The Futility of Suing the Government in Nigeria: Charting The Future of Human Rights of Litigants in Cases Against the Government

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Abstract

Access to justice is a fundamental right that is globally recognized. This right is multi-faceted and may be construed in specified contexts like women's right and access to justice; Children's rights and access to justice and some other persons that may be termed marginalized population and their respective access to justice. However, access to justice has been denied in most cases where private individuals have commenced lawsuits against the government. Fundamental rights to justice of litigants who have sought the court for justice against the government have always met a dead end. This may be due to certain political reasons. This attitude to cases against government is prominent in Nigeria. When the rights of a citizen have been breached by the government, it is almost a futility seeking redress in courts. The judge may not be disposed to giving judgment against the government for fear of being removed and where such government is given against the state, no step is taken further to enforce compliance with the judgment. Either ways, the litigant is disadvantaged and cannot enjoy the fruit of his legal tussle. This research examines the peculiarity of suing the government and the factors that inherently places the private individual litigant at a disadvantage. It however concludes that there is need to revisit ensuring access to justice in cases where the government is a Defendant or Respondent as the case may be.

Keywords: Human Rights, Government, Litigation, Access to Justice, Jurisprudence

1. Introduction

The government is a formidable institution; perhaps the most abstract just like a corporation and this very nature is one that may be explored in any lawsuit against the government. The persons who run the government are different from the offices that they occupy.

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There are circumstances when the persons may be personally liable for certain conduct regarding their public offices when investigated and found guilty. Such conduct may in most cases have to do with financial misappropriation. However, there are cases where the actions of public officers like Governors, Commissioners and Ministers of the Federal Republic of Nigeria are based on a policy, regulation or law. This means that any lawsuit arising from such actions will be an action against the government as an entity just like a company or a corporation. It is right in such cases that Plaintiffs who are private individuals have a challenge in accessing justice either through perversion of justice in court or lack of enforcement of judgment against the government. At this point the words of James A. Garden[1] becomes expedient; while he quotes the position of Justice Cardozo who said that 'what really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of good conscience.'

The ultimate end of the law ought to be justice. The reason for the 'ought' is because of the 'judge' factor which is a variable that changes from judge to judge and which ultimately affects perception of justice. Before justice is attained, it is a journey of transition from a judge to judicial reasoning before justice. The concept of justice is an indispensable issue particularly in man's socio-political milieu. It is an essential element requisite for a peaceful sustainability of a society. Its foundational nature remains intrinsic in man's existence. This utmost universal concept stands unique in the realization of happiness and social order.[2] Access to justice may be hindered also by the abstractness and the formidability of one of the parties which in this context defines the government. This research will not be wholesome without resort to 'precepts of jurisprudence' which Cardozo places as one of the obligations of a judge. In 2021, Civic Group and Socio-Economic Rights and Accountability Project (SERAP) sought publicly that the Buhari led Nigerian government should comply with judgments gotten from Economic Community of

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1 James A. Gardener, 'The Supreme Court and the Philosophy of Law' [1959] Vol. 5, Issue 2 Article 2

2 Solomon Kingsley Christoper et al, 'Legal Justice and a Quest for sustainable Development in Nigeria' (2014) Journal of Good Governance and Sustainable Development in Africa (JGGSDA), Vol. 2, No 2

West African States (ECOWAS) Court of Justice when the Court awarded the sum of ₦30,000 (Thirty Million Naira Only).[3] This cry was made publicly knowing that the government will do nothing about it. This kind of challenge happens to so many unreported cases. The inequality expressed in cases against the government is not peculiar to Nigeria. For example, An Nguyen discussed how the doctrine of laches has been invoked differently when it involves the government. The doctrine of Laches operates to limit private litigants if they fail to do certain acts by procedure within the time allocated for it; however, the government is exempted from the operation of the doctrine of laches.[4] The effect of this is that many private litigants are denied access to justice putting their fundamental rights at stake. Because of this challenge, many Nigerians whose rights have been wrongly breached by government owned agencies have given up those rights because seeking redress in court is a waste of their time and resources.

Access to justice is a fundamental right and it is important that justice is not denied where cases involving the government are concerned. The judges owe a duty of conscience and with consciousness of jurisprudence in cases where the government who appoints them is wrong and also to ensure that its judgment where given against the government are complied with. To be able to achieve this judges play major role. John Kleinig[5] gave a vivid perspective on judges' attitude to judicial decision making. The author of this work is of the strong position that judges make their determinations not in isolation but as part of an institution - the court system which is embedded within larger institutional frameworks such as the criminal justice system, the market system, the administrative system, and so on. Judges cannot be impervious to these larger frameworks, even though the demands of their immediate institutional framework will bear most directly upon them. This further suggests that it becomes a complex issue for a judge whose appointment was subject to the Executive government

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3 Sahara Reporters, New York Civic Group, SERAP Lists Six Court Judgments Disobeyed By Buhari-led Nigerian Government available at saharareporters.com/2021/12/08/civic-group-serap-lists-six-court-judgments-disobeyed-buhari-led-nigerian-government <accessed 9 August 2023>

4 An Nguyen, 'It's about Time: Reconsidering Whether Laches Should Lie against the Government' (2015) 2015 University of Illinois Law Review 2111

5 John Kleinig, *Ethics and Criminal Justice* (Cambridge University Press 1st ed. 2008)

to give judgment against it. There must be a way out and this is where this research seeks to chart the course of justice for future cases involving the government. It is however important to begin the discourse from understanding the nature and the impact of jurisprudence in ultimately safeguarding access to justice of private litigants against the government.

2. The Jurisprudence of Legal Rights

Rights are able to maintain their sanctity if they are duly enforced and a right can only be enforced through legal means which may appropriately be expressed in court proceedings. The term enforcement is here used in a wide sense to include the maintenance of a right or duty by any form of compulsory legal process, whether civil or criminal. There is a narrower use of the term, in which it includes only the case of civil proceedings. It is in this sense that we have already defined civil justice as being concerned with the enforcement of rights, and criminal justice as being concerned with the punishment of wrongs.[6] Salmond further divided legal rights into two: *Perfect rights* and *Imperfect rights*. A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognized by the law, but enforced.[7] From the postulation of Professor Salmond, a perfect right will necessitates a corresponding action on another who has a perfect duty owed. For example, under the Land Use Act 1978, the Governor of a State may on the basis of either 'public interests' or 'public purpose' revoke a Certificate of Occupancy by issuing a Notice of Revocation on the occupier.[8] The same law provides that adequate compensation must be given to the affected occupiers of the land depending on their losses.[9] However, there are several cases where the State has refused to compensate people whose certificate of occupancy was revoked;[10] in some other cases, notice of revocation was not given.[11] This means that the people have a perfect right under the law and the ultimate end of

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6 Dicey, Conflict of Laws (Sweet & Maxwell, 2000) p. 31, 2nd ed.
7 Salmond, Jurisprudence (The Ballantyne Press, London, 1913 4th ed.) 197
8 Section 28 Land Use Act 1978
9 Section 29 (1) and (4) Land Use Act 1978
10 Ben Ezeamalu, Lagos Govt. Appeals Court Judgment, Defends Demolition of Otodogbame available at https://www.premiumtimesng.com/regional/ssouth-west/235078-%E2%80%8Elagos-govt-appeals-court-judgment-defends-demolition-otodogbame.html?tztc=1 <accessed 18 August 2023>
11 Dicey, Conflict of Laws (Sweet & Maxwell, 2000) p. 31, 2nd ed.

enforcing such right is to mandate that a duty is performed by the government. In the words of Salmond, such perfect duty does not end in only recognition of such duty but must be enforced. Dicey puts:

> *A duty is enforceable when an action or other legal proceeding, civil or criminal, will lie for the breach of it, and when judgment will be executed against the defendant, if need be, through the physical force of the state. Enforceability is the general rule. In all ordinary cases, if the law will recognise a right at all, it will not stop short of the last remedy of physical compulsion against him on whom the correlative duty lies.*[12]

Where the physical force of the State can be used to enforce a duty upon which judgment has been given; how then can a force be used to execute a judgment where the defendant against who judgment has been given is the government? This context is not new, it has been aptly expressed in the doubts of Salmond that, 'there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form.'[13] This perfect form is what he referred to as 'enforcement' as described before. Conversely, an imperfect duty has also been ascribed several definitions. For example, many writers have described, an imperfect duty as one of such a nature that it is not fit for enforcement, but ought properly to be left to the free will of him whose duty it is.[14] Should a government's duty be categorized as perfect or imperfect? If it is perfect duty, why then are private litigants faced with the problem of enforcement? If it is an imperfect duty, do litigants have to clamour for enforcement since the duty is not compulsory anyways?

Since the jurisprudence of rights operates through correspondence, we may conversely examine if all rights are also perfect. Examples of imperfect rights are: claims already caught up

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12 Salmond, Jurisprudence (The Ballantyne Press, London, 1913 4th ed.) 197
13 Ibid
14 Dicey, Conflict of Laws (Sweet & Maxwell, 2000) p. 31, 2nd ed.

by statute of limitation; claims caught up by the doctrine of laches; cases brought before a court that lacks jurisdiction etc.[15] All these examples bothers on procedural defects and legal technicalities which means that no right can be an imperfect right when there is full compliance with legal procedure. These examples of imperfect rights are clear but what are the examples of perfect and imperfect duty. If a government withdraws the property rights of a person without following due procedure; does such a government owe a perfect duty or an imperfect duty? It is then necessary to consider the nature of rights of a State.

The Jurisprudence of Legal Rights against the State

Salmond presents a vivid doctrine on the rights against the State. He said that the rights against the State are no less than that same right against any other person.[16] A person may commence an action against the State just like he can commence an action against any other person. Salmond proceed to affirm that it is even possible to get judgment against the State by award of certain remedies in terms of money but there can be no enforcement of that judgment.[17] This issue of lack of enforcement ought to be revisited in philosophy. Can justice be said to have been done and completed when judgment given to one party cannot be enforced? Enforcement of judgment is a post-judgment procedure laid down in Judgement Enforcement Rules. This research asserts that enforcement of judgment forms part of the chain of substantial justice and where this is omitted, justice cannot be said to have been manifestly done. This position therefore means that judges are yet to dispense their duty of justice as long as they are oblivious to enforcement of judgment against the State.

In discussing the attitude of Nigerian courts to justice, in the case of *MTN Nigeria Communications Ltd v. Babayode*[18], the Court of Appeal in explaining the role of court in applying principles of substantial justice states that:

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15 Salmond, Jurisprudence (The Ballantyne Press, London, 1913 4th ed.) 198
16 Ibid 199
17 Ibid
18 (2014) LPELR-23520(CA)

> *The role of courts is to apply the principles of substantial justice according to law. The principles cannot be applied outside the law or in contravention of the law. A court of law will not be performing its role as an independent umpire if it bends backward to do justice to one of the other party. Justice, that very expensive commodity in the judicial process, should be evenly distributed between the parties… The Principle that substantial justice should not be allowed, where possible to overcome by procedural irregularity which could be cured by proper exercise of court's discretion was affirmed long ago…PER WEST JCA*[19]

Can justice be said to have been evenly distributed where a party cannot enjoy the fruit of his labour? If the court cannot hold the government in contempt ex facie curiae and has taken no steps in that direction, can that be justice? In the case of *Peoples Democratic Party v. Idaboh & Ors*[20] the Court explained in the following words:

> *I think that a Court has a duty to do justice in accordance with the law. In the administration of justice, a Court of law does not decide issues or matters on the basis of sentiments or sympathy. See Federal Republic of Nigeria v. Senator Adolphus N. Wabara (2013) 5 NWLR (Pt. 1347) 331 at 357 and Olu Ode Okpe v. Fan Milk PLC & Anor. (2017) 2 NWLR (Pt. 1549) 282 at 310, per I.T. Muhammad, JSC; where the Supreme Court stated, inter alia, that: ".... in the realm of law, sentiments or sympathy have no place. It is only law and law only that should take its course." In the earlier case of Mr. ImeImeUmanah Jnr. V. Nigeria Deposit Insurance Corporation (2016) 14 NWLR (Pt. 1533) 458 at 484, the Supreme Court, per Nweze, JSC stated as follows: ".....the law brooks neither sentiment nor*

[19] See also *Ekwere v. State* (1981) 9 S.C 3; *Dada v. Dosunmu* (2008) 18 NWLR (pt. 1010) 134

[20] (2017) LPELR-43404(CA)

> *empathy." In any case, what is the meaning of "interest of justice"? the answer to this question was answered by the Supreme Court in the case of Olu Ode Okpe v. Fan Milk PLC & Anor. (2017) 2 NWLR (Pt.1549) 282 at 311, per I.T. Muhammad, JSC where the noble Law Lord stated as follows: "Furthermore, interest of justice connotes such interest, aspirations and or attempts to achieve justice in a given case or situation. The whole goal is the achievement of justice. Justice is fair and proper administration of laws, whereas anything done in the interest of justice is done in pursuance of fairness to all the parties in a case without compromising the principles of the law and evidence under consideration which, as of right, entitle the successful party to judgment. That perhaps, is why they now say, that justice is a three-way-traffic. Justice to the plaintiff/appellant, justice to the defendant/respondent and justice to the Court itself. The last one of course, requires that parties to a legal tussle or their legal representatives should always come to Court with open mind, sincerity of purpose, diligent and coherent with unwavering confidence that the Court will at the end, deliver justice according to law." Therefore, where a Court is seised of any cause or matter, in order to be seen as having acted in the interest of justice, the case should be even-handedly decided in accordance with settled principles of law. Per ADUMEIN, J.C.A. (Pp. 22-24, Paras. E-E)*

The court seems to possess the right perspective concerning justice, but justice has been bent backward where the State is involved as a party. How do you describe a situation where a private professional was engaged to recover certain debt for a government and it was agreed that he shall be paid 10% of the amount recovered? This is a case of a written contract and while a sum in billions was

recovered, he was denied his agreed percentage. The professional sought legal redress and was given judgment against the State. The government refused to pay him and was denied his judgment benefit until he became old and wearied. This professional suffered health challenges at old age and needed money at this point would settle for 0.01% of the amount he is normally entitled to.[21] Is this justice? Would the court say, I have discharged my duty by giving you judgment, enforcement is up to you? This attitude then would drive us to query the ability of the judges to hold the government in contempt. This also means a query on the independence of the judiciary. The legal realists are concerned about the end of any judicial process which is justice. Justice or a just decision often requires judicial creativeness - the extension of legal categories and perhaps the creation of new categories of judicial relevance. If justice is to be served, new conditions of human life and new information about those conditions bearing on the quality of human life and the just distribution of goods and services require legal innovation and new interpretations and applications of established laws and principles.[22] There is a new for an improved ideology on enforcement of judgment against the State; this will help preserve the fundamental rights of private litigants against ordained breach of their rights by the State.

How then can we say, no one is above the law when the State proves to be above it and the court helps the State to stay above it? Salmond states that:

> *The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is. The rights of the subject against the state are therefore imperfect. They obtain legal recognition but no legal enforcement.*[23]

It is this traditional doctrine that needs to be revisited lest the society is ultimately robbed of their faith in the court. In the case of

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21 An unreported Case

22 Shuman, 'Judicial Legislation Or In What Way Is Relevance Relevant To Judicial Decision-Making'(1971).In Legal Reasoning: Proceedings Of The World Congress For Legal And Social Philosophy 390-91

23 Salmond, Jurisprudence (The Ballantyne Press, London, 1913 4th ed.) 199

Salisu & Ors v. Abubakar & Ors[24]the Nigerian Court stated emphatically that:

> *Now, the task before any Court in all disputes brought before it for adjudication is to ensure the doing of substantial justice to all the parties involved in the disputes. The theory of justice enjoins a Court of Law to hold an even balance between the parties as one sided justice will amount to injustice. It postulates that justice is three-way traffic – (i) justice for the plaintiff who is crying for redress of the alleged wrong to him; (ii) justice for the Defendant who is pleading that he should be heard and his defence considered before any order is made against him; and (iii) justice for the society at large whose social norms and psyche are certainly going to be adversely affected if it cannot be seen by the common but reasonable man that upon the facts as laid down, justice is in REAL and true sense of the word has been seen to have been done by the Court.*[25]*PER ABIRU*

The court holds the sword granted it by the Constitution to wield in justice against any party who comes before it for justice.[26] This research asserts that every right is perfect and the government owes a perfect duty and there is a need to be proactive in devising a mechanism for enforcement. The beginning of devising a workable mechanism is to have a basis in legal philosophy. Legal philosophy is important to advance the practice of law. For example, Legal Positivism is a philosophy that conceives of law as the command of the sovereign. Law is law because of *who* pronounces it, not *what* it commands. The question, "what is law" is asserted to be wholly distinct from that of "what *should* be the law." Judges have a legal

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24 (2014) LPELR-23075(CA)

25 See also *Okomu Oil Palm Ltd v. Okpame* (2007) 3 NWLR (pt. 1020) 71

26 Section 6 (a) & (b) Constitution of the Federal Republic of Nigeria 1999 (As amended): The judicial powers vested in accordance with the foregoing provisions of this section-**a.** shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law; b. shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person

duty to follow the law as it is. To a positivist, any moral duty to refuse to follow an unjust law that might exist is an extralegal affair.[27] Against this view, the proponents of the natural law position argue that this positivist definition of law puts the cart before the horse. The institution of Law, they argue, has a social function. While it is true that law oftentimes requires enforcement and that the proper source or sources of law must be determined if the institution of law is to fulfil its function, *what* the law requires is at least as important to this end as who decides on the law.[28] One of the omissions of the ideology of court proceedings is to believe that the impact of the judgment ends with the parties. Judges ought to bear in mind that each judgment reflects what people think of the law and a consistent behaviour in a particular way becomes an accepted ideology whether it is right or wrong. Hence, who decides the law ultimately determines the fate of justice and preservation of human rights.

Are there factors that affect enforcement of judgment against the State? How can the court participate actively in ensuring that its judgments are not ignored by the government? There is need to examine these factors to the end of suggesting ways to further ensure that rights of citizens who have taken the State to Court are not breached perpetually. There is a need to chart the course of the future for preserving human rights in cases involving the government.

3. Why Suing and Enforcement of Judgments against the State is Futile

Despite the philosophical categorization of rights against the State as being imperfect, this research believes that the philosophy allows for untamed breach of fundamental rights. The futility of suing the government in Nigeria may be explainable giving attention to the mode of appointment of judges which engenders the influence of politics on the judicial arm of government. Judges are public officials whose role are constitutionally created and also forms part of the tiers of government. Judges as officers that interpret the law

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[27] Randy E. Barnett, Why We Need Legal Philosophy, Foreword to the "Symposium on Law and Philosophy," (1985) 8 Harvard Journal Law & Public Policy 2

[28] Ibid

and officers who are constitutionally empowered to decide matters between persons and government[29] will undoubtedly have a close link with a political terrain that exists in their society.

In explaining the nexus between judges and politics, Rawls focuses on the idea of public reason and, in particular and how judges rely on public reason in hard cases involving constitutional essentials *(i.e.,* political rights and liberties) and matters of basic justice *(i.e.,* matters relating to the basic structure of society such as basic economic and social justice which are not covered by the constitution).[30] In *Political Liberalism,* Rawls argues that from two basic ideas (the idea of society as a fair system of cooperation and the idea of persons as free and equal) implicit in a democratic political culture, we can specify the conditions *(i.e.,* the original position-including its thick veil of ignorance) for coming to an agreement on a political conception of justice in a democratic society. Rawls claims that this thought experiment establishes this conception of justice as "freestanding" *(i.e.,* "political not metaphysical") in that it does not depend upon a comprehensive doctrine for its justification. However, Rawls argues that "an agreement on a political conception of justice is to no effect without a companion agreement on guidelines of public inquiry and rules for assessing evidence."[31] Rawls argues that his idea of public reason indicates what these guidelines and rules would entail in a democratic society of free and equal citizens. The "content of public reason" is formulated by a political conception of justice ("political values of public reason") which includes two parts and two values: (1) substantive principles of justice for the basic structure ("the values of political justice"), and (2) "guidelines of inquiry" including "principles of reasoning and rules of evidence in light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" ("the values of public reason"). With respect to judicial decision making, Rawls argues that both the deliberative process and the process of justification should rely solely on the political values of public

[29] Section 6 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)
[30] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 University of Chicago Law Review 765, 767.
[31] John Rawls, Political Liberalism (Columbia University Press New York 1993) 139

reason, which are independent of comprehensive religious, philosophical, or moral doctrines.'

For Rawls, the United States Supreme Court is the exemplar of public reason. In this respect, he further emphasizes that:

> *[t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason*.[32]

In Nigeria, judges have been believed to have strong political inclinations. This challenge is believed to be stemmed from the Constitutional basis of their appointment and removal which is subject to the powers of the Executive arm of government.[33] Hence, most of the times Judges are subjected to some pressure from the executive who threatens them if they do not behave in certain way. In the Nigerian political structure where party politics is dirty and humongous, judges who lack virtues of morality are often swayed by political interests. How do you enforce judgment against your employer? This is about the most salient issue but this further means that the judiciary is not independent and the structure of Nigeria's Federalism and democracy lacks reality.

This challenge of enforcement of judgment against government is not peculiar to Nigeria. For example, Mexico operates a Federal and democratic system just like Nigeria. Luna Ramos shared the situation where a private body sued the Mexican government over a breach of contract. The court has awarded certain sum against the Mexican government which the private body sought to enforce.[34] The Article 4 of the Federal Civil Procedures Code has

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32 Ibid at 236

33 See Section 230 -270 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)

34 Margarita Beatriz Luna Ramos, 'Suing the Sovereign in Mexico' (2003) 35 Geo Wash International L aw Review 738

provided that no execution mandate or attachment can be made against a Federal Public Administration Body. These bodies are also exempt from providing bails and guarantees demanded by the parties. The provision stems from the idea that the State is solvent and complies with its obligations.[35] It is rather strange that it is canonized that execution cannot be made against government body. The Ramos supports the fact that execution of verdict is part of the trial and it is expedient that judgments are executed irrespective of the parties involved.[36] How then can this be achieved? The inequality of treating parties before the court is often recorded when the government is a party. For example, in the United States the Court have traditionally refused to apply the doctrine of equitable estoppel against the government while it is invoked against other parties. Even though the Courts are divided over this issue, the basis on the application of the doctrine against the government is not consistent.[37] Bias towards the government as a party to a suit already defeats the purpose of justice and an outright disregard of fundamental rights to fair hearing. Justice Dahiru Musdapher[38] gave some important tests for the judiciary in the following words:

> *A society can operate under the rule of law only when laws are administered fairly; rationally; consistently; impartially and devoid of any improper influences that may be inconsistent with each of these objectives. Fairness requires a reasonable process of consideration; Rationality requires a reasoned relationship between the rights and duties and the outcome; Predictability requires a process by which the outcome is related to the original rights and duties; Consistency requires similar cases to lead to similar results and finally, Impartiality requires the decision maker to be indifferent to the outcome. Any form of improper influence or*

35 Ibid 739
36 Ibid 738
37 Deborah H. Eisen, 'Schweiker v. Hansen: Equitable Estoppel Against the Government' (1981-82) 67 Cornell Law Review 609
38 A former Chief Justice of Nigeria

> *incompetence, inefficiency, bias '"etc, distorts each of these objectives and weakens judicial efficiency.*[39]

Where a party either by law or practice is denied access to justice either by not being given a favourable judgment or lack of enforcement of judgment, it means that a party's right to justice, fair hearing has been breached. Despite the crusade for fairness and justice, factors that inhibit them persist and recently appointment of judges in Nigeria has been a phenomenon of great concern considering the political influence on it. How then can we begin to seek a reorder of the need to prioritize safeguarding human rights and justice in cases where a government is a party? While there is a huge focus on the role of judges in this matter, judges underutilize the power at their disposal to ensure justice. They possess the constitutional powers to make rules that guide their proceedings and in several provisions, they are granted discretionary powers to judge based on the peculiarities of the circumstances before them. In the case of *Mbas Motel Ltd v. Wema Bank Plc*[40], the Court states that

> *It is trite that the Rules of Court are handmaids to justice and were not designed to stultify justice. Therefore, the Rules of Court cannot circumscribe or delimit the discretionary powers of the Court to grant or make just and fair orders where the circumstances so require. Per Abiru JCA*

The wordings of the obiter of the learned justice prove that even the rules or practice and procedure cannot delimit or guide the discretionary powers of the court but the court is advised to adhere to what is fair and just in the instance. However, to create a balance in the discretionary powers that judges possess, in the case of *COP v Agholor*[41] on the issue of discretionary powers of the court, the court state that:

> *It's a trite principle, that Courts as the custodian of the Constitution, nay the rule of law, are imbued with sacrosanct and far-reaching fundamental*

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39 Ibid
40 (2013) LPELR-20136(CA)
41 (2014) LPELR-23212(CA)

> *powers to preserve, interpret and uphold the Constitution and the laws made pursuant thereto, as maybe enacted by the legislature, Federal or State… . Afortiori, the principle has equally been well settled, to the effect that – discretionary powers of the court are bound by rules and principles of law and not arbitrary capricious or unrestrained emotions. Judicial discretion implies that a court must act according to rules, reason and justice. The court in the exercise of its discretionary powers must look at the materials placed before it by the parties and the effect such orders prayed for would have on the eventual disposal of the matter…Per Ogakwu JCA*

However, we understand that judges find it difficult to carry out their constitutionally conferred powers or powers given to them by Rules of court in cases where the government are parties. Hence, we see instances just like the ones complained about by SERAP, Civic Groups who are seeking to enforce certain judgment sum against the government. The media has become a tool to seek justice. Assuming that judgment given by the court is sought to be enforced against a State Government in accordance with the Sheriffs and Civil Processes Act, the Court officials who will execute these judgments are civil servants who are paid by the government. Logic demands that it is futile to think justice in circumstance as this.

4. Safeguarding Human Rights in Cases against the State

There is a difference between legal basis and philosophical basis. It is legally basic that parties are equal and no party ought to be treated differently before the court. It does not matter whether the government is a party or not. On the other hand, the philosophical basis of the futility of enforcing a judgment against the state anchors on the fact that the right against the State are imperfect. Salmond explains that the strength of the law is not more than the strength of

the State and so it cannot be invoked against it.[42] This means that there is ideological conflict between law and philosophy. This research believes that human rights ought not to be sacrificed on the altar of an ideology that slaughters it. The written law has its own philosophy and this philosophy is equality. To this end, a case has to be made for the law.

In Mexico, a government that refuse to comply with judgment is faced with a number of disadvantages. First is that the party seeking to enforce judgment would seek to affect the freedom of the government or its agencies that are involved. Second, where the judgment has to do with payment of money, the other party seeking enforcement may apply to the court to deduct such amounts from the budget of the said government agency after requesting authorization from the Secretary of the Treasury and Public Credit.[43] Ramos was of the opinion that these two mechanisms have operated satisfactorily in Mexico. However, can these mechanisms be possibly applicable in the context of Nigeria's political terrain? How do you want to restrict the freedom of a government who does not need the votes of its citizens to win an election?[44] Aside the challenge of legitimacy that surrounds the government in Nigeria, there are certain legal procedures that by virtue of a legal requirement already inhibits justice. One of such procedure is what is called 'garnishee proceedings'. It is a legal requirement in garnishee proceedings that any enforcement of monetary judgment against the government and its accounts cannot be executed unless the Attorney General of the Federation approves the process. The said Attorney General by the Constitution of the Federal Republic of Nigeria is appointed by the

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42 Salmond, Jurisprudence (The Ballantyne Press, London, 1913 4th ed.) 199

43 Margarita Beatriz Luna Ramos, 'Suing the Sovereign in Mexico' (2003) 35 George Washington International Law Review 739

44 There has been an erstwhile agitation that the Constitution of the Federal Republic of Nigeria 1999 be amended in view of its provisions which allows a easy way for corrupt public officers to have their way. A critical examination of the provisions of the law that establishes the court and their mode of appointment calls for a review. Judicial autonomy has been hampered by the Executive involvement in the appointment of judges in Nigeria. Section 230-270 of the 1999 Constitution of the Federal Republic of Nigeria established the court and gave the Executives the power of Appointment. In a country where the rule of law is subjugated to the whims and caprices of the Executive, where law enforcement agents are executive stooges, the judges are threatened of dismissal if they rule against the government in any matter. The Attorneys General of the States are by the Constitution political appointees and also the Chief Law Officer of the State. By virtue of Section 174 the Attorneys General can stop the hearing of a criminal matter without giving any reason. A combined understanding of the legal terrain in Nigeria is a full proof of a society largely influenced by personal factors. Hence, judges especially are influenced by political factors in election petition cases and this may be reasons why the substantive issues are left unresolved and this serves a precedent until such ideology is reversed by progressives.

Executive and he also doubles as the Minister of Justice. The doubts of Salmond come to play here that it is a dream to the other party to believe that the Attorney General will approve that judgment be enforced against him. On the second approach adopted in Mexico, it is largely an estranged desire for a Nigerian to think he can have his judgment sum enforced by dipping his hands into the budget of the government. If these mechanisms have worked in Mexico, the possible postulations of foreigners or academics to this is that the government allows for legitimacy and its judiciary would not fold arms watching their orders disobeyed with recklessness by the government. This further means that an internal search needs to be done in order to be able to design a suitable mechanism that will enable the sustainability of the rights of litigants in cases against the government.

Mode of Appointment of Judges and Requisite Constitutional Amendments

The beginning of safeguarding the future of human rights in cases against the government is the need to revisit the influence of the executive arm of government on the judiciary. Also, there is a need to amend criteria for appointment of judges to reflect requirements that pertains to the life of the person that is to be appointed a judge. In Hawaii, the Judicial Selection Commission Rules provides that; The Commission shall consider each applicants and petitioners background, professional skills and character, and may give consideration to the following qualities: (1) Integrity and moral courage (2) legal ability and wisdom (3) compassion and fairness (4) diligence and decisiveness (5) judicial temperament and (7) such other qualities that the commission deems appropriate.[45] Why are these requirements unique? These requirements pay close attention to the moral possibilities of applicants to the position of the judge. Is there some judicial compassion and fairness to citizens who could not enforce their rights against the State? Why is there some level of silence or judicial apathy towards enforcement of judgment against the State in Nigeria? Aside from the need to truly secure the

[45] Rule 10 of the Hawaii Judicial Selection Commission Rules April 23, 1979

independence of the judiciary, the criteria for selection of judges should be upgraded.

These two suggested amendments are towards achieving one single purpose, justice. And according to this research, justice does not end when judgment is given but when that judgment is enforced. In an early discussion Llewellyn stated tentatively that 'it is to law that we owe the conception of *justice*', it is the law's 'own perfection',[46] and that it is this idea that provides the main limit and constraint on the judge.[47] A German commercial lawyer, Levin Goldschmidt states that:

> *Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is in-dwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.*[48]

The above dictum is to the fact that no matter the circumstances faced by the law, there exist natural aspects of it. For example, of what use is suing the government when there is no reward for it whether or not the judgment is favourable. It is natural that no party should be denied the fruit of litigation and this right has been affirmed in several judicial decisions.[49] Also, it is settled that a court of law has the jurisdiction to protect its judgment from being ridiculed or disparaged.[50] However, where it seems that the court does not care whether or not its judgment is being ignored where the

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46 K.N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (Columbia University, 1930) 121.

47 [C]ourts must move within the framework of the given rules. The rules, however socially unjust they seem to [any individual]…are there. The court is in part their mouthpiece. What it can do, all it can do, is to soften a little there and there in a detail the rigor of the general scheme'. *Ibid,* 80.

48 Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960) 122.

49 A.E.S.S Ltd v. Aina Adeosun & Sons Ltd (1993) 5 NWLR (PT. 293) 377 @ 382

50 Okoya v. Santilli (1991) 7 NWLR (Pt. 206) 753 @ 770

government is involved as a party, then there is a need to look beyond the hypocritical words of the written law and several dictums of the ages and then probe into the morality of both the law itself and the persons involved. First the morality of political influences on the appointment of judges; second the morality of judges.

5. Conclusion and Recommendations

There is yet to be another exception to the violation of human rights other than in execution of a sentence of a competent court and that is where the freedom of movement, life and other related ones are concerned. There is no such law that allows that a private litigant is to waive his rights to justice when suing the government. However, experiences have shown that most cases against the State end in judgments that a judgment creditor is unable to enforce. This research argues that justice is only done and completed when the judgment has been duly enforced. This further means that judges who have given judgment against the government and took no steps to ensure that such judgments are enforced are yet to deliver justice maximally. Thomas Acquinas opines that judges short on justice and other virtues, or devoid of any teleological conception of law, will poorly perform the most basic of judicial functions, whether judgment, sentencing, evidentiary analysis, or testimonial evaluation. As ordinary men and women, judges are not a separate category of human species, but are endowed like any other rational being. St. Thomas calls judging a "craft,"[51] indistinguishable from human identity. The judicial capacity to deliver any version of justice is tied to our operative powers. This further means that judges like any other human possesses power of rational thinking and good conscience. Hence, if there seem to be some apathy towards enforcement of judgment given by them in cases involving the government, we may then have to probe into external factors that may have inhibited the judges from free exercise of their discretion in favour of the law and justice. It is therefore recommended that there is a need to ensure that the judiciary is truly independent and this will necessitate certain constitutional amendments such as

[51] St. Thomas Aquinas, 2 Summa Theologica Pt. II-II, Q.57, Art. 1, Reply Obj. 2, At 1431 (Fathers of the English Dominican Province Trans., Benziger Bros. 1947)

appointments of judges amongst others. While drawing from Hawaii regarding certain crucial criteria that an applicant to the bench must meet, it is important that the personalities of men who will become judges are confirmed to be free of bad or dead conscience. As practiced in Hawaii, it is not out of place if judges may be screened before appointment with respect to factors such as religion, politics, temperament, morals and other related factors which may hamper their effective disposition to justice and positive and well-reasoned judicial decisions. When judges become true to the law and conscience, even the government must bow to the law and by this human rights of private litigants against the State will be safeguarded.