁹ A. N. Nwazuoke, *Introduction to Human Rights Law* (Copycraft Int'l Ltd., 2006) p. 7.

³⁰ O. Okpara, 'Nature of Human Rights' in O. Okpara (ed.), *Human Rights Law and Practice in Nigeria*, Vol. 1 (Chenglo Ltd, 2005) p. 36.

³¹ C. A. Oputa, 'Human Rights in the Political and Legal Culture of Nigeria', 2nd Idigbe Memorial Lecture, (Nigerian Law Publications Ltd, 1989) pp. 38-39.

³² (1982) 7 SC, 124 at 273

³³ (1990) 1 NWLR (pt. 127), p. 369

³⁴ W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1925). Hohfeld was a prime contributor to the modern understanding of the nature of rights and the implications of liberty.

Kurtz;³⁵ where the court asserted that any invasion of right means a violation of duty.³⁶ Adaramola, influenced by Hohfeld, notes as follows of right:

The term 'right' is often used loosely and indiscriminately by lawyers and non-lawyers alike to describe any advantage conferred on a person by a rule of law even though these advantages and their implications, in fact and in law, are of different kinds.... There are four vastly different things that are commonly, but erroneously used interchangeably as if they were synonyms. These are (true) right or claim; liberty or privilege or no duty; power, and immunity or no liability.³⁷

Elegido asserts that the most important issue is that of who owes the relevant duty or duties.³⁸ That is to say, before one can effectively lay claim to certain rights, it is imperative to delineate: (a) the beneficiary of the right (b) the person who is under a duty of some sort; and (c) the action obligating the person under such duty, that is, what action he should perform or refrain from performing.

Etymologically, the word 'human' is derived from the Latin word *humanus* meaning 'pertaining to or distinctive of a man or mankind'.³⁹ Human can also be used to denote people rather than animals, machines or gods. When the two concepts are brought together, we have human rights as a unique concept. A lot of attention has been drawn globally towards the concept of human rights due to its sentimental nature. This is because evolution of human rights was premised on man's resistance against oppression by his fellow man. Human rights was therefore popularised by the writings of John Locke, Thomas Hobbes, Jean Jacques Rousseau, Montesquieu, etc, the American War of Independence from 1775 to 1783 and the French Revolution of 1789 and the establishment of the United Nations in 1945.⁴⁰

Nevertheless, Cranston has given a somewhat fair definition of human rights as follows: '[A] human right is something of which no one may be deprived without a great affront to justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are supremely sacred'⁴¹ This definition was heavily relied on by the Supreme Court in *Ransome-Kuti v. Attorney-General of the Federation*⁴² where human right was defined as a right which stands above the ordinary laws of the land and which is in fact antecedent to the political society itself. The concept of human rights, therefore, arises from the intrinsic nature of man. He is a human being endowed by God with certain rights which are universal, inalienable, interrelated, interdependent and indivisible.⁴³ Because of his inviolable nature, he cannot be used as a means to other ends. As a human being, he stands free as an end unto himself in this regard.⁴⁴ Osita Eze defines human rights as representing demands or claims which individuals or group make on society, some of which are protected by law and have become part of the *lex lata*⁴⁵ while others remain aspirations to be attained in the future.⁴⁶ From this definition, it can be seen that human rights, as a concept, is of primary concern in every legal system. Thus, a right is only right in law because it is recognised and protected as such by the legal systems; either the law gives you right or you do not have it because the law denies you of it. Umozurike defines human rights as claims invariably supported by law and made on society, especially its official managers, by individuals or groups on the basis of humanity regardless of race, colour, sex or other distinction.⁴⁷ This definition appears to place human rights on a suppliant level before the law, while human rights as claims have gone beyond the level of ethics, having received formal expression in objective law at the national and international levels.⁴⁸

Igwenyi, on his own part, defines human rights as those rights that are believed to belong to human beings by virtue of their humanness and which have been recognized either as justiciable or non-justiciable in various national and international legal instruments.⁴⁹ Olowojobi sees human rights as pertaining to the right to be treated equally and also as the birthright of the human race.⁵⁰ In December 10, 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the United Nations wherein human rights are defined as universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity.⁵¹ Furthermore, the second paragraph of the American Declaration of Independence, 1776 states that: '[W]e hold these truths to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are right to life, liberty and pursuit of happiness....' Therefore, human rights are those rights inherent to all human beings, irrespective of status, gender, origin or colour which are attached to human beings ordinarily because of his humanity. These rights are as inalienable as they are fundamental to human person. Ndubuisi and Nathaniel posit that:

³⁵ (1894) 10 Ind. App., 60.

³⁶Hohfeld, *op. cit.*, p. 38

³⁷F. Adaramola, *Jurisprudence, 4th edn.*, (LexisNexis, 2008) p. 143.

³⁸Elegido, *op. cit.*, p. 156.

³⁹A. W. Read (ed.), *The New International Webster's Comprehensive Dictionary of the English Language (Deluxe Encyclopedic Edition)* (Typhoon Int'l Corp., 2004) p. 614.

⁴⁰ B. O. Igwenyi, *Modern Constitutional Law in Nigeria* (Nwamazi Printing & Publishing Co. Ltd., 2010) p. 355.

⁴¹M. Cranston, *Human Rights: Real and Supposed* in D. D. Raphael (ed.) *Political Theory and the Rights of Man* (Indiana University Press, 1967) p. 52.

⁴² *Supra*

⁴³ E. K. Akingbade, *A Handbook on Legal Human Rights in Nigeria* (Hope & Faith Press Ltd., 2008) p. 2.

⁴⁴Okpara, *op. cit.*, p. 38

⁴⁵ Meaning the (substantive) law of the land.

⁴⁶ O. C. Eze, *Human Rights in Africa: Selected Problems* (Macmillan Publishers, 1984), p. 5

⁴⁷ *Ibid*

⁴⁸ M.O.U. Gasiokwu, *Human Rights: History, Ideology and Law* (Fab Educational Books, 2003) pp. 1-2.

⁴⁹Igwenyi, *op. cit.*

⁵⁰ Y. Olomajobi, *Human Rights and Civil Liberties in Nigeria: Discussions, Analyses and Explanations* (Princeton & Associates Pub. Co. Ltd., 2016) p. 9.

⁵¹ UDHR 1948, Art. 1.

The existence of human rights does not depend on any legal or conditioned authority... By its nature, human rights is [*sic*] beyond the power of legal or political authority to make void because it is impossible to annul or remove from existence something that is an inherent aspect of man.⁵²

Human rights were incorporated into Nigeria's Independence Constitution in 1960, following the Report of the Willink's Commission and have since formed part of the constitution of Nigeria.⁵³

Community Development

Most writers associate community development with physical, social, and economic improvement of a community. Others see it however as the ability of communities to act collectively and enhancing the ability to do so.⁵⁴ However, a more holistic approach includes a variety of community factors, such as physical, psychological, political, social, cultural, and environmental.⁵⁵ De Wet Schutte identifies community development with the 'people-centred development and the alleviation of poverty and inequality, an explicitly humanistic redistribute orientation aimed at the consistent improvement of human well-being, which entails the requirement of social sustainability.⁵⁶ De Wet Schutte x-rays the successes and failures of community development and notes that in most cases the failures of community development are product of low or lack of community participation and/or enthusiasm for the development project. He identified enthusiasm as a key factor in enthroning sustainable community development.⁵⁷ Enthusiasm is the driver of community involvement. Community involvement in turn is nourished by the following elements:

- a. Full community participation
- b. Bottom-up development approach
- c. Addressing the real needs of the community
- d. Initiated by the community
- e. Planned by the community
- f. Executed and driven by the community
- g. Accommodating local knowledge, cultures, norms and values
- h. In interaction with the capacity of the social environment
- i. Timeously executed.⁵⁸

Phillips and Pittman's definition is symmetry with De Wet Schutte position above. According to Phillips and Pittman, economic development is a process of developing and enhancing the ability to act collectively, and an outcome. This definition bifurcates and entails: (a) mobilizing the community towards taking collective action, and (b) the end result of such collective action for improvement in a community in terms of physical, environmental, cultural, social, political, economic, etc.⁵⁹ The United Nations adopted the following definition: 'Community development is the process by which the effort of the people themselves are united with those of the governmental authorities to improve the economic, social and cultural conditions of communities, to integrate these communities into the life of the nation, and to enable them contribute fully to national progress'.⁶⁰

These definitions above all highlighted communality in efforts and outcome of such collective efforts for the overall wellbeing of a given society as the basic elements of community development. In contrast to the idea of collectivism and communalism is the dominant individualism characterising modern post-industrial capitalist societies. This individualism is enhanced by asymmetry and social stratification created by industrialization and class struggles on one hand and the nourishing supportive legal rules which were transplanted from entirely different and individualistic social climates. Individualism is antithetical to community development. According to an erudite author;

Community development refers to something with which everyone is in sympathy. That is why it is used at every turn, and preferably within the context of 'upliftment'. And this is exactly what one might expect. Community development simply has to be a good thing! Moreover, if a so-called community development project involves some concrete manifestation, for example a building, community leaders usually have no doubt that the project simply has to be a success. Simply not true!⁶¹

Bauman seems to be averse with the idea of collective active and emphasised membership as a dominant cohesive force of a community.⁶² Membership conveys certain status including rights, privileges and responsibilities as well as some degree of common purpose. Membership of an organisation, entails agreeing and been initiated into the aims and goals of that organization. Members are therefore expected to work and act in consonance with those aims at all times. Also implied is certain degree of commitment and enthusiasm to contribute in furtherance of the organization's goals.⁶³ The idea of

⁵² F. N. Ndubuisi and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights* (Dmodus Publishers, 2002) p. 181

⁵³ C. A. Odinkalu, *The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights* in V. Gauri and D. M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) p. 193.

⁵⁴ R. Phillips and R. H. Pittman, 'A Framework for Community and Economic Development' in R. Phillips and R. H. Pittman (eds.), *An Introduction to Community Development* (Routledge, 2009) p. 3.

⁵⁵ S. J. Lee and Y. Kim, 'Searching for the Meaning of Community Well-being' in Lee and others, *op. cit.*, p. 13.

⁵⁶ De Wet Schutte 'Community Development and Community Participation: A Conceptual Revisit' Working Paper · September 2016 DOI: 10.13140/RG.2.2.22723.81443; available online at: <https://www.researchgate.net/publication/307560360>; accessed on 27th March, 2023.

⁵⁷ *ibid*

⁵⁸ De Wet Schutte, *op cit*.

⁵⁹ R. Phillips and R. H. Pittman, *op. cit.*, 6. The word community in itself ordinarily means collectivism of action. A community is not just a collection of individuals; the individuals are part of something bigger, which has meaning for them and for others.

⁶⁰ Ojukwu, *op. cit.*, p.51.

⁶¹ De Wet Schutte, *op cit*.

⁶² Z. Bauman, *Community: Seeking Safety in an Insecure World* (Polity Press, 2001) p. 89.

⁶³ Z. Bauman, *op cit*.

membership as an imperative element of community is germane. This is because membership induces a feeling or sense of belonging, which is a *sine-qua-non* for community. People tend to be influenced by this idea of 'belonging' that is, belonging; of a place where one is recognized and included, in their attitudes towards the community.⁶⁴ The idea of membership is particularly important in appreciating the symbolic significance of community in contemporary society. Arthur illustrates that the aim of community development is to initiate, give direction to and sustain community action. Community action is usually in response to real problems, such as perceived by the community members, about which there is genuine concern. Ideally, these problems are systematically analysed so that realizable goals may be elucidated with the aid of the appropriate strategies for attaining them.⁶⁵

3. Theoretical Framework

Realist Theory of Law

Realism is an ultra-positivist approach to law which dramatically turns away from pure analysis of legal concepts which it decries with as much vehemence and revolutionary acrimony as was done by the positivists when they first denounced natural law philosophy.⁶⁶ Realism was one of the earliest reactions to the logical and formalist excesses of legal positivism which posit that an instrument is law once it has received the official seal of the sovereign, irrespective of whether it has been enforced, or is in fact enforceable.⁶⁷ It veers off mainstream positivism to ask when law actually becomes law - when it is made by Parliament or when it is confirmed by the court.⁶⁸ Realism, in the mind of moderate realists, has been depicted by Llewellyn thus: 'One lifts an eye canny and skeptical as to whether judicial behaviour is in fact what the... rule purports (implicitly) to state... one seeks the real practice on the subject, by study of how the cases do in fact eventuate.'⁶⁹ In other words, the view of very many realists is that one can only ascertain the real rules which judges apply by looking at what the judges do (i.e. the results of their decisions) rather than to what they claim to do.⁷⁰ Oliver Wendell Holmes, the chief postulant of Realism, argued that what is called 'law' is not a texture of subsisting rules from statute books, but a mere technique for predicting what decisions courts of law are likely to make in particular cases.⁷¹ He describes his conception of law as follows:

Take the fundamental question. What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for axioms and deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁷²

In a similar vein, Gray asserts that law is only what the judges decide. Everything else, including statutes, are only 'sources of law' until they have been interpreted by a court.⁷³ This is apt in relation to Llewellyn who is of the conviction that what the judges do about disputes is the law itself.⁷⁴

The Realist approach has been applied in a number of Nigerian cases especially where popular perceptions of the position of law have been interpreted differently following judicial contest. For instance, in the case of *Awolowo v. Minister of Internal Affairs*,⁷⁵ the plaintiff had hired a British lawyer to handle his court case in Nigeria. But the lawyer was turned back at the airport as *persona non grata* by the government officials. The plaintiff contended that refusing his counsel entry into Nigeria amounted to a breach of the former's constitutional right to a legal practitioner of his choice. However, the court held that being a legal practitioner does not alone qualify any person from anywhere; the intent of the law is that such lawyer has to be one who is resident or has the right of ingress and egress in Nigeria. Also, in the case of *Attorney-General of the Federation v. Attorney-General, Abia State & 35 Ors (No. 2)*,⁷⁶ judicial interpretation differed from the public perception of law. Here, the Federal Government had sued the 36 States of the Nigerian federation to determine the seaward boundary of the littoral States for purposes of determining or calculating (on-shore/off-shore) revenue allocation especially as it concerned the principle of derivation for those littoral States. The popular opinion and practice before this case was that the littoral States extended to the farthest seaward boundary of Nigeria such that all oil mining and exploration activities up to the territorial waters created derivation opportunities for the littoral States as the Nigerian Territorial Waters was believed to be part of the littoral States. However, the Supreme Court, in its wisdom, declared that the littoral States were not that extensive and therefore not entitled to derivation from revenue/resources beyond low water mark - their seaward land boundaries.

Utilitarian Theory

The utilitarian school of jurisprudence revolved around the works of Jeremy Bentham, the 'father of English jurisprudence'⁷⁷ He prescribed that the function of laws should be the promotion of 'the greatest happiness for the greatest number.'⁷⁸ Bentham

⁶⁴J. Ife, *Community Development: Community-Based Alternatives in an Age of Globalization*, 2nd edn, (Pearson Education Publishers, 2002).

⁶⁵V. Arthur, 'Community Development: Whither Bound?' [1970] *Community Development Journal*, vol. 5, p. 85.

⁶⁶Adaramola, *op. cit.*, p. 275.

⁶⁷Ngwakwe, *op. cit.*, p. 50.

⁶⁸Ngwakwe and Agbazuere, *op. cit.*, p. 7.

⁶⁹K. N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' [1930] *Columbia Law Review*, vol.30, p. 450.

⁷⁰Elegido, *op. cit.*, p. 96.

⁷¹Ngwakwe, *loc. cit.*

⁷²O. W. Holmes, 'The Path of the Law' [1887] *Harvard Law Review*, vol. 10, p. 457.

⁷³J. C. Gray, *The Nature and Sources of Law* 2nd ed. (The Macmillan Company, 1921) p. 84.

⁷⁴K. N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 2008) 3.

⁷⁵(1966) 1 All NLR, 178.

⁷⁶(2002) 6NWLR (pt. 764), 542.

⁷⁷Adaramola, *op. cit.*, p. 254.

⁷⁸Elegido, *op. cit.*, p. 43.

based his theory of utility on the premise that men are self-interested and they always act to gain pleasure and pain or mischief. According to him, this is invariably so even though the self-interest may be disguised as altruism or some similar selfless ideal. As pleasure, Bentham includes physical pleasures of all sorts - knowledge, riches, power, friendship, and good reputation. Pain includes deprivation, enmity, bad reputation, malevolence, fear, etc. According to him, all institutions devised by men are supposed to promote happiness and avoid pain and may be tested to see whether they succeed in performing this function or not. This test is readily provided in the principle of utility which he defines as, 'that principle which approves or disapproves of any action according to the tendency which it appears to have to increase or diminish the happiness of the individual affected by it.'⁷⁹ The task of laws should be to bring about the maximum happiness of each individual, for the happiness of each will result in the happiness of all.⁸⁰ There is in this postulation the age-old problem of reconciling interests of the individual with those of the community, but it amounts almost to a contradiction to try to harness a selfish pursuit of pleasure and avoidance of pain to the unselfish service of the common weal. One way of avoiding contradiction would be to suppose that individual pleasure-pain motivations, by and large, would not run counter to those of the community, but this is difficult, nay, impossible.⁸¹ For example, in the case of *Agbai v. Okogbue*,⁸² the (personal) right to freedom of religion of the respondent conflicted with the communal right to development. The Court held that the respondent had a right to choose not to join in the community development efforts due to his religious doctrines.

Communitarian Theory

Communitarianism emphasises the bond between the individual and the community. Its overriding philosophy dovetails on the belief that a person's social identity and personality are largely shaped by matrix of relationships in the community. *Communitarianism* deemphasises individualism and has been conceived, in a wider philosophical sense, as a network of interactions among a community of people in a given geographical area, or among a community who have common interest or history.⁸³ *Communitarianism* usually opposes extreme individualism and disagrees with extreme *laissez-faire* policies that neglect the stability of the overall community. Emile Durkheim underlines the integrating role of social values and the web of relations between the individual and society.⁸⁴ Durkheim and Tönnies caution that in a highly atomized modern societies wherein individuals had gained their freedom, jettisoned communal principles and lost their social quays, there exists higher risks of anomie and alienation.⁸⁵ This risk of anomie and alienation could increase the rate of suicide in a given society. Schalkwyk, *et al*, posit that 'The suicide rate of a population varies inversely with the stability and durability of the social relationships within that population'⁸⁶ This accounts for the communitarians' criticism of John Rawls' political liberalism and the image Rawls paints of human as atomistic individuals. Communitarians insist that when individuals are well-integrated into communities, they reason better and act in more responsible manners in comparable to isolated individuals. They conclude that if social pressure to conform rises to high levels, it will undermine the individual self.⁸⁷

Liberalists have however argued that the term 'community' is too vague or cannot be defined. In addressing this critique, proponents of *communitarianism*⁸⁸ note that there is nothing vague in conceiving community. Etzioni outline that a community imbricates two characteristics: one, a web of affect-laden relationships among a group of individuals, relationships that often crisscross and reinforce one another; second, a measure of commitment to a set of shared values, norms, meanings, and a shared history and identity - in short, a particular culture.⁸⁹ Pearson also proposes that:

To earn the appellation 'community', it seems to me, groups must be able to exert moral suasion and extract a measure of compliance from their members. That is, communities are necessarily, indeed, by definition, coercive as well as moral, threatening their members with the stick of sanctions if they stray, offering them the carrot of certainty and stability if they don't.⁹⁰

African communitarianism was typified in the Ujama principle practiced in Tanzania from the 1950s into the 1960s propounded in the writings⁹¹ and teachings of Julius Nyerere, then President of Tanzania. *Ujamaa* emphasized brotherhood, a form of African socialism, a broad blend of socialist principles with communitarian ideals of African societies.⁹² *Ujamaa*

⁷⁹ R. Harrison (ed.), *Bentham: A Fragment on Government* (Cambridge University Press, 1988) p. 5.

⁸⁰ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, cited in Dias, *op. cit.*, p. 427.

⁸¹ Even the law acknowledges that, sometimes, there would be a conflict between individual interest and public interest and, in its wisdom, declared that the latter prevail over the former as can be seen in s. 45(1), Constitution of the Federal Republic of Nigeria 1999.

⁸² (1991)7NWL R (pt. 204) 391 SC.

⁸³ S. Avineri and A. De-Shalit (eds.), *Communitarianism and Individualism* (Oxford University Press, 1992) p. 4.

⁸⁴ M. S. Cladis, *A Communitarian Defence of Liberalism: Emile Durkheim and Contemporary Social Theory* (Stanford University Press, 1994) p. 43.

⁸⁵ Ibid; F. Tönnies, *Community and Society* (East Lansing, 1957) p. 186

⁸⁶ Johanna Schalkwyk, Charles Lazer and Elaine Cumming 'Another Look at Status Integration and Suicide' *Social Forces* Vol. 57, No. 4 (1979), pp. 1063-1080.

⁸⁷ J. Rawls, *A Theory of Justice*, rev. edn. (The Belknap Press of Harvard University, 1999) pp. 3-4.

⁸⁸ For instance, Amitai Etzioni, one of the foremost American communitarianist, was vocal in this response. See J. Beckert and M. Zafirovski (eds.), *International Encyclopaedia of Economic Sociology* (Routledge, 2006) p. 81

⁸⁹ J. Beckert and M. Zafirovski (eds.), *International Encyclopaedia of Economic Sociology* (Routledge, 2006) p. 81.

⁹⁰ J. Beckert and M. Zafirovski (eds.), *op. cit.*

⁹¹ They include: J. K. Nyerere, 'Ujamaa - The Basis of African Socialism' in J. K. Nyerere (ed.), *Ujamaa: Essays on Socialism* (Oxford University Press, 1968) 6-7; J. K. Nyerere, 'Socialism and Rural Development' p. 120.

⁹² Olusegun Gbadegesin, 'Ujamaa: Julius Nyerere on the Meaning of Human Existence' (Howard University, Washington, D.C., U.S.A) available online at <https://www.utpjournals.press/doi/pdf/10.3138/uram.17.1.50>; accessed on 18th April, 2023 by 543am

pouched ideas about self-reliance, total participation,⁹³ communal labour, communal land ownership and management, and nationalization of the public sector and public services.⁹⁴ This is akin to the Igbo notion and ideals of communal living.⁹⁵

4. The Nigerian Case of *Agbai v Okogbue*

*Agbai & 5 Ors v Okogbue*⁹⁶ is considered a *locus classicus* when the issue of the clash between human rights and communally based social development efforts is raised. In the case, the plaintiff/respondent was a tailor by trade. The appellants and the respondent were indigenes of Amankalu Alayi village resident in Aba.⁹⁷ The respondent was grouped under the Umunkalu age grade which had undertaken to build a health centre for the village and consequently levied its members for the project. The respondent refused or neglected to pay up his levy of N109.00. The defendants/appellants seized and carried away the respondent's butterfly sewing machine. The appellants contended that the grouping of persons into age grade, the age grade levying its members' financial contributions for their development project and compulsory membership of an age grade was a custom of their people. The plaintiff/respondent was therefore bound to pay the levy. The respondent, on the other hand, contended that the levy ordered by the Umunkalu age group of Amankalu Alayi is not binding on him because he did not want to associate with the group. He admitted that he was grouped under the Umunkalu age grade as has been their custom but that he refused to join the association of the age group. He contended that he was not a member of this new age group which decided to build a health centre for the community. His refusal to associate with the group was based on his religious principles. Not being a member of the said group, he was not subject to the levy of the group. The appellants therefore had no business seizing his sewing machine in order to force him to pay their levy.

The plaintiff/respondent commenced the suit in the Chief Magistrate Court, Aba, on 10 August 1978, claiming against the defendants/appellants, a sum of N2000. The learned Chief Magistrate held that the custom which compelled every person to join an age group whether he likes it or not did not exist. He further held that 'a custom which deprives a citizen a free choice of association runs contrary to Section 37 of the Constitution of the Federal Republic of Nigeria and therefore cannot acquire the force of law'. The learned Chief Magistrate found as a fact, that the respondent was not a member of the Umunkalu age group of the appellants and was not therefore bound by the decisions of the group. He ordered the return of the respondent's sewing machine or its value of N115. He further awarded the respondent the special damages of N740 and general damages of N200, with costs assessed and fixed at N100.

The appellants appeal to the High Court. The High Court reversed the decision of the trial court and held, *inter alia*, that:

The plaintiff/respondent said in his evidence that on religious grounds he has not joined the age grade into which he was grouped. He can certainly keep his religion to himself and nobody is forcing him to abandon his sect. ... He himself has not said that his religious beliefs also forbid him from taking part in community development programmes. In fact, he did show that he takes part in community development programmes. Having admitted that community development projects are usually embarked upon by age groups, and that he is grouped in *Umunkalu* age group which he now knows is building a Health Centre for the community and also admits that people have to contribute in cash towards the project and his own share is ₦109.00 and having also admitted that all adults take part in community development projects, how can he now avoid rendering this service to his community?... [T]he plaintiff/respondent cannot escape his civic obligation to his people and can be compelled to contribute his own quota for community development project. The construction of a Health Centre for the community is for the well being of the whole community and is a project which should be encouraged....He cannot run away from his civic duty...⁹⁸

The Court of Appeal allowed the appeal, set aside the decision of the High Court and reaffirmed the trial court's decision. On further appeal by the Defendant/Respondent to the Supreme Court, the Supreme Court, dismissed the appeal and held, *inter alia*, that the plaintiff/respondent had the right to freedom of religion and the right to or not to associate with any group of his choice respectively protected under sections 24(1)⁹⁹ and 26(1)¹⁰⁰ of the then 1963 Constitution.¹⁰¹ Delivering the lead judgment, Per Nwokedi, JSC reasoned as follows:

...[T]he plaintiff/respondent was not opposed to community development and levies consequent thereon.... His contention was that if the community embarked on a project, he was prepared and willing to make his own contribution. He however was not disposed to accept the authority of the Umunkalu age group association (which he refused to join for religious reasons) compulsory levying contributions from him.... The village centre was not a requisition of the community. Umunkalu age grouped[*sic*] association offered to build one for the community through contributions by its members only and not by every member of the community. The project would benefit the community but it was not undertaken by the community, nor was there evidence that it was requisitioned by the community. It was a gratuitous offer.... These rights have been enshrined in a legislation, that is, the Constitution, which enjoys superiority over local custom. Freedom of association and of religion are enshrined in sections 21(1) and 36(1) of the 1963 Constitution as amended respectively which is applicable in this instance.¹⁰²

⁹³ This is also known as Nation building and Self-help.

⁹⁴ *Ujamaa* as an idea not only had profound impact on Tanzania's economic and development policies in the late 1960s, but also had a wider continental impact in contributing to and shaping a distinctive form of African socialism in the 1960s and 1970s. See G. Arrighi and J. S. Paul, 'Socialism and Economic Development in Tropical Africa' [1968] *Journal of Modern African Studies*, Vol. 6, No. 2, p. 168.

⁹⁵ The Igbo is an ethnic group inhabiting the Southeastern part of Nigeria. For a detailed discussion on the socio-cultural background and politics of this ethnic group, see M. M. green, *Igbo Village Affairs, 1st edn* (London: Routledge, 1964).

⁹⁶ (1991) 1NWLR (pt. 204) 391 at 444.

⁹⁷ Amankalu Alayi is a village tucked away somewhere in Imo State and now in the area recently constituted as Abia State of Nigeria.

⁹⁸ *Agbai v. Okogbue (supra)* pp. 406-407.

⁹⁹ Now S. 38(1).

¹⁰⁰ Now S. 40(1).

¹⁰¹ Now 1999 Constitution (as amended).

¹⁰² *Agbai v. Okogbue (supra)* p. 415.

5. The Construction in *Agbai v. Okagbue* and Problematics of Engineering Social Development in Commonwealth Africa

We have highlighted in this paper the nature of African societies and the dominant roles of communitarianism in African socio-cultural, political and economic scenes. Communitarianism evinces the rule of law which encapsulates human rights and civic obligations of citizens. Communitarian principle defined and shaped personal aspirations and role assignment and formed the nuances of everyday life among Africans.¹⁰³ In a typical Igbo society, role assignment finds perfection in the age grade system - the grouping of individuals based on their approximate year of birth. Grouping people into age grade is therefore a rule rather than an exception. It is more than a culture. It is a well known doctrine of customary law which is as old as the Igbo society itself. As a very significant part of Igbo society, the age grade performs sundry obligations including military, police, adjudicatory, sheriff roles, etc, depending on the class and age of the group. They also play imperative part in community building and development through articulation of physical or financial exertions or both in engineering social development through building of new roads, maintenance of existing roads, policing the community, waging war against erring community, cleaning all the community paths, playgrounds, markets, streams and ponds, and later, schools.¹⁰⁴

During the colonial era, the age grade system impressed the colonial officials, thus, they utilized the communal efforts of age grades to drive and execute most of the developmental projects of the colonial government, such as land clearing for the establishment of schools, churches, road building and maintenance, health and recreation centres, etc.¹⁰⁵ It is this notion of African, especially Igbo communitarian principle perfected through role assignment to persons of different age brackets, who were duty-bound to perform their assigned roles and where roles are not adequately assigned, to develop some roles for execution by themselves for the overall welfare of the community, that influenced the High court decision in *Agbai v. Okagbue* thus:

...Having admitted that community development projects are usually embarked upon by age groups, and that he is grouped in *Umunkalu* age group which he now knows is building a Health Centre for the community and also admits that people have to contribute in cash towards the project and his own share is ₦109.00 and having also admitted that all adults take part in community development projects, how can he now avoid rendering this service to his community?... [T]he plaintiff/respondent cannot escape his civic obligation to his people and can be compelled to contribute his own quota for community development project. The construction of a Health Centre for the community is for the well being of the whole community and is a project which should be encouraged.... He cannot run away from his civic duty. The custom of his people is to seize and keep any goods of a person who fails to pay his own share of such project until the person pays. This is a custom which is in vogue through [*sic*] Ibo land and I do not see anything in it which is repugnant to natural justice, equity and good conscience nor does it offend any section of the Constitution of the Federal Republic of Nigeria 1979.¹⁰⁶

Conversely, agitations by citizens of different states to be treated humanely led to revolutions and concomitant codification of certain prerogatives as fundamental to man. With the colonization and consequent transposition of European law in African colonies, the notion of codified rights was also brought to Africa.¹⁰⁷ These rights, at least those recognized as enforceable rights by most constitutions in Africa, are subjects of positive law. Codification of human rights is one of the legacies Africa got from both colonial and international laws. At municipal level however, there is no clear rifts between human rights and community social development efforts. It is purely a matter of construction of constitutional provision.

Introducing rift between human rights and community development efforts by way of construction and judicial precedent unfolds dangers for Africa. For one, African government over the years is, in most cases, bereft of the needed resources to engineer significant infrastructural development. Where the resources exist, the government is corrupt and defies responsibilities imbued on them by the constitution. Two, patriotic leadership is in the dearth in Africa. That is, the type of legitimate and people-oriented leadership that could harness human resources and channel them towards achieving significant development in these countries. This been the case, communities are mostly in lack of the needed life changing infrastructure. The result is high mortality, poor living condition, underdevelopment, poor hygiene, poor storage system, bad road network, persistent epidemic, rural – urban drift, etc. in order to assuage the plights of the rural inhabitants, groups, including professional and social clubs usually take up roles that will engender development in their respective communities without waiting endlessly for the government. For instance, recovery processes in post civil war Igbo communities in terms of rebuilding educational, health, market and other social infrastructures was championed by age grades, social and professional clubs and philanthropic individuals, the most notable among these was the People's Club of Nigeria. As noted earlier, these basic social amenities such as pliable roads, equipped hospitals, potable water, thriving markets, schools, etc, which these associations strive to provide are obviously indispensable since they offer key facilities for the realization of the foremost human right - the right to life and dignity of the human person.¹⁰⁸

¹⁰³ There was communal labour in building houses, farming, environmental cleanliness, road building and maintenance, etc. There was the use of communal powers even in avenging wrongs done to each member of a community by another. See C. A. Achebe, *The Arrow of God* (London: Heinemann, 1964)pp. 10 -30, chapter 3.

¹⁰⁴ C. A. Achebe, loc cit.

¹⁰⁵ C. A. Achebe, op cit.

¹⁰⁶ *Agbai v. Okagbue* (*supra*) pp. 406-407.

¹⁰⁷ This also includes the fissure between fundamental rights and socio-economic rights. Though most of these rights are codified and entrenched in the constitutions of most modern states, they are classified as justiciable and non justiciable rights. In Africa, this fissure between fundamental and socio-economic rights never existed prior to colonialism. In Hohfeldian sense, duties enhancing the enjoyment of both rights were conferred on the natives. Even during inter tribal wars, there were rules of engagement which spelled out humanitarian principles guiding warfare. For example, women, children, the weak and those who surrendered by raising palm fronds are not killed, etc.

¹⁰⁸ *Malawi African Association and Ors. v. Mauritania* (2000) AHRLR, 149.

The English Law received into most commonwealth African colonies did not abolish customary law. In fact, section 45 of the Interpretation Act 1964 which received English laws in Nigeria did not abolish customary law. In fact, S. 16 (1) of the Evidence Act¹⁰⁹ provides that '[A] custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence' by virtue of S. 18 (3), customs could be relied in any judicial proceeding where such custom is not contrary to public policy, is in accordance with natural justice, equity and good conscience. Customary law or customs which assigns roles to individuals as civic obligations that have to be rendered or discharged for the advancement of their communities cannot be against public policy or natural justice, equity and good conscience. Where situations arises that some individuals who are supposed to contribute their own human and material resources for the advancement of their community declines participation for reasons based on their religious doctrines, personal beliefs, or simply lack of enthusiasm for communal affairs or other sundry grounds of human rights guaranteed by the Nigerian Constitution¹¹⁰ and it is trite that this law is supreme and prevails over every other law or custom in Nigeria;¹¹¹ section 45 of the same constitution has to be invoked as a litmus test for gauging the propriety or otherwise of such claims. Claims of rights which enables individuals to dodge or evade civic obligations, no matter at what level, should not be upheld by the courts.

In *Nkpa v. Nkume*,¹¹² the plaintiff/appellant dragged the defendants to court for trying to make his wife join an association of women in their village and partake in their community development efforts and village sanitation exercise. He claimed that her religious beliefs forbade her to do any of such things. The women association tried all civil approaches of persuasion and other forms of gentle cajoling and finally resorted to exacting financial equivalent through dues, contributions and penalties from her totaling Forty Naira (₦40.00). The trial court discountenanced their claim and held as follows:

All the levies which the plaintiff objects to are definitely for the well being of his community. Will it be right to allow individuals to ruin development projects in their communities because of religious tenets? My answer is clearly in the negative. The plaintiff is allowed to practice whatever religion he professes but there must be something fundamentally wrong with a tenet which renders its adherents odious before the people.... There is evidence which I believe that levies are collected without discrimination. Some of the levies amount to no more than N5.00. That the plaintiff is able to institute this action, paying a summons fee of N533.00 shows that he is not at all indigent.... So he has come to court on a matter of principle based on his professed religious beliefs. Such intransigence amounts to foolhardiness and stupid bigotry.... The payment of levies for development projects is a civic obligation and a good citizen does not wait until he is forced to perform such obligation.¹¹³

On appeal, the Court of Appeal allowed the appeal, reversed the High Court and held that the plaintiff/appellant had the constitutionally protected rights to freedom of religion and association. According to Pats-Acholonu, JCA (as he then was):

Time was when the law governing the native community was force of custom good or bad and whether repugnant or not. Now in the 21st century we are governed by a living law the Constitution fashioned after the Constitutions of older democracies. No one can force or coerce any one to join a club, society or group that he does not intend or wish to be a member. It is an affront and infraction of his constitutional right to use old age custom that has now been relegated to moribundity to make one acquiesce or become a member to a body that he or she despises. It is atrophy.¹¹⁴

At this point, it is very ripe for us to look at the provision of section 45 of the Nigeria constitution since these two decisions were reached based on chapter IV of the constitution.

- S. 45(1) - Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society:
- (a) in the interest of defence, public safety, public order, public morality or public health; or
 - (b) for the purpose of protecting the rights and freedom or other persons.

From the foregoing provision, certain rights guaranteed under the constitution of Nigeria are derogable in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting other rights and freedom or for the purpose of protecting other persons. Such derogable rights include all other rights apart from those guaranteed under sections 33 – 36. Rights to freedom of religion and of association fall under the derogable rights and the Constitution. Section 45 of the Nigeria constitution places public interest above individual interest. Community social development efforts serve public interest and guarantee the enjoyment of other rights. It therefore falls squarely on the protections of S.45 and ought to have received same from the courts. We therefore humbly submit that due consideration ought to be given to the interest of the community above individual interest. Additionally, section 34(2)(e)(i) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) excludes normal communal and other civic obligations for the well-being of the community from the right to dignity of the human person. This imports a constitutional avowal for communal labour which is capable of

¹⁰⁹ Cap E14 Laws of the Federation of Nigeria 2011.

¹¹⁰ S. 40, CFRN 1999 provides for freedom to (or not to) join any association of one's choice.

¹¹¹ *Ibid*, S. 1(1) & (3).

¹¹²(2001) 6NWLR (pt. 710) 543 CA. The case of *Nkpa v. Nkume* (*supra*) is remarkable in more respects than one. In the first place, it was an appeal from the decision of the same Judge, Njiribeakor, J. (now retired), who had decided the case of *Agbai v. Okogbue* (*supra*) on its first appeal at the High Court. In the second place, the facts of *Nkpa's* case are almost on all fours with the facts of *Agbai's* case and the High Court Judge expressed the same views and decision in *Nkpa's* case as he had expressed earlier in *Agbai's* case. In the third place, Chief I. Tagbo Nwogu had appeared in *Agbai's* case as counsel for the plaintiff/respondent but in the present *Nkpa's* case, he appeared for the defendant/respondent and was urging the Court of Appeal on the very standpoint against which he had strenuously, industriously and very successfully argued before it and at the Supreme Court in *Agbai's* case - an act which the Court of Appeal in *Nkpa's* case deemed 'misleading' and not 'very honourable'. See *Nkpa v. Nkuma* (*supra*)

¹¹³ *Nkpa v. Nkama* (*supra*).

¹¹⁴ *Nkpa v. Nkama* (*supra*).

overriding conscientious objections based on freedom of thought, conscience and religion.¹¹⁵ This also ought to have influenced the courts' decisions in these cases.

6. Conclusion

Age grouping and other forms of traditional associations and clubs is laden with quintessential basis for harnessing proportionate physical and intellectual energy necessary for implementing communal civic obligations which are in turn imperative for social development at the communal level. People falling within the same age group are usually born within the same or approximate time frame and usually have an average uniform of physical and mental ability.¹¹⁶ The classification also provide avenue for effective integration of all member of the community. This gives a sense of belonging and fosters interaction and mobilization among members of the community. Community is not only about the collection of people, membership and participation play significant part and this naturally imposes certain rights and obligations.¹¹⁷ Thus, for the plaintiff/respondent in *Agbai's* and *Nkume's* cases to evade development projects embarked upon for the well being of the general community on grounds of religious beliefs is perplexing and antithetical to the ultimate goal of community development. The concept of self-help in community development entails members of the community appraising their local challenges with a view to providing solution to these challenges in the in the general interest of the public.¹¹⁸ It is this public interest that sections 34 and 45 of the constitution of Nigeria 1999 seek to protect.

Customary laws developed from time immemorial, are flexible but *non scripta*, The Learned Justice stated in *Agbai v. Okogbue* thus:

Customary laws were formulated from time immemorial. As our society advances, they are more removed from its pristine ecology. They meet situations which were inconceivable when they took root.... When however customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment.¹¹⁹

This statement is very true especially if a poser is thrown as to what the existing social environment was at the time on development and communal advancement vis-à-vis the responsiveness of government. Law generally grows and advances with the growth and advancement of the society. So has the level of communal labour changed from the pristine clearing and sweeping of village paths to the articulation of efforts towards executing more community advancing projects. Flux and dynamism are imperative driving forces of every society. Karibi-Whyte summarises this thus:

At the background always is the recognition that rules are made to serve men and not the converse. This is the reason for the struggle to formulate definite rules and at the same time to escape from earlier definite rules not in keeping with current sociological, political or economic conditions.¹²⁰

Therefore, as 'economic conditions change, social philosophies develop; an expanding society demands an expanding common law.'¹²¹ Kwame Nkrumah – the lion of African nationalism instructs that 'The law must fight its way forward in the general reconstruction of African action and thought, and help remold the generally distorted African picture in other fields of life....'¹²²

We submit that the constitution should be interpreted as a whole to achieve interpretive harmony and legal synthesis. To this effect, if the positions of sections 34 and 45 were taken into consideration in the two cases above, different results would possibly have been achieved. The two cases have introduced precedents in this area of law. Sadly, the precedents will form the bases for determining other cases falling for determination in this area. The *locus classicus* and the one following thereafter have, as we have shown in this paper, introduced anarchy in the area of community development efforts and community labour by upholding impetus to evade such civic responsibility. This is very deleterious and antithetical to rural development not orchestrated by the government because we cannot fold our hands and wait for the government to clear our village paths, repair our roads, prevent erosion from damaging our roads, provide water and repair damaged boreholes, build our community schools, town halls, markets, even churches are built with communal efforts, etc. If we all shun our responsibilities to the society, the society undoubtedly would collapse; and if the society collapses, it would definitely collapse with all of us.

¹¹⁵ E. S. Nwauche, 'Law, Religion and Human Rights in Nigeria' [2008] *African Human Rights Law Journal*, vol. 8, p. 589.

¹¹⁶ G. T. Basden, *Among the Ibos of Nigeria* (Seeley, Service & Co. Ltd., 1921) pp. 72, 80, 94-95.

¹¹⁷ Z. Bauman, *Community: Seeking Safety in an Insecure World* (Polity Press, 2001) p. 89.

¹¹⁸ O. B. Akpomovie, *op cit.*, p. 97.

¹¹⁹ *Agbai v. Okogbue* (supra), p. 417.

¹²⁰ A. G. Karibi-Whyte, 'The Tyranny of Judicial Precedent', Being a Paper Delivered during the Law Week of the Law Students' Society of the Faculty of Law, University of Calabar on 16th April, 1988, p. 6.

¹²¹ McCardie, J in *Prager v. Blatspiel, Stamp & Heacock Ltd.*, (1924) 1KB, 566.

¹²² K. Nkrumah 'Law in Africa' *Journal of African Law* Vol. 6 (1962) p 103.