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**Traps and Tools:
A Contextual Critique of the Right to Development in
International Law**

Wilfred Ukanwoke Mamah

School of Law

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**Traps and Tools:
A Contextual Critique of the Right to Development in
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Wilfred Ukanwoke Mamah

A thesis submitted in partial fulfilment of the
requirements of the University of Westminster for the
degree of Doctor of Philosophy in International Law

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ABSTRACT

Chronic poverty existing alongside surplus wealth engages issues of ‘rights’ and ‘development’; however, law’s capacity to respond to these issues appears gravely limited and under analysed. This paradoxical coexistence of poverty and wealth in society and ‘rights’ and ‘development’ in law tends to transverse national, regional and international realms, hence the proposition that something more is at stake than normative inadequacy, defective judicialisation or ‘non-sequitur’ rules application. On the basis of this premise, this thesis contributes to the literature in Nigeria and globally by making the case for a shift of analytical lenses from legal norms to structures, and from property to people. By focusing on structures, law’s presuppositions become objects of critical inquiry, thus facilitating interrogation of the apparent value neutrality of law in the seeming perennial struggles between power and powerlessness – ‘having’ and ‘being’. Drawing from the case study of Nigeria, an oil-rich country with high poverty indices, this thesis critically examines the underlying structures of ‘rights’ and ‘development’ in national and transnational constitutions. Five structural pitfalls relating to law’s contradictory existence as traps and tools, the orthodoxies of economic determinism and methodological fetishism are identified and critiqued. In delving into the dichotomies of orthodox/unorthodox, visible/invisible, norms/structures, rights/emancipation and regulation/deregulation, this thesis draws methodological insights from Sousa Santos’ (2007) ‘Epistemology of the South’ and Smith’s (1999) *Decolonizing Methodologies*. In conclusion, the thesis offers suggestions for transcending traps as conditions necessary for the success of any socio-legal, political and economic strategies for poverty eradication in Nigeria – and by extension many ‘Third World’ countries.

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I would like to thank my family and friends for their prayers, support and patience.

In conclusion, I wish to state that any lapses or errors of judgment in this thesis are mine. I take full responsibility for any such lapses.

DECLARATION

I declare that this thesis is the result of my own efforts. The various sources to which I am indebted are clearly indicated in the references in the text and bibliography.

I further declare that this work has never been accepted in the substance for any degree, and is not being concurrently submitted in candidature for another degree.

Wilfred Ukanwoke Mamah

(Candidate)

ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AIDS	Acquired Immune Deficiency Syndrome
ATCA	Alien Torts Act
CFCR	Citizen's Forum for Constitutional Reform
CSA	Corporate Social Accountability
CSR	Corporate Social Responsibility
DfID	Department for International Development
DRTD	Declaration on Right to Development
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
FDI	Foreign Direct Investment
GA	General Assembly
GC	Global Compact.
GP	Guiding Principles on Business and Human Rights
HIV	Human Immunodeficiency virus
HURILAWS	Human Rights Law Services
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Protection Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFIs	International Financial institutions
ILO	International Labour Organisation
MDGs	Millennium Development Goals
MNC	Multinational Corporations
MNE	Multinational Enterprises
NBS	National Bureau of Statistics
NEPAD	New Partnership for Africa's Development
NIEO	New International Economic Order
OAU	Organisation of African Unity
OECD	Organisation for Economic Corporation and Development
OEEC	Organisation for European Economic Co-operation
OPEC	Organisation of Petroleum Exporting Countries
PPP	Public Private Partnership
RTD	Right to Development

SERAP	Socio-Economic Rights and Accountability Project
TNC	Trans-national Corporation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN OHCHR	United Nation's Office of the High Commissioner on Human Rights
UNCTAD	United Nations Conference on Trade and Development.
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs & Crime
WTO	World Trade Organisation

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Chapter 1:

Norms versus Structures

Introduction

In this introductory chapter, I present my research question on ‘Right to Development (RTD) in International Law’. This chapter first outlines my case study, research question and the six traps to the right to development. Following this, section 2 analyses the challenges of ‘development’ and ‘rights’. The relevance of my research question is justified in the light of historical and ongoing challenges. Section 3 deals with theoretical and methodological questions, whilst section 4 analyses theoretical frameworks and RTD traps. The final section 5 presents an outline of the entire thesis, analyses the contribution of my research to scholarship and sums up the chapter.

Case Study and Research Questions

1.1 A Case Study of Nigeria

This thesis analyses RTD in the context of Nigeria. The Nigerian context was chosen as a case study for strategic reasons: as the largest producer of oil in Africa and one of the ten largest exporters in the Organisation of Petroleum Exporting Countries (OPEC), Nigeria’s extreme poverty and inequality highlight the social consequences of economic growth devoid of human development. Furthermore, they portray the tendency of law to align with the forces of oppression while paradoxically offering a space for fighting for rights, both at local and transnational levels. Instructively, Nigeria is usually analysed, in spite of her huge potential, as a country with one of the worst social indicators in the world. For instance, the Economist Intelligence Unit, in its Report “The lottery of life: Where to be born in 2013,” published in *The Economist* of 21 November, 2012, rated Nigeria as the worst country in which to be born in 2013. According to DfID’s country profile for Nigeria, “more than 100 women die every day from complications during pregnancy and childbirth, over 2,000 children under 5 die every day from preventable diseases, and 8.5 million children do not go to school, the most of any country in the world”(DfID Country Profile, 2012) .

Average life expectancy in Nigeria is in the region of 46 years (UNDP, 2007/8), and more than three million people live with HIV/AIDS, the second highest number for any country in the world. Official corruption, fuelled by local and international greed, remains endemic. The 2012 Corruption Perception Index published by the Transparency International ranked Nigeria as 139 out of 174 countries surveyed. In 2004, it was ranked 144 out of 145 countries surveyed, in 2003 it was ranked 132 out of 133 countries and in 2000 it was ranked 90 out of 90 countries surveyed (Transparency International, 2012, 2005, 2004, 2003 and 2000). Overall governance is poorly rated. The Mo Ibrahim Governance Report 2012, for instance, rated Nigeria as one of the 10 worst governed nations in Africa, using the index of “Safety and Rule of Law, Participation and Human Rights, Sustainable economic opportunities, and human development” (Mo Ibrahim Governance Report, 2012). Nigeria’s situation clearly questions the whole notion of ‘common humanity’ as expressed in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” As the most populous and potentially most powerful country in Africa, Nigeria crucially provides a window for critically examining the challenges of poverty and the paradox of development.



Figure 1: Maps of the World:

Nigeria, a former colony of the UK, operates a three-tier system of government. The country is divided into 36 states and a federal capital territory in Abuja. There are 774 local government areas, each governed by a local government council. Nigeria's population is approximately 160 million. Three major ethnic groups, namely Hausa-Fulani, Yoruba and Igbos, represent about 70% of the population. Another 10 per cent comprises several other groups numbering more than 1 million members each, including the Kanuri, Tiv and Ibibio. More than 300 smaller ethnic groups account for the remaining 20 per cent of the population. Most Nigerians speak more than one language. The country's official language is English, but there are about 400 native Nigerian languages also spoken.

1.2 Research Question exposes Traps

The central argument in this research is that the obstacles to RTD are not normative, but structural. In pursuit of the central research question – what role can law play in resolving the paradox of chronic poverty amidst surplus wealth? – this research identifies five structural impediments at national and international levels that act as development traps and constrain law’s response capacity. The first trap is that Nigeria’s constitutional law is in conflict with the ideals of RTD and may be the lifeblood of anti-development struggles and violence in the country. The second trap is that chronic corruption, not resource availability, explains the continued failure of Nigeria to discharge her primary RTD duties. The third trap is that the dominant theory of international law is hegemonic, as it mainstreams the almost discredited Westphalian logic of statism. Trap four is that the global economic super structure that towers over and above Nigeria’s constitution is private interest-oriented and hence in conflict with the public interest goals of RTD. The fifth trap is that the statist duty framework, identified in trap three, overlooks the current power asymmetries between states and corporations. With many multinational corporations becoming more economically powerful than some states, voluntary corporate social responsibilities have been severely weakened, hence the prevailing situation of ‘profit over people’ (Chomsky, 1999). Drawing from the live case of current global financial crises, the challenges of reconciling the individual ownership of borderless capital with the notion of RTD are laid bare. To overcome these traps, this thesis argues for a shift from legal norms to addressing underlying structural challenges.

Challenge 1: Right to Development amidst Poverty and Exclusion

History offers an important tool for assessing development and formulating new ways of approaching the paradox of ‘poverty and plenty’ in Nigeria. Perry (1996: 223) reflects on the place of history in development scholarship as follows:

“Any discussion of implementing a ‘right to development’ at the present day cannot conscionably elide the history of the development idea itself and simply carry on as though the logic of development were a transparent form of common sense instrumental rationality disburdened of its historical baggage – indeed it is precisely this enduring ‘commonsensical’ quality of development discourse that calls for closer examination.”

In her opening statement at the 12th Session of the Working Group on the RTD, Navi Pillay, the UN High Commissioner for Human Rights, assessed the challenges confronting RTD by reflecting on the chequered history of the UN Declaration on the subject. According to Pillay (2011:2):

“.. 25 years after the adoption of the Declaration on the Right to Development, the normative content of this right is beyond doubt. This right has been reaffirmed in the Vienna Declaration and Programme of Action; the Millennium Declaration, the Istanbul Programme of Action for the Least Developed Countries, and the MDGs Review Outcome document... [y]et almost three billion people still live in poverty. Twenty per cent of the world’s people hold 70% of its total income. Internationally agreed development goals are being trampled underfoot in a world where global military expenditure has doubled since the adoption of the MDGs in 2000 – now reaching a record high of 1.5 trillion dollars...”

Post-development scholars such as Esteva (1992), Sachs (1992) and Alvarez (1994), who jettison the notion of development as fraud, a “label for plunder and violence” (Alvarez 1994:1), also claim to employ the tool of history. Development critics, from right to left, draw support from decades of development history, which they argue have been marked by the trajectories of power and of powerlessness, of poverty and wealth and the failure of constitutional law, nationally, regionally and internationally, to counter this trend by prioritising poverty rights in a concrete, socially attestable fashion.

The criticisms levelled against development could be analysed with the aid of two historical mappings on power and powerlessness. Goldberg (1993: 148-84) calls attention to “the production of otherness” in development thinking, whilst Escobar (1995: 227) elaborates that:

“... the concept that is currently named ‘development’ has revolved through six stages of metamorphosis since late antiquity. The perception of the outsider as the one who needs help has taken on the successive forms of the barbarian, the pagan, the infidel, the wild man, the ‘native’ and the underdeveloped.”

Underlying the arguments of Goldberg (1993) and Escobar (1995) is the fact that development is failing because it is founded on the perception of the other as less human.

Their argument can be represented vertically to show progression in the perception of the other as the one who needs help or as the outsider. This perception did not end with decolonisation or with the Declaration of Right to Development, and it is one of the structural challenges that normative principles often overlook.

Figure 2 is a diagrammatical representation informed by the ‘Production of Otherness’ in Goldberg (1993) and Escobar (1995).

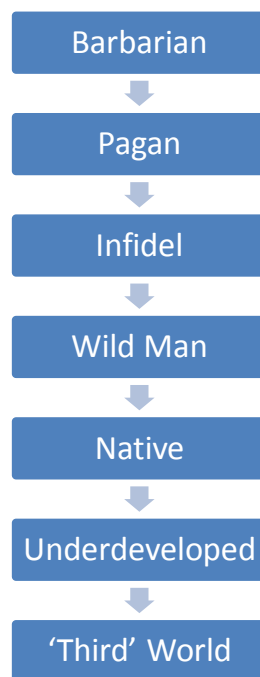


Figure 2: Vertical Production of otherness.

The above diagram shows how the notion of development has evolved from antiquity to the present day. When the underdeveloped are not called barbarians, pagans or infidels, they are referred to as people of the ‘third’ world, or those at the periphery. When these terms are not specifically voiced, they are implied in the unequal frameworks erected. The production of

otherness in development thinking informs the centre-periphery paradigm. According to Kambhampati (2006: 72), the world economy is comprised of two sectors – the centre and the periphery. In the periphery, backward sectors (with low productivity and backward production techniques) coexist with modern sectors and high productivity levels. Another way of representing the critique of development is to employ normative linear mapping, as shown in Figure 3 below. Here we see an attempt to abandon or mask the crude production of otherness through the use of a normative framework that proclaims its universality, although constructed by a few powerful but reflective victors.

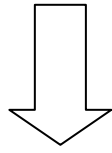
The agonies of World War II exposed grave dangers inherent in the ideologies of ‘otherness’ that hitherto had drawn a radical line between real humans and the less human. The humanity/animalist binaries of the pre-war years were seen as too dangerous and antithetical to the logic of self-preservation.

The evolution of ideas and policies around development in the UN recasts normative efforts towards the right to development. Nevertheless, the centre-periphery paradigm, discussed above, underlies the failure of the normative framework to deliver development. The perception of the outsider as someone who needs help found expression in the modernisation theory at the heart of the key normative efforts. As ably analysed by Kambhampati (2006: 70), modernisation theorists drew on the distinction between tradition and modernity and argued that any transition from the limited economic relations of traditional societies to the innovative and complex economic associations of modern societies depended on a change of values, attitudes and the norms of the people; in other words, development depended on ‘primitive’ values being replaced by modern ones.

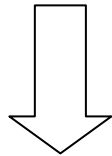
The evolution of ideas around development is shown diagrammatically in Figure 3 and discussed in the sections that follow.

Figure 3: The evolution of RTD Norms

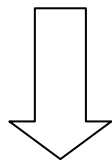
1945: The United Nation's Charter post-World War II



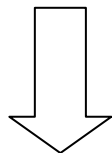
1948: The Universal Declaration of Human Rights



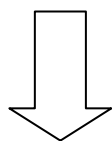
1966: The Two Covenants: ICCPR & ESCR



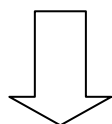
1966-1980s: The New International Economic Order



1981; 1986: African Charter on Human & People's Rights



1986: The Right to Development Declaration



1986: Continuing Struggles

1.3 (a) The UN Charter (1945)

After the horrific events of World War II, the victorious allies came together to chart a new course for the world, with the declared objective of ensuring that war would never break out again. In pursuit of this declared vision, a small group, made up of the 27 most powerful countries, assembled in San Francisco on June 26, 1945 to agree a Charter with the preamble: “We, the people of the United Nations...” Sixty-eight years after this historic event, the Charter remains the basic norm of the UN, membership of which currently stands at 192, “following the admission of Montenegro on 28 June 2006” (UN Press Release ORG/1469, 2006). Despite the obvious issues of domination that are constantly raised by two-thirds of the current membership, it is this 1945 Charter that serves as a critical departure point in our attempt to understand the notion of right to development in a transnational setting.

As an illustration, Article 55 of the UN Charter is premised on the need for “peaceful and friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples.” The Article promises higher standards of living, full employment and conditions of economic and social progress and development. Additionally, it seeks solutions to international economic, social, health and related problems and nurtures international cultural and educational cooperation and universal respect for and observance of human rights and the fundamental freedom of all, without discrimination based on race, sex, language or religion. Article 56 stipulates the pledge of all UN members to take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55. The language of the above articles is loose and difficult to enforce. The pledge to cooperate is, however, a mere promise that lacks an accountability monitoring mechanism. To further create doubts about the legitimacy of these articles the writers of the charter were victors whose main aim, according to de Regil (2001:6), was “to maintain and perpetuate the power asymmetry.”

The centre-periphery paradigm at the heart of post-World War II development thinking was exemplified by Harry Truman, the then president of the United States. In his Inaugural Address of January 20, 1949, published by the Yale Law School, The Avalon Project: Documents in Law, History and Diplomacy, the former president stated:

“More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive

and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.

For the first time in history, humanity possesses the knowledge and the skill to relieve the suffering of these people.

The United States is pre-eminent among nations in the development of industrial and scientific techniques. The material resources which we can afford to use for the assistance of other peoples are limited. But our imponderable resources in technical knowledge are constantly growing and are inexhaustible.

I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life...

What we envisage is a program of development based on the concepts of democratic fair-dealing... Greater production is the key to prosperity and peace.”

The seemingly positive development manifesto contained in President Truman’s address has often been critiqued as an instance of what Goldberg (1993: 148-84) calls the “production of otherness,” a fault line on which development was erected in 1945. This view is supported by a careful reading of President Truman’s manifesto, and such a reading opens up a lot of disturbing questions in relation to its historical timing, tone, grand design and overall credibility. On historical timing, for instance, when Truman’s speech was made in 1949, much of the world was still under draconian colonial rule whereby the colonised were denied self-government. Prior to this colonial domination, many able-bodied men and women were taken into slavery, and they were not seen as capable of bearing any form of rights, as they were mere chattels (properties) owned by their masters. Morris (1996:42) vented this perspective of ‘slave as property’ when he quoted Sir Moses Finley’s notion that “the essence of slavery is the totality of powerlessness in principle and for that, the idea of property is juristically the key...”The ‘program of development’, envisioned by Truman, would be based on the concept of ‘democratic fair dealing’. How genuine was this envisioned programme considering that it was being declared at a time of intense subjugation, summed up as ‘totality of powerlessness’ and master-servant relationships, without any reference to the injustices of

the era? Consider again the tone: the crusaders of development, according to Truman, are the 'we'. Modernisation thinking, encapsulated in 'we' versus 'them', exemplifies the continued 'production of otherness', which sees the stranger as the one in need of help. Consequently, the normative becomes open to interpretative critique. Escobar (1992: 231) calls Truman's vision a "magic formula, a vision in which capital and technology were the main ingredients... through which the American dream of peace and abundance could be extended to all peoples of the planet." Writing about 40 years after Truman's proclamation, Escobar (1992: 412) declares:

"... the dream is over. Development as it was promised in the midst of post-World War II euphoria has not happened. Moreover, the Third World is more underdeveloped than when it was initially discovered to be so."

1.3 (b) The Universal Declaration of Human Rights (1948)

Although criticised in some quarters as an ethnocentric document, the Universal Declaration has been largely accepted as a customary international law, as it is said to form the cornerstone of international anti-poverty law (Amitsis 2006:214). One crucial characteristic of the UDHR is its comprehensive treatment of the content of rights and bearers of rights. For the UDHR, there is nothing like the so-called first, second or third generations of rights, and right bearers extend beyond individuals to communities. The preamble unequivocally recognises that the inherent dignity and equal and inalienable rights of all members of the human family are the foundations of freedom, justice and peace in the world. The freedoms that the UDHR prioritises are freedom of speech and belief and freedom from fear and want. The centrality of friendly relations in advancing these freedoms is also emphasised. Article 22 provides for the rights of everyone to social security through national and international efforts, while Article 25 provides for the right to adequate standards of living and to social security.

The problem with the UDHR, it is often argued, is its implementation. As Gabriel Amitsis (2006: 215) observes:

"In strict legal terms, the declaration contains neither enforceable right for citizens nor binding obligations on member states. It simply acknowledges the international dimension of human rights and the goal of progressive realisation in its entirety: civil,

political, economic, social and cultural.”

Despite this inadequacy, the UDHR is generally agreed as a means of codifying general principles of international customary law that can serve as a normative foundation for erecting international poverty law. The problem with the UDHR is that it is also open to interpretation, and its core principle of indivisibility of rights can only make sense if there are clear-cut provisions for giving it life. The fact that such a monumental framework was conceived as a declaration, a soft-law mechanism, gives us an insight into the fragmentation of views in its making. One should not be surprised that, 18 years after this declaration, polarisation in normative thinking emerged in the form of the two covenants of 1966 that watered down the indivisibility logic.

1.3 (c) An Ideological Battle, Rights Fragmentation and the Struggle for a New International Economic Order

Whatever the achievement recorded by the UDHR, it was soon swept away by the ideological warfare between capitalist and socialist blocs which led to the fragmentation of rights into first and second generations. The International Covenant on Civil and Political Rights (1966) was formulated with the backing of rich industrialised nations like the US, while the International Covenant on Economic, Social and Cultural Rights (1966) was backed by the socialist bloc. For the two-thirds of the world’s population groaning under the pains of poverty, neither of these rights framework mattered – for them the only rights that were relevant were rights against poverty and deprivation.

These concerns led to the struggle for a New International Economic Order. Led by countries from the southern hemisphere, the NIEO was a confrontational stance against the forces of imperialism. The ‘Third World’ advocates of the NIEO shared similar histories, in that they were victims of colonialism and slavery, which dealt heavy blows to their cherished ideals and stalled human and material development efforts in their regions. It is in light of this history that the NIEO demanded the restructuring of the economic order on the basis of, among other things, the provision of Article 28 of the UDHR, which provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in the UDHR can be fully realised.

Drawing inspiration from this peculiar history, the Organisation of African Unity (OAU) adopted the African Charter on Human and People's Rights on 27 June 1981. This Charter came into force on 21 October, 1986. Okafor (2009: 1) analyses the Charter as "one of the precious few hard laws that guarantees right to development in the realm of international human rights." Article 22 of the Charter crystallises the African position on the right to development, by providing that all peoples shall have the right to economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind. Furthermore, the Article stipulates that states shall have the duty, individually and collectively, to ensure the exercising of the right to development.

1.3 (d) The United Nations Declaration on the Right to Development (1986)

The right to development declaration came in the wake of the three development decades. Frithjof Kuhnen, Professor of Rural Development at the University of Göttingen, expounds that the first development decade (1960-1970) began to grow as a result of the industrialisation concept, but this was soon abandoned as the first United Nations Conference on Trade and Development (UNCTAD) proved that industrial countries were not ready to make trade concessions to poor countries. The emphases therefore shifted to agriculture, which was seen at that time as the new power in the process of economic growth, leading to the birth of the Green Revolution. It was soon discovered that the Green Revolution was not entirely a blessing, though, as it had been possible to reduce food shortages but at very high social and environmental costs. The rich became richer, regional differences greater and the beginning of oil crises caused questions to be posed as to the suitability of the agrarian strategy based on the high utilisation of farm inputs. This decade was also characterised by the development of new theories, such as the influential dependency theory, which persisted throughout the second and third development decades (1970-1980; 1980-1990).

Kambhampati (2006: 73-75), who discusses the central themes of dependency theories, states that the basic argument of the dependency school was that poverty and underdevelopment were caused by exposure (economic and political) to advanced countries. As Bernstein (1971:152) argues, underdevelopment is created as an intrinsic part of the process of Western capitalist expansion. All models of dependency theory, according to Kambhampati (2006: 74), agree that the main outcome of such dependency is that surplus produced at the periphery is extracted and expropriated by the centre, using mechanisms such as access to

cheap raw materials, subsistence output and low wages, increased demands for imports from the centre, increasing budget deficits and foreign investment and repatriation of profits to the core.

It was against this background that the General Assembly adopted the third UN Development Decade, 1981 (83rd Plenary Meeting, 5th December 1980), in which governments pledged individually and collectively to fulfill their commitment to establish a new international economic order based on justice and equity. The third development decade strategy set forth goals and objectives for the accelerated expansion of developing countries between 1981 and 1990. One of the key strategies was a rapid and substantial increase in official development assistance provided by all developed countries to reach or exceed a target of 0.7% of GNP of developed countries. This target, like most of the others, was largely unmet. The failure of three development decades to narrow the deepening gulf between poverty and wealth led to the right to development ‘revolution’, a counter-hegemonic initiative championed by states on the periphery, with a view to challenging the notion of development as charity and constructing a new model of development as freedom.

1.3 (e) The UN Declaration on the Right to Development (1986)

Though described by one of its staunchest critics as “brusque yet oblique” (Donnelly, 1985:1), the Declaration on the Right to Development belongs to this era of the search for a new international economic order. First conceived in 1972 by the Senegalese Judge Keba M’Baye, who admitted that introducing the right involved considerable ‘temerity’, the first recognition of RTD was in 1977, following the Human Rights Commission’s Resolution 4 (XXXIII).

According to Donnelly (1985: 475), prior to this resolution such a right had never even been discussed in the UN system. The scholarly literature was similarly silent, other than M’Baye’s article. Donnelly argued that despite the lack of background support, the Human Rights Commission, after almost no discussion, not only called for a study of the right (rather than simply an investigation into the possibility that it did exist or ought to be established), but also felt itself competent to specify the appropriate conceptual context for such a study.

In 1979, the human right to development became relatively prominent following the issuance

of the Secretary General's Report, described by Donnelly (1985) as the most thorough discussion of the sources and content of the human right to development. In the light of this history, the RTD Declaration has remained controversial. As a Declaration it is non-binding – it merely exists *lex ferenda* (the law as it ought to be) – and there are problems surrounding the concepts, content or implementations, as states and scholars take divergent views on the Declaration.

One attempt to implement the RTD was through Millennium Development Goals (MDGs). In 2000, this more popular framework was introduced at the UN Millennium Summit with the overwhelming support of 191 countries. It outlined eight goals with defined targets. Goal (1), which I consider the cardinal goal, proposed to halve the proportion of people living in abject poverty by 2015, while Goal (8) provided for international cooperation as a prerequisite for development. Thomas Pogge (2004) exposed the betrayals of Goal (1), which he claimed was a complete U-turn from earlier global agreements on the subject. Pogge (2004: 380) juxtaposed two relevant consensuses in order to expose these contradictions:

“MDG-1 is meant to supersede a commitment the world's governments had made years earlier, notably at the 1996 World Food Summit in Rome. There they promised to reduce the number of extremely poor to half its present (1996) level, from 1096.9 million to 548.45 million. MDG-1 departs from this earlier commitment in three important respects. First, our governments' goal is now to halve the proportion of extremely poor people, not their number. Second, the plan period has been extended backward in time, having it start not when the commitment is made, but in 1990. Third, the commitment is now regionally disaggregated, which further cuts back the planned poverty reduction and also detracts from the global moral responsibility of the affluent countries. Compared with the 1996 World Food Summit commitment, MDG-1 as interpreted by the UN raises the number of extremely poor people deemed acceptable in 2015 by 335 million (from 548.45 million to 883.5 million) and thereby shrinks by over 62% the reduction in this number which governments pledge to achieve during the 2000-2015 period. Had we stuck to the promise of Rome, our task for 2000-2015 would have been to reduce the extremely poor by 545.55 million. The Millennium Declaration envisages a reduction by only 210.5 million.”

Phillip Alston, a vocal advocate of the RTD, analyses the MDGs vis-à-vis human rights as

“ships passing in the night, each with little awareness that the other is there and with little if any sustained engagement with one another”(Alston 2005: 825). For him, the ideals of development and human rights stand in stark opposition to one another, whilst the careful avoidance of rights language by key development institutions is problematic. The apparent disconnection in practice between ‘development’ and ‘rights’ raises the question about the utilitarian value of a rights framework that cannot be employed as a tool of emancipation. The incompatibility of development and rights creates another dilemma for ‘right to development’ scholarship, in that if ‘development’ does not qualify as universal rights, in theory and practice, what then are ‘universal rights’? The next section elaborates on the challenge of rights in relation to development. This is followed by a reflection on how the challenges of ‘development’ and ‘rights’ are addressed in RTD scholarship.

1.4 Challenge 2: Imperial Rights versus Poor Rights

Drawing from the above history of development, it is clear that RTD was theoretically conceived as universal rights, but the very notion and utility of universal human rights have been critiqued by contemporary scholars. Douzinas (2000; 2007), Ibhawoh (2007; 2011), Fredman (2008) and Banakar (2010) are illustrative of some of the most recent efforts to harvest scholarly scepticism around universal rights, including RTD. Earlier, cultural relativism had long established a position that the idea of universal human rights is simply another form of imperialism. For failing to factor in the equation of history and particularistic cultures, relativists distance themselves from the grand narrative of universal human rights; Max Travers (2010: 45) argues that it has no explanatory value for sociologists. On a related front, critical legal scholars such as Douzinas (2000: 21) and D’Souza (2010:55) argue that the rights discourse presents a “paradox” and a “conundrum,” respectively. In a similar vein, Ibhawoh (2011) focuses on the UN Declaration on the Right to Development, which he critiques as a language of power and resistance. In the meantime, Ibhawoh (2011: 103) is of the view that “analysis of the polemics and politics of power and resistance on right to development offers important lessons on the uses and misuses of human rights language.” Continuing, Ibhawoh (2011: 104) states that “disagreement over meanings and priorities, differences over the nature and extent of entitlements and responsibilities, as well as narrow and distorted interpretations have all had undesirable impacts on the promotion of human rights,” hence the urgency to “seriously consider the morally troubling outcomes that arise when human rights are co-opted by authority structures in ways that serve more to enhance

their powers than alleviate human suffering.” A similar trend runs through Ibhawoh (2007), in which the author draws scholarly attention to the paradoxes underlying the discourse of human rights in colonial Africa. In this work, Ibhawoh juxtaposes the meta-narratives of universal and transcendental rights with the historical experiences of colonialism with a view to capturing the nuances that underlie the notion of human rights.

From the foregoing, it is clear that underlying scholarly misgivings about the rights regime are the reason why the seemingly angelic notion of universal human rights has been unable in reality to liberate the poor and powerless. This stunning reality has been captured by Douzinas (2000: 153) as follows:

“There is no greater insult to victims of natural or man-made catastrophes, of famines and war, of earthquakes and ethnic cleansing, of epidemics and torture, there is no greater scorn and disregard than be told that, according to the relevant international treaty, they have a right to food and peace, to shelter and home or to medical care and an end to maltreatment.”

On balance, therefore, there is a growing consensus among critical legal scholars, legal historians, post-structural thinkers and an array of social and legal theorists that the top-down nature of the so-called universal regime of human rights renders it largely unhelpful for the poor, the weak and powerless, for whom ‘rights’ actually means ‘survival’. For those in dire needs, according to these critical perspectives, human rights framework, far from promising justice, may in fact perpetuate the notion of ‘justice lost!’ (Hafner-Burton and Tsutsui, 2007).

In furtherance of scholarly views on rights-poverty disjuncture, postmodern tools of deconstruction, provided by philosophers such as Derrida (1990), help to deconstruct poverty and expose the violent underside of legal instruments purporting to embody poor rights. Robert Cover, another deconstructionist, unravels the ‘homicidal’ and ‘jurispathic’ dimensions of law and legal interpretation, that is, law’s immense capacity to wreak violence, especially on the poor and powerless (Cover 1983; 1986). A close study of rights in practice, from national to transnational realms, seems to support the critical thesis that the notion of human rights may have run out of steam, hence becoming a ploy for a further choreographed subjugation of the poor and powerless. Derrida’s formulation of structural violence seems to

capture this in a telling manner. When deconstructed, rights instruments which may appear as healers have often been shown to harbour destruction in their seemingly harmless bosoms. Michel Foucault's (1975) study also helps us to see clearly the power networks that are implicated in the discourse of law and rights. Foucault argues that modernity has transformed violence into a "normalising science" resulting in the techniques of a "carceral archipelago" in which far-reaching power networks have been created using the technique of violence. For Foucault, violence does not just destroy and injure (direct violence), but also it constitutes and expands various forms of knowledge, such as the science of law.

1.5 RTD scholarship: The Need for Research Focus

It is against this backdrop of failing development and rights paradigms that any serious study of the UN Declaration on the 'right to development' (1986) must be based. This Declaration was one of the first major human rights documents to trace its origin to the region of want, notorious for involving so many people who are entrapped in a revolving door of penury and disease. Collier (2007) prefers the term 'bottom billion' to describe these "Malawis and Ethiopias of this world, the minority of the developing countries that are now at the bottom of the global economic system." The success/failure dichotomy also featured prominently in the work of Hernando de Soto, the Peruvian economist, who sought to demystify capital by showing why capitalism is winning in the West and failing everywhere else (de Soto 2000). In analysing Nigeria, the relationship created between the local and the global is apparent.

RTD scholarship therefore needs to address the gap between RTD as a norm and structural development traps. I interpret the persistent failure of the RTD as suggesting that something deeper than normative and enforcement inadequacies may account for the dilemma of the framework in Nigeria. To this end, one of my underlying arguments is that any reform of the rule of law in Nigeria, though well-funded by big development institutions, may be unable to refocus development and rights, to deliver basic needs and dignity to poor people, unless underlying structural issues are equally confronted. By strategically targeting my research questions at structural issues, I hope to create a new narrative that illuminates understanding and inspires change in Nigeria and on a global scale.

1.6 Theoretical RTD Debates and Framework

Scholars of RTD are sharply divided along the lines of normative and enforcement challenges. Drawing from the conceptual, content and enforcement inadequacies of RTD, scholars have aligned themselves along the ‘reality-myth’ divide. The myth school, led by Professor Jack Donnelly, argues that RTD has no legal or moral foundation on which it can stand, and hence they dismiss it as a utopian ideal. The reality school, pioneered by Professor Phillip Alston, holds the contrary view. In analysing this theoretical divide, I am conscious of the methodological insights of Bryman (2004:7), in that:

“Literature acts as an impetus in a number of ways: the researcher may seek to resolve an inconsistency between different findings or between different interpretations of findings; the researcher may have spotted a neglected aspect of a topic... certain ideas may not previously have been tested; the researcher may feel that existing approaches being used for research on a topic is deficient, and so provides an alternative approach...”

1.7 The Jack Donnelly School

In his ‘In Search for the Unicorn: The Jurisprudence and Politics of the right to development,’ Donnelly (1985:1) writes:

“A philosopher is a person who goes into a dark room on a moonless night to look for a nonexistent black cat. A theologian comes out claiming to have found the cat. A human rights lawyer, after such an on-site visit, sends a communication to the Commission on Human Rights; and a member of the Commission leaves the room drafting a resolution on the treatment of black cats.”

“Possessed of something of a philosophical temperament,” Donnelly further enthuses, he joins the search for the “black cat” and comes back empty-handed, despite going the extra mile of “turning on the light.” The “black cat,” in Donnelly’s formulation is the ‘right to development’ (RTD), which he argues has no legal or moral foundation on which it can stand. As such, Donnelly (1985:478) dismisses the notion of RTD as:

“A dangerous delusion that feeds off, distorts, and is likely to distract from the urgent need to bring together the struggles for human rights and development.”

Donnelly’s conclusion is based on six theoretical markers: history, content, legality, morality, subjects and substance. Historically, the author demonstrates the haste and speed with which the notion of the right to development was erected. As a result of this ‘haste and speed’, what emerged as RTD, according to the author, becomes a “poorly reasoned” normative framework. For Donnelly, proponents of RTD saw it as self-evident, requiring no proof – a “fait accompli,” as Phillip Alston was said to have categorised it.

In the light of the above, Donnelly passed through the historical corridor, without holding onto anything of value to support the claim of the existence of the black cat. Donnelly’s views on RTD have been supported by Laure-Helene Piron (2002). Powerful states, such as the US, which voted against the Declaration, remain firm in their opposition to RTD. However, Marks (2004), in dissecting the paradox of ‘rhetoric and reality’ with regard to RTD, has shown the danger in simplistically dismissing the US as an opposer of RTD. According to Marks (2004: 156):

“At the Monterrey Conference, President Bush launched an idea that is not far removed from the concept of the RTD and even the development compact, as proposed by the Independent Expert. In his March 22, 2002 speech to the conference President Bush ... proposed a \$5 billion annual increase of Overseas Development Assistance (ODA) through a new Millennium Challenge Account (MCA), ‘devoted to projects in nations that govern justly, invest in their people and encourage economic freedom’.”

Considering the similarities between MCA and RTD as set out in Marks (2004: 159), Marks (2004: 167) concludes as follows:

“If the United States is serious about implementing the MCA, demonstrated by a significant increase of resources and perhaps partial commitment to supporting countries that integrate human rights into development, these actions may be more important than a rhetorical commitment to the RTD. Indeed, the key question is

whether the rhetoric of the MCA is matched by the reality, or if it remains a mere rhetorical device used to cover aid policies that, in the end, do not further human rights in development.”

What stands out clearly, however, is that the US opposes the notion of attaching any idea of enforceable right to development assistance. The notion of ‘right’ is a key element in the Realist School of RTD.

1.8 The Reality School

Phillip Alston, the leader of the reality school supportive of the RTD, argues that rights discourse is magical, as it has transcendental potential, so both victors and vanquished can lay claim to rights. Invoking rights often trumps other claims and elevates the goal characterised as rights above competing societal goals, thus giving it a degree of immunity from challenge. Alston (1988:3) puts it as follows:

“It is now generally accepted that the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity.”

Alston further elaborates on why the RTD framework is crucial. According to him, one principal failing of existing intergovernmental institutional approaches to human rights, and one to which the RTD seems designed specifically to tackle, is the rigid separation between the work of the United Nation’s Human Rights organ and the work of international development institutions.

Alston argues that this separation is extremely problematic, simply because human rights bodies have no operational component of any significance. For example, they have no funds to offer for carrying out projects designed to provide respect for human rights and they have virtually no resources which would enable them provide technical expertise to governments or other entities that might require them. In contrast, various international development agencies are in almost direct contact with government officials and departments dealing with matters of very direct relevance to the enjoyment of human rights.

Another area of contrast between the two schools rests on the value of the enforceability of rights. Donnelly's black and white views sharply contrast with Alston's more differentiated inclinations. Alston argues that, for Donnelly, an element of formal justiciability is an indispensable attribute of right. According to Alston, Jeremy Bentham argued from a similar standpoint whereby obligations and rights must be juxtaposed and both must be concretised by law, if they are to have any meaning beyond that of mere 'fictions'. Hans Kelsen, according to Alston, also links the existence of right to the notion of justiciability. For him, the essential element (of a right) is the legal power bestowed upon the individual by a legal order to bring about, by lawsuit, the execution of a sanction as a reaction against non-fulfillment of the obligation. Despite the difference between municipal and international law, similar arguments of enforceability as a criterion for right have been drawn. However, Alston argues that on any new right, such as the right to development, the issue is not whether they are justiciable, for clearly they are not. Two issues that are of concern for Alston are the relationship between justiciability and international law, and the capability of the new rights attaining whatever degree of justiciability or implementability that may be required. With regard to the first issue, Alston states that international law has adopted notions of implementation and supervision and not justiciability as its touchstone.

In his direct response to Donnelly's article, Alston (1985:510-518), in his critique of the right to development, calls Donnelly's approach a "'Garfield the Cat' approach." Garfield the Cat is a "street smart cat whose legendary laziness is interrupted only by the seemingly boundless energy which he is able to bring to his efforts to expose the foolishness of his owner." Donnelly's adoption of a purely positivist criterion in assessing whether or not there is a right to development was derided by Alston (1985:511) as a "straw man technique," which enabled the author to erect a number of straw men whom he proceeded to knock down very effectively. In support of the ineffectiveness of a purely legalist approach to enforcement, Alston (1985:513) states that the problem with Donnelly's approach is that he pursues these straw men at great length, as if to imply that their destruction is sufficient to discredit entirely the concept of the right to development. Moreover, if we effectively erect and destroy straw men, our so-called effectiveness is worthless. What Alston is implying here is that to limit one's vision to a purely positivist framework is to risk being unable to see the bigger picture. What is being suggested is that Donnelly's search for the black cat may have been frustrated by his limited vision. In support of this assertion, Alston goes further to discuss two

complementary uses of the right language. First, the ideology of right is invoked to mobilise people to support a particular goal. Secondly, the language of right is used to facilitate access to a range of legal norms and enforcement mechanisms to vindicate rights claims. Alston, however, warns that we should not assume that talking about human rights requires us at all times to plunge into deeply legalistic analyses – to do so is to risk falling into what Alston (1985:513) calls a “legal straightjacket,” which leaves us at the mercy of the vagaries of legal interpretations. The success of the struggle to secure respect for human rights must be located in the middle: the interplay of the two approaches to rights.

It is also instructive to review the contextual dimension of RTD, which Alston expertly discusses and Donnelly overlooks. As Alston stated, an understanding of the right to development, as well as an appreciation of its significance, can only be understood in the context of the rights debate. Alston discusses three aspects of this context. First is the failure of the indivisibility argument as manifested in the reality of the continued privileged importance attached to Civil and Political rights in contrast with Socio-Economic rights. The failure of the indivisibility theory in collapsing the divide between the former and latter regimes of rights led to the clamour for socio-economic rights such as RTD on the rationale that for a majority of the world’s population, civil and political rights without the right to food mean nothing.

The second context that Alston discusses is the tendency in the existing approach of human rights to limit its reach within national boundaries; hence, rights acceptable nationally are often seen as irrelevant internationally, as no international obligation is said to be implied. This tendency is evident in the practice of states and raises certain questions, especially in the increasingly interconnected world in which we live.

The third context is the tendency in the literature to limit human rights to an individualistic perspective. This tendency has led to the greatest challenge regarding the universality of rights. The communitarian philosophy of rights merits equal consideration because, as Alston (1985: 516) argues, “our fate as individuals is bound up with the fate of others in whose social context we find ourselves.”

Alston was of the view that the failure of Donnelly to focus his mind on the above context meant that he was unable to see the black cat. Therefore, Alston (2005: 516) further argues:

“It is only in the light of growing recognition of the need for (1) more attention to economic rights, (2) greater recognition of the international implications of national commitment to human rights and (3) a less atomistic approach, that the full significance of the right to development can be appreciated.”

It is on the strength of the above reasoning that Alston concludes that Donnelly’s categorisation of the right to development as an “insidious threat” is hyperbole that overstates his own case. The right to development, according to Alston, is not the black cat that Donnelly was searching for, or the white cat which some commentators might imply, but in Alston’s formulation it is “a kitten,” which may change its colours as it grows. Alston’s analysis of RTD has been shared variously by RTD analysts. Scholars such as Okafor (2009) and Udombana (2000) have continued to point to the fact that the only true framework that means anything to those who are suffering is actually RTD.

As rights scholars take positions along the lines of Alston’s or Donnelly’s, there remains a noticeable gap, in that scant attention is paid to the underlying institutional and structural challenges that seem to negate RTD, *ab initio*. To this end, Orford (2001) is hugely inspirational. Refusing to be unnecessarily swayed by the polarising RTD myth-reality controversies, Orford (2001) sets out with the clear goal of analysing RTD in the context of economic globalisation. The author’s dual aims are, firstly, “to assess the impact of economic globalization on right to development and secondly, to consider the utility of RTD as a tool for resisting some of the more destructive effects of economic restructuring in the post-Cold War era.” From this standpoint, Orford (2001) posits that a key dilemma that the notion of right to development confronts is at the structural level – the positivist interpretations of ‘development’ and ‘right’ favour the agenda of economic globalisation. Illustrating this point, with regard to the positivist econometric interpretation of ‘development’ Orford (2001:180) argues:

“The strategic utility of the right to development is questionable on two grounds in the light of directions taken by Third World activism. First, the right to development has itself been criticised for enshrining the notion of development that has been so thoroughly critiqued and contested. If it is only possible, or if it is too easy, to understand development in narrow economic terms, it may be of no use to speak of a

right to 'development'. Secondly, not only does advocating a right to development appear to go against the grain of much Third World activism today, but using the logic of development risks legitimizing the very agendas and programmes that the right is aimed at subverting. In other words, talking about right to development may act to prop up the whole edifice of developmentalism as practised by the World Bank and international economic institutions.”

On the limitation of 'right' as a language of resistance against capitalism, Orford (2001: 177) writes:

“Human rights are concerned principally with constraints on the exercise of one form of power: power that operates publicly, through repressive and coercive means, largely at the level of the state. Human rights instruments are arguably less suitable to resisting other forms of power.”

Continuing, Orford (2001: 177) equally argues that “critics from Karl Marx onwards have argued that the language and concept of rights provides no purchase for resisting the excesses of capitalism. The essence of that argument is that human rights discourse takes as its subject a particular conception of what is to be a human being, that is; property-owning, self-sufficient, atomistic, competitive and individualistic...Thus rights discourse may not be capable of contributing to the political practice of marginalising the Western economy, precisely because it is central to constituting the subject of that economy.” The writer, however, concedes that the “less atomistic approach offered by the right to development may offer a useful counterweight to the excessive individualism of some more traditional approaches to human rights.”

Attempting therefore to analyse 'development' and 'rights' from an overtly 'positivist perspective', as the discipline of law tends to impose, may be counterproductive. The 'legal straightjacket' dilemma highlighted in Alston's and Orford's analyses seems to be an analytical debility in law as a discipline, as the overbearing nature of legal positivism in the training of lawyers has created a situation whereby people trained in law struggle whenever they are confronted with contradictions between laws in the statute books and those written large in the bosom of the social. Considering that this positivist approach facilitates the predominant economic order, thus presenting law as an appendage to that order, questions

must be asked on the actual interrelationship between law and the economy. If economic determinism thesis is proven, then the role of law as an instrument of change may have to be further interrogated. I will revisit these questions later in this thesis in order to take a firm stand on the possibility of law as a tool for escaping oppression and marginalisation. For now, it needs to be reiterated that in Nigeria, the ‘legal straightjacket’ problem seems more pronounced, as the country’s supreme constitution clearly favours a strictly legalist interpretation of ‘rights’ and ‘development’. The Nigerian constitutional lawyer trained in the art of distinguishing between ‘justiciability and non-justiciability’ may not bother to inquire into the underlying structural questions that precede and predetermine justiciability/non justiciability categories. The impact of the ‘legal straightjacket’ mode of thinking in law manifests itself in questions around ‘constitutional rights’ being abstracted from their objects, their enablers, their *raison d’êtres*. It is this deficient approach that clouds analyses of the RTD framework, a situation that this research intends to remedy.

1.9 Theoretical framework and RTD Traps

Theoretical Framework

Two conceptual ‘human rights’ models, constructed around property and poverty, compete for attention. I juxtapose these theoretical maps as represented by two contemporary exponents: Hernando de Soto and Lucy Williams, respectively.

Property Law versus Poverty Law

Property law is a branch of law that governs ownership of movable and immovable things and bestrides the normative domain like a colossus. This area of law is closely intertwined with a long line of legal subjects such as sovereignty in international law, contract, tort, equity, company law, land law, commercial law, wills and tax law, to an extent that it may be argued that a legal archaeologist tasked with unearthing the origin of law would most likely conclude that property law is, in fact, the original norm. Mievile (2006:86) arrived at this conclusion when he quoted with approval Yevgeny Pashukanis’ statement that “private law is the fundamental, primary level of law.” Nothing clarifies the dominance of the property model in law more than the construction of sovereignty in international law. Here we see that

who owns what is dependent on how the property law regime is construed at any given time. Hence, in international law, Brownlie (2003:102) expounds that:

“In spatial terms, the law knows of four types of regimes: territorial sovereignty, territory not subject to the territory of any state or states and which possess the status of its own, the *res nullius* and *res communis*.”

Going further, Brownlie (2003:168) states that:

“... a ‘*res nullius*’ (no person’s property) consists of land territory, the territorial sea appurtenant to the land, the seabed and subsoil of the territorial sea, island, islets, rocks and reefs that are open to acquisition by any state.”

It was on the basis of a similar construction of international law that the Final Act of the Congress of Vienna/General Treaty (1815) declared the whole expanse of land, the territorial sea appurtenant to the land, the seabed and subsoil of the territorial sea, island, islets, rocks and reefs in Africa as “*res nullius*” (no person’s property), irrespective of the fact that these territories were actually inhabited by human beings. This declaration paved the way for the scramble to partition Africa and legally justified the unprecedented distortion of national boundaries, cultures, languages and imaginative worlds of peoples and nations in history. Tuhiwai Smith (1999: 21) captures this phase poignantly in the following words:

“For many communities there were waves of different sorts of Europeans, Dutch, Portuguese, British, French, whoever had political ascendancy over a region. And in each place, after figures such as Columbus and Cook had long departed, there came a vast array of military personnel, imperial administrators, priests, explorers, missionaries, colonial officials, artists, entrepreneurs and settlers, who cut a devastating swathe, and left a permanent wound, on the societies and communities who occupied the lands named and claimed under imperialism.”

The centrality of property in the wealth of nations, corporations and people has indeed become trite: “If capitalism had a mind,” writes de Soto (2000: 65), “it would be located in the legal property system.” It is not surprising, therefore, that the ‘right over a thing’ is one of the very first rights to be recognised by law.

Poverty law, on the other hand, is a new area of law and evolves on the margins of property law's hegemony. Its counter-narratives of wealth and poverty are stoutly opposed by powerful states, institutions, corporations and individuals. Research grants and dissemination propaganda are often deployed to perpetuate property dominance versus the poverty marginality status quo. Williams (2006) is apt in describing international poverty law (IPL) as an "emerging discourse." In Nigeria, poverty law is largely an unexplored area, despite the country's high poverty rate, and the relevant model is so dominant that one of the very first lessons that a Nigerian law student must master, in order to prosper, is the distinction between 'justiciable' rights and 'non-justiciable' rights. Property rights can form a cause of action in a court of law, whereas poverty rights are illusions, i.e. they are make-believe rights with no judicial teeth. Remarkably, Williams and other contributors to the work on poverty law are not persuaded by the chasm that seems to separate property law and poverty law. Instead, they construct a new jurisprudence that swims against the tide, and they posit that the central objective of the emerging discourse of poverty law is to expose the legal structures that perpetuate poverty and to develop new strategies for tackling it accordingly. For poverty lawyers, laws governing 'who owns what' are crucial subjects of scrutiny, as they may favour one group over the other and propagate inequality. In the next section I interrogate these two paradigmatic options, which are both couched in the language of liberation and/or rights. I critique liberation/rights potential in both paradigms with reference to Nigeria, and in so doing I pay special attention to orthodoxy, no matter how structurally it may be disguised as the 'new' liberation.

The celebrated Peruvian economist, Hernando de Soto (2000), and the American professor of law, Lucy Williams (2006), serve as theoretical markers. Whilst de Soto's work pushes the property strategy for poverty eradication, Williams' collection of essays focuses on the rights-based approach and is complemented by moral, political and international cooperation frameworks. Interestingly, both markers command commendable scholarly pedigrees. Whilst de Soto's work falls within the tradition of libertarianism already popularised by scholars such as Hayek, Mises, Nozick and Friedman, Williams' collection of articles could be grouped within the human capability paradigm, as advocated by scholars such as Pogge, Sen, Naussbaum, Rawls, Fredman and Blichitz. On connection, both theoretical markers are presented from the perspective of poverty and/or growth. The sharp distinction in their approaches, however, raises a serious dilemma for RTD scholarship. In the next section, I

distil the main themes in the works of de Soto (2000) and Williams (2006), before attempting a dialogue between the two camps.

1.10 De Soto and the Mystery of Capital

Hernando de Soto's *Mystery of Capital* is centred on answering one key question: why is capitalism triumphing in the West and failing everywhere else? Summarising briefly, de Soto presents property law as a tool for unlocking the mystery surrounding the success and failure of capitalism. Put simply, his central message is as follows: contrary to widely held opinions, the poor are not poor because they do not have property; on the contrary, they hold assets worth billions of dollars. They are poor because the assets they hold are "dead capital" inasmuch that information about their assets is not captured in the Western way, which would otherwise enable the poor to use their assets to create capital. This missing fundamental also accounts for why globalisation is not delivering to the poor. In the absence of capital, non-Western poor are stuck outside the periphery of globalisation. According to de Soto (2000: 241), resolving the problem of failing capitalism is relatively easy, if governments are willing to accept the following key ideas:

- the property situation and potential of the poor need to be better documented
- what the poor are missing is a legally integrated property system that can convert their work and savings into capital
- civil disobedience and organised crime of today are not marginal phenomena but the result of people marching by the billions from life organised on a small scale to life on a big scale
- the poor are not the problem but the solution
- implementing a property system that creates capital is a political challenge because it involves getting in touch with people, grasping the social contract and overhauling the legal system.

De Soto (2000:242) is optimistic that once internal rethinking is pursued and implemented, in the light of the above ideas, the transition from the Third World to a market-based capitalist

system that “respects people’s desires and beliefs” will be completed and “we can move beyond the limits of the physical world and use our minds to soar into the future.”

De Soto’s framework may be summarised as follows: poverty and wealth are about property and capital, no more, no less (de Soto 2000: 36-68). On that premise, the transfer of capital from the rich to the poor is not needed because the so-called poor have enough assets that could be turned into capital. The only reason for poverty is that the poor have not been able to harness their resources, which are held as dead capital. De Soto (2000: 6) dramatises this point, by using the example of Haiti, in the following words:

“In Haiti, the poorest nation in Latin America, the total assets of the poor are more than 150 times greater than all the foreign investment received since the country’s independence from France in 1804. If the United States were to hike its foreign aid budget to the level recommended by the United Nations – 0.7 per cent of national income – it would take the richest country on earth more than 150 years to transfer to the world’s poor resources equal to those that they already possess.”

Continuing, de Soto (2000: 30) declares “virtual mountains of the ‘dead capital’ held by the poor lines the streets of every developing and ex-communist country.” Rather than wait for the transfer of capital, de Soto (2000: 241) urges the poor of the Third World to learn from the West, which has solved the problem of poverty because of her virile legal system that centrally registers all properties, thus enabling her citizens to use their properties to generate capital. De Soto (2000: 167) also argues that law is a neutral framework and could be employed by politicians as a tool for resolving the mystery of capital in poor countries. Without success on the legal and political fronts, no nation, he posits, can overcome legal apartheid between those who can create wealth and those who cannot. The implications of de Soto’s framework are equally laid bare, in that poverty should be viewed mainly from a nation state perspective. Capitalism is in crisis outside the West, not because international globalisation is failing, but because developing and ex-communist nations have been unable to ‘globalise’ capital within their own countries (de Soto 2000: 219). Governments, therefore, should not try to intervene artificially through the creation of safety nets; rather, all governmental efforts should be geared towards creating an efficient system for holding properties and allowing owners of properties to use information held centrally, in order to

generate capital. Additionally, de Soto also surmises that historical and power narratives on poverty causation are diversionary and that culture is not an important variable in the discourse of property and capital. He posits that legal properties empower individuals of any culture (de Soto 2000: 241).

1.11 Lucy Williams' Collection of essays on Poverty Law

Turning to Lucy Williams' collection of articles on the emerging discourse of poverty law, I first and foremost present a brief summary. Williams (2006) builds on the foundation that legal rules, as embodied in laws such as property, contract and family laws, are often chosen to benefit the interests of parties and nations in power. Williams and her colleagues construct a new framework for tackling poverty by recasting the human rights debate to incorporate other moral and political approaches and to include the theorisation of some human rights as 'global public goods'. Two reasons are offered to justify expanding the legal discourse on poverty reduction. First, advocates for economic redistribution and poverty reduction often operate and conceive their advocacy within nation state boundaries. Since the theoretical short-sightedness of such an approach has been exposed by a growing integration of the global economy, they argue that poverty can no longer be understood, let alone contested, within national boundaries. Moreover, national strategies for poverty eradication must be combined with the technique of interrogating international finance structures. The second reason they offer is the need for an interdisciplinary approach as a result of the growing connection within and across disciplines.

The collection of essays in Williams (2006) shares a similar analytical framework, which I summarise as follows: poverty and wealth are not just about property and capital, they are also about power and injustice. Secondly, poverty and wealth are not just about the material, as there is also the important question about human capability. The notions of power and capacity implicate globalisation, hence the structures and agents of globalisation need to be carefully investigated, in order to understand how they aid or impede growth. Underlying their frame of arguments is also the proposition that law is not a neutral framework, as laws are often chosen to benefit the interests of parties and nations in power, thus the rationale for going beyond law and applying social tools of solidarity and redistribution in the search for answers to human misery occasioned by the paradox of poverty and wealth.

Attempting a Dialogue between de Soto & Williams

From the summary of the two approaches, it could be suggested that almost every single underlying statement made by de Soto is negated in Williams' collection of essays. It is most likely that a dialogue between the two theorists may end in a stalemate, especially as de Soto's thesis is presented in such a self-evident manner that seems to give no room for reflexivity. Unlike contributors to Williams (2006: 8), who critique the human rights approach to poverty eradication and suggest ways in which poverty law could improve in the future, de Soto's property-capital thesis is presented as a *fait accompli* (de Soto's 2000:242). The main rationalisation for the clear distinction between de Soto and Williams' frameworks lie squarely on their varying philosophical conceptions of poverty and how law and power impact thereon. In Nigeria, one would struggle to see de Soto's 'rich-poor' with billions of assets held as dead capital. Kingwill et al. (2006) also tested the relevance of de Soto's work in post-apartheid South Africa and concluded that South African policymakers "must resist the temptations to seek simplistic solutions to poverty of the type offered by de Soto."

From the foregoing it is clear that Williams' deeper understanding of poverty as including and transcending a lack of means is more attuned to the reality in Nigeria and Africa. Whilst de Soto's work seems to recreate the discredited modernisation thesis in which development is seen through the eyes of the West and the Rest, Williams and her colleagues are more aligned to a world system theory that sees development from the perspective of unequal relations between countries in a global political economy. Consequently, they are able to explode the myth that development is only about the Third World, whereas de Soto seems stuck on the doubtful thesis that the West has successfully overcome the pangs of development. De Soto's narrow conception of 'property' as purely individualistic appears to prevent him from seeing the bigger picture regarding 'common property'. In Nigeria, with its huge oil resources, one of the key challenges is how to deal with the pauperisation of the people of the Niger Delta, whose individual and communal lands give Nigeria access to colossal oil wealth. It goes without saying that what is termed "individual or common property" may be dependent on the wielder of preponderant force in a state. Proceeds from common property may also be misallocated in such a way as to deepen poverty in some sections and increase access to wealth in another. The social, political and economic injustices embedded in poverty and wealth appear to have been suppressed in de Soto's theoretical framework. Another underlying issue in de Soto (2000) is his strong orthodox

capitalist leanings. The neoliberal agenda that is pursued in his *Mystery of Capital* is the classical variant that has been abandoned in many Western states, yet astonishingly de Soto is able to disguise this retrogression by a seeming focus on poverty eradication and growth. The strong property agenda pushed in his work favours the logic of the invisible hand of the market, which in effect rolls back the states. The failure to contrast this view with the logic of state interventionism, as pioneered by people like Maynard Keynes and Williams Beveridge, meant that de Soto was unable to reflect on the counter-logic of the visible hand of state planning to address the injustice of the market. In the light of this, another way to distinguish between de Soto and Williams is that whilst de Soto's work takes us back to the Cold War era of atomised rights, Williams' work builds on the new revolution that sees rights as complementary.

Considering that my approach to RTD seeks to question the trivialisation of rights, it stands to reason that the property law framework of de Soto will offer a very limited lens for addressing the paradox of poverty and plenty. My choice of the poverty law framework is informed by the fact that the focus on property, i.e. the having mode of development, often leads to the neglect of the human, the being mode of development. In making this choice, it is important to point out that I recognise the dialectical unity between the 'having mode' and the 'being mode of living', between 'power and powerlessness' and 'poverty and wealth'. As ably captured by Jasudowicz (1994: 24), "Man is not a creature divided by the 'iron curtain' between a human 'to be' and 'to have', the elements and requirements of 'to be' and 'to have' are constantly alternating and conditioning one another. It is not possible nor is it admissible to stress only the human 'to be' so as to annihilate the human 'to have'. This 'to be' is not possible at all without satisfying the elementary requirements of the human 'to have' and inversely." The problem with the 'property law' paradigm is precisely its seemingly aggressive commitment to annihilate the human 'to be'. It is not surprising, therefore, that throughout human history the scramble to accumulate property has driven humankind to unspeakable heights and atrocities such as slavery, colonialism, mass murder, bio-piracy and robbery. The crises of modernity are that the lofty heights attained on the scaffold of injustice have proven to be unsustainable, whilst a theory of indignation, to borrow from Sousa Santos (2007), and that of reframing are needed to re-construe and ignite the healing and recovery process. Hence, my research adopts the theoretical framework of poverty law, a human right model that is complemented by other moral and political approaches, including theorising human rights as public goods.

In this research on RTD, the adoption of an interdisciplinary theoretical insight into poverty law enables me to ask underlying questions – to look at law not just as a normative instrument but also as a social, political and economic tool. Hence, when I examine laws on the right to development, I question whether they are the real things that lie beneath the surface or the appearance of the meaning I attach to them. My critique exposes the often hidden violence of law, whilst the inherent contradictions in laws also become meaningful through this device.

1.12 Traps to RTD: Outcome of Theoretical Insights

By employing these multi-level tools of interpretation, my research identifies five *key institutional and structural ‘traps’*, namely national and transnational, although they do overlap at certain points.

National Traps:

- Trap 1: Nigeria’s constitutional law is in conflict with the ideals of RTD. The contradiction between national and international acts is a development trap.
- Trap 2: Chronic corruption is at the heart of the continued failure of the state (Nigeria) to discharge her primary RTD duties.

Transnational Traps

- Trap 3: The predominant theory of international law privileges the interest of dominant states that have access to large properties. International law, viewed from this perspective, is hegemonic and hence a trap to RTD, as this dominant paradigm of international law tends to diminish the alternative perspective of a counter-hegemonic space.
- Trap 4: The global economic super-structure that towers over and above Nigeria’s constitution is private interest-oriented and hence in conflict with the public interest goals of RTD.
- Trap 5: Following on from Trap 4, the statist duty framework overlooks the current power asymmetries between states and corporations. As some multinational corporations have become more economically powerful than some states, voluntary

corporate social responsibilities have been severely weakened, hence the prevailing situation of ‘profit over people’.

I will now turn to the methodological pathway followed in exposing these traps.

1.13 Towards an ‘Epistemology of the South’

“Methods are not simply techniques that can be used in obtaining facts about the social worlds, but are always used as part of a commitment to a theoretical perspective, even if this is not discussed explicitly in a research project.”

(Banakar and Travers, 2005: 19).

This section highlights the methods employed in this research. I have chosen to describe and analyse my methodological leanings, mainly in my own words, instead of attempting to pigeonhole my techniques within the divides of qualitative, quantitative or mixed methodologies, as expertly set out in Bryman (2004: 361-521). I take this approach in order to obviate the risk of dampening research imagination/originality or distorting meanings that may flow from both the visible and invisible forms of epistemology.

Smith (1999) and Sousa Santos (2007) offer tools for a researcher caught in the dichotomies of the orthodox/unorthodox; visible/invisible; norms/structures; regulation/emancipation. In such scenarios, epistemology may diverge and contradict. Sousa Santos (2007) mirrors this dilemma in his ‘Epistemology of the South’, in which he analyses the impact of Western thinking, which he characterises as “abyssal, consisting of visible and invisible distinctions.” According to Sousa Santos (2007:1):

“The invisible distinctions are established through radical lines that divide social reality into two realms: the realm of this side of the line and the realm of the other side of the line.”

The division is such that on “the other side of the line” there is “non-existence, invisibility and non-dialectical absence.” From a similar intellectual standpoint, Smith (1999) defines research “through imperial eyes” as an approach which assumes that Western ideas about the most fundamental things are the only rational ideas possible to hold. To indigenous people, this approach, according to Smith (1999:56):

“... conveys a sense of innate superiority and an overabundance of desire to bring progress into the lives of indigenous people – spiritually, intellectually, socially and economically.”

Smith (1999) and Sousa Santos (2007) provide tools to situate my own life experiences of living with people “at the other side of the line”; people yoked together in penury, whose voices are often heard in dirges, songs, idioms, dance and the names they painstakingly give to their children. Since my experiences play an important background role in this research, serving as its ‘poetic muse’ and moulding its imagination, I argue that they help me overcome subjective/objective and structural/agency divides.

1.13 (a) Living with the poor and hearing their clamour for survival, recovery, decolonisation, development, transformation, mobilisation and self-determination

Growing up in a rural Nigerian village, I have had close contacts with local thinkers, the custodians of local cultures whose views are sought after by ordinary people as if they were celebrated philosophers such as Socrates and Plato. These local thinkers and theorists, some of whom hold the ‘ofor’ (priestly function), are generally uneducated. They cannot read or write in the English language, but their ideas on human rights resonate with a deep philosophy. When libations are poured to their gods for family and communal sustenance they do so on terms similar to the Lockean Social Contract. One of them, ‘Mama Eze Abugu’, the Ede of Obollo Etiti, was my first ‘teacher’ in human rights. Pa Eze Abugu, who died at the age of over 100 years, would normally precede his solemn, barefooted approach to the shrine of ‘Ezechiteoke,’ the Supreme Deity, with the following words:

“The Great Deity, I come to you with open hands... If I have ever slept with another man’s wife, if I have ever stolen a penny from my neighbour, if I have ever soiled my

hands in the blood of a human person or borne false witness against my neighbour, visit me with slow and painful death and may my prayers be like a smelly rag torn to shreds.”

These invocations are replicated by chief priests and elders who had never read or heard of the Universal Declaration of Human Rights or seen a copy of their own country's constitution, let alone discussed it. Curiously, their illiteracy and informational poverty pale into insignificance when contrasted with their capacity to reason and properly allocate values in celebration of the sanctity of the human person. When names like ‘Nwakaego’ (a human child is greater than material possessions) are given to their children, these unlettered philosophers are using the vehicle of child-naming to call attention to their understanding of what development really means. ‘Nwakaego’, for them, is a permanent reminder that the ‘having mode’ of development is ephemeral, whilst the ‘being mode’ of development is more enduring. This traditional view about the pre-eminence of the ‘being’ over the ‘thing’ has been philosophically articulated by the American psychoanalyst Eric Fromm (1985), whose work draws a line between the ‘having’ and ‘being’ modes of living. The having mode tends toward consumerism and materialism, whereas the being mode tends toward more enduring values, the selfless use of talents and self-abnegation.

On another level, living among rural people offered me an array of time-honoured proverbs that touch on ‘rights, solidarity and development’. Proverbs and sayings, such as “Egbe bere ugo bere” (live and let live), “igwebuike” (there is strength in numbers), “onye ayana nwanneya” (no one should leave his neighbour in the cold), “Echidime” (the future is unpredictable) and “nwanne di na mba” (the spirit of cooperation transcends filial bonds), are some of the proverbial sayings that remain indelible.

Works like those of Smith (1999) and Sousa Santos (2007) provide an epistemological bridge to articulate the cultural concepts in names, stories, idioms and proverbs within the language of Western academic knowledge discourse.

I will now turn to two other methods I used in this research.

1.13 (b) The Discourse of rights and development: Literature, Statutes and Narratives

Five of these discourses stand out:

- the constitutional discourse
- the corruption discourse
- the international law discourse
- the oil, violence and globalisation discourses
- the legal reform discourse

On the legal reform discourse I drew a lot of background data from my work in the field of human rights and development in Nigeria. During this time, I participated in two major civil society constitutional reform projects, the first of which was ‘Model Constitution for Nigeria’, a project initiated by the Human Rights Law Service, Nigeria, with the support of the Ford Foundation, USA. This project culminated in the publication of Agbakoba & Mamah’s (2000; 2002) work. I also represented HURILAWS at the Citizen’s Forum for Constitutional Reform (CFCR), a civil society coalition for the reform of the Nigerian constitution. The CFR’s key debates on constitutional reform were published in 2002 (CFCR, 2002). The search for a ‘perfect’ constitution for Nigeria is ongoing alongside the legal challenge launched by the Nigeria’s Nobel Laureate in Literature, Professor Wole Soyinka, and Mr Fred Agbeyegbe, who are asking the court to nullify the Constitution of Nigeria (1999) which they claim is not the act of the people of Nigeria. Prior to this legal challenge, Ogewewo (2000: 135-166) argued the case for the judicial annulment of the Constitution of Nigeria 1999 as imperative for the survival of democracy in Nigeria, thus offering impregnable tools for anyone committed to challenging its legality.

On statutes and laws, I focused mainly on the following:

- The Constitution of Nigeria (1999) in the light of its history
- The African Charter on Human and People’s Rights
- Case laws
- The UN Declaration on the right to development vis-à-vis sources of international law: treaties, customs and judgments of international courts and the opinions of highly published authors. I focused specifically on sources that are related directly to international human rights and development.

In studying these legal texts, I aim at transcending the literal by questioning underlying structures. Consequently, in interpreting the preamble of the Constitution of Nigeria (1999), which is couched as a solemn act of the people, I seek underlying evidence as proof or in negation of such a proclamation. In studying international treaties (hard laws) and declarations (soft laws), I question the criteria for calling one “hard” and the other “soft.” What is it that determines the categorisation of international law as “soft” or “hard”? Is it majority or minority interest? Overall, I approach laws (national, regional or international) from a critical perspective. Since laws, at all levels, are not a product of omniscient, transcendental reality, I see them as humanly created, and thus it is likely that legal provisions may be contradicted by the tension between power and powerlessness. Law, as I interpret it, does not exist in a social, economic and political vacuum – it is always the expression of the predominant power in a state at a given time. Mansell et al. (2004) support this method of analysing law, which they argue is needed, among other reasons, to “uncover the hidden politics of law and challenge our taken-for-granted common sense knowledge.” In critiquing ‘law’, ‘rights’ and ‘development’, my overriding objective is to deepen knowledge and catalyse change with a view to impacting positively on societal growth.

1.13 (c) Networking and monitoring the work of identified NGOs

I identified local and international NGOs whose works and publications on human rights, poverty and development I have followed in the last 42 months. The organisations identified are as follows: Human Rights Law Service, Nigeria, <http://www.hurilaws.org>; Socio-economic Rights and Accountability Project, Nigeria <http://serap-nigeria.org>; Human Rights Watch, USA, <http://www.hrw.org> and Share The World’s Resources, UK, <http://www.stwr.org>. I have also been following current events in national and international media. The results of this effort fed into the discourse of right and development, as outlined above.

1.14 Research Structure/Outline

The chapters that follow analyse the development traps identified herein. Chapter 2 deals with National Trap 1, investigates the conflict between Nigeria’s constitutional law and the ideals of RTD and questions whether the notion of structural violence could be attributed to the Constitution of Nigeria. Chapter 3 focuses on chronic corruption (National Trap 2), whilst

Chapter 4 investigates the limitations imposed by international law on the basis that its overemphasis on states as subjects tends to frustrate the realisation of RTD. In Chapter 5 the transnational trap of neoliberalism is confronted, and questions are asked as to whether RTD can ever be realised within an economic base that tends to leverage the ‘private’ over the ‘public’.

Chapter 6 deals with multinational corporations (MNCs) and investigates the proposition that voluntary corporate social responsibilities have been severely curtailed by the power asymmetries between states and corporations. In this chapter a proposal for transcending voluntary corporate social responsibility is presented. The concluding Chapter 7 employs a dual thematic model to analyse the research findings and draw underlying meanings. This chapter also offers a post-critique analysis of the research’s relevance whilst reflecting on the need for further research on the viability of the right to self-determination as a tool for transcending traps.

1.14 (a) Relevance of the Study: A preliminary Statement

This research contributes to the literature on national and international law, as well as on the nexus between human rights and development in a new global age. Methodologically, this research contextualises new thinking around the ‘epistemology of the south’ within Nigeria, particularly in the study of rights and development. This approach has not been well tested – if at all – in Nigerian legal scholarship. Furthermore, the research fills a crucial gap in the literature on Nigeria by going beyond the orthodoxy of normative inquiry into structural, underlying issues. The few published research papers on the right to development within the Nigerian and/or African contexts are based on the content and implementation of RTD, and the underlying structural challenges that RTD imposes are engaged with rarely. This research seeks to delve into underlying questions and to employ an interdisciplinary tool to study what may be viewed ordinarily as strictly legal questions of justiciability and non-justiciability.

In addition, the right to development framework is not popular in Nigeria. Poverty law is not part of the curriculum for the training of lawyers in the country, despite its high poverty statistics. Furthermore, human rights law subsists within a constitutional framework that constructs a separate and unequal rule of law for poor people. Nice’s (2008: 629) observation in relation to the US constitution applies to Nigeria with equal force because “across constitutional doctrines, poor people suffer diminished protection, with their claims for

liberty and equality formally receiving the least judicial consideration and functionally being routinely denied.” The current Constitution of Nigeria 1999 draws a clear dichotomy between enforceable and unenforceable rights. Chapter II, covering sections 13-32, defines fundamental objectives and Directive Principles of State Policies. Although these sections set out the purpose of government and the economic, political and social objectives of governance, these sections are interpreted as mere privileges. In fact, section 6 (6) (c) of the constitution categorically provides that judicial powers shall not extend to any issue or question as to whether any act or omission of any authority or person, or whether any law or judicial decision, is in conformity with the fundamental objectives and directive principles.

It is not surprising, therefore, that this constitution has been hotly contested. In fact, since 1999, pro-democracy activists in Nigeria have been calling for a Sovereign National Conference to map a way forward for a people’s constitution. To divert attention, the government has been jumping from one constitutional reform initiative to another, but these efforts are often hijacked by party politics and other parochial interests – without any tangible success. For instance, in 1999, the then President Olusegun Obasanjo set up a 24-member Presidential Technical Committee for the Review of the 1999 Constitution. In 2000, the National Assembly also set up the National Assembly Joint Committee on Constitutional Review (JCCR), but despite the widely publicised touring of all states, with obvious implications on state resources, their efforts were clouded by their infamous recommendation, aptly captured by Okpanachi and Garba (2010: 6) as follows:

“...the National Assembly JCCR under the leadership of the Deputy Senate President, Ibrahim Mantu, recommended, among other amendments, the amendment of the constitution to allow for the elongation of the tenure of the president and state governors beyond the constitutionally stipulated two consecutive terms of four years each. The proposed constitutional amendment was formally defeated on May 16, 2006 when the Senate voted against it, a decision that, in effect, undermined the other seemingly desirable clauses recommended for amendment.”

The National Political Reform Conference (NPRC), set up in 2005 to discuss reform areas in the constitution, also failed to deliver. The reason for this failure was also well-documented by Okpanachi and Garba (2010: 6). In their words:

“After several months of deliberation, the NPRC ended in deadlock over the demands by delegates from the Niger Delta, Nigeria’s oil producing region, for an increase in the derivation formula from the constitutionally stipulated 13% of ‘revenue accruing to the federation account directly from any natural resources’ to 25% in the short term and 50% in the long term. This position, ‘25% derivation now and 50% ultimately’, was vehemently rejected by the delegates from non-oil producing states, especially the North. The argument of the delegates from the North was that acceding to this demand in an economy that is solely dependent on oil will lead to bankruptcy for the region and entire federation. Ultimately, the 17% ‘compromise’ reached was rejected by the Niger Delta delegates.”

In contrast to government-led reform efforts that were often deadlocked, the Citizens’ Forum for Constitutional Reform (CFCR), set up by over 100 civil society organisations in Nigeria, published a commendable report on constitutional reform following wide consultation with Nigerians across the country, but the government is yet to seriously consider their recommendations. The tendency in government circles to stifle the worthy efforts of civil society organisations is one of the offshoots of Nigeria’s history of military dictatorship and the ongoing trend of “competitive authoritarianism” (Levitsky and Way, 2002).

There is, however, a continuing discourse about constitutional reforms in Nigeria, but the better funded, government-led constitutional discourse in Nigeria is often conducted without any thought for engaging with the people. The theories, methods and processes behind gathering reform ideas are at best rudimentary. For instance, there is an unmistakable paucity of theoretical materials to help discussants articulate their views, and consequently the people’s voices are often swallowed up by the largely egocentric priorities predetermined by the powerful ruling class. A study of the constitutional history of Nigeria, from the repressive colonial phase through to the present day, shows a consistent denial approach which numbs efforts to push for an alternative strategy. In her 50 plus-year history, since independence from Britain, the country has been mostly under military autocracy – the current Constitution of Nigeria 1999 came into existence via Military Decree 24 in 1999.

Moving from one repressive phase to the other throughout these years has meant that the poor continue to be given the illusion of rights, which ultimately they cannot claim. The declared purpose of governance curiously revolves around these so-called ‘rights’ without judicial

teeth, yet the nexus between power and law is easily glossed over. Illustratively, Sections 13-32 of the Constitution of Nigeria, 1999, bordering on the Fundamental Obligations of Government, are not enforceable. Hence, section 15 (5) of the constitution, which provides that the state shall abolish all corrupt practices and abuse of power, is not mandatory, hence raising serious questions about Nigeria's commitment to confronting the evils of chronic corruption, one of the greatest barriers to development in the country. The poverty eradication strategy draws inspiration from idealist national models as well as the United Nations' Millennium Development Goals, but it nevertheless remains utopian. The concept of non-justiciability, a colonial legacy¹, has no doubt affected the literature and legal scholarship on the alternative enforceability framework, without which the gap between the poor and the rich would continue to widen. The dearth of literature, at the national level, is symptomatic of the impact of the dominant viewpoint, which takes as a given that these rights of the poor are conditioned on the availability of resources and cannot be sufficiently defined as to be constitutionally protected. The issues addressed in this research have the capacity to drive change and affect the curriculum of legal education and scholarship in Nigeria, by refocusing attention on issues of poverty and solidarity and drawing from deeply embedded traditional values that appear lost in the language of enforceability and unenforceability.

At the international level, "poverty law," according to Williams (2006:1-13), "is an emerging discourse." The US's refusal to ratify the core rights to development, whether in the form of a treaty or declaration, is but an illustration of the powerful forces stacked against the rights of the poor. Constitutional and judicial innovation in South Africa is prompting emergent scholars to think constructively about how the constitution could be made to deliver to the poor, but yet again, the overbearing nature of meta-constitutional reality is often lost in the haze, so current efforts in constitutionalising poor rights have been criticised as mere exercises in rhetoric.

Another area to which the research contributes concerns the role of non-state actors. As scholars converge on state responsibility, the role of powerful non-state actors, some more powerful than the states themselves, are rarely analysed in relation to the right to

¹ The history of constitutional law making in Nigeria has been marked by elitism. The 1914 Amalgamation Constitution, authored by the colonial Office in London, merged the Southern and Northern Protectorates and paid no attention to the plight of the poor. This lapse has been replicated over the years.

development because of the limiting notion of ‘legal personality’. This research goes beyond these orthodoxies and argues for sharing duties across state and non-state entities. In the concluding Chapter 7 of this thesis, I hope to further reflect on the contributions of the research to the theory, method, pedagogy and substance of constitutional law.

1.14 (b) Conclusion

To sum up, Chapter 1 has presented my research questions in the context of the historical and ongoing challenges of ‘rights’ and ‘development’. The questions for investigation are mainly structural and institutional in character, so I have demonstrated the need for a multi-level interdisciplinary approach. This chapter has discussed the methodological approach adopted in dealing with orthodox and unorthodox ideas and theories, and it has also demonstrated the relevance of this approach as a viable mechanism for delving into legal and social complexities, in order to truly explore and understand the interactions, norms, processes and belief systems that are part of individuals, institutions and cultural groups. In Chapter 2, I will focus on the key legal document in Nigeria, the ‘supreme’ Constitution of Nigeria, with a view to investigating the identified ‘Trap 1’, i.e. the proposition that Nigeria’s constitutional law is in conflict with the ideals of RTD and may be the lifeblood of anti-development struggle and violence in the country.

Chapter 2

The Trap of Constitutional Violence

2.0 Setting the Scene

“Modern states kill and plunder on a scale that no ‘robber bands’ could hope to emulate. Any attempt to quantify their crimes is inevitably subject to enormous margins of error... Government officials also make a major contribution to property crime. According to a major international victimisation survey (Zvekic 1998), being asked for a bribe is the second commonest form of criminal victimisation (after consumer fraud) outside the industrialised world. But such petty corruption pales into insignificance beside the ‘grand corruption’ of political elites... Apart from sheer scale, the other obvious difference between ‘robber bands’ and ‘states without justice’ is that states claim the power to determine what is ‘just’, who is a robber and who is a tax collector. How, then, can we speak of ‘state crime’? If states define what is criminal, a state can only be criminal on those rare occasions when it denounces itself for breaking its own laws...”

(Green and Ward, 2004: 1).

The Nigerian state presents a crucial case study of what Cover (1986) refers to as the “homicidal” dimensions of law, i.e. the murderous capacity of state laws. In this chapter I put forward the following propositions: (a) law, especially constitutional law, and its interpretation in Nigeria have often tended towards the violent subjugation of the majority (poor & powerless), (b) law, in this context, is a tool of oppression (violence) in the hands of a few powerful elites with selfish interests they seek to protect (at all costs) and (c) the most intractable development traps in Africa’s most populous country cannot be divorced from this prevailing normative/state violence.

First, I interrogate law and violence in terms of what they mean in the context of real struggles for human survival. On the meaning of violence, I draw on scholarly insights from Arendt (1970), Galtung (1990), Wolff (1969) and Coady (1986) in a bid to expose fault lines in the one-dimensional conception of violence as violence from below. Secondly, I examine

the jurisprudence of violence, by analysing Cover (1983 and 1986) in the light of other scholars of law and violence. I thereafter extend these insights gained from the scholarly literature on law and violence to Nigeria itself. I limit my analysis to the constitution(s) of Nigeria. The choice of the constitution is strategic because this constitutional law declares itself as an autochthonous (home-grown) instrument – the measure of legal validity of any other law in Nigeria. Using Achara’s (2005) theory of preponderant force, I question the viability of textual analysis, by considering the inherent danger of what Achara (2005) calls “textual fetishism.” Achara’s theory of preponderant force threads through the rest of the chapters, taking them toward the conclusions I draw from them ultimately.

2.1 Structure and violence causation

The World Development Report (2011), ‘Conflict, Violence and Development’, delivers a striking message: “Strengthening legitimate institutions and governance to provide citizen security, justice, and jobs is crucial to break cycles of violence.” Put differently, the report urges a shift of emphasis to structural elements in the causation and curtailment of violence. With diverse ethnic, religious and cultural affiliations, a high dependence on oil and astonishing levels of severe poverty, Nigeria is a key battlefield for development conflicts. Analysts of post-independent Nigeria agree that at the heart of this country’s development challenges in the last 50 years lie violent conflicts of varying dimensions – ethnic, religious and political (Maier 2000; Osaghae and Suberu 2005; Abimbola 2010). A one-dimensional approach has, however, been largely applied in attempt to construe and respond to these development pitfalls. The ‘criminal’ perspective of ‘violence from below’ largely informs response and analytical frameworks that have revolved historically around one commonly acceptable line of prescription, namely disablement-destruction-retribution, or in the more militant and current terminology ‘operation flush’. This single-minded focus on ‘unauthorised’ or illegitimate violence often tends to remove attention from the foundational question of institutional/structural/legitimate violence (violence from above). The similarities between the two forms of violence support the need for broadening analytical categories, in order to inspire a more reflective approach. This chapter pursues an alternative perspective of ‘violence from above’, which it suspects may be the lifeblood of ‘violence from below’. Considering the centrality of law in a polarised setting like Nigeria, this chapter focuses on law (constitutional law) as a form of violence from above.

2.2 Analytical Framework

Professor Robert Cover's theories of 'homicidal law' and legal hermeneutics of "death and pain" (Cover, 1983; 1986) find ready application in Nigeria and Africa, but Cover was not the first thinker to associate violence with law, as the tendency of violence to masquerade as law had been long exposed by ancient Greek philosophers. 'The Republic', by Plato (c. 427-347 BC), for instance, was a devastating critique of law and justice. The works of Austin (1832), Benjamin (1978), Foucault (1977) and Hart (1961) also predate that of Cover on law and violence. However, Cover (1986) was significant in resurrecting the theme of violence and law at a time when many of his contemporaries glossed over such themes on the understanding that law's violence was 'legitimate'. To this effect, Cover is said to have achieved a crucial conceptual breakthrough, penetrating a venerable intellectual deposit that nearly succeeded in completely concealing law's violence as violence (Sarat 2001). Cover (1983 and 1986) is also appropriate to this work because of his focus on the US, a country that Nigeria theoretically borrowed so much from in the making of her presidential constitutions of 1979 and 1999. In addition, Cover's use of apt imagery in the form of "death and pain" captures the tragic picture of massive human suffering that is being experienced by many in Nigeria and Africa. Therefore, in arguing that Nigeria presents a thought-provoking case study of the 'homicidal' and 'jurispathic' dimensions, I draw support mainly from the works of Cover (1983; 1986) and the supporting views of a long line of scholars of law and violence, such as Derrida (1990), Benjamin (1978) and Sarat (2001).

2.3 The Hurdle of Definitions

2.3.1 What is Law?

Although mired in jurisprudential controversies (Williams 1945:1), the meaning of law can be constructed from the following main perspectives. The first view sees law from the perspective of statutes, such as a constitution or Acts of parliament. The second meaning that may be attached to law is that which sees it from the perspective of judicial interpretation (judge-made laws). The argument here is that law is not just the mere dry bones of the statutes but the outcome of judicial interpretation, which in fact gives life to law. Law may also be interpreted as a superstructure that facilitates commodity exchange, or as a system of command, imposing obligations and guiding behaviour under pain of sanctions. Another interesting view of law sees it as a system of coordination and a form of language communicating shared meanings and intentions.

In the analyses that follow, I use some of the above categories, with a view to understanding law in the context of the theoretical framework of this thesis. Scholars of law are divided sharply by the multiple perspectives of law as outlined above. As ably noted by Pound (1934:1):

“... much depends on the standpoints from which the body of precepts, if one limits himself to these, is approached. From the standpoint of the judge we may think of rules of decision. From the standpoint of the individual we may think of rules of conduct or threats of consequences of conduct. From the standpoint of the counsellor at law they seem rather to be the basis of prophecies or predictions of judicial and administrative action. From the standpoint of the jurist, they might seem a body of raw materials for systematic organisation or for the development of doctrine.”

Goodhart (1953:19), aligning with Pound’s (1934) ‘rules of conduct’ viewpoint, defines law as “any rule of human conduct which is recognised as being obligatory.” The term ‘obligatory’ in Goodhart’s definition is the recognition that “the order or rule *ought* to be obeyed.”

On what constitute the bases of obligation, Goodhart (1953:23-25) analyses four main grounds of obligation, namely: “the general law conviction,” reverence, the conscious or unconscious realisation that “law is essential if we are to escape from anarchy” and finally – and most importantly – the moral obligation to obey the law. According to Goodhart (1952: 37):

“In English law we shall, I think, find that morality has played a particularly important part in the development of the common law, and that on the whole we shall be able to say at the conclusion of these lectures that English law and the moral law are rarely in conflict.”

This conclusion, when tested in a common law country like Nigeria, may produce a problematic situation because there seems to be a disconnection between morality and law, as the majority of the population feel alienated from the supreme law, the constitution, which is

the basic law in Nigeria. However, Goodhart (1952: 5) had earlier advised that law is not necessarily identical to freedom or justice. As such, he wrote:

“I am not suggesting that law is identical with freedom or justice. Law is merely a piece of machinery and can be used either for or against liberty. Law is not necessarily either reasonable or moral... Law ought to be based on reason, it ought to protect liberty, and it ought to be in accord with the moral law, but these ideals are not a necessary part of our conception of law.”

Goodhart (1952: 7) went further to argue:

“... Law is essential in every state. What is of equal importance is the purpose of the law which is under consideration. If this is directed to the achievement of freedom and justice then it can be described as beneficent: if on the other hand it is used as a tool by an autocratic government then it assumes the character of those who find in it an instrument by which they can control those under their absolute power. The quality of the law therefore depends on the purpose to which it is directed.”

In the face of Hayden's (2009) *Political Evil in a Global Age*, that is, among others, abject poverty coexisting side by side with surplus wealth in a common law country like Nigeria, the perspective that law could be used to achieve egalitarian purposes like equality and participation needs to be further interrogated. Furthermore, considering that the long line of historical and current tragedies surrounding human existence – slavery, colonialism, apartheid, unfair trade, state murder and many others – was premised on the power of law, it seems fit and proper that law's seemingly classless attributes be further questioned. The target, however, is not to destroy the bases of law and open a floodgate for anarchy; the objective is to have a deeper and more robust understanding of law from both positive and negative angles so as to strengthen law and increase its purchase among the populace.

It is therefore to develop this deep appreciation of law that I focus attention on the aspects of law that are often drowned by the egalitarian/libertarian perspectives of law. To this end I apply a tripartite model. First, I examine the views of law as a tool of violence (command theory). Secondly, I analyse perspectives that see law as a mechanism for celebrating inequality (commodity-form theory) and finally I ventilate the views of law as a

constitutional framework for locating power (the preponderant force theory). I do this in the context of my central proposition in this chapter that the constitution of Nigeria is the life-blood of violence in the country.

Model 1: The Command Theory of Law

Austin's (1885) 'command' (violence) theory, analyses law from the perspective of commands backed by sanctions. For Austin, a law is a rule laid down "for the guidance of an intelligent being by an intelligent being having power over him". As Austin (1885: 86) puts it:

"The matter of jurisprudence is positive law: law, simply and strictly so called: or a law set by political superiors to political inferiors...A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him...."

Determined to distinguish "positive law", which he called "the appropriate matter of jurisprudence", from the "various objects" which are related to it by resemblance, Austin (1885: 88) emphasised the nature of law or rule which can be given the term 'law' properly. In his memorable words:

"Every law or rule (taken with the largest signification which can be given to the term properly) is a command...

A command is distinguished from other significations of desire, not by style in which the desire is signified, but by the power and purpose of the party commanding to inflict an evil or pain in case the desire is disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not command, although you utter your wish in imperative phrase...

A command then is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other in case he comply not with the desire. Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged to your command" (Austin, 1885: 88-89).

The emphasis on ‘sanctions’ and the manner of its presentation by Austin (1885) have been critiqued by scholars, within and outside the positivist school of thought. (Goodhart 1952, Hart, 1961, Kelsen, 1961 and Cotterrell, 2003). As an illustration, Goodhart (1953) challenged Austin’s ‘command’ theory of law and dismissed it as unattractive. According to Goodhart (1952: 11):

“Command definition of law is not a very attractive one. It assumes that in every law we must find a superior and an inferior, and it also assumes that the will of the superior is enforced on the inferior by the threat of a sanction.”

Hart (1961) also corroborates Goodhart’s criticism of Austin. According to Hart (1961: 5), on the question of what constitutes law, the best course is “to defer giving any answer... until we have found out what it is about law that has in fact puzzled those who have asked or attempted to answer it.” Hart also identifies three recurrent puzzling issues: “How does law differ from and how is it related to orders backed up by threats? How does legal obligation differ from and how is it related to moral obligation? What are rules and to what extent is law an affair of rules?” Focusing on Austin’s command theory, Hart (1961: 48) argues as follows:

“The theory of law as coercive orders meets at the outset with the objection that there are varieties of law found in all systems which in three principal respects, do not fit this description. First, even a penal statute, which comes nearest to it, has often a range of application different from that of orders given to others; for such a law may impose duties on those who make it as well as orders. Secondly, other statutes are unlike orders in that they do not require persons to do things, but may confer power on them; they do not impose duties but offer facilities for the free creation of legal rights and duties with the coercive framework of the law. Thirdly, though the enactment of a statute is in some ways analogous to giving an order, some rules of law originate in custom and do not owe their legal status to any such conscious law-creating act.”

On the basis of the above reasoning, Hart (1961: 49) dismisses Austin’s command theory as a model that “obscures more of the law than it reveals.”

Although, Kelsen (1961) shares the same positivist orientation with Austin, that is, a commitment to presenting law from a 'pure', unadulterated perspective, Kelsen was not, however, deterred from criticising Austin's command theory. In presenting the 'coercive order' theory of law, Kelsen (1961:21) just like Austin, isolated the element of 'coercion' as an indispensable element of law, but goes further in reflecting on the meaning of 'command' within a legal order. By so doing he opened up a dilemma in Austin's 'command' and 'binding command' categories. Consequently, Kelsen (1961: 31-32) unequivocally raised an alarm to what he called Austin's "mistake" in identifying two concepts of "command" and "binding command". He argues that "not every command issued by somebody superior in power is of a "binding nature" even if that person can enforce the command. A "command", in Kelsen's formulation, "is binding, not because the individual commanding has an actual superiority in power, but because he is "authorised" or "empowered" to issue commands of binding nature. And he is authorised or empowered only if the normative order, which is presupposed to be binding, confers on him that capacity...The binding force of command is not "derived" from the command itself but from the conditions under which the command is being issued."

Kelsen's critical analyses of Austin and their impacts on the history of positivism, has, expectedly attracted the attention of critical scholars (Finnis, 1999; Vinx, 2013), it is not, however, my purpose here to go into these debates. My interest is to reflect, in passing, on the element of coercion/sanction as a quintessential attribute of positive law in the context of my analytical framework. I take the view that from whichever angle we view the sanction that law unleashes, as an "essential element" in its nature, we will observe the tendency of sanctions to become violent and painful. In fact, Austin used the term 'evil' interchangeably with 'sanction' (Austin, 1885: 88-89).

In the light of the criticisms levelled against Austin's 'sanction', both from left and right, how best should I employ the attribute of sanction within the theoretical framework of this thesis? Roger Cotterrell offers a crucial handle that enables one to transcend the confusion that is bound to be generated on how best to situate Kelsen. First is to take a different view of what 'sanction' means. According to Cotterrell (2003:73):

"...to treat Austin's view of law as much like a view of mere orders backed by threats(such as those of a gunman pointing his gun at the person addressed) is

misleading(cf Hart 1961:ch 2). The relation between sovereign and subject is far more than one founded on coercion. The habit of obedience to the sovereign is, according to Austin, rooted in custom, prejudices and ‘reason bottomed in the principle of utility’: that is, a recognition of the expediency of government (Austin 1832: 246-247).”

Once this route is followed, then we can also transcend what Finnis (1999: 1597) termed, “the incoherence of legal positivism” and firm up a position from the above précis. I take the view therefore; that the ‘command theory’ is neither exhaustive nor infallible model. However, in spite of the criticisms against the theory, like those of Hart (1961) as quoted earlier, it is difficult to deny that the ‘command theory’ captures some nature of law although it may obscure other qualities of law. Interestingly, also, I have noted, thanks to Cotterrell (2003) that ‘command’ must be interpreted analytically to make sense, especially in our contemporary world of change. We can also say the same thing about ‘sanction’ or ‘violence’. Like idioms, ‘command’, ‘sanctions’ or ‘violence’ may have little or nothing to do with the literal meanings of the component words. Consequently, I adopt Cotterrell’s (2003:77) views that:

“Austin’s jurisprudence remains a valuable contribution to normative legal theory and one that grasped the problem of recognizing realistically the phenomenon of centralized modern state power in a way that classical common law thought was wholly ill-equipped to do.”

On that note, I proceed to the economic theories that seek to connect the marketplace with laws.

Model 2: Karl Marx and the Commodity Form Theory

First, it is important to note that the ‘commodity form theory’ was not developed by Karl Marx. Rather, it was one of the key attempts at interpreting Marx’s views on law. Marx himself did not develop any coherent theory of Law (Stone, 1985). However, in his 1859 Preface to a *Critique of Political Economy*, Marx, offered engaging insights into the nature of law by describing law as a superstructure upon an economic base. Considering Marx’s exposition of the classist nature of the economic base as evident in the relationship between the “owners of the means of production and sellers of their own labour” (Marx, 1976:274), it

is reasonable to imply that law as a superstructure resting upon the classist economic base could rightly be viewed, from a Marxist perspective, as primarily targeted at facilitating the preservation of material-economic bases rather than the protection of all humans in society. Put differently, law – like capitalism – is essentially a class conscious structure. This interpretation of the Marxist ‘base/superstructure thesis’ is not free from controversies, though. As well-captured by Cain and Hunt (1979:48), for instance, “the extent to which these formulations of a determinant relation between base and superstructure can be regarded as an adequate précis of the full richness of Marx’s theoretical position is itself an important area of controversy within the Marxist theory.” Considering that we live in a ‘triumphant capitalist’ society, and also in the light of my theoretical framework constructed around property law versus poverty law, I feel it is important that I further interrogate this perspective of law, especially as Marx and Engels, according to Stone (1985: 1) did not provide a coherent and detailed discussion of law within the context of historical materialism. To aid this exercise, I seek illumination from scholars who have laboured to interpret Marxist theories of law. The works of Evgeny Pashukanis, Alan Stone, Bhupinder Chimni, Miéville China and Bill Bowring are instructive tools in highlighting the essential elements in this respect, and although a detailed exposition of their analyses is not intended here, I feel that an outline of their views would go some distance in helping to open what Miéville (2008:97) calls the “black-box of the legal form.”

The Commodity-form theory of law and matters arising

Evgeny Bronislavovich Pashukanis, described as an “imaginative Marxist, the most imaginative to appear among Soviet lawyers immediately after the October Revolution” (Hazard 1980: xi), is reputed for his ‘commodity form theory of law’. The central argument of Pashukanis is that there is a close relationship between the logic of the commodity form and the logic of the legal form, in that “Both are universal equivalents which in appearance equalize the manifestly unequal: respectively, different commodities and the labour which produced them, and different political citizens and the subjects of rights and obligations” (Bierne & Sharlet, 1980: 3). Put differently, Pashukanis’ argument is that in commodity exchange, each commodity must be the private property of its owner, freely given in return for the other. Therefore, each agent in the exchange must be an owner of private property and formally equal to the other agent (s). Without this format, what occurs cannot be classed as commodity exchange. The legal form is the necessary form taken by the relation between

these formally equal owners of exchange values (Miéville, 2006: 78), in which case the character of law is therefore pervasive in capitalism. Therefore, a key to understanding the legal form is to cast our gaze at what transpires in the marketplace.

Although, Pashukanis' commodity form theory did not focus specifically on international law, as "he was more concerned with how to create a new municipal legal system that would provide order and at the same time prepare the way for a classless society" (Hazard 1980), Miéville (2006, 2008) in his analyses of the "commodity-form theory of international law" nevertheless extrapolates Pashukanis' theory and applies it to this field. On the definition of international Law, Miéville (2006: 11) highlights the inadequacy of classic, textbook definitions of international law, such as that of Akehurst (1987:1), which Miéville (2006: 11) quotes as defining international law "as a system of law which governs the relations between states." Miéville criticises norm-focused definitions of international law on the ground that they tell us almost nothing about its underlying nature. In his words, "the standard definitions of international law encountered in the textbooks leave the fundamental 'law-ness' of international law completely unexamined" (Miéville 2006: 13). The omission of classic writers is the failure to analyse systematically the specificity of the legal form. Hart (1961: 231), for instance, argues that the analogy between international law and municipal law "is one of content and not form." Miéville (2006: 15) counter argues that "if the legal form is not shared between international law and municipal law, then they have no legal essence in common, and the only thing that make them both 'law' becomes the fact that they are called law." Since the shared legal essence between international law and municipal law is increasingly evident, Miéville (2006: 16) asserts that jurisprudence must examine the fundamental nature of international law as law, to open up the black box at its centre. Once this black box is opened, what we see is that liberalism underpins the logic of international law. The logic of inter-state relations under capitalism is defined by the same logic that regulates individuals, because in this system and in the underlying precepts of international law, states – like individuals – interact as property owners, as each state owns its sovereign territory (Miéville 2006:54). It is therefore not surprising that Chimni (2003) characterises international law as 'class law'. In his chapter on *The Third World and International Order*, Chimni (2003: 447-73) seems to extrapolate from the 'commodity form theory of law' to demonstrate how the classist nature of international law alienates the people of the Third World, and hence the urgency for a new manifesto for the Third World Approaches to International Law (TWAIL).

This brings to the forefront the problem with Pashukanis' analyses. According to Bowring (2008:26), Pashukanis' view of international law "is as far as it could be from a 'commodity-form' theory." For those who would want to use law as a tool for liberation, Pashukanis' 'commodity-form theory' also raises a serious barrier, in that law cannot assume the form of commodity exchange and be proletarian in content. Bowring (2008: 20-30) provides critical tools for unravelling the limitations of Pashukanis' commodity-form theory, especially in the context of a new theory of international law. Bowring's main objections centre on the following points:

- Pashukanis' neglect of the whole history of pre-capitalist society: to this effect, Bowring (2008:23) quotes with approval Chris Author's observation that Pashukanis is limited, from a Marxist point of view, by making reference to commodity exchange whilst overlooking various forms of production that might involve production for the market.
- Pashukanis' reduction of law to a "single, static and illusory legal form": quoting Robert Fine (2002:157), Bowring (2008:24) articulates the objection that demonstrates a disconnection between Marx's perspective of law and that of Pashukanis – "whereas Marx derived law from relations of commodity production, Pashukanis derived it from commodity exchange."
- Pashukanis' positivist approach to international law contradicts his 'commodity-form' theory; he fails to grasp the fact that international law must be defined as a class law.
- Pashukanis' failure to recognise the importance of self-determination in international law is another area of critique. According to Bowring (2008:28):

"It was not simply the result of the limitations imposed by the period in which he was living, or the necessity to adopt Stalin's ideology, but was the direct consequence of his own theoretical position, worked out in the early 1920s."

It is instructive, however, that for those who would want to use law as a tool (instrument) for liberation, Bowring offers a lifeline via what Williams (1991) in the *Alchemy of Race and Rights* refers to as the "subversion and appropriation of bourgeois legal norm – a process of alchemy." Hence, Bowring (2008: 38) affirms that "the United Nations itself was transformed, not in effectiveness or ultimate independence, but in the unique possibility it

gives for the less powerful states – and international civil society – to gather and talk.” These views corroborate both Krisch (2005) and Koskenniemi (2010). Krisch (2005) analysed the complex interplay between hegemony and international law and arrived at “the ambivalent position of international law as both a tool for the exercise of domination and as an element of resistance to it.” Continuing, the author asserts that “both functions are interdependent: without resistance – its stable, egalitarian and coherent character – international law could not provide the benefits of pacification, stabilisation and legitimation for powerful states. But, without providing these benefits to the powerful, international law could lose much of its effectiveness...” (Krisch 2005: 408). The picture that emerges from our analysis of the ‘commodity-form’ model is equally mixed. At the municipal level, depending on the context, the ‘commodity-form theory’ may reveal a deep classist character of law. In the Nigerian context, for instance, where chronic poverty lie side-by-side with oil wealth and massive political corruption, one could employ the ‘commodity-form’ theory as a tool for construing the deepening inequality of opportunity in Nigeria. However, when this theory is analysed in a different setting, like in the context of international law, another picture may emerge as evident in Bowring’s (2008) critique of Pashukanis. So, why is it that the same theory/model exerts distinct/dissimilar impacts depending on the context in question? What does this tell us about the unseen forces that may lie behind the laws in operation? To this end we turn to the ‘constitution’ which by its very name evokes serious ideas like, “structure’, ‘foundation’ ‘establishment’ and ‘framework’.

Model 3: The ‘Constitution’ as “Preponderant Force”

‘Constitution’ and ‘Constitutional Law’ are not necessarily synonymous. The former is the object whereas the latter is the subject. The tendency to conflate the two could create confusion and controversies. Achara (2005: 184 -209) employing the themes of object and subject provide an engaging analyses on the distinction between the ‘constitution’ and ‘constitutional law’. What I find interesting in the context of the analytical framework of this thesis is not the definitional variations and preferences that theorists have offered but the nature of the ‘constitution’ that has tended to baffle popular comprehension. This nature of the constitution, that is, its ontology approximates to what Miéville (2006: 13), quoted earlier, with reference to international law (a supra-form of constitutional law), termed the ‘fundamental law-ness of international law’ or what he termed the “black box of the legal form” (Miéville 2008:97). Surely, if one is able to understand the nature of this kind of norm

setting law, that is, the black box at the centre of the constitution, one would also be better suited to understand the academic subject that is targeted at studying it.

Therefore, focusing on the object, that is the ‘constitution’ so that I do not lose sight of it, what are the key elements that could aid one to understand the ‘constitution’, whether written or unwritten, even if one is unable to offer a generally acceptable definition of it? To answer this question, I have identified the following key elements, but I must caution that these elements are non exhaustive albeit central. The defining elements that run through the ‘constitution’, as I construe it are contained in Box 1 below:

Element 1: The constitution is at heart of any country's legal system.

Element 2: The constitution has an overriding nature; hence it provides a measure for testing the validity of all other laws within a particular country.

Element 3: The constitution is at the heart of any country's political system.

Element 4: The constitution provides the structure for sharing both physical and fiscal powers in any country.

Element 5: The constitution is the charter of freedom and creates something akin to a contract between the people and their leaders.

Element 6: The constitution provides the bases of union, especially in multi ethnic settings, like Nigeria.

Box 1: Suggested elements that could aid one to define ‘constitution’.

Armed with these key elements, I argue that however one chooses to define the constitution, what ought to stand out clearly is that in interpreting this special kind of law one is dealing with a different kind of animal. It is an animal with multiple legs and variegated colours: the ‘constitution’ has legal, socio-legal and socio-political dimensions. In the constitution, we see a fusion of norms and facts in a way that would certainly mystify anyone who is accustomed to seeing law from a strictly legalistic perspective. Clearly, to understand the “constitution” one must have to understand not just the wordings of the constitution but the context of those

wordings. Put differently, it stands to reason that to understand the 'constitution' one must have to also understand the society in question, its groupings and socio-political alliances. To limit our understanding of the 'constitution' to just the wordings of the constitution may appear too simplistic, in fact, naive. Achara (2005:19) argues that simplistic interpretation of the constitution creates confusion and diverts attention away from the study of the 'real constitution' that is, the people/ entities that wields "preponderant forces" in any polity. Nwabueze (2003) equally creates another dimension. He argues that the presence of a formal constitution does not mean that a government is a constitutional government. What determines whether a government is constitutional, according to Nwabueze (2003: 3), is whether the constitution has the force of "supreme, overriding law; imposes a limitation on the powers of the government and the extent of such limitations and how they are applied."

On the issue of the overriding nature of the constitution, Kelsen (1978) introduces the notion of 'grundnorm' in his 'Pure Theory of Law'. He defines 'grundnorm' as the basic law from which every other law derives legitimacy. Constitutional law scholars in Nigeria, like Eso (1986) and Abiola (1987), have often identified the constitution as the 'grundnorm'. However, the slippery nature of locating the 'grundnorm' in Nigeria's situation has been exposed by Nwabueze (1982: 206) with respect to the impact of military autocracy. According to Nwabueze (1982:206), the grundnorm of the military legal order was the Federal Military Government and not the constitution. Could similar analyses be made in relation to the colonialism and internal re-colonisation that is evident in Nigeria's "competitive authoritarianism?" In his analysis of the theory of 'preponderant force', Achara (2005: 417) introduces another concept of grundfact, in order to call attention to the tenuous distinction between Kelsen's theory of effectiveness, which depends on grundnorm, and Achara's theory of effectiveness, founded on 'grundfact'. Whilst grundnorm considers the ultimate foundation of effectiveness to be a matter of norms, grundfact analyses effectiveness as a matter of the fact that the preponderant powers first determine "the creation, use and regeneration of the constitution." This matter of fact thereafter energises a system of norms (Achara 2005:417).

Despite these varied conceptualisations and rationalisations, that have taken us from posited municipal laws to judge-made laws; from command/violence theories of law to commodity-form theories of law; from international law and politics to norm setting laws and power

politics at the heart of the 'constitution', law is generally viewed as something good for society: "Consciously or unconsciously the people realise that without fixed rules civilised life will come to an end" Goodhart (1953:25). In addition, it is not uncommon to associate law with justice, another ideal that Derrida (1990) described aptly as "the experience that we are not able to experience."

In the light of the seemingly dominant perspective of law as something that points towards justice, "the announcement of something that remains eternally postponed," it is paradoxical that law, which based on that popular notion should serve as a counterpoise to the criminal act of violence, could be analysed as a source of violence. This is exactly what Cover (1986) set out to achieve in his highly influential work, 'Violence and the Word'. As earlier mentioned Cover's thesis is the analytical framework of this chapter. For a deeper understanding of Cover's work on violence, it is important to refer to his earlier work, titled 'Nomos and Narrative' (Cover, 1983). The 'nomos' that law helps to create, according to Cover's reasoning, always contains within it visions of possibility not yet realised, images of a better world not yet built. Cover is quick to point out that law is not simply, or even primarily, a gentle hermeneutic apparatus; it always exists in a state of tension between a world of meaning in which justice is pursued and a world of violence in which 'legal interpretation' takes place in a field of death and pain. At this juncture, we must focus attention on Nigeria. What should be violence in the context of Nigeria? And how relevant is Cover's analysis to the understanding of violence in Nigeria?

2.4 Defining Violence in the Context of a 'Divided' Nigeria

Context is an important factor, because words and concepts may change their meanings in varying situations. The only way to gauge whether such changes are applicable is to carefully analyse various contextual usages and assess their similarities and dissimilarities.

Defining violence within the Nigerian/African context requires an understanding the Nigerian/African condition. According to the British Broadcasting Corporation (BBC) report of 11 January 2012, "Nigeria: A Nation Divided":

"Nigeria should be Africa's powerhouse – it is the continent's biggest oil producer and most populous country. But after decades of poor governance, most of its 160 million people are still mired in poverty. They are also divided along many lines –

ethnic, religious, economic and political – and sometimes these tensions boil over into violence.”

The emphasis on poverty as a key dividing issue is appropriate. Located in the tropics, where temperatures average between 26 and 40°C, most Nigerians, irrespective of ethnic and religious affiliations, ‘sweat it out’, in a literal sense, to meet Maslow’s (1954) first hierarchy of needs, namely food, shelter and clothing. Despite its oil and gas wealth, the statistics of poverty here are well known – in total, over 70% of Nigeria’s 160 million people are poor. The gap between the very poor and the very rich is jaw-dropping. Poverty here is not the type we see in the West, where the state provides some level of social security system to cater for people on the lowest rungs of society; poverty here is absolute and it is generational. The children of the poor will most likely become poor unless a ‘miracle’ happens on the way. If you are poor in the West, you will at least be able to eat, have shelter over your heads, buy durable clothes and possibly drive your own car, thanks to social safety nets. For the Western poor, access to constant electricity, clean water and an efficient transport system is taken for granted, but in the Nigerian context, these basic amenities are ‘luxuries’ and serve as status symbols. The poverty we refer to in Nigeria is not just the poverty of means, it is also the poverty of being. It is the poverty that closes all doors – being unable to eat one square meal a day, being incapable of going to hospital when sick, being unable to go to school, being despised and voiceless; in fact, being unable to be human.

On the political scene, where the question ‘who gets what?’ is addressed, the real Nigerian poor are effectively ‘disenfranchised’ despite official laws that empower them to vote and be voted for. Poverty envelops the typical Nigerian poor person with an inferiority complex, and he sees people in government and the few rich people around him as ‘ndi-ukwu’ – the ‘big ones’, the privileged few whose ‘gods’ are awake in a country where the majority question their ‘being’ and ‘nothingness’ on a daily basis. The hope of the poor ‘hero worshippers’ is that somehow the morsels from the high table of the ‘big players’ will trickle down. But most often self-perpetuation and self-enlargement desires create impenetrable barriers and frustration sets in, with aggression in hot pursuit. Pogge (2002 and 2005) analyses this kind of poverty from the perspective of the structural violation of human rights, while Hayden (2009) calls it “a political evil.” In a situation of abject poverty, a political right to life can only make sense in the context of the right to live. In such a setting, reclaiming humanity lost

at the junction of poverty and exclusion must be prioritised to forestall the ever-present danger of insecurity.

It is therefore from the above snapshot of the Nigerian condition that we attempt to build our conceptualisation of violence in the country. Our task here will not be easy, as definitions are notoriously elusive in nature, often create a cloud of mystery and push bare facts to the realm of the metaphysical, yet definitions or descriptions of concepts remain critical in drawing research boundaries and perspectives.

2.5 Scholarly Debates on Meaning

According to Scheper-Hughes & Bourgois (2004: 1), “violence is a slippery concept – nonlinear, productive, destructive and reproductive. It is mimetic, like imitative magic or homeopathy.” The crucial task of unravelling the ‘slippery’ concept of violence has engaged the intellectual efforts of Arendt (1970), Wolff (1969), Galtung (1990), Coady (1986) and many more scholars cutting across the fields of sociology, law, criminology and related human interest disciplines. Three types of definitions are discernible: ‘restrictive’, legitimist’ and ‘wide’. The restrictive school focuses on positive interpersonal acts of force, usually involving the infliction of physical pain. Coady (1986) hinges on this framework. For the restrictive school, any attempt to extend the definition of violence beyond the restricted framework may be self-serving and unhelpful. For the legitimists, violence is the illegitimate or unauthorised use of force to effect decisions against the will or desire of others. Hannah Arendt and Robert Wolff are analysed as representatives of this school. In her book on violence, Arendt re-examines the relationship between power, force, strength, authority and violence. She examines the nature of violence and its manifestations and argues against Mao Tse-tung’s dictum that “power grows out of the barrels of the gun.” Arendt demonstrates that power and violence are poles apart; where one rules absolutely, the other is absent. She goes further to challenge our understanding of power, force, strength, authority and violence. In her opinion, the most crucial political issue is, and always has been, the question of who rules whom. Power, strength, force, authority and violence – these are but words to indicate the means by which man rules over man; they are held to be synonyms because they have the same function. It is only after one ceases to reduce public affairs to the business of domination that the original data in the realm of human affairs will appear, or rather reappear, in their authentic diversity (Arendt 1970: 44). Power, according to her, corresponds to the

human ability not just to act but also to act in concert. Power is never the property of an individual, as it belongs to a group and remains in existence only so long as the group stays together. Strength unequivocally designates something in the singular, an individual entity, and the strength of even the strongest individual can always be overpowered by the many whom often will combine for no other purpose than to ruin strength precisely because of its peculiar independence. Force, which we often use in daily speech as a synonym for violence, especially if violence serves as a means of coercion, should be reserved, in terminological language, for the “forces of nature” or the “force of circumstances,” that is, to indicate the energy released by physical or social movements. Authority can be vested in persons, as there is no such a thing as personal authority, while violence is distinguished by its instrumental character. Phenomenologically, it is close to strength, since the implements of violence, like all other tools, are designed and used for the purpose of multiplying natural strength. “Violence,” she writes, “can always destroy power. Out of the barrel of a gun grows the most effective command, resulting in the most instant and perfect obedience. What never can grow out of it [violence] is power” (Arendt 1970: 44-46). She (1970: 53-54) further expounds “in a head-on clash between violence and power, the outcome is hardly in doubt” – as in a military force against a collective non-violent resistance (power). But, she adds, “nowhere is the self-defeating factor in the victory of violence over power more evident than in the use of terror to maintain domination, about whose weird successes and eventual failures we know perhaps more than any generation before us.” Violence, she sums up, “can destroy power; it is utterly incapable of creating it.” For Arendt, therefore, violence is illegitimate and can never create power. Under certain conditions, however, according to Arendt, rage and violence are justified. Violence, she writes, “... is rational to the extent that it is effective in reaching the end that must justify it” (Arendt 1969, 1970: 53-54).

Although grouped within the ‘legitivist’ philosophy, Wolff’s (1969) work is said to have added an untypical twist to legitimist definitions, because, unlike Arendt, he argues in favour of ‘philosophical anarchism’ which contests the legitimacy of all forms of social order based on class. Underlying confusion in the use of violence, according to Wolff, is the concept of ‘legitimate authority’, which is “inherently incoherent.” In his words, “Once the concept of violence is seen to rest on the unfounded distinction between legitimate and illegitimate political authority, the question of the appropriateness of violence simply dissolves. It is mere superstition to describe a policeman’s beating of a helpless suspect as an ‘excessive use of force’ while characterising an attack by a crowd on the policeman as ‘a resort to violence’.”

The implication of such a distinction is that the policeman, as a duly appointed representative of a legitimate government, has a right to use physical force, although not the right to use 'excessive' force, whereas the crowd of private citizens has no right at all to use even moderate physical force (Wolff 1969: 17).

The 'wide' definitional approach to violence challenges its literal notions, exposing them as limited constructs. Galtung (1969 and 1990) offers significant studies on the subject, and his work on the structural element is hugely relevant, as it has influenced the construction of violence in many fields of research: sociology, anthropology and clinical medicine, to name but a few. In his essay, Galtung emphasises both the analytical and practical-political importance of distinguishing between direct and structural violence (Stegar & Lind, 1999: xv-xvi). He defines structural violence as the "avoidable impairment of fundamental human needs or, to put it in more general terms, the impairment of human life, which lowers the actual degree to which someone is able to meet their needs below that which would otherwise be possible." The impairment is said to be avoidable, "when the potential is higher than the actual and when it is avoidable, then the violence is present" (Galtung, 1969:169). Going further, the learned author draws a distinction between direct and structural or indirect violence. According to him, in a structural violence scenario, "there may not be any person who directly harms another person in structure. The violence scenario here is built into the structure and it shows up as unequal power and consequently as unequal life chances" (Galtung, 1969:171).

Galtung's (1990) contribution also discusses the related concept of cultural violence, which he defines as "those aspects of culture, the symbolic sphere of our existence – exemplified by religion and ideology, language and art, empirical science and formal science (logic and mathematics) that can be used to justify or legitimise direct structural violence." He further states that violence studies tackle two problems: the use of violence and the legitimisation of that use. The study of cultural violence highlights the way in which the acts of direct violence and structural violence are legitimised and thus rendered acceptable in society. Violence, according to Galtung, is an "avoidable insult to basic needs" (Galtung 1990: 40). He (1990: 40-42) then identifies four classes of basic needs as a) survival needs, b) wellbeing needs, c) identity and d) identity and freedom needs. From these elements he builds the typology of direct and structural violence. According to him, one way in which cultural violence works is by changing the moral colour of an act from red/wrong to green/right, or at least to

yellow/acceptable; an example being murder on behalf of the country as right but on behalf of oneself as wrong. A violent structure leaves marks, not only on the human body but also on the mind and spirit.

2.6 A Perspective of Violence

In the light of the above scholarly opinions which cut across literal, analytical and structural definitions, I take the view that in defining violence, from a Nigerian context, it is important to emphasise analytical-cum-structural (indirect) over literal (direct) definitions. Structural and analytical definitions of violence, in the Nigerian context, strike at the roots, whereas a literal conceptualisation thereof hovers around the branches. The violence we see on the streets of Nigeria is symptomatic of a more complex violence, and so it is therefore not just the infliction of bodily harm, the beheading of innocent citizens by members of the resurgent Islamic Group that goes by the name ‘Boko Haram’² – violence here has a psychological dimension that often mystifies criminal law. The psychological aspects of violence could be more destructive than its physical acts. Psychological violence takes various forms, such as the constant feeling of incapacity (not being able to be what one wants to be); the crushing impact of poverty in the midst of wealth; the sheer inability to ask questions and expect answers; the falsehoods, shattered hopes and aspiration in the law; the inability to challenge patent injustice, such as the injustice of political corruption; the constructive denial of the capacity to choose one’s leaders and a lack of means or legal enablement to present one’s case before an independent court of law or an independently minded judge that could look at one’s case unhindered by the imperial notion of ‘stare decisis’. The erosion of traditional virtues, such as honesty and accountability and the seeming absolute incapacity to reverse the trend, are also forms of psychological violence.

Galtung’s (1990) formulation of an “avoidable impairment of fundamental human needs” could not be more appropriate. The danger inherent in this kind of violence is that it is ‘mimetic’, and its perpetrators tend to resort to more violence in a literal (direct) sense. The guilty mind (*mens rea*) which criminal law punishes may in fact be traced to the devastating impact of a third – actor – type of violence or violence inbuilt within a structure. Dollard et

² “Boko Haram,” according to Abimbola (2010: 100) is “derived from a combination of the Hausa word *boko* meaning “book” and the Arabic word *haram* which is something forbidden, ungodly or sinful; literally, it means “book is sinful,” but its deeper meaning is that Western education is sinful, sacrilegious or ungodly and should therefore be forbidden.”

al.'s (1939) 'frustration-aggression' thesis is a landmark study about the complex interaction between psychological feelings of ill-being and aggression that are manifested in violent acts. I take the view, therefore, that violence in Nigeria is often the result of a fatal assault on the minds of two-thirds of the people by powerful forces that masquerade as legitimate power. Law, constitutional law particularly, is a key element of these masked forces, hence the focus on this law, which is always quick to assert its supremacy and autochthony.

2.7 Cover and the Jurisprudence of Violence

Despite his early demise, Professor Robert Cover's (1983; 1986) ever-lasting impact on the jurisprudence of violence remains a worthy tribute to his imaginative scholarship. His contribution to scholarship has been described variously as "path-breaking, seminal, brilliant and compelling." Sarat & Kearns (2001: 50) describe Cover as a "visionary legal thinker who saw law as a bridge between the world-of-present and the world of our imaginings and our aspirations..." On a personal level, I come to Cover from the perspectives of the complex interactions of power/powerlessness; poverty/wealth; development/underdevelopment; life/death.

In the very first paragraph of his work, titled 'Violence and the Word', Cover (1986) makes an instant connection:

"Legal interpretation takes place in a field of pain and death. Legal interpretative acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text and as a result somebody loses his freedom, his property, his children, even his life... When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence" (Cover 1986: 1).

Cover (1986) elaborates the above thesis using a series of practical insights that cut across history and the practical activities of judges, as they pick and choose multiple meanings that any law throws up. On history, Cover opines that constitutional histories often begin with acts of rebellion. US constitutional history, according to the author, was an act of rebellion with the risk of pain and death. The proclamation of political independence from Great Britain was an act of treason against the English constitutional perspective. Conviction for treason, under

such circumstances, carried with it “a horrible and degrading death, forfeiture of estate and corruption of the blood” (Cover, 1986: 1606). The history of revolution, as analysed by Cover, becomes an entry point for understanding contradictions in law. A successful rebellion imposes a new legal order and is celebrated as a legal triumph, but an unsuccessful rebellion is punished as treason. In the rebellion scenario, law’s dual and contradictory roles as both healer and destroyer are tragically exposed.

Legal Interpretation

The creation of legal meaning, which Cover (1986) calls “jurisgenesis,” is not as straightforward as it may appear, because according to Cover each and every one of us inhabits a *nomos*, a normative universe, where we constantly create and maintain a world of right and wrong, lawful and unlawful, valid and void. The normative universe we (including judges) occupy does not necessarily require a state, and the meanings we attach to law may therefore be unrelated to institutional or professional experience but rather to narratives that thrive in history, literature and culture.

Cover (1983: 5) expounds:

“History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories planted upon material reality by our imagination.”

According to Cover (1986: 1607), the relationship between legal interpretation and the infliction of pain remains operative. When faced with conflicting meanings and multiple interpretative options, judges are more likely to adopt an interpretative method largely targeted at suppressing one meaning (in favour of powerlessness) and promoting the other (in favour of power). Judicial ‘jurisgenesis’ therefore becomes an avenue for fulfilling a “jurispathic” (law-killing) role.

2.8 Cover and other Scholars on Law and Violence

Sarat (2001) focuses on deconstructing the place of violence in law by using Cover’s work as a peg or point of departure. The book, according to its introductory passages, “seeks to move

violence to the centre of theorizing about law and to connect it to the question of justice. Does law's violence, stand as an impenetrable barrier, to the achievement of justice in and through law? Or, alternatively, is violence necessary to the realisation of justice?" Referring to Cover (1986), Sarat (2001: 4) asserts further:

"In Cover's work one finds a mournful story of violence set against utopian possibility, and an appeal by legal scholars to enter the shadows and explore law's violent underside. However, one also finds an acknowledgment that the violence of law is, despite its tragic character, different from and preferable to other forms of violence – the violence of a lynch mob or lawless state – which in their own way casts even more destructive shadows. Law's violence is to be preferred, albeit reluctantly, as a way of counteracting and containing that other violence, as a way of saving us from the darkest possibilities of human existence."

Simon's (2001) contribution, titled 'The Vicissitudes of Law's Violence', challenges Cover's notion that violence is an ontological feature of law, by demonstrating how law mutates from "repressive de-sublimation" to the enabling, revivifying phase of 'bio-power'. Cover's oversight concerning these changes is analysed from the point of view that he was not a criminologist or even a criminal law professor; consequently, Simon (2001) argues that Cover's effort to describe his increasingly dark visions of law and politics force him to fall back on a largely untheorised understanding of the power to punish. Cover is presented as being over-fatalistic about law's violence – overestimating its centrality as well as the capacity of judges to control and discipline it accordingly. Although Simon (2001) shares Cover's concerns about the increase of violence in law, he calls our attention to the forces that might be brought to bear to re-channel law to the justice, hence the vicissitudes.

Sarat and Kearns (2001) follow a similar path of criticism in their chapter 'Making Peace with Violence'. According to the authors, in reading Cover, two messages distil as follows: a) wherever possible, withhold violence; let new normative worlds flourish and b) for the sake of justice do not forget that law's violence is sometimes necessary and that its availability is automatic but must be carefully provided for. The two critics are concerned that Cover seems too optimistic that these two-fold admonitions can be realised in reality, but a critical examination of Cover demonstrates how the imperatives of dishing out violence limit the possibility of attaining justice via law. Sarat and Kearns take a rather contrary view and

expose the inherent contradictions in Cover's thinking of judges as being both 'people of violence' and 'people of peace'. For them, law's capacity to perpetrate violence comes at a price, namely the disposition to be hostile to the visions of other normative orders, contrary to the plea in 'Norms and Narrative', "to stop circumscribing the 'nomos' and 'to invite new worlds'." Hence, Sarat and Kearns (2001) conclude that law's capacity to be homicidal tends, against Cover's fervent hope, to make it jurispathic as well. In their words:

"Cover was hopeful about law even in the shadow of violence. We are much less hopeful. He sought to acknowledge law's violence and temper or domesticate it in a reconstruction of the promises of law's relationship with society. We, however, fear that the violence of law stands in the way of such reconstruction... he believed that law could be homicidal without being "jurispathic." We do not share his belief. While we admire Cover for taking the violence of law seriously and for facing up to the way that violence is both an indispensable feature of law and at the same time, deeply antagonistic to it, we do not think that he saw fully the difficulties of accommodating violence and law" (Sarat 2001: 50).

Tushnet (2001), lending support to Sarat and Kearns (2001), explains that the key to unravelling Cover's dilemma is to question whether he was a romantic anarchist who believed that the practice of individual violence would disappear in a well-ordered lawlessness.

To conclude this section, it is important to refer to Benjamin (1978), who methodically reviewed both natural and positive law and arrived at the same destination: the obstruction of law and order by various mythical forms of violence. In 1975, before Cover (1986), the gifted French theorist Michel Foucault published 'Discipline & Punish', a devastating critique of the modern prison system, which he saw as the prison house of legal violence. In this work, Foucault (1977) argues that modernity has transformed violence into a 'normalising science', resulting in the techniques of a "carceral archipelago," in which far-reaching power networks have been created by using the technique of violence. For Foucault, violence does not just destroy and injure (direct violence), but it "constitutes and expands" various forms of knowledge such as the 'science of law'.

A Nigerian reader of Foucault (1977) may think that the work was set in Nigeria, where over two-thirds of the prison population are held in various institutions of violence, awaiting their trials, which may take many years to commence and many more to conclude in official defiance of the constitutional presumption of innocence. On another plane, Nigeria is a case study of ‘power networks’, in that a few powerbrokers terrorise the majority. Jacques Derrida’s work, ‘Force of Law: The Mystical Foundation of Authority’, approaches the theme of law and violence from a similar concurring perspective. Derrida (1990) discusses the incurable dilemma of law and justice. Reflecting on the phrase ‘to enforce the law’, Derrida (1990: 925-927) states:

“Law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. Applicability, enforceability is not an exterior or secondary possibility that may or may not be added as a supplement of law. It is a force essentially implied in the very concept of justice as law (*droit*); of justice as it becomes *droit*, of the law as *droit*... The word ‘enforceability’ reminds us that there is no such thing as law that doesn’t imply in itself, a priori, in the analytic structure of its concept the possibility of being ‘enforced’, applied by force. There is no enforceability of the law without force whether this force is direct or indirect, physical or symbolic exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative and so forth.”

Going further, by applying the tool of deconstruction as opposed to critique, the incisive legal thinker presents us with several ‘aporias’ (dilemmas) that demonstrate the constitutive violence of law. Aporia 1 deals with the perennial problems confronted by those who look up to the judiciary as the last hope of the common person:

“To be just, the decision of a judge... must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value by a re-instituting act of interpretation, as if ultimately nothing has previously existed of law, as if the judge himself invented the law in every case. No exercise of justice as law can be just unless there is a ‘fresh judgment’. This ‘fresh judgment’ can very well – must very well – conform to a pre-existing law... the responsible interpretation mood the judge requires that his ‘justice’ must not just consist in conformity, in the conservative and reproductive activity of judgment... each decision is different and requires an

absolutely unique interpretation which no existing, coded rule can or ought guarantee absolutely” (Derrida 1990: 961).

Derrida (1990: 961-963) concludes in relation to this dilemma as follows:

“It follows from this paradox that there is never a moment that we can say in the real sense that a decision is just (that is free and responsible), or that someone is a just man... Instead of ‘just’ we could say legal or illegitimate, in conformity with a state of law, with the rules and conventions that authorize calculation but whose founding origin only defers the problem of justice. For in the founding of law or in its institution, this problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, and repressed.”

It follows from the above that scholars from Plato to Cover, from ancient to modern, agree that law may not lead to justice because of law’s constitutive violence. Despite this obvious agreement, I intend to test their theories in the context of Nigeria – perhaps it may be possible to concede law’s violence and still be able to tame it in a given setting, in order to deliver justice. Perhaps what may be termed ‘law’ in one setting may differ appreciably from another setting. This analysis will now proceed to the Nigerian constitution.

2.9 The Constitution and Violence

Having established that the construction or deconstruction of violence have to transcend the literal, pedestal infliction of physical pains or the destruction of lives to include psychological and structural aspects, we will now turn our attention to the basic law in Nigeria, the constitution. The underlying question remains: are the Nigerian constitution and its interpretation the bedrock of Nigeria’s survival or the lifeblood of violence?

2.9.1 The Significance of the Constitution

The constitution as the foundation of the state and government, the creator of powers, institutions and principles of government, the charter of freedom, the mechanism for power limitation and the medium for affirming the duties of the state and ensuring social justice for ethnic, racial and religious groups in a plural setting, has been ably analysed in a five-volume work by a leading scholar of constitutional law in Africa (Nwabueze, 2003a, 2003b, 2004a,

2004b& 2005). Governance of a nation through the use of a constitution, written or unwritten, has therefore become a universal practice such that the question now is not whether a nation is without a constitution, but whether the type that has been adopted for the governance of the people is the right one (Yakubu, 2000: 1).

In demonstrating the pre-eminent status of the constitution, Nigeria's sojourn as a nation, from colonialism through to military dictatorship and ongoing democratisation, has been marked by the search for the perfect constitution. From 1922 to 1999, Nigeria experimented with various options, mostly imposed on its own people. From 1922 to 1951, the country's constitutions were named after British colonial administrators in clear demonstration of their imperialist nature; hence, Nigeria experimented with the Clifford's Constitution (1922), the Richard's Constitution (1946), the Macpherson's Constitution (1951) and the Lyttleton's Constitution (1954)³. The 1960 independent constitution of Nigeria was named the Nigeria Constitution (1960) Order in Council and laid before the British parliament on September 16, 1960. The 1963 constitution was the first to use the preamble, "We the people of Nigeria..." but retained the Westminster parliamentary model.

The first military coup in Nigeria occurred in 1966, followed by a three-year civil war. The 1979 constitution, which broke away from the Westminster model and sought inspiration from Washington's presidential system, was prepared under the watchful eyes of the military. The current Constitution of Nigeria (1999), which retains the Washington model, came into force via a military decree. The search for inspiration from Washington seems, therefore, stunted by the dictatorial military regimes that rode, rightly or wrongly, on Kelsen's doctrine of revolution and have ruled Nigeria for 31 out of her 50-year history since independence. Notwithstanding the chequered history of constitutional law-making in Nigeria, the crucial place of this body of law in both dictatorial and democratic governance remains unassailable. Nwabueze (2003: 1-35), however, draws attention to the distinction between a constitutional government and a 'constitutional democracy'. A government need not be a democratic government to be constitutional, nor need it be constitutional to be democratic, but it must be both democratic and constitutional to be a constitutional democracy. Nwabueze (2003: 91-118) further expounds that core institutions must exist in every genuine constitutional democratic setting, namely free and fair elections, the accountability of rulers to the people,

³ See Nwabueze, B. (1982: 29-59) for a detailed and incisive analyses of Nigeria's constitutional history – "from Colony to Protectorate to Independence."

the constitutional guarantee of human rights as a means of limiting government and the separation of powers and federalism in a plural setting. The learned author is unequivocal on the importance of federalism as one of the most effective checks on democracy. The notion of federalism canvassed goes beyond political federalism to include fiscal federalism, hence Nwabueze (2003: 119-154) analysed the challenges of fiscal federalism in Nigeria. In a plural setting like Nigeria, the constitution ought to get it right as far as sharing its physical and fiscal powers and responsibilities, or otherwise risk being held responsible for any catastrophic backlash that may emanate as a result of its failings.

Nonetheless, the question that needs to be answered is whether this focus on the constitution as an ultimate body of law is the right one. Considering the ‘seen and unseen forces’ behind every constitution in Nigeria, could it be that the ‘lifeblood of violence’ may be sought in a meta-constitutional force? A similar question inspired Achara (2005) to propose the theory of ‘preponderant force’, arguing that constitutional law ought to be considered along with this meta-force. To limit analysis to only the first level is to fall victim to what he calls ‘textual fetishism’. My analysis of the current Constitution of Nigeria (1999) will therefore proceed along two levels: textual and meta-textual. This two-level approach will be critical in reaching a dependable conclusion.

2.10 The Constitution of Nigeria (1999) and the Violence Question

2.10 (a) First-Level Approach

The Constitution of Nigeria (1999) was promulgated via Military Decree No. 24 of May 5, 1999. Since its inception, this constitution has been widely criticised, and the case against it seems overwhelming. The Nigerian government at all levels, civil society organisations and scholars of constitutional law in the country agree that it is essentially defective. Every government since 1999 has made efforts to remedy this deficient framework, albeit via a piecemeal method. The government of Olusegun Obasanjo instituted the Presidential Committee on the Review of the 1999 Constitution, which drew its members from the then three political parties in Nigeria as a smart move to shut out the clamour for a sovereign national conference. Civil society groups under the ‘Citizen’s Forum for Constitutional Reform’ umbrella have done commendable grassroots work, organising conferences and

publishing materials such as the Citizens' Forum for Constitutional Reform (2002), which offers analyses on contentious issues in the reform of the 1999 constitution. In 2010, the Nigerian parliament passed the Constitution Alteration Acts (The Constitution of the Federal Republic of Nigeria, first, second and third Alteration Acts, 2010), a careful reading of which shows that the underlying causes of discontent with the constitution remain largely unaddressed, despite the continuing efforts of parliament at piecemeal reform.

2.10 (b) Key Constitutional Problems and the Violence Thesis

The following problems have been identified in support of violence charges. First, the constitution tells a lie against itself. Secondly, it provides for a federal system of government whilst it is in fact, in the words of Professor Ben Nwabueze, "a unitary constitution for a federal system of government" (Nwabueze, 2003:59). Tied to this is the fact that its vertical and horizontal revenue allocation principles advance its inherent philosophy of subjugation and deprivation. To raise the stakes higher for the powerless, it imposes capital sentencing for their crimes whilst looking the other way at the crimes of the powerful. In addition, it institutionalises an apartheid-like system that abandons the majority poor whilst protecting the minority rich. The next section focuses on analysing these issues in the light of the violence thesis.

2.10 (c) Foundational Fraud

As stated earlier in the introductory section, the Constitution of Nigeria asserts itself as the 'supreme' law in the country. Section 1 stipulates this supremacy clause unequivocally: "This constitution is supreme... If any other law is inconsistent with this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void."

The preamble of the constitution articulates the autochthonous basis of this very important instrument with the now familiar phrase "We the people of Nigeria..."

A careful examination of these foundational sections should raise questions about the possibility of violence through a brazen denial or emasculation of historical and current realities. Considering the constitutional history of Nigeria (Nwabueze, 1982) and the reality of legal interpretation in the country, the question that begs an answer is can Nigeria justifiably talk of a Nigerian home-grown constitution or legal system?

Historically, Nigeria's constitutional law, from colonial to present times, has been tied to the English and American legal systems. Law that is taught in Nigerian law schools, as well as the lawyers and judges that are produced in the country, can easily adapt to these approaches. The curricula and the language of delivery are foreign. Established legal principles of interpretations of law in these foreign jurisdictions are applicable to Nigeria. The Nigerian Supreme Court has considered the impact of the influences of English common law on the country's jurisprudence and arrived at a rational conclusion.

In the Caribbean Trading and Fidelity Corporation v Nigerian National Petroleum Corporation (NNPC) [2002] 34 W.R.N 11, the Supreme Court of Nigeria observed as follows:

“... apart from the fact that borrowing from other legal systems has always been and continues to be a common form of legal change and development and that legal transplantation is not foreign to most legal systems... Nigeria does not cease to be Nigeria because it has chosen a particular mode for ensuring the procedural completeness of its legal system, just as Nigeria does not cease to be Nigeria by choosing the English language... Our legal system draws much of its strength from being part of a common law system having its roots in the past while remaining organic.”

The globalisation of law currently holding sway would continue to inspire and accentuate the cross-fertilisation of legal ideas. The one-way traffic nature of the ongoing globalisation of law – a reality that is consciously emasculated in Nigeria's supreme constitution – would continue to attract inward looking criticisms targeted at a more robust legal development. The crucial challenge, however, is not about the origin or language of law but on the need for creating a dependable framework for the growth of a Nigerian common law, which according to the Nwauche (2007) should be a synthesis of received English law, customary law, including Islamic Law, and a fundamental human rights obligation. It is argued that a successful synthesis may offer a unique perspective that would enable Nigeria to contest the one-dimensional nature of the ongoing globalisation of law by offering a coherent alternative.

In the light of this reasoning, how can we justify the preamble of the 1999 constitution, “We the people of Nigeria, having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation... Do hereby make, enact and give to ourselves the following Constitution?” Was it not Lord Lugard’s Amalgamation of 1914 that brought together the various entities within Nigeria for the purpose of administrative convenience? When was the solemn resolution passed? The nationalist struggle for independence from Britain was so preoccupied with transcending ‘divide-rule’ sectional politics, in order to present a common front and wrench ‘power’ from Great Britain, that there was little or no time to confer with the ‘grassroots’ illiterate villagers that form the major section of ‘We the people’. Surely, the “firm and solemn” resolution to live together as “one indivisible and indissoluble sovereign nation under God” could not have occurred during the 30-plus years of military dictatorship or the recent years of ‘competitive authoritarianism’ (Levisky and Way, 2002) and persistent popular clamour for a sovereign national conference or renegotiated federation? The piecemeal model of amending the constitution, without proper consultation with the people, could hardly meet the requirements of “transparency, participation, inclusivity, diversity, openness and autonomy” (CFRCR, 2002: 10-11). In light of this, it is therefore not surprising that the Constitution of Nigeria (1999) has often been described as a doctored, fraudulent document that is not for Nigerians (Falana 1999).

Apart from the autochthony dilemma analysed above, the supremacy of Nigeria’s constitution is another area of interest⁴. This supremacy clause was easily brushed aside during the three-decade rule of the military. The judicial effort to reassert this supremacy in the celebrated case of *Lakanmi and Kikelomo Ola vs. Attorney General (West) and ors*⁵ was easily

⁴ Section 1 of the Constitution of Nigeria (1999) provides for this as follows: “this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 1 (2) bars forceful takeover of Government in the following words: “The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this constitution.”

⁵ Reported in (1971) 1 U.I.L.R. 201. Francis Famoroti’s recent article, titled, “Lakanmi: How the S’ Court dared military regime”, published in the Daily Mirror of January 28, 2013 makes an interesting reading. His presentation of the case from the angle of judicial ‘resistance’ to military rule as well his journalistic device of using pictures from the archives to tell a powerful story is quite commendable.

overtaken by the speed of Decree No. 28 of 1970⁶ which created a totally new order not contemplated by the Westminster-inspired parliamentary constitution of Nigeria (1963). Considering the impact and duration of the military rule in Nigeria, it is important that we reflect on the significance of this ground-breaking case that offered the Supreme Court of Nigeria a precious opportunity to examine the constitutional legality of military rule.

The Lakanmi Case and the challenge of locating the ‘constitution’ in Nigeria:

One way to interpret this case is to realise, first and foremost, that in this remarkable case parties and paradigms battled for success and supremacy. The parties were E. O. Lakanmi and Kikelomo Ola (Plaintiffs/ appellants) and the Attorney General (West) and others (Defendants/ Respondents). The paradigms in contest were the theory of revolution as developed by Hans Kelsen and the doctrine of necessity as established in common law.

Paradigms or concepts by their very nature offer tools for making sense of conflicting realities. It is not surprising, therefore, that Cohen, et al, (2000) defined “concepts” as meaning- making devices. In their words: “Concepts enable us to impose some sort of meaning on the world; through them reality is given sense, order and coherence. They are means by which we are able to come to terms with our experience. How we perceive the world, then, is highly dependent on the repertoire of concepts we can command...” (Cohen, et al, 2000:13). In the light of this, it is fit and proper that I analyse paradigmatic issues of ‘revolution’ and ‘necessity’ before proceeding to the ‘res’ in contention in this case.

‘Revolution’ as a conceptual framework for locating the ‘constitution’ is a positivist doctrine. The major theorist, Hans Kelsen, argues that a revolution occurs when there is a sudden change of government in a manner un-contemplated by the pre-existing constitutional order. The manner of change whether peaceful or not is immaterial. In his memorable words:

⁶ Decree No 28 of 1970 states as follows: “ It is hereby declared that, (b) any decision, whether made before or after the commencement of this Decree by any court of law in exercise or [purported exercise of any powers under the Constitution or any enactment or Law of the Federation or of any State which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict (in so far as the provisions of the Edict are not inconsistent with the provision of the Decree) or the incompetence of any of the governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of making thereof.”

“A revolution...occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is affected through a violent uprising against those individuals who so far have been the “legitimate” organs competent to create and amend the legal order. It is equally irrelevant whether or not the replacement is affected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated”(Kelsen, 1961:117).

The common law doctrine of ‘necessity’ on the other hand, is targeted at post-factum justification of an unconstitutional act on the bases that the unconstitutional act was necessitated by the stated emergency⁷. In the 1966 case under review, it appeared that the necessity was not so compelling especially as other pressing legitimate alternatives, like declaration of a state of emergency on the bases of section 70 (3) of the 1963 constitution were not explored.

By analysing the judgment of the Supreme Court and how it was received by parties, it was clear that this case was defined by three main unique elements namely: the extraordinary turn of events that led to Nigeria being governed by decrees and edicts less than three years after political independence from Britain, the nature of the edict and decree that were being challenged by the plaintiffs/ respondents and finally the reaction of the Federal Military Government (FMG) following the judgement of the Supreme Court. In the next sub-sections, I examine each of these extra-ordinary elements.

Edict No 5 of 1967 as Legislative Judgment

In this case, Lakanmi and others challenged Edict No 5 of 1967 of Western Regional Government. The Edict in question purported to authorise the confiscation of the plaintiffs’ assets following the recommendation of a non judicial corruption investigation panel. The Edict also purported to oust the jurisdiction of the courts. This Edict traced its constitutional

⁷ As an illustration, the doctrine of necessity was employed recently in 2010 by the Nigeria’s National Assembly to appoint President Goodluck Jonathan, who was then the Vice President of Nigeria as an interim president, following the sickness and prolonged absence of the then incumbent president, the late Shehu Musa Yar’ Adua. The 2010 experimentation did not cause much legal controversy as the necessity seemed patent.

pedigree to the Public Officers (Investigation of Assets) Decree of 1966. Prior to this, Decree No 1 of 1966, the first expression of military constitutional architecture was already in place. This Decree had already suspended some part of the constitution of Nigeria 1963. The Edict in question was an extra-ordinary piece of legislation. It specifically mentioned the plaintiffs and by implication presumed their guilt for the crime of corruption. The Edict was therefore a legislative judgement that usurped judicial role. At the Lagos High Court, where the plaintiffs' application for the administrative remedy of certiorari was first considered the plaintiff lost. They suffered the same fate at the first appellate level. Both courts reasoned that the edict and decree were validly made by the Regional and Federal Military Government respectively and cannot be impugned. The doctrine of revolution as developed by Kelsen was the underpinning rationale for these rulings.

The Nature of the Military takeover: Revolution or Necessity?

At the Supreme Court, the context of the military takeover of 16 January 1966 was vigorously audited. The uncontested facts as set out by the court could be summarised as follows: A coup d'état occurred on 15 January, 1966 but failed to capture the seat of Government. However, some key functionaries of Government were either dead or unaccounted for. Among those unaccounted for was the Prime Minister, Tafawa Belewa. The President, Dr Nnamdi Azikiwe was not in the country. The Senate President, Dr Nwafor Orizu was acting on behalf of the president within a defined limit of Nigeria's parliamentary constitution of 1963. It was in these circumstances that the surviving members of the parliament met and through the acting president, Dr Nwafor Orizu invited the military and purported to "wilfully" hand over power to Major General Aguiyi Ironsi on the 16 January, 1966. Major Ironsi swiftly accepted the invitation. There were no constitutional bases for this hand-over of power. Few hours after accepting the invitation, Major Ironsi passed Decree no 1 of 1966, earlier referred to and suspended some aspects of the 1963 constitution. On 29 July 1966, Major General Ironsi was assassinated in a counter coup d'état and General Yakubu Gowon took over the headship of the FMG. One of the Decrees Major General Gowon passed, that is, Decree No. 45 of 1968 seemed targeted at this case. The Decree sought to validate all orders made under any enactment and also suspended the application of the human rights enforcement procedure in the constitution as well as ousting the jurisdiction of court from questioning the validity of any decree.

Following considerations of the issues, the Supreme Court held that what transpired on 16 January 1966 was within the doctrine of necessity and not a revolution. The implication of this decision was that the military government in power then, was only a temporary arrangement that ought to have ceased as soon as the necessity elapsed. The court held that the constitution of Nigeria 1963 remained the basic norm, and hence the purported confiscation of assets of the respondent was illegal, ultra vires that constitution. This decision, by re-asserting the supremacy of the constitution over edicts and decrees struck at the heart of military rule in Nigeria. The FMG reacted swiftly and strongly using the tool of legislative annulment. The purported action of annulling a valid judgment of the apex court provided the third extra-ordinary element to this case. I shall consider this third element before making some final deductions.

The Legislative Annulment of Supreme Court's Ruling

Few days after the Supreme Court's ruling, which among others struck down the legislative judgment of Edict No 5 of 1967, the FMG passed a legislative annulment Decree No. 75 of 1970. The decree was a retrospective legislation targeted at rendering nugatory the judgment of the apex court.

A careful examination of the action of the Supreme Court and the reaction of the FMG would demonstrate a conflicting interpretation of the "constitution". Whereas the Supreme Court analysed the event of 16 January 1966 as a constitutional necessity, the military that wielded 'preponderant forces' was not in any doubt that a revolution had occurred, with the effect that the pre-existing constitutional order had been toppled by another one. Decree No 75 of 1970 was therefore, meant to call attention to where the highest power laid.

Achara's (2005: 55) views that in interpreting the constitution 'textual fetishism' could be a barrier for deeper construction of the constitution and constitutional law seemed vindicated by this case. The case was a clear demonstration that whilst one could attempt to study other areas of law, like Contract and Property Law by focusing on textual provisions and interpretations by courts, in understanding the 'constitution', facts/realities of power are as important as norms; socio-political and economic tools must have to integrate with legalistic ones. I argue that with respect to the constitution, knowledge of these dual dimensions of power must be aggregated to create a meaningful whole. In absence of this whole, knowledge

of the constitution may remain stunted at the surface level, unable to ascend the ‘deep-end’ where transformational potentials may be deposited (Brockbank & McGill, 2007:4)⁸.

Apart from Military challenge to normative constitutional supremacy in Nigeria, there are other historical and ongoing conflicts that clearly negate this doctrine. Historically, the most remarkable of these conflicts remains the Nigerian Civil War (1967-70), in which the eastern part of Nigeria sought to secede from the rest of the country. The proclamation in 1967 of the Republic of Biafra was seen by the Nigerian government as an act of rebellion, which struck at the heart of the nation’s ‘supreme’ constitution. Paradoxically, this same constitution, from the perspective of the Biafran secessionists, was a tool of subjugation and a ready source of violence. The movement for the actualisation of sovereign Biafra, the clamour for resource control, the imposition of criminal Sharia in some states in the north, in spite of the constitution, and the unceasing calls for a constitutional overhaul, were all geared towards the renegotiation of the supremacy of Nigeria’s federal constitution.

Cover (1986) explains the paradox of divergent views of constitutional norms in a telling manner. According to him, revolutionary constitutional understandings are commonly staked in blood. The violence of the law, according to Cover (1986) takes its most blatant form in these constitutional understandings.

It is arguable, therefore, that in Nigeria the violent overthrowing of the government remains a possibility as Nigerians clamour for a framework that serves as a guiding lantern to their persistent questions around inequality and empowerment. Locating and utilising the ‘constitution’ are key parts of the ongoing change project in Nigeria.

⁸ ‘Transformational learning’ in Brockbank & McGill’s (2007: 4) formulation has the capacity of changing both the individual and society. Their views reinforce Biggs’ and Tang’s, (2007), theories of learning. The best approach to learning is that approach that sees learning beyond the narrow ‘instrumentalist’ viewpoint. The effective learner is the one that thinks ‘outside the box’ and sees meaning beyond the surface level. Learning is not just about acquiring information, but the way we structure and think about the information and applying it. Learning, in the real sense of the word, is transcending the shallow realm to the deep territory of knowledge where information is processed to generate applied knowledge. The challenge for an effective teacher is, therefore, to ‘shepherd’ or facilitate the students’ journey towards the deep learning mode.

2.10 (d) Pluralism and Federalism's Enduring Questions

According to Nwabueze (2003), core institutions must exist in every genuine constitutional democratic setting. These institutions are free and fair elections, the accountability of rulers to their people, the constitutional guarantee of human rights as a means of limiting government and the separation of powers and federalism in a plural setting. Nwabueze (2004) focused on analysing “the pillars supporting constitutional democracy.” I argue that his analyses could be examined through the lenses of federalism and human rights and still achieve a similar purpose. In testing my law and violence theses, I would like to concentrate on federalism and the enduring questions of human rights.

Federalism

Much scholarly ink has been spilled on the suitability and frailties of Nigeria's federalism. Awolowo (1947), Azikiwe (1964), Ayoade (1980), Oyovbaire (1979), Okonta and Douglas (2001) and Egwu (2002) illustrate this point. Etymologically, the word ‘federalism’ derives from a Latin word, *foedus*, meaning covenant; a solemn agreement imposing duties and obligations. Federalism describes the system of government of a constitutionally shared sovereignty, where the division of power is held between the centre and federating units. K.C. Wheare (1943: 3), a leading scholar on the subject, outlines federal principles as follows: a division of power among levels of government, a written constitution showing this division and the coordinated supremacy of two levels of government with regards to their respective functions.

In light of the above, federalism is a system of government or an arrangement of power that is deliberately crafted to deal with sociological, complex polity – as presented by Nigeria's plural composition. Livingstone (1956) reflects on this sociological premise for the adoption of a federal constitutional framework, while Oyovbaire (1979: 9) observes that “the existence of federalism presupposes the existence of certain compelling and propellant forces which, theoretically at least, are absent from the opposite phenomenon, called (a) unitary system.”

Nigeria's federal structure has been dealt a heavy blow by over three decades of rule by the military. A key characteristic of the military incursion into politics was the extreme centralisation of resources and power. Apart from the military aberration, the general

obsession with unity after the civil war (1967-70) ushered in a new sense of nationalism that reinforced the centralisation of resources and power (Egwu 2002: 56).

On the physical distribution of power, the key problems revolve around the centralisation and decentralisation of power. The exclusive legislative list upon which only the federal government can legislate covers too wide a field. When this list is analysed together with the concurrent list on which both the state and federal governments can legislate, the picture that emerges is a hegemonic centre that subsumes the other units of power. The autonomy of local government, as promised by the Local Government Reforms (1976), remains largely unfulfilled. Furthermore, minority fears, which were first thrown up in the dying days of colonial rule, are yet to be satisfactorily resolved, and despite the Willink Commission's recommendation for the creation of development areas and the entrenchment of fundamental rights, Nigeria seems stuck in a unitary framework constructed to reflect the hegemonic interests of ethnic majorities as represented by a few powerful elites. The cosmetic strategy of creating more states to allay minority fears without changing power asymmetries has been the game in politics. The minority are usually given an illusion of power, as well as rights that translate into nothing concrete.

Fiscal federalism, which simply means the division of resources among the tiers of government, is the more troubling aspect in Nigeria, for obvious reasons. As an oil-rich country, it has earned over 250 billion dollars in revenue from oil (Sagay, 2008) and has little or nothing positive to show for it. Oil, instead of leading to development, seems to have become a curse as a result of the 'leech syndrome' and the disincentive it has created, which hinders the development of other sources of earnings.

More than seven commissions have been set up to work out an acceptable revenue allocation formula, but the 'magic formula' is yet to be found. These commissions have come up with varying recommendations ranging from a 50-50 allocation between a federal government and the state, to an 87-13 share under the 1999 constitution. The search for the elusive revenue allocation formula continues amid the thick stirrings of ethnic violence.

The tendency to concentrate on constitutional provision and defined revenue allocation formulae with regard to physical and fiscal federalism may move attention to the impact of 'preponderant forces' with the capacity to 'rig' formulated words. The truth is that a revenue

allocation formula that reduces appreciably the financial power of the centre will shift the power equation. The central government will normally stand stoutly against such a move, but it will give the impression that something is being done to cater for the interests of the minority. Moreover, distinguishing between ‘light and shadow’ is critical to understanding and confronting the complex interactions between power and powerlessness in Nigeria. In the next section, I turn to the human rights framework, which is an important agenda for checking excesses in a federal system.

2.10 (e) Human Rights as a ‘Berlin Wall’

Nice’s (2008) analyses of poverty law in the US are applicable to Nigeria. Poverty law in Nigeria is embedded within a constitutional framework that constructs a separate and unequal rule of law for poor people: “Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally receiving the least judicial consideration and functionally being routinely denied” (Nice 2008: 629). The allegation that Nigeria’s constitution (1999) institutionalises an apartheid-like system that abandons the majority poor whilst protecting the minority rich requires closer scrutiny, since such an abandonment of the majority poor strikes at the heart of democracy and may lead to frustration and then to aggression.

2.10 (f) The Issues

A key dilemma in Nigeria is how to understand the paradox of poverty and plenty. As will be shown in Chapter 3 of this thesis, official corruption in Nigeria fritters away resources that should be used in generating jobs, building hospitals, roads and educational facilities and empowering Nigeria’s teeming population to be the best at what they want to be. An analysis of the Human Development Index, vis-à-vis the Corruption Perception index for the last ten years, supports the argument that the more the corruption in a country, the less the development. In a setting like Nigeria, with perceived high corruption, one would expect to see a constitution that raises the bar against official corruption by emphasising poor rights. The constitutional reality, however, is an unreflective incorporation of the Western notion of positive and negative rights, using the mechanisms of Directive Principles (sections 13-32 of the 1999 Constitution) and Fundamental Rights provisions (sections 33-46 of the Constitution). The priority choices of law raise the question of violence, considering that in

privileging the interests of the property-owning class, the interests of the majority are often under-represented.

The simplistic understanding of the Western notion of rights is that positive rights that border on resources are not enforceable, whilst negative rights that require the state to abstain from doing something are enforceable. The problem of borrowing this notion simplistically is that one may overlook the vibrancy of democracy and rule of law in Western countries and the strategies in place to secure safety nets for the poor. In Britain, for instance, the Beveridge Report (1942), authored by the influential economist William Beveridge, was an important document in the founding of the Welfare State in the country. In the report, the economist identified five “giant evils” in society – squalor, ignorance, want, idleness and disease – and went on to propose widespread reforms to the system of social welfare to address these issues. His report was the basis for post-war reforms culminating in the Welfare State, which included the expansion of National Insurance and the creation of the National Health Service.

Despite on-going cuts to address deficit problems in the UK, there remains a gulf of difference between the ‘British poor’ and the ‘Nigerian poor’. The certainty of detection and punishment for official corruption have made it practically impossible to see on a comparable scale the type of daylight robbery perpetrated on a daily basis by political leaders in Nigeria. It is commonly known that the quickest route to wealth in Nigeria is via political leadership. The reasons for this are twofold: corruption and a questionable salary scale. Itse Sagay, in his interview published by the Vanguard Newspaper of 26 May 2012, puts it as follows:

“... there is a lot of immaturity in the behaviour of the political actors... They voted for themselves high income and remuneration, the highest amount of money ever received at any legislature in the whole world. They were so immersed in seeing money that they forgot that is Nigeria’s money, not legislature’s money. So, we have a senator earning about 1.7 million dollars a year. When, by contrast, his American counterpart is earning just over two hundred thousand dollars a year... The President of America earns just four hundred thousand dollars a year. So, one can see not just the ironies but how ridiculous it is... The politicians are there to promote their material interest without any consideration for the country. The teeming population of this country which currently stands at well over one hundred and fifty million are

earning less than a dollar per day... one can see the magnitude of the impunity and criminal misconduct that is involved.”

A closer reading of the key sections of Chapter II and Chapter IV of the Constitution of Nigeria (1999) could give credence to our suspicion that the Nigerian poor are constitutionally endangered. In Chapter II, Section 13 provides for the fundamental obligation of all organs of government to abide by the constitution. Section 14 states that Nigeria shall be a state based on democracy and social justice, in which sovereignty belongs to the people; the security and welfare of the people shall be the primary purpose of government. Going further, Section 15 provides for the promotion of national integration and prohibits discrimination on the basis of origin, sex, religion, status, ethnic or linguistic association or ties. Section 15 (5) provides that the state shall abolish all corrupt practices and abuses of power. Section 16, on economic objectives, further provides that the state shall harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy. Section 16(2) states that the state shall direct its policy towards ensuring that the material resources of the state are harnessed and distributed as best as possible to serve the common good – that the economic system is not operated in such a manner as to permit the concentration of wealth in the hands of a few individuals or a group. Section 18 provides for educational objectives, in that the government shall direct its policy towards ensuring that there are equal and adequate education opportunities at all levels. Section 20 borders on the environment, which is crucial for a country reliant on natural resources. Interestingly, Section 24 counterbalances these ‘rights’ with duties by declaring the duties of the citizens to abide by the constitution, help to enhance the power and prestige and good name of Nigeria, respect other people’s rights, make a positive and useful contribution to the advancement, progress and well-being of the community where he resides and declare his income and pay his tax promptly. Despite the use of the obligatory ‘shall’ more than 20 times in the 24 sections of Chapter II, section 6(6) (c) provides that judicial powers shall not extend to any issue or question on the conformity of any authority, person or law with the Fundamental Objectives and Directive Principles of State Policies in Chapter 2. Put simply, the sections of the constitution highlighted above are not ‘rights’ that can be enforced – they are illusions of rights that cannot be enforced.

In contrast to Chapter II, Chapter IV of the constitution provides for ‘real’ rights, i.e. rights that can form a cause of action in a court of law. Some of the rights covered are the right to life, with a proviso that allows for the imposition of capital sentencing, the right to dignity for a human person, the right to personal liberty, a fair hearing, freedom of thought, conscience and religion, the right to property, compulsory acquisition of property and so on. The most important right here is the right to life, but the irrationality of a right to life without a right to live has been ably demonstrated by Justice Bagwati of India. Another crucial right here is the right to personal liberty – a right that has been dealt a heavy blow by severe poverty in Nigeria. Other rights revolve around protecting property and privacy.

In comparison to Chapter II on Fundamental Objectives, it is fair to say that the people who would benefit more from Chapter IV on Fundamental Human Rights are the rich and powerful, as what the poor have under Chapter IV are illusions of rights and a promise of death. Capital sentencing, the most direct example of how law carries out violence, is constitutionally covered under Chapter IV. Historically and statistically, capital punishment in Nigeria has been the fate of the poor who may be tempted to rob or be unable to pay their way and effectively defend themselves against criminal prosecution. This unusual punishment has also been employed as a mechanism of silencing environmental activists, who are seen as threats to Nigeria’s oil wealth. (The state murder of the poor rights activist and intellectual, Ken Saro Wiwa, is illustrative of this point). Corruption, which is a key example of the crimes of the powerful in Nigeria, is curiously provided for under Chapter II. All the other subsidiary and ancillary laws on corruption do not provide for capital sentencing, however, so poor people have been condemned to death for robbing paltry sums of money whilst politically exposed persons that have robbed the state of billions of dollars armed with their fountain pens can be assured that even when prosecuted, the death penalty cannot be an option.

Apart from the divergence in the nature of rights protected in Chapters II and IV of the constitution, another hindrance to the realisation of human rights in Nigeria has been the problem of access to court. Section 6 (b) of the constitution of Nigeria, 1999 provides for access to court in a way that historically hindered litigation on behalf of the poor. It has been argued that the misreading of this section in the ruling of *Adesanya vs. President of the Federal Republic of Nigeria* (1981) 2NCLR 358 led to the problem of locus standi in relation to poor rights. Nweze (2011: 394-428) offers a critical review of the current Fundamental

Human Rights (Enforcement Procedure) Rules, 2009. Considering the centrality of access to court in matters of human rights breaches, it is important to understand what these fundamental human rights enforcement procedures rules are and their likely impact in improving access to court.

Fundamental Human Rights (Enforcement Procedure) Rules 2009

The Fundamental Human Rights (Enforcement Procedure) Rules are ancillary rules that the Chief Justice of Nigeria may make under the authority of the constitution. In the extant constitution of Nigeria (1999) the authorising section is 46(3) whereas with regard to the old 1979 constitution of Nigeria it was section 42(3). The Enforcement Rules, border on the practice and procedures, that should govern the High Court in the exercise of its original jurisdiction,⁹ with regard to fundamental human rights litigation.

The first of these Enforcement Rules in Nigeria was made under section 42(3) of the Constitution of Nigeria (1979). The 1979 Rules which came into effect on 1 January, 1980 has however been criticised for restricting access to court as a result of the sheer absence of any access-boosting interpretative philosophy. The case of *Adesanya v. President*, cited earlier has also been criticised along the same line of constraining access to court. The case is said to have led to the narrow interpretation of ‘locus standi’ (standing to sue) that is, the preliminary requirement that courts often look for, in order to be certain that people who bring cases to court have interests that they needed to protect¹⁰. The *Adesanya*’s case is equally cited as a key barrier to Strategic Impact Litigation (SIL)¹¹, not necessarily because

⁹ Sections 46 (1) and (2) provide for the original jurisdiction of the High Court with respect to fundamental human rights applications.

¹⁰ Section 6 (6) (b) of the Constitution of Nigeria provides for ‘locus standi’ as follows: “The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person 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.**” (Emphases are mine)

¹¹ Strategic Impact Litigation (SIL) is a form of public interest lawyering. It involves a lawyer or human rights organisation taking up, pro-bono, the case of an individual or a group, as part of a strategy to achieve a larger objective of driving change. The case taken up may not succeed in the court of law but the advocacy and awareness created in the court of public opinion may drive more lasting change, (exerting strategic impacts).

of what it decided, but as a result of the access-limiting interpretative model that has been applied by subsequent courts. By following this case, wrongly or rightly and without any clear distinction between private law and public law cases, courts in Nigeria had tended to insist that people who come to court to enforce human rights must demonstrate sufficient personal interests or damage over and above other members of the society. Hence, human rights activists, like the late Gani Fawehmi, (SAN) and the Human Rights Law Service (HURILAWS) who had taken up cases on behalf of marginalized groups in Nigeria under SIL had often had many of their cases thrown out for failing to show enough personal interests or damage over and above other members of the Nigerian society. Terms like ‘busy-bodies’ have often been used to frustrate rights activists from taking pro-bono cases on behalf of the poor and voiceless.

It was against this background that the current Fundamental Rights Enforcement Procedure Rules (2009) emerged. Nweze’s (2011: 394-428) analyses of these new Rules are important as they clarify the key reform elements of the new Rules. The reforms championed by the 2009 Rules are underpinned by an interpretative philosophy termed ‘overriding objectives’¹². With respect, to the issue of SIL and ‘locus standi’, Nweze (2011:410) was of the view that paragraph 3(e) of the new Rules, “patterned after section 38 of the South African constitution... may be described as an undoubted coup de grace on the restrictive applications of the principle of locus standi.” Equally remarkable was the conclusions that this writer drew from his analyses of the new rules. Refusing to be carried away by the “far-reaching” provisions of the new rules, Nweze (2011: 428) concludes that “there can be no gainsaying the fact that the commendable steps introduced in the said rules would only impact favourably on human rights litigation if judges and practitioners brace up for the challenges which the creative interpretation of the provisions of the rules envisages...”

Nweze’s reservations could be enlarged in the light of our analyses of the impact of the ‘unseen’ constitution in Nigeria. Fundamental human rights enforcement procedures, no matter how well couched, may not be able to resolve the structural questions at the heart of the human rights challenges in Nigeria. The first structural limitation is that the new rules are concerned with the old constitutional priorities of “fundamental human rights”. Hence, the

¹² Preamble to the Fundamental Human Rights (Enforcement Procedure Rules). See particularly paragraph 3(a) to (g).

enabling constitutional provisions for these rules are part and parcel of Chapter IV (Fundamental Human Rights) provisions of the Nigeria's constitution. The reality in Nigeria is that the core human rights question that borders on chronic poverty and massive political corruption are outside the framework of the "fundamental regime". Hence, 'literal' interpretation of the constitution confirms the fact of the pre-eminence of 'things' over 'people' (Chambers, 2010). It is, however, at the level of 'meta constitution' that the reality of human rights abuse in Nigeria takes a more dangerous bent. At this level, what the rules say and how legal exegetes interpret them may not count, not because the rules and their interpretations lack rigour but for the sole reason that a few people and entities that wield 'preponderant forces' in Nigeria have other priorities that inform their own conflicting interpretations and rule executions.

In the light of the analytical framework of this thesis, that is, a critique of the property and poverty law paradigms, my considered view is that the Fundamental Human Rights Enforcement Procedure Rules (2009) are far from resolving the challenges of access to court in matters of human rights. Access should not be seen solely from the literal sense of rules that empower claimants to be represented in court. Poverty, ignorance and structural inhibitions may impede access even under SIL. Human rights activists that represent claimants under SIL would still need to weigh up their resources in order to prioritise cases. Chances of success and relevance of cases to larger change agenda would still need to be carefully considered. Questions would still need to be asked on what kinds of claims to bring under the fundamental rights regime? For instance, does 'right to life' under fundamental rights provision, also imply right to live under the Directive Principles of Chapter II? Clearly, the disconnection between Chapter 11 and Chapter IV of the constitution imposes a paradigmatic dilemma. Limiting access to court is in line with the 'logic' of property over people. This 'logic' being so entrenched in Nigeria's acutely liberal constitution cannot be wished away by selective rules of procedures no matter how brilliantly couched. To this end, Nweze's (2011) choice of title¹³ may have revealed the deep structural challenges that may unravel the new rules. From this angle, the 'new' regime of human rights enforcement procedures in Nigeria may be termed a mismatch of "old rights" and "new enforcement strategies". It is my case that for Nigeria to make any headway with regard to human rights

¹³ "The New Regime of Human Rights Litigation in Nigeria: Old Rights; New Enforcement Strategies."

enforcement, at least three dimensions of ‘new’ are needed, namely: new rights, new underlining philosophy of rights and new enforcement procedures. The 2009 Enforcement Procedure Rules may satisfy dimension 3 required for enforcement, yet fail to engineer change because of the sheer absence of dimensions 1 and 2.

2.10 (g) First-Level Approach

“Legal interpretation takes place in a field of pain and deaths... Judges are men of violence and men of peace...” Robert Cover(1986).

In the light of landmark cases such as *Balarabe Musa vs. INEC*¹⁴ (2003) 10 WRN 1, *Fawehinmi vs. Akilu*¹⁵ (1987) 2 NWLR (PT 67) 767 and *Fawehinmi vs. Inspector-General of Police*¹⁶ (2002) 23 WRN, which clearly expanded the politico-legal landscape in Nigeria (thanks to the exceptional advocacy of the Late Chief Gani Fawehinmi, SAN), it may be tempting to jump to the conclusion that the Nigerian judiciary is indeed the last hope of the common people, having made an enormous contribution to stabilising the polity. Once such a conclusion is arrived at, the idea of judges being ‘men of violence’ could be jettisoned as inapplicable. Nonetheless, the premises for such a sweeping conclusion must be further interrogated in the light of the Nigerian condition, which is marked by poverty and corruption. How imaginative has the judiciary in Nigeria been in confronting the poverty conundrum? How well has the judiciary been able to insulate itself from the corrosive impact of corruption? The latter question may determine the answer(s) to the former, because no wise person living in a glasshouse would risk throwing stones – and judges are men and women of wisdom.

¹⁴ In this case the Supreme Court laid down harsh conditions on the registration of political parties that were imposed by the Nigeria’s electoral body, the Independent Electoral Commission. This case opened up Nigeria’s political space and encouraged multi-party politics.

¹⁵ This case instituted the right of private prosecution in Nigeria, as the Supreme Court took a fresh view of the doctrine of ‘locus standi’, thus making it possible for a concerned individual to privately prosecute criminal cases.

¹⁶ In this case the Supreme Court took the view that the immunity clause of s. 308 of Nigeria’s constitution refers only to immunity from prosecution whilst in office, but there is no immunity from investigation whilst in office.

Difficult Terrain

To assess the judiciary on these two counts, one must first and foremost factor in the difficult terrain of judicial work in Nigeria. The judiciary is the weakest link in the triangular power equation in the country. The consistent emphasis on judicial independence is an open acknowledgement of the perennial challenges that the judicial arm of government faces in the lopsided power equation in Nigeria. Despite the provision of section 17(2) (e) of the Constitution of Nigeria (1999), to the effect that the “independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained,” the Nigerian judiciary cannot be cited as a good example of independent judiciary. Section 17(2) above falls within the unenforceable Directive Principles. This is not surprising, as the wielders of preponderant powers in Nigeria have been historically scared of the judiciary. The fear is that to arm men and women of wisdom with ‘added’ powers, to decide without ‘fear or favour’, may be tantamount to dislodging irretrievably the power equation and shifting the fulcrum of ‘preponderant force’. In a transitional country like Nigeria, where the supreme law traces its origin to the bosom of imperialism and autocracy, it is easy to envision the hurdles on the path of legal interpretation. Furthermore, it is not unusual to see judges of exceptional courage who have been pulled down for daring to stand up for the masses against the powers-that-be. Trumped-up charges of corruption and the abuse of judicial powers may be levelled against such judges. The powers-that-be, with easy access to the purse and weapons of mass propaganda, have the capacity to turn white into black or create doubts that question our perception of white as white. El Rufia’s (2011)¹⁷ analyses of the ‘power tussles’ that led to the suspension of the President of the Court of Appeal Justice Ayo Salami, contrary to Section 292 (1) of the Constitution of Nigeria 1999, is illustrative of this trend.

¹⁷ This article titled, “Due Process, Rule of Law and Impunity” was published by the THISDAY Newspaper. See: <http://www.thisdaylive.com/articles/due-process-rule-of-law-and-impunity/97132/>. The article focused on the challenges of impunity and due process. In the case of Nigeria, the writer reflected on the suspension of the President of Court of Appeal, Justice Ayo Salami and swearing-in of an Acting President, which according to the writer “appears to be a gross violation of the constitution and the Oaths Act”. The writer traced the background of this case to the reversal of fortunes against the ruling People’s Democratic Party (PDP) following the unfavorable decision of the Court of Appeal in several gubernatorial election disputes between PDP and the Action Congress of Nigeria. The writer was of the view that “far from accepting the decision of the final arbiter and respecting the rule of law, the losers embarked on a campaign of calumny against the eminent justices of the Court of Appeal and particularly its president - Justice Ayo Salami - for being daring enough to decide against the PDP”. The writer opined that “when it was obvious that the same fate might befall the PDP in Sokoto and in the more recent 2011 elections, a hatchet job to remove Justice Salami was set in motion.”

Apart from the problem of the independence of the judiciary in a transitional setting, the judiciary in such a setting confronts two other perennial challenges. First is the challenge of the colonial doctrine of ‘stare decisis’, which obligates judges to decide cases in accordance with precedence; consequently, if there is already a decision of a higher court on a similar issue, the lower court judge may not depart from the laid down rules. This doctrine strikes at the heart of originality and it may harbour the seeds of injustice. Then there is the problem of enforcement. Judicial decisions have to be implemented for them to make any sense, but curiously the executive arm of government is the body tasked with implementation. In a transitional country with a history of executive lawlessness, sublime judicial decisions may be thwarted by non-implementation. The concerns around non-implementation may serve as a chilling effect on judicial activism.

2.10 (h) Judicial Corruption

There is a burgeoning amount of literature on the subject of judicial corruption in Nigeria – Olowofoyeku (1989), Oko (2006) and Transparency International (2007) are illustrative of this point. The 19 September 2011 address of the Nigerian Bar Association on the theme of judicial corruption, as reported in the *Vanguard* newspaper of 20 September 2011, was striking. In that address, presented before the then acting Chief Justice of Nigeria, the Bar Association argued that the root cause of the ‘Boko Haram’ violence in Nigeria was the failure of the Nigerian judiciary to provide authentic, credible and realistic justice for the country’s people. In the words of the Bar Association, “there is a growing perception backed up by empirical evidence that justice is purchasable and it has been purchased on several occasions in Nigeria.”

The ‘empirical evidence’ that the Bar Association refers to may not be unconnected to the suspension of the President of the Court of Appeal, after presiding over several election petition cases that nullified the Gubernatorial elections of the ruling party. In addition, the reports and informed opinions of key stakeholders in the judiciary on the subject must have also inspired the Bar’s address. For instance, Burkaa (2012), writing for the *National Mirror* newspaper on ‘the role of judiciary in combating corruption in Nigeria’, presents interesting data on the subject of judicial corruption in Nigeria. In that report, Burkaa (2012) refers to the Joint Corruption Survey by the EFCC and the Nigeria National Bureau of Statistics, with the support of the United Nations Office on Drugs and Crime. The EFCC joint report records that

“Nigerian courts of law receive the biggest bribes from citizens among all institutions in which corruption is rampant...” Burkaa (2012) also refers to the public speech of the former Supreme Court Justice, Justice Kayode Eso, in which he lamented that the “endemic corruption in the judiciary,” if left unchecked, could “sound the death knell for justice administration and delivery in the country with dire consequences for its democratic governance.” This view, according to the *National Mirror* report, was corroborated by Retired Major General Ishola Williams, Chairman of Transparency International (TI) in Nigeria, who claimed that “all the judges are just using the election tribunals to make money. All those who had gone through election tribunals are millionaires today. I challenge any one of them to say ‘no’!” Chief Afe Babalola (SAN), a leading senior counsel, was reported on the same issue in the *Punch Nigerian* newspaper of 23 September, 2012 as follows: “Time was when a lawyer could predict the likely outcome of a case because of the facts, the law and the brilliance of the lawyers that handled the case. Today, things have changed and nobody can be sure. Nowadays, politicians would text the outcome of the judgment to their party men before the judgment is delivered and prepare for their supporters ahead of time for celebration” (Chiedozie and Okpi 2012).

Whether or not these reports are controvertible, the damage they may cause is huge – ‘Justice must not only be done but must be seen to have been done’. If an association of Nigerian lawyers, the Economic and Financial Crime Commission and key stakeholders are of such firm views that there are question marks about the ability of the judicial system to deliver justice rooted in the universal principles of rule of law and constitutionalism as a result of corruption, how do we expect the common person in Nigeria to view the judiciary?

The Judiciary in a difficult setting

The right to life occupies a premier position under the Fundamental Rights provision of the Nigerian constitution. The punishment for murder, i.e. the wilful and intentional killing of another person, is the death penalty. The mass murderer’s only hope is the cold comfort that he can only die once.

The ‘mass murder scenario’ that I find relevant in Nigeria is a more complicated concept. It is a methodological device that shifts emphasis from direct, personal violence to indirect structural violence, as exemplified by severe poverty. Hayden (2009), on the theme of

‘political evil’, provides a compelling work on the urgency for such a shift of emphasis. Although statistics are problematic in Nigeria, such that in the words of Soludo (2012) “several of the most important national data (if they are available and on time) are either of poor quality or downright wrong,” there is a case to be made that over two-thirds of all deaths in the country are poverty- or deprivation-related. Put differently, daylight robbery by people in power accounts for two-thirds of deaths in Nigeria because the chronic corruption in the nation’s governmental corridors translates to a poor health care system, a lack of good roads or safe water, a poor education system, poor air traffic management and inadequate amenities that sustain lives. The ill-being occasioned by these paucities reduces lifespan and increases other avoidable mishaps that end in deaths. The Socio Economic Rights and Accountability Project (SERAP)¹⁸ have been able to successfully link massive corruption to right to development. In the case¹⁹ presented before the ECOWAS Community Court²⁰, the organisation argued that the massive corruption in government’s Universal Basic Education Commission (UBEC), amounted to the denial of right to free, mandatory and quality education for Nigerian children. The ECOWAS Court, in a celebrated decision²¹, declared

¹⁸ SERAP was formed in 2004 as a Non Governmental Organisation. The mission of SERAP is to promote “transparency and respect for socio-economic rights.” The organisation “aims to use human rights law to encourage the government and others to address developmental and human rights challenges such as corruption, poverty, inequality and discrimination.” For a highlight of the commendable work that the organization has done from 2004-2013, including their high impact cases at the ECOWAS Community Court of Justice, see: <http://serap-nigeria.org/escrs-corruption-in-nigeria/>

¹⁹ ECOWAS Court suit no: ECW/CCJ/APP/12/7: The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) versus the Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)

²⁰ The ECOWAS Community Court was established in 1991 on the bases of the ECOWAS Treaty (1975) as amended in (1993). All member states of ECOWAS are automatic members of this court. The main purpose of this Court is to adjudicate cases relating to the interpretation and operation of the ECOWAS Treaty. Its jurisdiction has however been enhanced to deal with human rights cases involving any of its member states following the adoption of the protocol on Democracy and Good Governance and the consequent implementation of Supplementary Protocol A/SP.1/01/05. The Court’s headquarter is located in Abuja, Nigeria. For a brief introduction to the Court, See: ECOWAS Community Court of Justice (2012). About us: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5. See also International Justice Research Center (2011-2013) <http://www.ijrcenter.org/ihr-reading-room/regional-communities/economic-community-of-west-african-states-court-of-justice/>

²¹ This case is a landmark because the linkage that the ECOWAS court drew between corruption and abuse of right to education was quite unprecedented. Remarkably, this decision handed down against

that a right to education can be enforced, and dismissed all objections relating to non justiciability and locus standi put forward by the Nigerian government as a bar to jurisdiction of the court or admissibility of claims²². The Court held that education is not just a mere directive policy of government but a legal entitlement of the citizens and that corruption impedes the realisation of this right²³. In another case that the Amnesty International termed, groundbreaking²⁴ SERAP v. Nigeria²⁵, the ECOWAS court decided that the Nigerian government must hold oil companies responsible for breach of human rights. The Court therefore held that, the Nigeria government was in breach of its responsibility to protect for shirking its duties to enact effective laws, create effective monitoring and accountability regime, among others. In fact, from the ruling, we can conclude that the Nigeria government failed the people of Niger Delta and left them as vulnerable victims to decades of corporate abuse of their rights to adequate standard of living, health, economic and social development, environment, among others.

The decisions coming out from the Abuja based ECOWAS Court in recent years have attracted the interest of scholars who are keen to find out how “an international tribunal,

a country with an acutely liberal constitution as well as an acutely capitalist economy is quite significant and could inspire activist municipal judges to take a fresh look at the justiciability/non justiciability binaries.

²² The preliminary objections of Nigeria in this case support my thesis that poverty in Nigeria has been constitutionalised. I use ‘constitution’ in the wider sense to locate the structural challenges that stand in the way of poverty eradication in Nigeria. For the Court’s sound ruling on the preliminary objections of Nigeria, see: SERAP v. Nigeria, Judgment, ECW/CCJ/APP/0808 (ECOWAS, Oct. 27, 2009) http://www.worldcourts.com/ecowascj/eng/decisions/2009.10.27_SERAP_v_Nigeria.htm

²³ The Court’s ruling supports my thesis in Chapter 3, that in a corrupt country, resource availability argument must pass multiple layers of validity in order to be considered as a reasonable excuse against people’s right to development. It is senseless to claim lack of resources, when the state collude with corrupt officials and entities or stands idly by as resources are frittered away through massive political corruption. The big problem in Nigeria is that the presumption of lack of resources has already been constitutionalised as a pre-emptive self-defence. The psychology of corruption and waste that underpin governance in Nigeria is closely linked with the philosophy of unenforceable socio-economic and development rights.

²⁴ See: <http://www.amnesty.org/en/for-media/press-releases/ground-breaking-ecowas-court-judgment-orders-government-punish-oil-companie>

²⁵ For the full PDF Report, see: ECOWAS Community Court of Justice. SERAP V. Nigeria: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=177:case-serap-v-federal-republic-of-nigeria&catid=10:judgements&Itemid=86

initially established to help build a common market, was re-deployed as a human rights court.” (Alter, Helfer and McAllister, 2013). In the context of this thesis, another mystery that is thrown up by the human rights decisions of the ECOWAS court in cases involving Nigeria is the question of how the same body of evidence could yield consistently different results, depending on the forum. In the light of decisions of this court, why is it that poverty law jurisprudence in Nigeria had historically laboured under the pain of justiciability and non-justiciability? The more we probe into this question, the more we reveal the nature of the Nigeria’s extra-ordinary environment and the role of ‘preponderant forces’ in Nigeria in conscripting not only the political and economic space, but crucially, the judicial space. The problem of judicial independence and the challenge of enforcement are some of the mechanisms these forces employ to frustrate poverty lawyers and judges. Judicial passivism, also linked to the context of judicial work in Nigeria, must also be factored in. In navigating through the challenges of adjudication in Nigeria, it is useful to review the excellent analyses of Alter, Helfer and McAllister (2013) on how the ECOWAS Court of Justice was able to transform itself from an opportunity offered by its failure. According to Alter, Helfer and McAllister (2013: 12-14): “The opportunity for change presented itself following the Court’s first decision-*Afolabi v. Nigeria*- a case challenging blatant non compliance with ECOWAS free movement rules...The dismissal of the Afolabi suit exposed a basic flaw in the Court’s architecture: there was little incentive for governments to challenge barriers to regional integration and no judicial mechanisms for private traders to do.” Put simply, there were institutional roadblocks for attaining justice in such cases. What did the ECOWAS judges do to meet these challenges? The engaging analyses of these authors reveal that the judges took an activist role in reform of the judicial system. They distributed booklets on their rulings, highlighting the flaws in the ECOWAS legal system. They took the task of advocating for enlarging access to court such that private litigants could be accommodated. They also held meetings with stakeholders, like government functionaries, lawyers and civil society organisations. The outcome of the judges’ activist role was the creation of a movement that finally won the victory for the transformation of the ECOWAS court, “giving the court a capacious human rights mandate” (Alter, Helfer and McAllister, 2013: 15-17).

The human rights cases under review are some of the immediate impacts of the reform of the ECOWAS Court. Although, questions continue to be raised around the practical value of ECOWAS Court’s decisions on human rights considering the challenge of enforcement by the same government that negates these rights as well as the difficulty of calculating and

awarding adequate compensation to victims, one must not lose sight of the strategic importance of such rulings. In Strategic Impact Litigation, there is a larger objective of using cases as springboards for change advocacy. In such litigations, what is targeted actually is not just favourable judicial decisions, creation of awareness and mobilisation of people to drive sustained change are part of the game-plan in successful impact litigations. In the Nigeria's situation, I argue that the significance of the ECOWAS Court's decisions should be better analysed from the angle of their capacity to drive change, through public enlightenment and grassroots mobilisation.

In the same way, that ECOWAS judges rediscovered its mission, imaginative municipal judges, in a mass-murder scenario that Nigeria typifies, could play very significant roles in building strong poverty law jurisprudence and providing hope in hopeless situations. Although, their positive decisions in support of poor rights may not be implemented by the authorities judging from the tired argument that Nigeria advanced at the preliminary of stages of the ECOWAS Court cases, it is my case that such decisions would certainly drive the change agenda in Nigeria. To that end, the question still needs to be asked as to how imaginative the judiciary in Nigeria has been in confronting life threatening poverty in their country. The question is asked, in spite of the challenges of getting government to enforce whatever favourable rulings that may emerge with regard to poor rights. I take the view that in a setting like Nigeria, favourable decisions of the court in matters of life and death that poverty represent in Nigeria could go a long way in driving change because as more and more people come to realise that human rights can only be actualised by the mass of the people whose actions can give life to the seemingly 'lifeless bodies' of statutes and statutory interpretation, human rights, as a tool for change, in a difficult setting would begin to make more sense, as social mobilisation and mass movement eventually serve as enforcement mechanisms that transcend the justiciability/non justiciability roadblocks. In the next section, I consider the current judicial approach to poor rights in Nigeria.

2.10 (i) The Judicial Approach to Poor Rights

The first test case was *Attorney General of Ondo State vs. Attorney General of Federation and others* [2002] 9 NWLR (PT 772) 222. The case concentrated on the power of the National Assembly to legislate on corrupt practices. It was argued by the A.G Ondo State that the power to legislate on such matters falls within the purview of the state. S. 15 (5) of the

constitution was said to empower the state to abolish all corrupt practices. However, item 68 of the exclusive legislative list provides that the National Assembly can legislate on any other matters “incidental or supplementary” to any matter mentioned elsewhere in the legislative list. On this basis, Uwais, Chief Justice of Nigeria, held that “it is incidental and supplementary for the National Assembly to enact the laws that will enable the enforcement and observance of the Fundamental Objectives and Directive Principles of State Policy....” Justice Uwaifo, in his concurring judgment, stated that whilst the Directive Principles remain “mere declarations, they cannot be enforced by legal process but it would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them....”

On the basis of that case, the attitude that can be inferred is that of avoidance and buck-passing. However, in the case of *Olafisoye vs. FRN* (2004) 4NWLR (part 764) 580, Justice Niki Tobi made pronouncements to the effect that the Directive Principles could be enforced. According to the learned justice’s lead judgment at page 661:

“... the non justiciability of section 6(6) (c) of the constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words, ‘except as otherwise provided by this constitution’. This means that if the constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the court.”

Tobi, JSC, held that a combined reading of item 60(a) of the Exclusive Legislative List and Section 15(5) demonstrates that Chapter 2 of the constitution is not just a toothless dog which can only bark but not bite – it is justiciable.

The Supreme Court’s pronouncement in this case is like a light at the end of the tunnel. This development, however, pales into insignificance when compared to the robust jurisprudence of poor rights in other jurisdictions such as India and South Africa. The Indian judiciary has shown extraordinary courage and foresight in their interpretation of a similar constitutional framework. In several cases, as set out below, the Indian Supreme Court declared the justiciability of ESCR. In *Francis Mullin vs. Administrator, Union Territory of Delhi* (1981) 2 SCR 576, the Indian court declared that the “right to life includes the right to live...” In *People Union for Civil Liberties vs. Union of India & ors* (Writ Petition (Civil) No. 196 (2001), the Civil Liberties Union sought within Article 21 of the Indian Constitution the

enforcement of a right to food for thousands of families starving as a result of drought. The Supreme Court held that it was the responsibility of government to prevent hunger and starvation. In *Pashim Banga's case* (1996) 4 SCC 37, the Indian Supreme Court linked the fundamental right to life to the Directive Principle rights to adequate medical facilities and shelter.

2.10 (j) Nigerian Judges: People of Peace or Violence?

Despite the serious charges of corruption and the vacillating judicial attitude to issues of poor rights, the Nigerian judiciary remains the “least dangerous branch” (Achara 2005: 80). For the judiciary to maintain its relevance, however, it must reclaim its place in the hearts and minds of the Nigerian people; it has to reform quickly and leave the ‘danger zone’ entirely. Tackling internal corruption and standing up against the structures of ‘mass murder’ in Nigeria will be critical. In a country with such massive poverty and chronic political corruption, the judiciary cannot afford to be corrupt, and it cannot afford to be passive in interpreting the constitution. The lesson from India, with a similar constitutional framework but a dissimilar approach, is that the judiciary can bring life to the ‘dead letters’ of the constitution and by so doing transform it into a dynamic instrument of change. As analysed earlier, there is morale in the transformation of the ECOWAS Community Court from impending failure to emerging success: judges are part of the society and in a difficult setting; judges can play a significant role in the change agenda. The constant ‘reviews’ and ‘reforms’ of the Constitution of Nigeria (1999) may be unnecessary, if the judiciary adopts a more sustained and imaginative approach to dealing with issues that border on human survival. The danger in maintaining a passive approach in a country like Nigeria is that the consumers and stakeholders of justice may be left with no other option than to explore other ways of transcending the dichotomy of justiciability and non-justiciability. This exploration may end in revolutionary violence.

2.11 Second-Level Approach

The Theory of Preponderant Force

Achara (2005) propounded the doctrine of ‘preponderant force’ to show the epistemological poverty of constitutional law in Nigeria. My purpose here is to adapt this theory, in order to locate the epicentre of violence in the country. Achara (2005: 407) defines the term ‘preponderant force’ as “the force which outweighs other existing forces contending for

constituent and governmental power within any given polity.” In relation to the epistemological foundation of constitutional law, Achara (2005: 409) argues that “constitutional law cannot fully be taught or studied without appreciation of this underlying doctrine.” The constitution, according to the learned author, “should be seen as consisting of two planes: macro and micro.” The first plane “is the ‘foundational’ one where authority and imprimatur are located. The second plane is the super-structural edifice that constitutes the actual concrete framework by which government is carried on. The ‘preponderant force’ is concerned with the more important sub-structural plane where the very authority to issue the lower level framework of government is located.”

Put simply, the written words of the constitution, to which some may easily relate, is not the constitution per se. The overemphasis on understanding written texts, in Achara’s firm view, translates into ‘textual fetishism’ and leads expressly to mental blindness. The most important force is that behind the written texts; the overwhelming force behind the constitution. This ‘force’, according to Achara (2005: 417), is similar to Kelsen’s grundnorm, only that in the case of ‘preponderant force’ we use the term grundfact.

2.11 (b) Re-examination of Theses and the Imperative for Self-Determination

In the light of the above theory, and on the weight of evidence marshalled in this work, how valid are my theses: (a) that law, especially constitutional law and its interpretation in Nigeria, has often tended towards the violent subjugation of the majority (poor and powerless); (b) that law in this context is a tool of oppression (violence) in the hands of a few powerful elites with selfish interests to protect (at all costs); (c) that the most intractable development traps in this, Africa’s most populous country, cannot be divorced from this prevailing normative violence?

This chapter has shown that constitutional law in Nigeria has often tended towards the de-constitutionalisation of poor rights using the mechanism of justiciability/non-justiciability. As a result, the tendencies to discriminate against the poor are high indeed, but it is not the law that subjugates the poor, as the law in the books has no animation until someone supplies the forces of ‘good’ or ‘evil’. Furthermore, on the basis of the doctrine of ‘preponderant force’, the ‘law’ we read and interpret in the Constitution of Nigeria is a ‘camera obscura’ that

shields us from understanding the ‘forces’ behind the words. These overwhelming forces are so powerful that they are able to brush aside our perception and interpretation and instead reassert their dominance. As concluded in my recent work (Mamah 2011: 459-483) ‘Haiti, Nigeria and the Human Rights: Transcending the Universalism-Communitarian Binary’, the greatest stumbling block to pro-poor rights in Nigeria is that the state has been captured by home-grown ‘colonialists’, who have elevated institutional violence as the only game in politics. Whilst the British colonialists built roads and rail lines and created institutions, home-grown Nigerian colonialists destroy institutions of accountability and create a system akin to apartheid in which the generality of Nigerians is poor and incapacitated, whereas a few political elites rig elections and rewrite the constitutions in the name of the people. They have amassed fortunes aimed at perpetuating their hegemonic hold on power. The epicentre of violence in Nigeria is located at the doorsteps of these home-grown colonialists, some of whom, officially, are in the business of making ‘laws’ or ‘executing laws’, either at the local, state or national levels, but in reality are wreaking violence on their own people.

As a prelude to the conclusion of this chapter, it is important to reflect on how this chapter’s engagement with violence embedded in structures relates to RTD. In pursuit of the structural perspective of violence, this chapter argued that violence embedded in structures of law and constitution provides a springboard for the violence rife on the streets of Nigeria. The focus on the latter form of violence has tended to overlook the urgency to confront the violence embedded in the key normative framework that is the Constitution of Nigeria. The notion of a ‘constitution’ as analysed here transcends the literal, in order to shine a light on the meta-constitution; the wielders of ‘preponderant forces’ in Nigeria. The persistence of violence at both the literal and analytical levels of constitutional law is a ‘trap’ to the realisation of RTD, because RTD is premised on the need for the state, as the primary duty bearer, to create national conditions favourable for the realisation of the right to development. In support of this primary responsibility of the state, Article 3 of the UN Declaration on RTD, for instance, provides that “states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.” Article 6 (3) provides that “states should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.” In order to discharge her primary responsibilities, the state, in this case the Nigerian state, needs to create a dependable framework that will serve as a baseline for RTD policies. The constitution is clearly a cardinal normative vehicle that Nigeria employs in providing the

framework for meeting her primary RTD responsibilities. As argued in this chapter, the norms of the Constitution of Nigeria compete with the grundfact of unaccountable power, the latter – being a de facto constitution – wreaking violence on the poor and powerless. The violence here, built into the structures, shows up as unequal power and consequently as “unequal life chances” (Galtung, 1969:171). Therefore, in Nigeria, RTD will continue to remain a pipedream unless the trap of constitutional violence is successfully removed or transcended.

2.12 Is Self-Determination a tool for Transcending the Constitutional Violence Trap?

Article 1(2) of the Declaration on the Right to Development provides an important tool that is rarely explored. The article provides as follows:

“The human right to development also implies the full realisation of the right of peoples to *self-determination*, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their *inalienable right to full sovereignty over all their natural wealth and resources*” (emphases supplied).

Aptly described as “the revolutionary kernel of international law” (Bowring 2008:9), self-determination, provided for in Article 1(2) of the UN Charter, offered impregnable tools for the emancipation of the colonial peoples from the stranglehold of colonial powers. For this, the people of the Third World owe some form of gratitude to Lenin, “the first forceful proponent of the concept at the international level” (Cassese, 1995: 15). According to Cassese (1995:44), the socialist countries played an important role in the drafting of Article 1(2) of the UN Charter, the first multilateral treaty to lay down the principle of self-determination. These socialist countries, in Cassese’s view, also worked closely with newly independent Third World countries at the end of World War II to expand the meaning of self-determination in Article 1(2) by adopting and developing Lenin’s thesis that self-determination should first and foremost be a postulate of anti-colonialism. This perspective of history is supported by Bowring (2008), according to whom, it was through “the logic of new international law, developed through the efforts of the USSR and its allies, that a people with the right to self-determination faced with the aggressive attempts to deny that right enjoyed the right to self-defence under Article 51 of the Charter, and was in all respects to be considered a subject of international law” (Bowring 2008:34). This historical perspective of

the evolution of the right to self-determination has been challenged by Oloka-Onyango (1999: 179-180), who calls attention to the tendency in the literature to give “short-shrift – if mentioned at all” to non-European experiences. In his words, “self-determination can be traced to the time Moses allegedly led the Israelites from Egypt. The quest for liberation, and the desire to freely determine one’s economic, social and political life, is a sentiment intrinsic in all individuals and peoples.” Nevertheless, it ought to be noted that treaty laws do not emerge just because the subject is intrinsic in nature, as people must act and align forces to give treaty expression to something that may be intrinsic, which is why it is fit and proper to acknowledge the role of Lenin and the USRR.

What is of paramount interest to our reflection here is how to employ this liberating tool of self-determination in a situation of internal re-colonisation, as analysed in this chapter. How will the majority in Nigeria re-imagine the right to self-determination to give real meaning and content to the notion of “We the people” in the Constitution of Nigeria? This re-imagination is crucial because the source of oppression here is an internal one, masked by the toga of democratic legitimacy. The complication, however, is that this internal source of oppression seems to be in a power-like network with external forces, and thus it challenges the adequacy of internal self-determination as postulated by Cassese (1995: 101), who defines internal self-determination as:

“The right to authentic self-government that is the right for a people to really and freely choose its own political and economic regime – which is more than choosing among what is on offer perhaps from one political or economic position only. It is an ongoing right. Unlike external self-determination for colonial peoples which ceases to exist under customary international law once it is implemented – the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect.”

I will revisit these conundrums in the concluding chapter. For now, it is important to understand that the linkages between internal and external ‘traps’ are well established, before delving into prescriptions on how to scale the hurdles. In the next chapter, I focus on the related ‘trap’ of chronic political corruption, another instance of how the state and its officials “kill and plunder on a scale that no ‘robber band’ could hope to emulate” (Green and Ward, 2004: 1). This ‘trap’ is arguably the greatest stumbling block to

development in Nigeria, but it also offers the key for a better appreciation of the other traps. Chronic corruption, for instance, exposes the illogicality of resource arguments often employed to avoid accountability for poor rights.

Chapter 3

The Trap of Chronic Corruption

3.1 Setting the Scene

“You lived modestly in London in the 1990s and no-one... at that time would imagine the multi-millionaire high profile governor that you became some eight or nine years later... It was during those two terms that you turned yourself in short order into a multi-millionaire through corruption and theft in your powerful position as Delta state governor” (Judge Anthony Pitts of Southwark Court, sentencing a former Governor of Delta State of Nigeria to 13 years’ imprisonment for money laundering).

“Nothing holds a country back like audacious and endemic corruption, which eviscerates any efforts to provide public welfare” (Khanna Parag, 2011).

Nigeria’s constitutions (colonial to post-colonial) institutionalised disinterest in poor rights on the basis of resource limitation. How viable is the resource argument as a bar to Nigerians’ right to development? This question is asked specifically in the context of a resource-rich country²⁶ with a high incidence of abject poverty and very poor official corruption indicators. In answering this question this chapter attempts to unravel what de Sardan (1999) calls the ‘corruption complex’, the interlinking of statist and non-statist dimensions to corruption. By critically reviewing the four historical trajectories that expose Nigeria to corruption, namely colonialism, military autocracy, ‘competitive authoritarianism’ (Levitsky and Way, 2002) and corporate imperialism (Onimode, 1978, Udofia, 1984), the chapter demonstrates what Held (2010: x) calls the “interlinking of the fortunes of cities and countries” with regard to

²⁶ Nigeria has estimated proven oil reserves of 37.2 billion barrels and is the sixth-largest producer in OPEC. Proven natural gas reserves are estimated at 174 trillion cubic feet, with energy content slightly greater than the country’s oil reserves. Nigeria is blessed with abundant solid mineral deposits including coal, tin ore, kaolin, gypsum, columbite, gold, gemstones, barites, graphite, marble, tantalite, uranium, salt, soda and sulphur (Nigeria Poverty Reduction Strategy Paper, 2005). With a population of over 140 million people, the nation’s human resources are also huge.

corruption. In doing so, this chapter argues that in a country like Nigeria, with its huge oil resources, abysmal poverty indices, the perception of high corruption and weak democratic institutions, the right to development may be the last self-defensive mechanism available to the masses. Consequently, any argument that seeks to contradict the pre-eminence of these rights must go beyond the seemingly sensible economic argument of the interplay of insatiable needs and limited resources. Such arguments may make sense in a setting with stronger democratic institutions and safety nets for the poor, but they may not be strong enough to preclude extra-legal enforcement mechanisms that popular movements seem to offer as alternatives in weak and failing states. On another level, this chapter also makes the underlying case that in the light of economic globalisation (current and historical) and the consequent interlinking of the fates of statist and non-statist institutions, the resource argument must also pass multiple layers of validity to bar people's rights to survival. Proven limited state resources, for instance, do not ipso facto exhaust resource opportunities for non-state institutions or proceeds from multinational development corporations, currently formalised in Millennium Development Goal 8 (GA/RES/55/2, 2000). This chapter's engagement with this second level offers an opportunity to challenge the theoretical claims of cosmopolitanism. The mantra of 'common humanity', which cosmopolitan theories promote, supports the rationale for shared responsibilities in confronting a humanitarian catastrophe. However, by situating cosmopolitanism within the prevailing experience of chronic poverty amidst wealth, an opportunity is offered to interrogate the key critique thereof as cosmetic imperialism, which can only be rescued by a counterbalancing narrative or agenda of "emancipatory cosmopolitanism" (Pieterse, 2006).

Subsection 3.1.1 onward identifies the broader context, key issues and challenges. In this subsection, discourse boundaries are also defined. Section 3.2 explores the debate on resources. Section 3.3 discusses the quadruple factors that make Nigeria vulnerable to corruption. These spinal cord-like factors, which the chapter terms 'assaults', recreate the four key phases of Nigeria's socio-political and economic sojourn from colonialism through to military autocracy and pseudo-democratic experimentation, ending with what I call the 'third wave of colonisation', or the capture of a weakened state by multinational corporations. In section 3.4 the chapter questions the corruption perception data in Nigeria, to test if they are merely 'perceptions' or reality. Through the triangulation of data this chapter seeks to test the corruption perception ratings of the country in the light of other data drawn from other sources. Section 3.5 is a response to the resource question in the light of the complexity of the

issues analysed, while section 3.6 summarises the preceding discourse and offers recommendations aimed at bolstering citizens' defence against corruption by reprioritising rights and shifting the 'burden of proof' in the light of the peculiar situation in Nigeria and Africa.

3.1(a) The Broader Context and Key Issues

Corruption is not a country- or region-specific concept. It is a pervasive concept that runs through all regions – east, west, north and south. No country is immune from its negative impact on development (Theobald, 1990; Robinson 1997; Osoba 1996; Heiderheimer et al. 2002). The wave of globalisation has further complicated the picture by blurring the lines between countries and regions. Across various countries, however, there are noticeable differences in its scale, speed and impact. For some, these elements are cushioned by a comparatively strong defensive wall of law. In these nations, where the law speaks directly to the culture of the people, enforcement mechanisms are less problematic, as the certainty of detection and punishment tends to minimise corruption. I call these countries category 'A' countries. For some other countries, in category 'B', the law itself may have become an instrument of corruption and oppression. Two main reasons are usually offered for this impasse. First is the historical origin of the laws in operation, which creates a wedge between the law as it is and the law as it ought to be. Secondly, those who make, interpret or implement the laws may be perceived as products of fraud and corruption. Whilst in the category 'A' countries aggrieved citizens resort to law, democratic restructuring through the ballot and at times peaceful demonstrations, in the latter category B countries the roles and legitimacy of law and democracy are being challenged as hungry and disillusioned citizens act out Dollard et al.'s (1939) 'frustration-aggression hypothesis' and take to the streets to enforce their fundamental rights to survival, often in a violent way. For many citizens in category 'B' countries, their survival is founded on their ability to confront the evil of corruption, which they understandably see as a terrible crime akin to 'nso ala' (abomination) in traditional criminal jurisprudence. It is important to note that the differences in scale, speed and impact, referred to above, do not tell us much about the complex interactions between categories A & B. For instance, it is possible that a country in the 'A' category may experience a lower incidence of corruption but be implicated directly or indirectly in the high incidence of corruption in a country from the 'B' group. This is the 'corruption complex' that I must confront and unravel.

3.1 (b) Conceptual Clarification

What is corruption? Can corruption aid growth? What is development? How crucial is resource availability in understanding underdevelopment? These are some of the questions that I will engage with in this section.

3.1.(c) Corruption: The Limitation of Legal Definitions

Corruption is widely defined as an unethical behaviour that can take different forms, such as bribery, the diversion of public funds and breach of trust. Legal definitions abound. For instance, Chapter 12 of the Criminal Code Act (Laws of the Federation of Nigeria, 1990), which deals with the crime of ‘Corruption and Abuse of Power’, defines corruption in its section 98 as follows:

Any public official (as defined in section 98D) who –

- (a) Corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or bribes, etc.
- (b) Corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person, on account of –
 - (i) anything already done or omitted, or any favour or disfavour already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which he is serving as a public official, or
 - (ii) anything to be afterwards done or omitted, or any favour or disfavour to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid, is guilty of the felony of official corruption and is liable to imprisonment for seven years.

A closer reading of this and other related sections with regard to official corruption shows that the following have to be present for official corruption to be proved:

- a) The defendant must be a public official as defined in the statute

- b) The defendant must have the requisite mens rea, i.e. corrupt intent
- c) The defendant must receive benefit of value
- d) There must be a nexus between the thing of value and the official act
- e) The relationship must involve intent to influence or be influenced in carrying an official act

It is interesting to note that Lowenstein (1990) identified similar elements following a review of American statute on bribery (cited in Heiderheimer 2002, p.8). Although positivist legal definitions seem to offer the advantage of legal clarity in the sense that one is either guilty of official corruption or not guilty according to the proclamation of a competent court on the basis of evidence before the court, legal definitions could be limiting and may preclude the possibility of seeing the bigger picture. At the municipal level, a crime is an act or omission which renders a person liable to punishment under a defined statute. What is termed a 'crime' may therefore vary across time-location boundaries. In the light of this fact, legalistic definitions of corruption may be too restrictive to make any sense to a sociologist who is interested in understanding the social dimensions of corruption. Murphy (1979: 57) argues that criminal science is greater than criminal law, hence he urges the legal profession to familiarise itself with this science as a means of improving the latter. Apart from the issues of criminalisation and decriminalisation, which raise doubts about the certainty of what is crime and non-crime, it is possible to engage in a corrupt practice that falls within a current legislative Act and yet escape legal accountability on a technical, evidential ground or as a result of the failure of the criminal justice system. In Nigeria, where all institutions within the criminal justice system – police, courts and prison – have been tainted with varying levels of corruption, where there is a historical culture of secrecy that constrains freedom of information, it makes a lot of sense to see corruption beyond legalistic definitions. This line of thinking receives scholarly support from Scott (1972), whose warning about legal definition remains ever-compelling. According to Scott (1972: 5), in analysing the relevance of legalistic definitions of corruption, we must, among other things, be wary of the danger of implicitly giving normative value to whatever standards of official conduct happen to prevail, thereby failing to treat corruption as an integral part of politics. This advice is very relevant to Nigeria, where the culture of fraudulent elections could return parliamentarians that lack legitimacy and may pursue legislative interests far from public, people-driven priorities. Heiderheimer (2002) analyses three models used to define official corruption that could aid us in both understanding and transcending purely legalistic viewpoints. The three models

Heiderheimer (2002) analyses are: public office-centred, public interest-centred and market-centred definitional models.

After critically examining all models – social and legal – the problem that remains is determining which norm will set the criteria. The legal definition becomes difficult to jettison in terms of legal enforcement of punishment, but it remains restrictive. The best approach is to keep an eye on the law while refusing to allow legal categories to block the search for deeper sociological explanations of corruption and how it impacts on people's lives.

In this chapter my main interest is official corruption, which directly affects public finances such that it limits the funds available for government to pursue development projects, such as the provision of electricity, access to health, education, public empowerment and other basic social amenities. This chapter is also interested in another closely related type of corruption, the type that constrains the choices of the electorate and thereby imposes unelected politicians on polity, giving them 'illegitimate' access to public finances. It is important to note also that although attempts at defining corruption have always tended to recreate state-centric theories, corruption, especially at a time of intense interconnection, must transcend the statist ideology to make real sense. Hence, in this chapter, I construe corruption from non-statist theories. Corporate corruption is an important angle to pursue in Nigeria, considering the nation's history, oil wealth and multiplicity of foreign corporations that operate on her soil. The mechanism I adopt in measuring corruption incidence goes beyond legal data on convictions as well as other narrow statist theories. I look at the lives of people within Nigerian society and how they view the impact of corruption on their lives. I gauge people's quality of life from available data, including artistic representations of people's ways of living in a community. In addition, I observe the influence of multinational companies on government policies and how contracts are won by these entities. My aim in all of these inquiries is quite simple: to expose the level of corruption in Nigeria and the difficulties in stemming its rise, in order to test the argument of resource limitation as a disincentive to RTD.

3.1 (d) But can Corruption aid Growth?

Although a strong case seems to have been made about the inverse relationship between corruption and development (Khanna 2011; Ribadu 2009, Diamond 2008; Achebe, 1984),

some scholars have expressed doubts by pointing to instances where corruption could aid growth. As Bardhan (1997:1322) puts it:

“There is a strand in the corruption literature, contributed both by economists and non-economists, suggesting that, in the context of pervasive and cumbersome regulations in developing countries, corruption may actually improve efficiency and help growth.”

Bardhan (1997) buttresses this point by quoting Leff (1964: 11) to the effect that if government erred in its decision, the course made possible by corruption may be the better choice. Bardhan (1997) also refers to Huntington (1968: 360), who argued that with regard to economic growth, the only thing worse than a society with rigid, over-centralised, *dishonest* bureaucracy is one with rigid, over-centralised, *honest* bureaucracy.

Despite these minority views, the overwhelming majority of scholarly analyses support the thesis that corruption, by diverting needed development resources, hinders progress and constrains human flourishing (Khanna 2011; Ribadu 2009, Diamond 2008; Achebe, 1984). Corruption creates poverty, leading to violence and insecurity; hence, the Human Development Index²⁷ and the Corruption Perception Index²⁸ tend to reinforce each other –

²⁷ The UNDP website provides interesting insights into the meaning and bases of Human Development index. See, for instance <http://hdr.undp.org/en/statistics/hdi/> According to UNDP, “The Human Development Index (HDI) is a composite measure of health, education and income that was introduced in the first Human Development Report in 1990 as an alternative to purely economic assessments of national progress, such as GDP growth. It soon became the most widely accepted and cited measure of its kind, and has been adapted for national use by many countries. HDI values and rankings in the global Human Development Report are calculated using the latest internationally comparable data from mandated international data providers. Previous HDI values and rankings are retroactively recalculated using the same updated data sets and current methodologies. On what the HDI tell us, UNDP states as follows: “The HDI was created to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone. The HDI can also be used to question national policy choices, asking how two countries with the same level of GNI per capita can end up with such different human development outcomes. For example, the Bahamas’ GNI per capita is higher than New Zealand’s (by 17%) but life expectancy at birth is about 5 years shorter, mean years of schooling is 4 years shorter and expected years of schooling differ greatly between the two countries, resulting in New Zealand having a much higher HDI value than the Bahamas. These striking contrasts can stimulate debate about government policy priorities.”

²⁸ According to Transparency International on its website, http://www.transparency.org/cpi2012/in_detail#myAnchor1, Corruption Perception Index (CPI)

countries with a low and medium Human Development Index are usually countries with a low Corruption Perception Index. The corrosive effects of corruption, it is argued, have led to multi-pronged efforts to curb it, with some countries, like China, imposing the death penalty in the hope that a deterrence philosophy will serve as a brake to greed that often drives corruption. Scobell (2009: 503-520) offers an interesting analysis of the death penalty in post-Mao China. Some scholars, like Bantekas (2006) and Harms (2000), have argued for the expansion of the jurisdiction of the International Criminal Court to include dealing with systemic corruption, which these scholars define as a crime against humanity.

In Nigeria, the Economic and Financial Crime Commission (EFCC) is the champion of the ‘anti-corruption war’, although its efficacy and independence are often debated. Every Nigerian government from 1960 to the present has tended to emphasise the ‘war on corruption’, with varying levels of commitment. Military coups in Nigeria, a reoccurring phenomenon since its independence, have often been justified as corruption-cleansing revolutions. Equally interesting is the intervention of churches, in that ‘*prayers* against bribery and corruption’ are offered in churches and mosques throughout the nation. Curiously, however, the corruption equation is rarely factored in whenever resource arguments are raised as a bar to socio-economic rights enforcement. On the one hand, top government officials identify corruption as the greatest single bane of our society today, yet on the other hand they argue that the government lacks adequate resources to finance basic development rights. Considering the role of the Nigerian state as the primary duty bearer of Nigerians’ right to the development (Articles 2, 3, 4, 5, 6, 8 and preamble) of DRTD, this connection between the prevalence of corruption and the seeming inability of government to meet its fundamental objectives will be of help in understanding the prospects for RTD in Nigeria. Resource availability as a key factor in resource allocation makes huge economic sense; however, the resource argument in a setting where a huge percentage of available resources have been depleted and are unaccounted for raises deep questions regarding justice and fairness.

“ranks countries and territories based on how corrupt their public sector is perceived to be. It is a composite index – a combination of polls – drawing on corruption-related data collected by a variety of reputable institutions. The CPI reflects the views of observers from around the world, including experts living and working in the countries and territories evaluated”. Although the index captures only perception, it does give a lot of insights into the level of corruption in a country. With regard to Nigeria, it is the view of this writer that when the CPI is viewed together with other indicators like the HDI, an analytical tool for construing drivers and inhibitors of change could emerge.

3.1 (e) Development and Rights

The thesis of this chapter is that chronic corruption not resource availability is the greatest hindrance to RTD in Nigeria. However, as analysed in Chapter 1, the concept of development is quite controversial, with post-development scholars arguing that it is a ‘fraud’, a ‘hoax’ ‘designed to cover up violent damage being done to so-called developing countries’. Alvarez (1994:1) puts forward what may be considered an extreme view of development as “a label for plunder and violence, a mechanism of triage.” Put differently, ‘development’, from post-development thinkers’ viewpoints, may be viewed from the prism of corruption. Although this chapter sees the ‘development as fraud’ thesis as an interesting axis with which to engage, as it can call attention to the ‘development-industry’ in order to separate the wheat from the chaff, I will, however, pursue the more optimistic view popularised by Chambers (1997), in that development is “good change.” Ideally, development is synonymous with transformation. On the other hand, ‘fraud’ or corruption has no ‘ideal’ taxonomy, which is why I reject the fraud thesis as the starting point of my analysis. However, it is possible for human agencies to mask fraudulent practices with the robe of ‘development’. In such a case the problem is not with ‘development’ but with the human agencies. What is needed in such a case is not to ‘throw the baby out with the dirty bathwater’ but to dispose of the bathwater and rescue the ‘baby’. This view is in line with Thomas’ (2000) views on how to approach the challenge posed by post-development scholarship. Although he considers post development thinkers’ viewpoints as “extremely important,” Thomas (2000: 21) argues that their points are about “development from a radical position, not argument for abandoning the concept.” Thomas (2000: 12) goes further to argue that “deciding not to use the term would not do away with real problems to do with poverty and powerlessness, environmental degradation, and social disorder, or with practical dilemmas such as that posed by the fact that to date there are no examples of large-scale improvements in living standards without industrialisation and huge dislocation it brings.” Hence, he argues finally, “insisting on the continuing importance of development does not mean endorsing any particular approach.”

The real challenge, therefore, is how to make development deliverable to the generality of the populace, many of whom may be incapacitated by poverty and powerlessness. The ‘right’ language offers an opportunity for this rescue mission, depending on how it is employed. The conjunction of ‘right’ and ‘development’, however, has not been embraced with enthusiasm by big development players, such as the World Bank and the IMF.

James Wolfensohn's (2005) explanation on this issue, in his chapter 'Some Reflections on Human Rights and Development', is quite telling:

“... the Bank works for the same people whose governments adopted the Universal Declaration. But in actuality their application of the principles to which they have so vigorously attested sometimes differs from the notions they had when they signed it. I raise the point because we are not an institution just composed of my colleagues and myself, able to do what we'd like to do. We're an institution which is owned and, to an extent, dominated by the very same people who wrote the Universal Declaration of Human Rights and the subsequent human rights instruments” (Wolfensohn 2005: 21).

The World Bank and its sister organisations would prefer to fund development, but they detest seeing it as an entitlement or obligation. The influence of these big players explains to a large extent why, despite the fact that the UN Charter (1945) insists that development and rights are central to maintenance of world peace, the two fields rarely connect in practice. This gap has led to renewed efforts by development and right scholars to create a framework for the 'mutual reinforcement' of human rights and development (Alston & Robinson 2005). The UN's Declaration on the Right to Development (1986), which is a significant effort at fusing together the notions of development and rights, remains underdeveloped. The most controversial issues are the competing questions of 'aid/gift vs. obligation/entitlement'. The trail-blazing efforts of the French anthropologist Marcel Mauss offer fresh insights into the way forward. In his book *The Gift*, Mauss (2002: 50) digs into history to demonstrate that across varying cultures there is nothing like a 'free gift'. What is termed a 'gift', he argues, imposes three obligations: to give, receive and reciprocate.

Notwithstanding the persisting controversies, I follow the UN Declaration on the Right to Development, the African Charter on Human and People's Rights (1981) and the Constitution of Nigeria (1999) to locate the human person as the subject of development. From this perspective, development is a human right (an entitlement) “to participate in determining the model... control over the process... and equitable access to enjoyment of benefits...” (Orford 2001:145). The central purpose of governance (local or global) ought, therefore, to revolve around 'development', i.e. creating an enabling environment to empower people to participate, control the process and share in both benefits as well as

burdens of the process. The right to development as used here becomes a synthesis of economic, social and cultural rights which are often questionably grouped as second and third generation rights. There is a strong connection between RTD and civil and political rights, hence the interdependence of rights provision that runs through the UN DRTD. The logic behind the interdependence of right is seemingly simple: for a person that is hungry, political rights mean nothing, as they can be easily denied. Even in cases where these rights are not directly denied, the hungry citizen may find it practically impossible to access them accordingly. For example, one may ask, what does a right to property mean to a person with no valuable property? What does a right to life mean to a person dying of hunger? What does a right to health mean for an HIV patient that has no access to anti-retroviral drugs? The seeming simplicity in the logic of interdependence unravels when the issues of resources are factored in. In the next section, I turn to the resource argument against the enforceability of the right to development. This argument could also be viewed as a critique and rejection of the logic of the interdependence of rights.

3.2 The Question of Resources: Problem Statement

Resource availability and limitations are key arguments against the right to development. The crux of the matter is that the right to development, which incorporates socio-economic and cultural rights, is too resource-intensive and therefore cannot be equated with civil and political rights, which do not require comparable resource allocation. Considering the resource implications of the right to development, judges and courts, it is argued, may not be the most suitable institutions or authorities to decide on these rights. At a glance, the case of non-enforceability of the right to development makes a lot of economic sense. The relationship that economics consistently draws between ends and scarce means is meant to constantly focus our attention on the reality that our every need will not be satisfied at the same time. Decisions must always be made on the needs to satisfy and forego.

The problem of adjudicating resource intensive rights has been theoretically analysed by Lon Fuller (1978). Such rights, according to Fuller (1978), raise 'polycentric' problems. Fuller borrowed the word 'polycentric' from Polanyi (1951: 170-175), who used it to explain why the principle of self-coordination offers an escape route from the seemingly irresolvable problems of central planning.

In Fuller's analysis, polycentric situations are "many centred" – each crossing of strands is a distinct centre for distributing tensions (Fuller 1978:395). Because of the web-like nature of polycentric problems, they tend to transcend the limit of adjudication. King (2006), in his analysis of Fuller (1978), throws more light on his subject's misgivings about the ability of judges to solve polycentric problems. Fuller, according to King (2006), believed that three key consequences arise from judges intervening in polycentric disputes: (1) it gives rise to unintended consequences, (2) it encourages the judge to try unorthodox solutions, such as consultations with non-represented parties, guessing at facts, etc., and (3) it prompts the judge to recast the problem in a judicially manageable form. In the face of these difficulties, Fuller suggests the use of alternative means of "managerial direction and contract (or reciprocity)" as better ways of resolving polycentric issues like socio-economic rights. For Fuller, 'contract' includes parliamentary methods and political bargaining.

Fuller's theoretical views, which are applicable to RTD, have been supported by recent scholarly analyses. For instance, in a recent article, Ferras (2008) reviews Bilchitz (2007) on the enforceability of social economic rights in South Africa and raises a series of similar 'polycentric' problems that limit adjudication, hence advocating a shift of emphasis from judicial interpretation to politics, on the basis that socio-economic rights are difficult to articulate in such a concrete manner as to initiate an enforceable claim. According to this view, given that the definition of the state's concrete duties arising in social and economic rights is dependent on scarce resources and how these resources are and ought to be raised and distributed by the state, it involves intractable empirical and normative issues which are much more complex and controversial than those involved in most civil and political rights.

King (2012) takes issues further and makes a rigorous case for constitutionalising social rights. In pursuit of this argument, King (2012: 198-203) offers a lucid explanation on how to give weight to Fuller's 'polycentricism', which he (2012: 98) acknowledges as "pervasive" in adjudication. According to the author (2012: 198), "once it is established that polycentricity is relevant, factors may attenuate the degree of weight it is to be given in adjudication."

Going further, he analyses some of these factors, namely:

1. Judicial mandate: the argument here is that where the law, constitution, statute or common law provides a clear mandate for judges to adjudicate, the question of polycentricity constituting a bar to adjudication does not arise.

2. The second attenuating factor that King (2012: 200) analyses concerns situations “where sources confer a general jurisdiction to adjudicate a class of dispute without suggesting any particular outcome.” In such a case, King argues that although polycentricity ought to constrain the interpretation, it should do so only to the extent that it does not encumber the judicial mandate.
3. King also considered situations “where the judicial mandate to adjudicate in a given case is itself what is in issue.” According to King (2012: 200), “it is here that consideration of polycentricity blend together inextricably with consideration of democratic legitimacy.”

In elaborating factor (3) above, King (2012) offers an insight which, for this writer, demonstrates the urgency for constitutionalising socio-economic rights in Nigeria and internationally. According to King (2012: 200) (re: situation 3 above):

“In my view, this is the type of situation now prevailing in respect of reading social rights into the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms and the Indian and United States Bill of Rights. In this case, the mandate is limited and the development in the area of social rights adjudication, in my view, in order to retain legitimacy, will need to be analogous to the organic development of the legal instrument as a whole. In my view, the whole attempt to leverage a comprehensive protection of social rights out of an instrument that is chiefly aimed at protecting a class of civil and political rights is not only undesirable, but irresponsible and undemocratic.”

Put differently, King’s argument challenges the desirability of reading social rights into a constitutional framework that negates these ‘rights’ ab initio. In the Nigerian situation, activist judges have endeavoured to break down the enforceability/non enforceability divide between Chapter 4 (Fundamental human rights) and Chapter 2 (Fundamental Objectives and Directive Principles) of the Constitution of Nigeria (1999). In following this path, some judges have been able, on a case by case basis, to declare some sections of Chapter 2 enforceable. But King’s argument, to which I wholly subscribe, is that this way of going about it may be “undesirable and undemocratic” (King 2012: 200). The best option that King recommends, which I exclusively adopt because of its capacity to uproot the uncertainty surrounding the role of courts in this area, is to provide for a clear mandate in the constitution

to give equal footing to socio-economic rights. The necessity for giving 'equal footing' to civil, political and socio-economic rights is a key motivation behind the UN DRTD. In her work, 'Globalisation and Right to Development', Orford (2001: 140-141) analyses the relationship between RTD and other rights and refers to Article 6 (2) of the DRTD, which "stresses that all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent attention should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights." Once this path of creating a level playing field for all rights is followed in a national constitutional framework, there will be no need to attempt to "leverage a comprehensive protection of social rights out of an instrument that is chiefly aimed at protecting a class of civil and political rights..."

From the foregoing, it is clear that the question of resources is at the heart of the usual inertia with regard to the status of socio-economic rights. It is also clear that the resource argument is not restricted solely to Nigeria – it is an argument that has impacted on the rights discourse since the end of World War II. The fragmentation of rights in the UDHR into ICCPR and ICESCR was dictated by the need to demarcate those rights that would require resource injection, i.e. positive state action from those that impose negative duties, or in other words 'restraint'. The differing enforcement mechanisms adopted for ICCPR and ICESCR speak volumes about this point. Socio-economic and cultural rights were seen as programmatic ideals subject to a 'progressive realisation' test which relied heavily on the availability and allocation of resources in the light of competing demands. The notion of 'progressive realisation', according to the Committee on Economic Social and Cultural Rights General Comment 3, "constitutes a recognition of the fact that full realisation of all [ESC rights] will generally not be able to be achieved in a short period of time... reflecting the realities of real world and difficulties involved for any country in ensuring full realisation of [ESC rights]" (Ssenyonjo, 2009: 59).

The power of the resource argument is such that it has impacted on rights jurisprudence across the world, raising questions about the likelihood that socio-economic and development rights are either 'dead or dying'. A careful study of the rights jurisprudence of Ireland, India, Canada and South Africa shows that underlying the persistent problem of enforceability lays the perennial issue of resources and caution on the part of the judiciary, which is not to be seen as usurping the role of parliament. In 2001, the Irish Supreme Court, in the *Sinnott v.*

Ministry of Education [2001] 2 I.R. 545 & *TD v. Minister of Education* [2001] 4 IR 259, considered the broad issue of how far the courts could enforce positive rights against an elected branch of government. The court made it clear that the Irish constitution was a charter of negative rights, and socio-economic rights, no matter how laudable, should not be the concern of courts but of elected arms of government. The position taken by the Irish Supreme Court has been criticised by Whyte (2002 & 2005). Although the South African post-apartheid constitution (1996) has been lauded as “the most admirable constitution in the history of the world” (Sunstein, 2001: 261) for incorporating socio-economic rights as justiciable rights, the courts are still struggling to give real content and meaning to these rights because of the issue of resources and legislative deference. For instance, in the case of *Soobramoney vs. Minister of Health Kwazulu Natal* (Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997), the resource argument tipped the constitutional right to health. In that case, a dying appellant, who was suffering from near chronic failure, was refused treatment on the basis of the unavailability of resources. His claim, based on section 27 (3) of the South African constitution, which provides for enforceable rights to healthcare, food, water and social security, was thrown out, as the court applied the so-called ‘reasonableness test’. Put simply, state resources are limited and the appellant did not meet the criteria for admission to the renal dialysis programme. The appellant later died.

In Nigeria, a majority of cases on socio-economic rights that have been adjudicated were often thrown out on the basis of non-justiciability, erected on the power of resources logic. For instance, in *Okojie and others vs. A.G of Lagos State* [1981] 2 NCLR 35, the applicant challenged the policy of the Lagos state government, which sought to abolish private schools within the region. The applicant claimed that such a policy was in violation of the right to education guaranteed under section 16 (chapter II) of the 1979 constitution, which is similar to the provision of the 1999 constitution. The court held that by virtue of section 6 of the 1979 constitution (similar to section 6 of the 1999 constitution) the provisions of Chapter II of the constitution were not enforceable and it was not in the power of the court to make any pronouncement thereon. The court stated that issues like this should be handled by either the executive or the legislative arms of government.

Despite the entrenchment of the resource argument, one of the key objectives of this chapter is to test the validity of this notion by factoring in the issue of chronic corruption in Nigeria. It is important to note that the ‘progressive realisation test’ of the ICESCR imposes an

obligation on states to utilise ‘maximum available resources’ (Article 2.1; Limburg Principles 23, 27 & 28). According to Ssenyonjo (2009:63), to comply with this obligation a “state must address all factors that adversely affect the availability of resources, for example the state must combat corruption.” In the sections below, I interrogate the perception of chronic corruption in Nigeria before revisiting the resource argument to test its validity and applicability to the country.

3.3 Vulnerability: Quadruple Assaults

Four historical trajectories expose Nigeria to corruption. I call these ‘trajectories of assaults’, and they encompass colonialism, military autocracy, make-believe democracy and corporate imperialism. Whilst the first and last of these factors are directly linked to external incursions, the second and the third are purely internal re-colonisation in practice. The purveyors of the second and third assaults are Nigerian elites, the second colonialists. The monopoly of power exercised by these second colonialists has led to a clamour for “the second independence from the indigenous leadership whose economic mismanagement, together with brutal repression, has made mere survival all but impossible” (Ake 1993: 240). Each of the identified four phases meets, to varying degrees, what Lord Atkins, in his letter to Bishop Mandell Creighton (1887), famously referred to as “absolute power that tends to corrupt absolutely.” To aid understanding it is important that we place these assaults within a historical timeline, as historical duration could be helpful in appreciating their impact and severity.

3.3 (a) The Colonial Assault

The duration of the colonial phase in Nigeria was at least between 59 to 79 years, depending on where one begins to count. If one chooses to start from the very first recorded encounter of the British with the territories later to be called Nigeria by Flora Shaw, the wife of Lord Lugard, then the year to begin may be 1880, because it was around this time that the British expanded trade with the Nigerian interior in the aftermath of the Napoleonic Wars and consequently established its authority. In 1885, the British claims to a West African sphere of influence received international recognition. In 1886, the Royal Niger Company was chartered under the leadership of Sir George Goldie. Significantly, however, it was in 1900 that the Royal Niger Company’s territory came under the control of the British government, in keeping with the saying in colonial times that ‘*the flag always followed the trade*’. In 1914,

Lord Lugard, the first Governor General, amalgamated the Southern and Northern Protectorates as the Colony and Protectorate of Nigeria.

The causal relationship between colonialism and corruption in Africa has continued to elicit the interest of scholars (Eke 1975; Udofia, 1984, Tignor 1993; Kebede 2004; Mulinge & Lesetedi 2004). Kebede (2004) provides a very interesting basis for the growing scholarly interest in the colonialism-corruption-under-development discourse. Is Africa's underdevelopment just a question of delay or an unfavourable climate? Could it be that it is simply a question of poor governance? Is Africa's poor state explicable by something more historically underlining: could Hegel's (1956) 'Philosophy of History', in which he identified Africa as "the land of childhood, which lying beyond the day of self-conscious history is enveloped by the dark mantle of Night" (Hegel 1956:91), supply an answer or is it just a question of Africans' innate incapacity to reason/philosophise and pursue a definitive transformative agenda? To answer each of these questions in the affirmative is to fall into the trap of what Kebede (2004: 1) calls the "internalisation of the colonialist discourse," a trap into which many Africans have fallen, some without intending to do so. Kebede's 'mental decolonisation' agenda was therefore meant to cure the paralyses of this colonially induced mental assault. In Kebede's engaging summation, Africa's developmental challenges are directly linked to the problem of choice/freedom and lack thereof. Colonial subjugation meant that Africans could not raise so many questions they would have raised were they not colonised (Kebede 2004: 114). I argue that one of the questions that could not be raised was the issue of economic imperialism, i.e. the "plunder of raw materials, seizures of territory and enslavement of local people" (O'Connor 1974: 23-68). The rigorous pursuit of this question would have exposed the plundering character of colonialism – one of the foundation blocks of chronic political corruption in Nigeria and Africa.

Colonialism, just like the discredited modernisation theory, was driven by imagined superiority. Although its impacts were said to be mixed, the fact that the colonisers in the 'scramble and partition' were driven, to a large extent, by selfish economic interests, disguised as humanitarianism, gave a clear indication of colonialism's corrupt dimension. Colonialism, by its very definition as "a practice of domination [and] economic exploitation" (Johnson 1995), which involved the subjugation of one people by another, is inherently a fraudulent negation of the Enlightenment principles that each individual is capable of reason and self-government. Founded on the Machiavellian principle that 'might is right',

colonialism was perhaps the greatest affront to universal human rights. The exercise of unbridled power by colonial crusaders, which distorted pre-existing regulatory mechanisms that held communities together and estranged the colonised, was bound to be viewed primarily as oppression, no matter how well intentioned it was as a civilising project. If the logic that power corrupts and absolute power corrupts absolutely makes sense, it does not take much analytical thinking to see the corrupt dimension of colonialism and the consequent physical and psychological impacts on both the colonised territories and the colonised. What are, however, of more interest to this chapter are the psychological dimensions of colonialism, the inferiority complex it created and the distortion of traditional mores, which hitherto abhorred any form of dishonesty. The rampaging went by the colonised to be like the colonisers led elites, trained in the worldviews of the colonisers, to jettison the traditional behaviours that emphasised succeeding as a group. “Onye ayana nwanne” (solidarity) and “igwe bu Ike” (there is strength in numbers) are time-honoured African sayings that remain rich in deep cosmopolitan philosophy. What colonialism did was to strike at the heart of this philosophy and propel the narrow and limiting idea of ‘succeeding’ alone, where success is measured on the basis of might and resources that one commands. The culture of greed that drives corruption in Nigeria cannot be divorced from this encounter of two complexes: superiority and inferiority. It is to unravel this complex encounter of double negatives that Fawole (2005) recommends as a preliminary step a retrospective look at the country’s political history by peeking into the psychology of politics and power.

In an influential study on the genesis of electoral fraud in Nigeria, Fawole (2005: 155) reports as follows:

“The logic that the holders of state power and offices use them to appropriate vital resources was the very hallmark of colonial plunder. The colonial state created an array of coercive apparatuses to pacify the rising wave of local opposition to foreign plunder. Unfortunately, this very authoritarian, violent and thieving character of the colonial contraption was eventually transferred wholesale into the post-colonial state. The state therefore became ‘a resource, devoid of moral content or attachment, to be pursued, occupied, milked – and later plundered – for the individual politician and his support group’ (Diamond 1995: 419). The emerging nationalists, having been waiting

in the wings and learning from the masters, simply stepped into the shoes of the departed colonial plunderers.”

Another interesting theoretical insight into the role of colonialism in the ongoing pillaging of Nigeria and much of Africa was offered by Eke (1997). In his analysis, colonialism created two publics in Africa instead of one public as exists in the West. The two publics created in Africa are the ‘civic public’ and the ‘primordial public’. Whereas the civil public is seen as an amoral arena where people are free to steal from without bothering to contribute, the primordial public is viewed as a moral platform where communal integrity must be maintained. By creating these dual publics, colonialism paved the way for Nigerians to view the civic public as nobody’s business. As referred to above, “the logic that the holders of state power and offices use them to appropriate vital resources was the very hallmark of colonial plunder...” (Fawole 2005: 156). Furthermore, people who steal from this public arena are hailed for their ‘exploits’ and recognised by members of their primordial public. In Nigeria, the resources that accrue to the civic public are called ‘national cake’. For many Nigerians within and outside government, the only thing that matters about the ‘national cake’ is how to grab their own share; no one seems to bother about who will bake more when it is depleted.

The two publics created by colonialism precipitated a situation where corruption, seen as a taboo at the local, primordial level, is hailed as being ‘smart’ in the national public realm, which is seen as a ‘distant’ realm, whereas its local, primordial counterpart is seen as an ‘indigenous’ non-distant realm. It remains a taboo to steal in this realm.

The question that the above analysis provokes is why did the nationalists prefer the path laid by the departing colonialists? Why was little or no effort made to synthesise laudable customary norms and give them their rightful place in the plural legal system of Nigeria? Self-interest and the inferiority complex created by colonialism may account for this inactivity. The interest of the elites seems to be favoured by the ascendant received system of law. An inferiority complex occasioned by a long period of colonial subjugation made the elites view everything ‘traditional’ as backward. We now turn to the post-colonial assaults of the Nigerian elite, which heighten Nigeria’s vulnerability to corruption.

3.3 (b) Post-Colonial Assaults

The post-colonial phase lasted for 51 years (October 1, 1960-October 1 2011) – a period shared by two forms of government: military autocracy and make-believe democracy. Significantly, the military autocratic phase took the lion's share of the governance 'pie'.

The army ruled for 31 years out of the 51 years following independence. Military rule in Nigeria would be better appreciated in two phases. The first military coup took place in 1964, during which time military crusaders deposed the first republic and assassinated Tafawa Belewa, the first Nigerian prime minister, barely four years after independence and 12 months after Nigeria officially severed her ties with Britain. From 1964-1979, the military held sway, challenged by multiple insurrections such as the counter-coup of July 29, 1966, the ethno-religious conflict of 1967, the massacre of the Igbos, the declaration of the Republic of Biafra by Lieutenant Colonel Chukwuemeka Odumegwu-Ojukwu and the consequent Nigerian Civil War (1967-1970). It was on 1 October, 1979, that the federal military government, then led by Major General Olusegun Obasanjo, who had stepped in to fill the void left by the assassination of the Head of State Major Gen. Murtala Muhammed, handed over to a civilian president in the person of Alhaji Shehu Shagari. The first military curtain was therefore drawn on 1 October, 1979.

On 31 December, 1983, Alhaji Shehu Shagari was ousted by a military coup that ushered in Major General Muhammadu Buhari (the presidential candidate of the Congress for Progressive Change, CPC, for the 2011 General elections). Between 1983 and 1999, when the military handed over to a civilian government, it is important to note key events that paved the way for this handover: the August 1985 coup that brought in Major General Ibrahim B. Babaginda (IBB), the event of August 1993 leading to the stepping aside of IBB and the inauguration of an interim government, the palace coup that forced the interim government to resign three months after inauguration and the military autocracy of General Sanni Abacha from 1993, ending in his abrupt death on 8 June, 1998.

The current democratic experiment in Nigeria started off on 29 May, 1999, following a questionable democratic election that returned Chief Olusegun Obasanjo, former Military Head of State, as the President of Nigeria. Significantly, from 1999 to October 2011, a period of 11 years and 10 months, Nigeria has been under a form of democracy with executive, legislative and judicial arms of government. Each arm of government, to some extent, serves as a check and balance on each other's powers. The outstanding eight years that complete the 19-year 'democratic' phase are computed by reference to 1960-1964 and 1979-1983. The years 1960-1964 cover the period of independence that ushered in the first parliamentary system of government, ending in the first military coup of 1964, whereas 1979-1983 covers the period of the second republic led by the democratically elected government of Alhaji Shehu Shagari. The regime was overthrown by the military on 31 December, 1983.

The phase of 'democratic' rule in Nigeria, especially from 29 May 1999, qualifies as a period of "competitive authoritarianism," in the view of Levitsky & Way (2002). Competitive authoritarianism, according to these scholars, is a "hybrid political regime" that falls short of democracy and full-scale authoritarianism. Nigeria's political landscape from 1999 to the present day is characterised by the dominance of a single political party. Democratic institutions and oppositional politics exist merely in name, and the abuse of incumbency powers and widespread electoral fraud define this period. The two General Elections conducted since 1999 have been widely criticised as fraudulent by both local and international election monitors (Transitional Monitoring Group, 2007).

In a recent study, *Votes and Violence*, with regard to the 2007 General Election in Nigeria, Collier & Vincente (2010) conclude that "as in earlier elections in Nigeria, there were many instances of electoral violence in 2007." Their study also finds that:

"... two other illegitimate strategies for gaining votes, ballot fraud and vote buying, were both rife alongside violence [and they conclude that] it is very likely that these illegitimate strategies were used predominantly by the incumbent party... and deployed most vigorously where electoral context was expected to be tight" (Collier & Vincente 2010: 34).

3.3 (c) Post-colonial Dictatorship: over 50 years of “Frustration-Aggression” in Nigeria

Here I use the term ‘post-colonial dictatorship’ advisedly. Although military dictators have exchanged political batons with ‘elected’ civilians, a careful examination of these regimes throws up a staggering similarity – the abuse of people’s power. Whilst the full-blown autocratic military regimes specifically strangle constitutional and accountability regimes, the kind of political regimes that it shared with the 50-year period can only be defined as a ‘hybrid’ regime, flawlessly defined by Levitsky and Way (2002) as “competitive authoritarianism.” According to Levitsky and Way (2002: 52):

“... in competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority, but incumbents violate those rules so often and to such an extent that the regime fails to meet the conventional minimum standards of democracy.”

The post-colonial period is also remarkable for another reason. Apart from the euphoria of seeming independence, oil, ‘the black gold’, was discovered in commercial quantities. This discovery meant a lot for the nation’s economy. Furthermore, it intensified the relationship between Nigeria and foreign countries on the one hand and Nigeria and multinational corporations on the other. The resultant rents from oil would later lead to what economists have called the ‘Dutch disease’ – the ‘resource curse’. The notion of the resource curse explains the tendency of oil to turn into a curse as a result of corruption and mismanagement. In Nigeria’s case, the seed of corruption was sown the very day that oil was discovered. The fact that the proceeds of oil in the past 50 years have been left in the hands of autocratic and competitive authoritarians has meant that despite the huge wealth generated so far from this valuable resource, there remains a paradoxical disconnection between Nigeria’s oil wealth and the quality of its citizens’ lives.

3.3 (d) Literature Mirrors Life

One of the most practical ways to recreate the post-colonial period in Nigeria is to revert back to artistic realism. ‘Literature’, it is often said, ‘is a mirror of society’. The timeless works of Professor Chinua Achebe have been widely celebrated for recreating Nigeria’s society. In all his writings, Achebe, arguably the most prolific African writer, pursues the central and

universal themes of power, leadership and development. I use 'central' and 'universal' to call attention to the global importance of the underlying themes that Achebe pursues. From Nairobi to Moscow, from Washington to Cairo, the issue that remains ever-present is how do we constrain power? How do we create an accountability structure to ensure that leaders pursue programmes that would favour the generality of the people?

Focusing on Nigeria, Achebe's works are particularly interesting. Born during the colonial phase in the country, he lived through all the major historical epochs in the country's history. It is reasonable, therefore, to expect that his works that span through all the phases of Nigeria's history – pre-colonial, colonial and post-colonial – would have a lot to offer to researchers that are interested in bridging the gap between theory and reality. The realism that runs through his works of 'fiction' lends credence to the notion of literature as a mirror of society.

If themes such as power, legitimacy, justice and rights are indisputable fields of political philosophy, then Chinua Achebe's *A Man of the People* (1966) is a masterpiece in political philosophy. The methodological tool that he frequently uses in this regard is literary realism, in which the genre of fiction is utilised to present life as it is. In *A Man of the People* we also see realism at its best. Substituting the omniscient third-person narrator in his earlier novels with the limited first-person narrator in the person of an idealist educationist, Odili, Achebe mirrors post-independence African society and ends in a prophetic revolutionary note as the abuse of power leads to military revolution. About a year after the publication of *A Man of the People*, Nigeria was engulfed in a three-year civil war that led to the massacre of over 2 million Igbos. Power (fiscal and political) and self-determination were at the heart of this conflict. A careful reading of *A Man of the People* throws up a multiplicity of themes relevant to development. The following themes stand out: leadership – what it is and what it is not; grand and petty corruption; the impact of colonialism on corruption; morality in the public sphere; political violence; electoral fraud and conscription of the democratic space; the influence of transnational corporations; incumbency power; ethnicity and the celebration of mediocrity; illiteracy and how it is used as a tool of suppression; campaign finance; poverty and exclusion; the devaluation of womanhood; education and the devaluation of expert opinions; the problem of statistics; the media and politics; military interventions/revolution; minority issues; the power of the community; the lack of people's consciousness; patriotism

and limits of citizenship; the independence of electoral bodies; the challenges of reforms and the role of literature.

My specific interest here is on the theme of corruption in post-colonial Africa. Corruption, as we understand it in this context, is the abuse of power by those who fought for post-independence freedom and the consequent betrayal of legitimate hopes.

In *A Man of the People*, Achebe introduces the Chief Honourable M. A. Nanga, MP, the Honourable Minister of Culture and the quintessential Nigerian politician. On his visit to Anata Grammar School, villagers came en masse to welcome him. Five or six dancing groups perform at different points in the compound, but the omniscient narrator Odili has some reservations. In his revealing words:

“As I stood in one corner of that vast tumult waiting for the arrival of the Minister, I felt intense bitterness welling up in my mouth. Here were silly ignorant villagers, dancing themselves lame and waiting to blow up their gunpowder in honour of one of those who had started the country off down the slopes of inflation. I wished for a miracle, for a voice of thunder to hush this ridiculous festival and tell the poor contemptible people one or two truths. But, of course, it would be quite useless. They were not only ignorant but cynical. Tell them that this man had used his position to enrich himself and they would ask you – as my father did – if you thought a sensible man would spit out the juicy morsel that good fortunes placed in his mouth” (Achebe, 1966: 2).

In this passage, Achebe lays the foundation for the corruption discourse that runs through the entire work and recreates not only the subject of corruption but also poverty of the common people’s minds – the perennial interplay between Eke’s (1975) ‘two publics’. The respected minister is in fact helping himself to the national till, but the villagers, his kith and kin, celebrate him. The public realm is presented as an amoral realm, and the villagers are unable to make the connection between their individual poverty and the corruption going on in the public realm. They sing the praises of those who should be in jail.

In *A Man of the People*, Achebe also engages with the important issue of media freedom; the suppression of alternative opinions, leading to the unwholesome use of the media to project

the views of the powerful. A key challenge to pro-poor development in Nigeria is the issue of access to information. The culture of secrecy that goes back to colonial rule continues to pose a real threat to growth in post-colonial Nigeria.

The *Daily Chronicle*, an official organ of the ruling party, is the government mouthpiece in this book. The media's primary role in Achebe's tome is to distort public opinion through a series of misinformation. For instance, economic experts' sincere and constructive advice on how to deal with inflation is derided, as the media calls them a 'miscreant gang':

“Let us now and for all time extract from our body-politic as a dentist extracts a stinking tooth all those decadent stooges versed in textbook economics and aping the white man's mannerisms and way of speaking. We are proud to be Africans. Our true leaders are not those intoxicated with their Oxford, Cambridge or Harvard Degrees, but those who speak the language of the people. Away with the damnable and expensive university a degree which only alienates an African from his rich and ancient culture and puts him above his people” (Achebe, 1966: 4).

Achebe also pursues the theme of nepotism. Odili, the narrator, meets the Minister of Culture during the latter's visit to Anata Grammar School. There and then, the minister invites Odili to the capital, promising to help him win a scholarship. Leaders that are supposed to represent everybody pick and choose those to assist, not on the basis of merit but on the basis of being members of the same ethnic group. Official positions and state resources provide means for sharing personal largesse. The pull of ethnic cleavages distorts the notion of citizenship, as leaders interpret their position as an opportunity to prop up their own ethnic groupings. The minister tells Odili, the village school teacher:

“... I think you are wasting your talent here. I want you to come to the capital and take up a strategic post in the civil service. We shouldn't leave everything to the highland tribes. My secretary is from there; our people must press for their share of national cake” (Achebe, 1966:12).

The politician, Chief Nanga, is unequivocal in stating that “a common saying in the country after independence was that it didn't matter what you knew but who you knew” (p. 17).

Odili's inability to access a higher position is attributed to his idealism of not wanting to 'push' for a share of the national cake.

The line between the corrupt African leaders and idealist reform advocates may be rather vague. Achebe uses the opportunity offered by Odili's visit to the palace of power to probe by asking why many idealist reformers change so radically once they are offered an opportunity to lead. The Chief Nanga in most Nigerians is philosophically explained by Odili, whose initial idealism is punctured on his first visit to Chief Nanga's residence. During his visit to the minister, Odili sees first-hand and overhears personally the intrigues of power. In his words:

"I had to confess that if I were at that moment made a minister, I would be most anxious to remain one forever... We ignore man's basic nature if we say, as some critics do, that because a man like Nanga has risen overnight from poverty and insignificance to his present opulence he could be persuaded without much struggle to give it up again and return to his original state. A man who has just come in from the rain and dried his body and put on dry clothes is more reluctant to go out again than another who has been indoors all the time. *The trouble with our new nation – as I saw it lying on the bed – was that none of us had been indoors long enough to be able to say, 'To hell with it'. We had all been in the rain together until yesterday. Then a handful of us – the smart and the lucky and hardly ever the best – had scrambled for the one shelter our former rulers left, and had taken it over and barricaded themselves in. And from within they sought to persuade the rest... that the first phase of the struggle had been won and that the next phase – the extension of our house – was even more important and called for new and original tactics; it required that all argument should cease and the whole people speak with one voice and that any argument outside the gate of shelter would subvert and bring down the whole house"* (Achebe, 1966: 37).

The short romance between the idealist reformer Odili and the avaricious politician Chief Nanga is short-lived, as Odili becomes a victim of the politician's greed and has to leave the palace of power. Odili reconnects with a classmate, a lawyer, Max, who introduces him to a new political party being floated to oppose the dominant Chief Nanga's party at the next

general election. The new party was founded on the need to expose the corruption in government:

“Max and some of his friends having watched with deepening disillusion the use to which our hard-won freedom was being put by corrupt, mediocre politicians had decided to come together and launch the Common People’s Convention” (Achebe, 1966: 77).

Achebe uses the opportunity of this clash between old and new political forces to demonstrate the difficulty that democracy encounters in Africa. Democracy here is a formal undertaking where people’s free choice rarely counts; where opposition politics is rarely entertained. Levitsky and Way (2002) call this type of hybrid political system “competitive authoritarianism,” whereby the domineering (incumbent) party use the ‘arsenal’ of wealth they have corruptly amassed to ensure that the voices of the opposition are muzzled. As Levitsky and Way (2002: 53) put it, “incumbents in competitive authoritarian regimes may routinely manipulate formal democratic rules... incumbents are more likely to use bribery, co-optation, and more subtle forms of persecution, such as the use of tax authorities, compliant judiciaries and other state agencies, to ‘legally’ harass, persecute or extort cooperative behaviour from critics....” In Achebe’s *A Man of the People*, the incumbent uses all these means. The way the opposition is viewed by the domineering party is well-captured by an in-law of the minister as follows:

“My in-law is like a bull... and your challenge is like a challenge of a tick to a bull. The tick fills its belly with blood from the back of the bull and the bull does not even know it is there. He carries it wherever he goes – to eat, drink or pass ordure. Then one day the cattle egret comes, perches on the bull’s back and picks out the tick...” (Achebe, 1966: 106).

The assassination of Max, the leader of the opposition, is emblematic of the politics of violence in Nigeria and Africa. Max’s life was cut short by a key member of the ruling party for daring to challenge brazen rigging and ballot stuffing.

Achebe's *A Man of the People* ends on a prophetic note whereby the corruption of the political class leads to a military intervention, and revolutionary change thwarts the slow pace of the evolutionary initiatives of weak oppositional politics.

It is remarkable that shortly after the publication of this book Nigeria experienced its first military coup in 1966, which was followed by a civil war. For this reason, "Achebe is seen, depending on one's affiliation, either as a prophet of doom or subversive political commentator" (Owusu 1991: 464). Far from these alternatives, Achebe may be described as a deep-minded writer who, by carefully analysing the events around him, is able to predict the future on the basis of the present. When literature mirrors society, it is able to draw from facts in the light of history and foretell the future.

All of Achebe's novels employ this mechanism of 'mirroring society' to explore the use and abuse of power. In *Things Fall Apart*, for instance, Okonkwo exercises absolute power in his own compound, and when faced with a conflict by an emergent colonial power he chooses to confront it in defence of himself and his clan. His confrontation ends in tragedy. In *Arrow of God*, we meet the Chief Priest of Ulu, Ezeulu, who relishes the immense power he wields to sustain his community. When another form of power confronts him, Ezeulu fails to read the writing on the wall, as he abuses his power and ends tragically (Owusu, 1991). In *Anthills of the Savannah*, Achebe continues with his mission of mirroring Nigerian and African society, by linking the discourse of democracy and military rule. The justification of military rule on the basis of corruption is punctured by the corrosive corruption and abuse of power that characterise military rule. Put briefly, Achebe, in his several books, demonstrates that a weak and corrupt democratic leadership and an avaricious military dictatorship have combined with external influences to steal billions of dollars from Nigeria, thus creating a situation well-captured by the UK's former Secretary of State for International Development, Hilary Benn, in the following words: "In poor countries [corruption] can kill. Money meant for drugs for a sick child, or to build a hospital, can be siphoned off into overseas bank accounts or to build a luxury house."

The Nigeria's Human Rights Violation Commission, set up in the fashion of the South African Truth Commission, was unequivocal on the impact of military dictatorship in Nigeria in its report of May, 2002. In the foreword to their report, the Chairman, Retired Justice Oputa, stated:

“For much the greater part of the period covered by this report, Nigeria was under military rule. During this period, most of our rulers’ principal motivation and pre-occupation were not service to country but the accumulation of wealth and personal gratification. This personal accumulation of wealth led to the decay of our society. Public and private morality reached its nadir; and the casualties included human dignity, human rights and our basic freedoms. We also experienced institutional and structural decay.”

Major General Sanni Abacha, the Nigerian military leader from 1985-1998, stole between \$5 and 20 billion. Nearly \$500 million of this haul was frozen by Swiss Bank (*The New York Times*, 19 August 2004). His predecessor, Gen. Badamasi Babaginda, is yet to account for the \$12.4 billion oil Gulf windfall (Acquaah-Gaisie, 2006). Democratic leaders have not fared any better, despite the institution of checks and balances. Although figures are yet to be assigned to reflect the total amount stolen by ‘democratic’ governments from 1999 till now, one can use figures on the amount stolen by some state governors and other politically exposed persons as an indicator. Consequently, it could be argued that over \$100 billion may have been taken away from Nigeria during this period – and the stealing continues despite the best efforts of Nigeria’s anti-corruption body, the EFCC. In his address to the US House Financial Services Committee, the former head of Nigeria’s anti-corruption body, the EFCC, stated that between 1960 and 1999 Nigerian officials had stolen or wasted more than \$440 billion. He estimated that this amount is six times the Marshall Plan, the total sum needed to rebuild a devastated Europe in the aftermath of the Second World War (Ribadu, 2009). It is important to observe that the massive theft of funds by military and civilian leaders would not have been possible without the aid of Western banks. The practice of stealing large sums of money and hiding them in these institutions is widespread. According to Nigeria’s *Tell Magazine*, October 7, 2002, following the death of Gen Sanni Abacha, investigators from Nigeria, Europe and America discovered over 130 bank accounts at home and abroad, where Abacha’s loot was hidden²⁹.

²⁹ The banks mentioned are listed in Appendix 2:

A careful examination of the list in footnote 8, below, shows the predominance of Western banks, hence the argument that without their cooperation, corrupt leaders who steal so massively may think twice about where to keep their assets. The stepping up in anti-money laundering legislation remains helpful, but a lot still needs to be done at global and transnational levels to confront corruption as well as to deal with its impact on victims, the majority of whom are in a developing country, where poverty is entrenched as a generational issue.

We now turn specifically to corporations, especially the multinational variants who are the indisputable drivers of economic globalisation. It is also important to note that some of the banks listed also fall within the category of multinational corporations.

3.3 (e) Corruption, Transnational Corporations and the capture of the Nigerian state

“Bad governance can be caused or made worse by the actions of rich countries and their companies. It is often called the ‘supply-side’ of corruption – those who provide the bribes or offer opportunities to hide stolen assets...” (Hilary Benn, Secretary of State for International Development, “Improving Governance, Fighting Corruption,” speech at Queen Elizabeth the 2nd Conference Centre, meeting organised by Transparency International, 14 September 2006).

As indicated earlier, ‘the flag followed the trade’ and not vice versa, with reference to Nigeria’s unique colonial history. The Royal Niger Company was already well-established prior to January 8, 1897, when the name ‘Nigeria’ appeared in print for the first time. Miss Flora Shaw, who was at that time a contributory writer on ‘Colonies’ for *The Times*, first used the term, ‘Nigeria’ as a title to an article (Meek 1960: 1). What is of interest here is the fact that Miss Shaw struggled whether to call her article ‘Nigeria’ or the ‘Royal Niger Company’s territories’. The latter option was considered because of the huge influence of this company on the territories around the Niger Delta. Mockler-Ferryman (1960) elaborated on this corporate influence as follows:

“The story of the Niger is one of great interest, and as an instance of what trade can affect in the matter of empire building, is probably without precedent. The common theory that ‘trade follows the flag’ hardly holds good with regard to the Niger, for that the Union Jack now floats over the greater part of these vast territories is due almost entirely to the efforts of traders and trading companies, though it is only fair to add that the British Government has usually backed up the traders whenever necessary.”

What is remarkable about this history is the continuing influence of corporations today, which were the driving forces of a colonial economy. Decolonisation and democratisation have so far failed to reduce appreciably the power of corporate entities, as they remain the nerve centre of economic globalisation.

At the municipal level, the doctrine of corporate legal personality was formulated as a mechanism for driving capitalist growth by encouraging people to invest and draw profits whilst remaining distinct from their companies. At the transnational level, multinational corporations are the vehicles for pulling together investors from many countries, with the primary aim of stimulating economic activities and drawing profits for investors. It is not debated, therefore, that in the absence of these MNCs wealth extraction from minerals in many developing countries will become difficult, if not impossible. What is rarely discussed, however, is the fact that many of these entities, especially multinational variants, have also become cogs in the wheel of human development in weak and poor states. Economic activities and growth do not necessarily lead to human development, and left to their own devices, corporations will naturally seek to maximise profits, even at the expense of human development, especially in a country where economic managers collude with corporate entities to corruptly enrich themselves at the expense of the populace. Onimode (1978) brought home this anti-development capacity of MNCs in the following words:

“In Nigeria, as elsewhere, the giant multinational corporations are the basic units of imperialism in its contemporary neo-colonial stage. The analysis of these monopoly ‘sharks’ is critical to the understanding of the mechanisms through which Third World countries are exploited, manipulated and perpetuated as the collective ‘wretched of the earth’.”

Udofia (1984) seems to draw inspiration from Onimode (1978) quoted above. In his work, ‘Imperialism in Africa: A case for MNC’, Udofia discusses the various forms that imperialism could take. According to him, although many theorists associate imperialism with colonialism, nationalism, neo-colonialism and capitalism, there is another form of imperialism that often escapes closer scrutiny – corporate imperialism – which he also referred to as economic imperialism. In further delineating this form of imperialism, Udofia (1984) states:

“The actions and existence of corporations constitute today’s imperialism in Africa. Their size, complex structure, and multiplicity of interests are what make up the corporate existence of imperialism. The corporate giants (multinational corporations) dominate means of production in Africa; they sustain transfers of income for their own benefits and at their own discretion.”

The ‘imperialism’ to which Udofia (1984) and Onimode (1978) refer to would be better appreciated by focusing on the tendency of these entities to dominate economic systems in a weak state and to avoid legal accountability. Driven primarily by the need to maximise profits for investors, their economic activities and stimulations in developing countries may become one-sided, as the oversight of law and regulations is systematically avoided, leading to the overpowering tendency of these entities to collude with corrupt officials for the purpose of achieving narrow economic gains at the expense of the populace.

The complexity in the corruption discourse is the fact that in a rapidly globalising world, it is no longer possible to view corruption merely from a statist perspective. Economic globalisation has pulled together a multiplicity of states and non-state actors in such a way that it becomes difficult to distinguish one from another. In a recent memorandum by a group of NGOs to the UK Secretary of State for International Development on concerns over alleged corruption in UK CDC-backed companies in Nigeria, a key to appreciating the complexity of corruption was offered in the following words:

“It would be wholly inaccurate, however, to characterise corruption as a problem solely of the South. Corruption flourishes wherever the powerful are able to undermine the rule of law for personal gain. It is as common in the North as it is in the South. Moreover, much of the corruption that takes place in developing countries is

possible only with the complicity – active or passive – of Northern financial institutions, which enable bribes and other forms of corrupt wealth to be laundered through ‘legitimate’ investments” (Jubilee Debt Campaign et al. 2010: 3).

In the next section, I will use a series of instances to demonstrate what Held (2010) calls the “interlinking of the fates of cities and countries” with regard to corruption in Nigeria.

The US Foreign Corrupt Practices Act

The United States Foreign Corrupt Practices Act (1977) was inspired by the need to deal with companies that bribe foreign officials to gain business advantage. The practice of making questionable payments by companies to foreign officials, especially in developing countries, was exposed as a by-product of the Watergate investigation into illegal political contributions and money laundering (Geo-Jaja & Mangum 2000). In the background report explaining the statute, the US Department of Justice states:

“As a result of SEC investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favourable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.”

The Act is jointly enforced by the Ministry of Justice and Security and Exchange Commission (SEC), with the SEC concentrating on civil enforcement of the statute.

Bloomberg Business Week of November 5, 2010 captured the current trend of corporate corruption in Nigeria and some other weak states. The report, was based on a series of US cases: *SEC vs. Noble Corp., 10-cv-4336*; *SEC vs. Panalpina Inc., 10-cv-4334*; *SEC vs. Pride International, 10-cv-4335, U.S. District Court, Southern District of Texas (Houston)* and *SEC vs. Transocean Inc., 10-cv-1891 U.S. District Court for the District of Columbia*

(Washington). Considering the centrality of the issues covered, I will reproduce major parts of the *Bloomberg Business Week* reports of 5 November, 2010:

“Bribes paid on behalf of Royal Dutch Shell Plc’s Nigerian unit came from ‘a culture of corruption’ that Panalpina World Transport Holding Ltd., a Swiss freight forwarder, admitted in a U.S. court.

Panalpina, Shell and five oil services companies agreed to pay **\$236.5 million** to settle probes by the U.S. Justice Department and Securities and Exchange Commission. Panalpina, which admitted to bribing government officials in seven nations, will pay **\$81.5 million**, and Shell will pay **\$48.1 million**.

Prosecutors agreed to defer the prosecution of five companies, including Panalpina and Shell. Panalpina said it paid at least **\$49 million** in bribes to government officials in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan. The bribes from 2002 to 2007 let its clients avoid the customs process, pass off phony documents or smuggle contraband including medicines and explosives, Panalpina said.

Prior to 2007 a culture of corruption within Panalpina emanated from senior-level management in Switzerland who tolerated bribery as ‘business as usual’, the company said in a 34-page statement filed in federal court in Houston. Dozens of employees throughout the Panalpina organisation were involved in various schemes to pay bribes to foreign officials.

The company said Shell’s Nigerian employees ‘specifically requested Panalpina Nigeria to provide false invoices with line items to mask the nature of the bribes’. Shell wanted to ‘hide the nature of the payments to avoid suspicion if anyone audited the invoices’, Panalpina said.

Shell separately admitted paying **\$2 million** to Nigerian subcontractors on its deepwater Bonga Project... Prosecutors charged Shell’s Nigerian subsidiary with conspiring to violate the anti-bribery and books and records provisions of the FCPA.

The SEC said Shell, based in The Hague, reaped about **\$14 million** in profit as a result of the payments related to the Bonga Project.

Panalpina helped oil and gas industry customers move rigs, ships, workboats and other equipment in Nigeria. Its workers there had 160 different terms for bribes, like ‘evacuations’ and ‘export formalities’, while its Kazakh workers called them ‘sunshine’ and ‘black cash’, Panalpina said.

The bribes in Nigeria were spread throughout the government for specific transactions, while some were weekly or monthly allowances to ensure ‘officials would provide preferential treatment to Panalpina and its customers’, the company said...

Panalpina acknowledged and accepted responsibility for misconduct and investigated and identified the nature and extent of the misconduct.

The company replaced most of its top leaders, as well as U.S. managers implicated in improper conduct, ended its Nigerian business in 2007 and changed its operations in high-risk countries, according to the filing.

The company also settled a lawsuit with the SEC.

In Nigeria, the company established Pancourier Inc., which used distinctive packaging to alert Nigerian customs officials to bribed shipments. As a result of bribes, the unit’s shipments sailed through customs without required paperwork or a pre-inspection process that ‘could take weeks to complete’, according to the SEC.

Bribes were paid to sidestep Angolan immigration laws, the SEC said. Angolan officials were bribed to fake employees’ exit and entrance documents, overlook visa inspections and avoid deporting employees who overstayed visas, the agency said.

The other companies that settled with the U.S. were Transocean Ltd., Tidewater Marine International Inc., Pride International Inc., GlobalSantaFe Corp. and Noble Corp. GlobalSantaFe merged with Transocean in 2007. Transocean is the world’s largest offshore drilling contractor. Tidewater is the world’s largest offshore energy support-services company.

Pride International will pay \$56.1 million; Transocean will pay \$20.6 million; Tidewater will pay \$15.7 million; Noble will pay \$8.1 million; and GlobalSantaFe will pay \$5.9 million, authorities said.”

It is worth noting that in the absence of the US Foreign Corrupt Practices Act, these cases may never have come to light. The passage of similar laws in other countries has been problematic because of the intense lobbying of MNCs and the pull of what Beck Ulrich calls ‘methodological nationalism’. Many companies complain that the passage of similar laws would put their firms at a disadvantage in international trade, despite recent research, such as that by Geo-Jaja & Mangum (2000), demonstrating the contrary position.

The second aspect to note in these cases is the prevalence of and impunity with which corporate corruption is engaged in by MNCs with the collusion of top government officials. The third is the ease with which information about this type of corruption could easily be shut out from the people, especially in a country like Nigeria with a long history of secrecy.

An accountability regime for MNCs at the local level has always been a problematic subject, as the impotency of local laws to deal with issues is further exposed by the fact that those who are supposed to implement any law in this regard have also been compromised. The grand nature of corporate corruption is another striking issue. It may well be that all the efforts made to deal with state-centric corruption may be whipping the wrong horse.

In addition, when the wealth of these MNCs and their high capacity to arm-twist weak and corrupt governments to pass policies in their favour is factored in, the picture of state capture becomes complete. Hillary Benn’s thesis, quoted above, to the effect that bad governance can be caused or worsened by the actions of rich countries and their companies, cannot be faulted.

In concluding this section on vulnerability, what stands out is the fact that corruption in a specified country can only be understood and confronted by interrogating local and external factors which have become so intertwined in this era of rapid and intense interconnection. The fates of cities and countries have, indeed, become inextricably tied together. Those who bear the burden of this complexity are the very poor, as monies meant to provide for their

basic socio-economic needs and cushion the effects of capitalism have been frittered away, whilst the logic of resource availability is constantly being rehearsed to avoid accountability.

In the next section, we will examine the Anti-corruption Perception Index as well as data from Nigeria's anti-corruption body. The hope is that these data will further demonstrate the prevalence of corruption and its complexity as a basis for interrogating the validity of resource logic in countries with weak defensive, anti-graft walls and poor safety nets for the most vulnerable.

3.4 Corruption in Nigeria: Between Perception and Reality

Measuring the level of corruption is difficult, if not impossible. Apart from the problem of agreeing to a universally acceptable definition of corruption in a country where access to information is problematic, generating verifiable corruption data could become an uphill task. In contrast, the impact of corruption on the lives of people is always easy to see in dwindling job prospects, the absence of basic social amenities such as electricity, a poor health system and dwindling life spans. In Nigeria, the first pointer that something is fundamentally wrong is the level of poverty that exists alongside wealth. Between 2007 and 2010, Nigerian GDP growth stood between 5 per cent and 7 per cent, yet there was scarcely any change in the lives of the poor. Access to constant electricity remains a problem and travelling by road has become a major cause of death in Nigeria because of the deteriorating state of the transport infrastructure.

The Transparency International (TI) Corruption Perception Index offers a popular tool for measuring the level of corruption across countries. TI defines corruption as the abuse of entrusted power for private gain. According to TI, the Corruption Perceptions Index (CPI) ranks countries according to the perception of corruption in the public sector. It is therefore an aggregate indicator that combines different sources of information about corruption, making it possible to compare countries.

'Perception', however, is not a categorical term, as people's accounts of what they perceive may vary significantly. TI's methodology of triangulating data to build the Perception Index may be helpful in minimising subjectivity, but questions could be still asked as to whether the

method of comparing countries by assigning corruption ratings still makes sense, especially considering the intense interconnections that continue to yoke together the fates of countries.

Despite this, a careful study of the Corruption Perception Index for Nigeria from 1996 to 2010 reinforces what Nigerians have always known: that the major reason why the wealth from oil is yet to impact on people's daily lives is because of the prevalence of chronic corruption. Since being ranked the most corrupt country in the world, in the 1996 CPI, Nigeria has continued to remain at the bottom end of the rankings. In 1997, it was again ranked the most corrupt country in the world. From 1998-2003, it was placed in the bottom five of the CPI. In 2010, despite all the emphases on anti-corruption, Nigeria was ranked 134th out of the 178 countries studied.

The picture that comes out clearly is that corruption is a major development problem. The former Chairman of the country's anti-corruption body, EFCC, in his testimony to the US House Financial Services Committee, was very unequivocal on this point. In his words:

“When you think of ‘corruption’ there will always be specific personalities and places that jump to mind, and inevitably Nigeria is near the top of that list... after one civil war, seven military regimes, and three botched attempts at building real democracy, there is one connecting factor in the failure of all attempts to govern Nigeria: corruption.”

A survey on corruption perception carried out in 2009 by the Nigeria National Bureau of Statistics, in collaboration with the Nigeria Economic and Financial Crime Commission, identified corruption as a serious problem after canvassing more than 2,200 businesses across all states and sectors of the economy. When she received the US Ambassador to Nigeria, Mr. Terrence McCulley, the then Chairman of the Economic and Financial Crimes Commission (EFCC), Mrs Farida Waziri was reported as saying that in the past seven years, the EFCC had recorded 400 convictions for corruption, most of them against politically exposed persons (PEPs). The sum of \$11 billion (about N1.6 trillion) was said to have been recovered from corrupt elements in the country (*Nigeria People's Daily*, 17 December, 2010). One million in Igbo dialect is ‘agukata agba awaria’, that is “you count and count until your jaw breaks.” One wonders what the Igbos would call a billion. The \$11 billion recovered, however, does not tell us much about what remains unrecovered and unrecoverable.

In his address to the US House Committee, referred to above, the former Chairman of the EFCC gives us a clue about how much has been stolen from Nigeria since independence. According to him, between 1960 and 1999, Nigerian officials stole or wasted more than \$440 billion.

Between 1999 and 2012, there is a case to be made by drawing from figures emerging from the Oil Subsidy Fraud, the Pension Scam, the Capital Market Fraud and so on, which almost double the amount quoted above that may have been siphoned by corrupt political leaders. Corruption statistics are always problematic, especially as figures on successful convictions may only be the tip of the iceberg, considering that many other cases may not even reach the prosecution stage and others may be thrown out of court for ‘lack of evidence’, where ‘lack of evidence’ may be actually or artificially induced by a high-profile accused whose power of influence may obstruct the course of justice. Content analyses of news reports of corruption in that period, combined with the underlying facts in the successful conviction of the former Delta State Governor by the British Court, offer an important window for demonstrating that chronic corruption, far from abating, is indeed gathering more speed. I turn to the Ibori case with a view to highlighting its significance in the fight against chronic corruption in a globalised world.

3.4 (a) The Case of Chief James Ibori: Governor of Delta State of Nigeria from 29 May, 1999 to 29 May, 2007

On April 17, 2012, Southwark Crown Court in London sentenced the former governor of the oil-rich Delta State of Nigeria, Chief James Ibori, to 13 years imprisonment for fraud and related offences totalling nearly £50m (\$77m). The former governor had earlier pleaded guilty to the charges. Although the court was told that the amount the ex-governor stole from people of Delta State was “un-quantified,” some of Ibori’s properties listed and subject to confiscation were as follows:

- A house in Hampstead, north London, worth £2.2m
- A property in Shaftesbury, Dorset, worth £311,000
- A £3.2m mansion in Sandton, near Johannesburg, South Africa
- A fleet of armoured Range Rovers valued at £600,000

- A £120,000 Bentley
- A Mercedes Maybach for 407,000 euros that was shipped direct to his mansion in South Africa (BBC Report, 17 April 2012)

Significantly, Chief Ibori's case exposed the complex challenges in dealing with corruption in a globalised world. Two earlier sets of charges in Nigeria in 2007 and 2010 collapsed. The first set of charges brought by Nigeria's Economic and Financial Crime Commission was thrown out on December 12, 2007 by the Nigerian Federal High Court sitting in Asaba. The second set of charges in Nigeria, alleging that Ibori embezzled N40 billion (\$266 million), could not be heard in court because attempts to arrest Ibori failed. He later fled the country.

3.4 (b) International Dimension

The strong alliance between the UK and Nigeria led to Ibori's eventually arrest and extradition to the UK. The efficiency of the UK criminal justice system led to the conviction of Chief Ibori, sending a strong warning to political office holders across the world that international conventions against corruption have the high potential of success when state parties resolve to genuinely meet their obligations. From a critical perspective, the huge success recorded in Ibori's case also raises the counter-argument that corruption in Nigeria may be persisting because international partners have not shown similar political will in collaborating on a consistent basis to root out chronic corruption that thrives on the wings of globalisation.

Another important aspect of this case was the role played by UK banks, in that HSBC, Barclays, CitiBank and Abbey National (now Santander) were used as vehicles for transferring money abroad, a situation that prompted Robert Palmer, a campaigner with Global Witness, to observe "by doing business with Ibori and his associates, these banks facilitated his corrupt behaviour and allowed him to spend diverted state assets on a luxury lifestyle, including a private jet and expensive London houses, while many Nigerians continue to live in poverty" (Ibiam 2012).

The BBC also uncovered claims suggesting that the CDC Group, an equity fund backed by the UK Department for International Development's (DfID's) private enterprise arm, put \$47.5m (£29.9m) into a private fund which invested in Nigerian companies allegedly linked to Ibori (Jubilee Debt Campaign et al. 2010). The DfID, which played a commendable

funding role in the investigation of Ibori, explained that the CDC always carried out “full and thorough” checks before investing in a fund manager and that CDC had investigated the claims and found “no indication that British funding had been misused” (Mitchell, 2010; BBC 17 April 2012).

A London-based solicitor, Bhadresh Gohil, who facilitated Ibori’s scam, had earlier been sentenced to jail. Ibori’s other associates also jailed had properties across the world. How were they able to beat the system in these countries and disguise the proceeds of crime in properties?

3.4 (c) What of the many ‘Iboris’ at large?

As earlier indicated, one of the problems with criminal law is its mechanistic approach to criminal behaviour. From a criminal law perspective, ‘criminal’ only refers to those who have been convicted by a competent court or tribunal. Criminal law cannot account for ‘criminals at large’, i.e. those who have exhibited similar criminal behaviour but are yet to be apprehended or have been let off the hook on a technicality. It has been argued that Ibori’s case would not have seen the light of day if he had not made the political miscalculation of trying to be a political godfather. It has also been argued that his fate would have been different but for the sudden death of the former President of Nigeria, Umaru Musa Yar’Adua. A *THISDAY* newspaper report of 18 April 2012, titled ‘Ibori: The Ogidigboigbo Goes to Jail’ puts this case as follows:

“... at the end of his governorship term in 1997, Ibori would probably have remained in peace, but for his quest to be a political godfather. That drew him into the public square and beamed the klieg light on him. His activities were scanned with a forensic lens and his hands were found full of filth... Ibori was reckless in government. The details of his wealth are only a slice of the proof. He thought he could control tomorrow, even out of office. With his cousin as his successor, and the president as his sponsored candidate, Ibori was sure to have a peaceful and protected life out of office. But fate had a different plan. President Umaru Musa Yar’Adua took ill and died. And the plan scattered. A new Pharaoh, who knew no Joseph, mounted the saddle...”

The startling truth is that there may be many political office holders that may have stolen and laundered their proceeds abroad, but they remain at large, outside the radar of the criminal justice system. Some of these unknown ‘criminals’ may even be occupying sensitive positions in law-making and the interpretation and execution of laws.

3.4 (d) The Judiciary and Justice System in Nigeria

In the same report on Ibori, *THISDAY Nigeria* was of the view that his conviction should serve as a wake-up call for the judiciary. The paper recalled that when Ibori’s case was tried in the Nigerian court, he was declared innocent. Nineteen former governors who, according to this report, have been standing trial since 2007, have also been declared innocent – thus enabling many of them to become distinguished lawmakers. The paper argued that considering the speed with which the UK judicial system was able to achieve conviction within just a year of the trial, questions needed to be asked as to whether there is a will to fight corruption.

In the light of these points, and in celebrating Ibori’s conviction, it is important not to lose sight of the most troubling questions bothering Nigeria’s failing criminal justice system, in which many influential criminals may be at large. How many of these ‘criminals’ are in the business of law-making and law enforcement in transitional countries like Nigeria? What kinds of law are they making? How far can these laws go in curtailing chronic corruption masterminded by the very people that hold the keys to the vaults? There is scarcely any day that passes without a report of chronic corruption in a country where about seventy per cent of the population live on less than one dollar a day. It has been reported that political office holders now steal in billions and trillions in one of Africa’s poorest countries. Hence, tackling corruption in Nigeria has been linked to the survival of democracy and Nigeria as an entity (Aboyade, 2012). Ibori is already paying for his crimes and there is a possibility that he may come out from prison rehabilitated, but the most troubling challenge that we face is the fact that so many pen robbers remain at large and our estimates of the amount of resources lost to corruption may in fact be abysmally low. As the level of corruption in Nigeria continues to skyrocket, it is not surprising that well-being continues to nosedive, thus leading to frustration and then aggression. The increasingly unbreakable link between chronic corruption and terrorism in Nigeria should be of real concern to the whole world.

Apart from these issues, there are other corruption variants that are easily overlooked, namely the collusion between top government officials and MNCs. The bribery for contracts referred to in section 2 is one issue. The collusion to sell oil illegally is another. The use of influence to pressure government to pursue policies that may not benefit the people is another form of corruption of the state. In dealing with government functionaries, the tendency for MNCs to call the shots is high because of the weak local accountability regime and the fact that in most cases those who represent the people may be products of corruption.

The 2003 General Election is symptomatic of this trend. All the election monitors – local and international – agreed unanimously that the election was roundly rigged. A few months before the next General Election, the courts have continued to nullify the elections of governors across the country.

In the light of this aspect, corruption in Nigeria is beyond mere perception – it is a reality with which people live daily. Moreover, its prevalence disproportionately affects the poor and powerless now congregating under a different banner, like the ‘Enough is Enough’ campaign, with the primary aim of pressurising government to meet their basic needs.

3.5 Testing the Resource Argument in Nigeria

Two levels of answers are offered. First, the rights to health, to housing, education and so on will mean nothing if the state has no means to provide them. Resource availability and resource prioritisation, established domains of economics, have become inextricably tied to human rights legislation and adjudication, hence the current notion of economics as an imperial science. To that extent, resource logic is incontrovertible.

However, for resource limitations to be proven, an independent opinion is necessary, but the prevalence of chronic corruption makes it difficult to sustain the argument of resource availability. It also weakens sole reliance on a national adjudicatory institution as the final arbiter, hence the need for multiple layers of testing the validity of resource logic and interrogating the burden of proof.

At the municipal layer, ‘m’, resource logic, must be placed side by side with the spirit of the ‘social contract’ between government and the governed. The primary responsibility of

Nigeria to provide an economic system that encourages growth and to abolish all corrupt practices is embedded in the constitution, which I see as an enforceable contract between citizens and their governments. The Constitution of Nigeria (1999) identifies economic objectives as key parts of the Directive Principles of state policy. Section 16 (2) of the constitution is clear that the Nigerian state shall direct its state policy towards ensuring that the economic system is *not operated in such a way as to permit the concentration of wealth or means of production and exchange in the hands of few individuals, so as to ensure that adequate shelter, food, employment and social care are provided for all citizens*. Aware of the chilling impact of corruption on meeting these ends, the constitution provides in section 15 (5) that the state **shall** abolish all corrupt practices and abuses of power. The use of the mandatory term ‘shall’ means that the Nigerian state has a core duty to take definitive steps against the identified anti-development forces of corruption and abuse. To ‘abolish’, as used in the context of section 15(5) above, does not mean to ameliorate but to completely destroy corruption and the abuse of power. The ‘destruction’ envisaged must therefore be total and unequivocal. Despite the fact that this fundamental law curiously seeks to preclude legal inquiry into the discharge of the state’s duty, via its controversial s. 6(6) (b), it has been successfully argued in other jurisdictions such as India that Directive State Policies could be made justiciable. The recent ECOWAS Court decision in the case of *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria and Universal Basic Education Commission* is also illustrative of this point.

At this ‘m’ level, the prevalence of corruption and the inability of the Nigerian state to create an economic system conducive for poverty eradication disqualify the state from arguing the case for resource limitation. For instance, the over \$5 billion stolen by former Head of State, the late General Abacha, would be enough to generate adequate electricity and create jobs for teeming jobless Nigerian graduates. The failure to provide an enforceable RTD regime in the Nigerian constitution, unlike that of South Africa’s post-apartheid constitution, has meant that the poor bear the burden of proof, as the cogency of their cherished rights has been constitutionally curtailed from the very beginning. Chronic corruption negates the applicability of resource arguments and challenges the orthodox notion of non-justiciability in the constitution. Furthermore, chronic corruption necessitates a holistic interpretation of the principles underlying the constitution and shifts the burden of proof from the thatched huts of the poor and powerless to the corridors of power and opulence.

The second layer of validity is the reality of a global economy. In the light of economic globalisation, does Nigeria really have the option of choosing which economic system it should adopt in a global setting structured on the economic logic of privatisation and deregulation? The global economic superstructure being piloted by the IMF, the World Bank and the WTO was erected at Bretton Woods when Nigeria was still under colonial subjugation. Many scholars, like Kapstein (2007), Hardt & Negri (2001) and Gill (2000), are of the view that this global superstructure has created an international economic order less favourable to poor and weak countries. The conclusion I draw from the prevailing superstructure of global economic governance is that the right to development in Nigeria is also the responsibility of the nation's international partners and multinational corporations. The UN Declaration on the Right to Development (1986) is targeted at sharing duties across these levels, but it remains stunted by opposition from powerful states and entities. The fates of cities and countries have been inextricably linked together in such a way that it would be difficult to avoid legal responsibility for non-state actors and rich third states. As at today, however, there is no enforceable legal structure to hold to account third states and non-state entities. Nonetheless, there are series of soft law mechanisms, such as the RTD Framework and the UN Millennium Declaration, that demonstrate the need for cooperation in this regard and provide inspiration for reimagining international law to deal with this uneven playing field. The current practice of giving 'aid' on a 'voluntary basis' could be restructured to address the growing criticisms of aid ineffectiveness. For instance, Ndikumana L. and Boyce, J. (2011) have criticised aid money for encouraging corruption and imposing huge debt burdens on weak states. Following Mauss (2001), the notion of a 'gift' is historically problematic, as there is anthropological evidence to show that 'gifts' are meant to be returned, one way or the other. To make 'aid' money deliverable to the poor, there is an urgent need for a system of oversight and the careful targeting of resources to where it is needed. In weak states like Nigeria, there remains the temptation to focus on monitoring official budgets whilst overlooking the huge receipts of resources from international development partners. In the light of the challenges in this country, there is a need for an impartial arbiter. As such, the call by some scholars for a World Court of Human Rights needs to be further explored.

3.6 Concluding Reflection

To sum up, this chapter set out to answer one underlying question regarding corruption, development and the true nature of resource availability. I have demonstrated, in the five sections above, the complexity of the issues and the limitations of statist ideologies in construing and confronting the issues of resources, corruption and the right to development. Although I conceded in answer to the question posed, whereby the resource equation is an important determinant of who gets what, I have also shown on the weight of scholarly data employed that in a chronically corrupt country like Nigeria, where political leadership oscillates between military and civilian authoritarianism, the resource argument has mountainous barriers to cross and it is doubtful if this argument can be sustained across all layers of validity. The chapter started off with what seemed like a national problem but ended as a global issue involving multiple actors and institutions. The Ibori case points clearly to the prospects of international collaboration on tackling chronic corruption. There is urgency to institutionalise such collaboration, in order to confront the challenge on a consistent basis. The prospect of using the International Criminal Court model to deal with chronic corruption therefore needs to be further investigated.

At the municipal level, a resource argument may be a device employed to preclude popular inquiry in the use of ‘maximum available resources’. In Nigeria, with its massive oil wealth and proven chronic corruption, RTD is an important tool of self-defence. The constitutional limbo to which these rights have been consigned since independence ought to be challenged as a mechanism for combating chronic corruption. Providing for an enforceable regime of socio-economic rights, like South Africa’s constitution, does not cancel out the relevance of the resource argument – what it does, and significantly too, is to provide an important avenue for galvanising the people and holding power to account. The burden of proving limited resources should lie with those who hold power and not vice versa.

At the regional (African) level, the importance of comprehensive human rights as a tool for ‘reclaiming humanity’ has been laid bare by Agbakwa (2002: 215), who puts it as follows:

“Human rights in Africa should be a quintessence of Africa’s attempt to reclaim humanity following its devaluation by the most invidious abuses... Full reclamation of humanity entails equal emphasis on what it takes to be human. This equal emphasis translates into equal enforcement of all human rights, whether civil and political or

ESCR, without discrimination. It requires a change of attitude towards ESCR in contemporary Africa. Protecting and enforcing only civil and political rights in a situation of exacerbated civil and political strife occasioned by worsening socioeconomic conditions ‘projects an image of truncated humanity’.”

On the international stage, the loose nature of international responsibility for issues regarding a desperate human situation raises deep questions about the authenticity of cosmopolitan and globalisation theories that are often expounded from the much critiqued standpoint of ‘methodological nationalism’ (Beck and Sznaider 2006: 3-6). Riding on the theories of a borderless world, liberalisation, world trade and privatisation seek to expand the frontiers of ‘free enterprise’ in a way that seems to benefit only the powerful. Humanitarian intervention, it seems, is only activated when the ideals of a ‘free market’ are directly threatened. The poverty tsunami ravaging much of the Third World rarely engages ‘unilateral or collective’ self-defence tools. The cosmopolitanism of the poor and powerless will insist on sharing the burdens as well as the benefits of globalisation. International ‘aid’ will need to be structured in such a way that it can be monitored legally to avoid ‘aid’ resources ending in private accounts abroad, whilst the argument on resource limitations is employed to block dissent. With the ‘Facebook’ revolution, the common people can no longer be deluded by tired rehearsals of econometric theories meant to confuse instead of enlighten. The popular revolts in Egypt, Tunisia, Libya, Bahrain and so on are symbolic and demonstrate that adjudication could come in various forms, with people power transcending the enforceability barriers erected by the authoritarian sovereign. In the next chapter, we cast our gaze on the transnational realm. First, I examine international law from a critical perspective. Ordinarily, international law, especially in the post-World War II era, appears to be beyond question. However, the persistence of global poverty and inequality raise concerns as to whether international law may be double-faced: a tool of liberation and a mechanism for subjugation.

Chapter 4

The Trap of Hegemonic International Law

“International law does not exist in an intellectual vacuum. Our understanding of the nature of international law, of what it is and what it can and should do, is ultimately dependent on our theoretical assumptions and presuppositions... As all law has a political dimension, because law attempts to provide authoritative models of how people should behave, it is not surprising that a theoretical model of international law encode specific views of the world and of relations between States”
(Scobbie, 2010: 58).

4.1 Setting the Scene

In the introductory chapter of this thesis, I critiqued, among other things, the modernisation theory of development that was promoted by international law after the Second World War. Two theoretical models of ‘property law’ and ‘poverty law’ were contrasted. The choice of the latter model was rationalised on the basis that it provided a more inclusive tool for construing ‘rights’ and ‘development’. In this chapter I build on that theoretical framework, with a particular focus on the possibility that international law, despite its seemingly incontrovertible positive sides, may have been constructed or conscripted as a ‘smart’ tool or mechanism for a form of colonisation/neo-colonisation. In pursuit of these ideological currents in international law we may draw from our analyses in Chapter 2, which demonstrated that constitutional law at the national level is not value-neutral, but it is associated with structural violence. With regard to our focus here on international law, the question of ideology becomes urgent when one examines the role that transnational corporations and financial institutions and systems played, unhindered by international law, during the colonial period and the role that they have continued to play, facilitated by international law, since the end of colonialism. The continued emphasis on states as subjects on the basis of the questionable logic of ‘state equality’ raises two main problems for RTD in international law. The first problem revolves around the shielding of transnational corporations as duty bearers of RTD, despite the considerable roles that these entities have always played in history. The second problem concerns the neglect of global capital such that “large swaths of the financial system that have important consequences for human rights

realisation and derailment have barely been touched by human rights analysis” (Dowell-Jones and Kinley: 2011: 183-184). These dual problems are analysed further in the latter chapters, but our purpose at this juncture is to expose the theoretical-normative underpinnings of these traps. The underlining thesis here is that the preferred theoretical framework of international law stands in stark opposition to the project of ‘right’ and ‘development’. Hence, the predominant theory of international law is itself analysed as a trap. Therefore, the propositions that fall for examination here are twofold. First, international law is built on hegemonic principles. A significant aspect of the imperial character of international law is manifested in the way it is constructed to insulate powerful entities and big finances that drive neo-capitalist agendas, thereby imposing analytical boundaries that limit the robust interrogation of ‘subjects’, ‘right holders’ and ‘duty bearers’ of international law. Secondly, a counter-hegemonic interpretation of international law that exposes the illogicality of state centrism and the imperative for widening the scope of right holders and duty bearers of poor rights is possible, but for this possibility to become actuality a ‘new’ theory and method of engagement are required.

In the next subsection I will examine the question of theory in international law. In this section I present conflicting theories of international law and the role that dominance has played in determining preferences.

4.2 Might is Right? A Structural/Theoretical Inquiry

According to Scobbie (2010: 64), “theory is necessary because it provides us with an intellectual blueprint which enables us to understand the world... Theory makes data comprehensible by providing a structure for the organisation of a given discipline or body of knowledge.”

In international law, I identify two theoretical paradigms competing for attention. The first and predominant theory privileges the interest of dominant states and is aligned with the theoretical foundations of ‘property law’ analysed in Chapter 1; therefore, it is termed ‘hegemonic’. The second and subservient theory privileges the interests of the powerless and reflects the framework of ‘poverty law’, also analysed in Chapter 1. Because this latter theory emphasises people rather than a collection of states, it is termed ‘counter-hegemonic’. On the

predominant theory of international law, Scobbie (2010: 55), as quoted above, argues that international law, like all laws, is a tool of power. The theoretical models and methods that are privileged in international law are representative of specific views of the world and relations between states. This view of international law is at the heart of the misgivings of many students of the subject as to whether this body of law is law or politics dressed up as law.

The predominant view that is encoded in contemporary international law, as I understand it, is ‘profit over people’, or ‘liberal utopianism’. Under this theory, what is privileged is the ‘having mode’ of existence, whilst the ‘being mode’ of existence is given less urgent attention. In Chapter 1 of this thesis, I drew from Jasudowicz (1994: 24) to demonstrate the problem of neglecting the dialectical unity between the human ‘to be’ and the human ‘to have’. By privileging the ‘having mode’ over the ‘being mode’ of existence, I argue that hegemonic international law presents a dual face, alternating between ‘myth’ and ‘reality’. In line with the preferred theoretical paradigm of hegemonic international law, notions of the sovereignty and equality of states (myths) are superseded in reality by the power of wealth. The motto here seems to be ‘might is right, and for those who have not, even what they have will be taken away from them’.

In some areas of international law, this theory may lie hidden under the cloak of humanitarianism, but in international economic law there are no pretensions about the ascendancy of ‘property over people’. Under the WTO system, the internationalisation of intellectual property law, as epitomised in the TRIPS agreement, offers a clear demonstration of the influence of ‘property over people’. As captured by Orford (2001:169):

“The TRIPS agreement will have a significant impact on the development model available to states, and limits the capacity of people to participate in making decisions about an extremely wide range of issues and interests. One illustration of the impact of those limitations on the right to development is provided by the requirement of Article 39 that contracting parties establish legal and institutional protection for trade secrets of investors. That requirement operates to entrench the unaccountability of TNCs to local communities. Internationalizing the protection of trade secrets of such corporation leads to a corresponding increase in the secrecy of production and

manufacturing process. As a result the right to participate in development is constrained.”

Going further, Orford (2001: 169) demonstrates how TRIPS impacts on Article 1 of the UN Declaration on Right to Development by privileging property over people. In her words:

“... the nature of the intellectual property regime embodied in TRIPS is such that traditional, community-based knowledge about seeds and plants is non-patentable, while innovative, individually-based knowledge produced by scientific researchers but derived from traditional knowledge is patentable... Corporations patent the genetic properties of seeds developed over generations as insect resistant or for medical properties, and are then able to exploit the intellectual property rights to that genetic material as a commodity in the countries from which the knowledge and seeds were first taken... As a result access to information about food and medicines is privatized and those goods are made more expensive. Human rights such as right to health or the right to adequate food thus become significantly less relevant.”

The myth of ‘sovereign equality’ or state autonomy in the choice of a development model has also been exploded by the TRIPS agreement. The privileging of ‘property over people’ as a development model seems to have been dictated by the powerful in a way that leaves the less powerful no choice at all. Again, Orford (2001: 170) strikes at the heart of the matter as follows:

“... a powerful state, the US, was able to make use of its market power to ensure that states signed on to a far-reaching agreement relating to a form of property that will be at the heart of economic development into the next century. That agreement goes further than any other international agreement to date in terms of stating in detail the kind of laws and administrative system that states must have in place.”

In the World Bank’s Articles of Association, we see the privileging of property over people in the regime of weighted voting, which simply translates to ‘property over people’. Those who call the shots are those who provide the funds and are ever-ready to back up funds with the force of arms, if need be. The poor, who are alleged to be the beneficiaries of the World Bank’s interventions, are pushed to the back burner in critical decision areas. In international

corporate and finance law, this theoretical model is employed to limit the legal accountability of TNCs and neglect the increasing reach of global finance, both in the creation of wealth and the perpetuation of poverty. The hegemonic thinking here is that regulation will constrain the commercial viability of TNCs and, by extension, the rich countries they represent. Similar thinking stands in the way of regulating global finance to benefit people everywhere. Hence, we are constantly confronted with a situation where the benefits of development are shared by a few whilst its burdens are borne by all.

Conversely, the theory of resistance in international law contrasts sharply with the above paradigm in terms of its method and reach. For instance, the possibility of holding TNCs legally accountable for poor rights is quite remote under the predominant state-focused theory of international law. Also, the roles that financial products and systems play in facilitating and curtailing human rights cannot be fully discerned under the predominant statist system. As Scobbie (2010: 60) posits, dominant theories of international law are instrumental and directed at elucidating and explaining the role and conduct of states in the international sphere. It is instructive that even in this area of primary focus, the predominant theory of international law struggles to explain the radical distinction between state equality as law and state equality as a fact. Rather than elucidation, the reality of power imbalance at the state level is usually hidden under the veil of 'equal powerful sovereigns'. With an increasing number of TNCs becoming more powerful than many sovereign states in the 'Third World', and global financial systems generating resources that currently outstrip global GDP, it has become critical for a counter-theory of international law to challenge the dominant theory constructed around the plastic notion of sovereign equality.

Allott (2001) argues for the need to transcend the statist ideology in international law. According to Scobbie (2010: 85), Allott's 'Eunomia' is founded on the rationale that "states are neither conscious nor sentient." Moreover, "states neither bleed nor starve, nor are they forced to flee for their lives." Locating this thesis within the 'Third World', where people have often bled, starved and been forced to flee for their lives or died in their millions, 'Third World' scholars such as Bhupinder Chimni and Balakrishnana Rajagopal, under the banner of 'Third World Approaches to International Law' (TWAIL), have mapped the theoretical manifestos for a new 'theory of resistance' in international law. The 'theory of resistance' they present is counter-hegemonic and aligns neatly with de Sousa Santos' project termed 'Epistemology of the South', which in critiquing the dominant epistemology for de-

contextualising knowledge from its political and cultural roots demonstrates the viability of a new approach that engages with ‘ecologies’ of knowledge.

On the theory of resistance, Rajagopal (2003:162) enunciates as follows:

“A theory of resistance in international law must pay particular attention to the re-articulation of four issues: against what? (the nature of the exercise of power in current international society, including the exercise of power by the modern state); towards what end? (the nature of human liberation that is aimed at, including the relationship between resistance and the psychology of deprivation); using what strategies? (the relationship between reformist and radical resistance); and what should be the role of the post-colonial state in resistance? (state as a plural, fragmented and contested terrain).”

I argue that the only way to construe the role of TNCs, and to hold them responsible for the wanton abuse of poor rights, especially in developing countries, is to give content and meaning to the theory of resistance in international law. The same argument applies with equal force to construing and managing what Dowell-Jones and Kinley (2011: 183) refer to as “large swaths of the financial system that have important consequences for human rights realization.” To give content and meaning to this alternative theory would mean direct confrontation with predominant theories that have been constructed by the powerful to serve their interests, and it may mean constructing new methods of engagement, in order to deal with ‘impossibilities’ in the predominant laws. One such impossibility revolves around legal personality or ‘subjects of law’ in orthodox international law. The doctrine of legal personality limits our appreciation of the changing nature of power in a global age. By focusing on states, other loci of powers in a global age, such as large corporations and finance houses (individual and institutional), are often lost sight of. In the next subsection, I draw from the competing theoretical maps identified to confront the orthodox interpretation of legal personality in international law. The inadequacies of the orthodox approach in the light of concrete realities are equally analysed here.

4.3 Confronting Orthodoxies of the ‘Subjects of Law’

In Charles Dickens’ (1838) *Oliver Twist*, Mr Bumble is informed by Mr Brownlow that “the law supposes that your wife acts under your direction,” and Mr Bumble replies, “If the law supposes that... the law is an ass – an idiot. If that’s the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience...”

The increasing relevance of non-state actors and global finance is one of many new experiences that ought to open the eyes of orthodox international law. On non-state actors, Clapham (2006) identifies three different approaches to the debate surrounding the human rights obligations of non-state actors. The central argument against corporate legal accountability lies on what Clapham (2006: 35-40) calls the ‘legal impossibility argument’. Put briefly, the logic here is that transnational corporations are not legal persons under international law. Furthermore, they are not parties to treaties and cannot be treated as states with responsibilities to protect and preserve human rights. According to ‘legal impossibility’ logic, states are the main actors in the international system and the only bearers of human rights obligations under international law. Human rights abuses emanating from non-state actors, it is argued, can be tackled better through the states. In order to consider the RTD obligations of TNCs, it is important to challenge the ‘legal impossibility’ argument.

Alvarez (2005) expounds that “international law presupposes, as do national laws generally, that ‘legal personality’ is a prerequisite for the capacity to bear rights and obligations. An entity that is not a subject of international law or an ‘international legal person’ is not able to be a party to treaties, present claims against other international persons, possess other international rights and duties or exist with relative autonomy in the legal sphere.”

This view confirms Brownlie’s (2003:57) earlier articulation of the general principles of international law with regard to legal personality. Considering the current balance of power between states and corporations, one may argue, like Mr Bumble, that international law is an ass. However, it may be better to view the doctrine of legal personality as illustrative of instrumentalist international law, which may be a tool for achieving a defined purpose of those who wield preponderant powers at any given time. Koskeniemi (2002:171) identifies the persistent Western dominance in international law. In his view, what counts as law is decided with conclusive authority by the sensibilities of the Western prince. But there is also

a counter-narrative, in that international law could also be used as a tool for taming power. RTD (1986) is an example of such a power-taming tool. However, the hurdle/trap is that dominant powers have always been able to blunt the counter-hegemonic tools available in international law. Take for instance the challenge of holding TNCs accountable as duty bearers under RTD. The question remains as to on what basis one can alter the hegemonic views of a legal personality in relation to TNCs, in order to pave the way for holding these powerful entities legally accountable. With powerful countries like the US voting against an RTD declaration, how far can such a ‘soft law’ mechanism go in generating an adequate consensus on the basis of its stated normative goals alone? To demonstrate the paradox of international law-making and how power and dominance could determine what becomes urgent and less urgent, I suggest that the first port of call is to understand the structural nature of TNCs and the role they play, especially in weak states like Nigeria. When this understanding is placed side-by-side with corporate voluntarism encouraged in international law, the handwriting of power and powerlessness on the walls of hegemonic international law appears more legible.

4.3.1 Understanding TNCs

TNCs are business entities that cut across more than one country. Such corporations operate outside the state of origin, so they may be incorporated in state ‘A’ but operate in state ‘B’ with a workforce cutting across many nationalities. Under municipal law, once the process of incorporation is complete the doctrine of corporate legal personality kicks in and the corporation becomes a legal person with rights and duties. It can sue and be sued. Under municipal law, cases of corporate fraud could lead to ‘lifting the veil’ of incorporation to hold shareholders directly accountable. Section 16 of the UK Companies Act 2006 deals with the legal consequences of incorporation. The cases of *Salomon vs. Salomon* [1987]AC (HL); 1985-9] ALL ER 33; *Macaura vs. Northern Assurance Co. Ltd & others* [1925] AC 619, [1925] All ER 51; *Tesco Super market Ltd vs. Natrass* [1972] AC 153; *Lee vs. Lee Air Farming Ltd* [1961 AC12; *Unit Construction Co. Ltd vs. Bullock (Inspector of Texas)* [1960] AC351; *Rafsanjan PP Cooperative vs. Reiss* [1990] BCLC352; *D.H.N Food Distributors Ltd. v Tower Hamlets London Borough* are some of the leading cases on corporate legal personality in English law. Under municipal law, corporations can also be tried for manslaughter – the UK Corporate Manslaughter Act (2007) is targeted at this point. However, it ought to be noted that the effectiveness of corporate manslaughter legislation has

been doubted, and examples of successful prosecutions are rare, so much so that the Act has been termed a “disappointment.” (Gobert 2008). In all these cases of corporate fraud and corporate manslaughter, what is not contested is the realisation of the need to balance corporate powers with responsibilities – and by so doing to enhance corporate accountability.

However, when corporations operate outside the state of incorporation, the equation changes dramatically and in a way that raises concerns about hegemony. When corporations are involved in rights abuse outside their countries of incorporation, victims look up to their government, i.e. the host state, to protect them in the belief that it is the sole responsibility of government to respect, protect and fulfill human rights. The host state may, however, be weak, inept or corrupt. Moreover, the host (age) state may be desperately wooing the TNCs to encourage elusive foreign direct investment (FDI), which it sees as critical to development. This creates a clash of priorities between economic growth and human rights. Corporations as non-state actors are traditionally seen as not being covered under the doctrine of international legal personality. This belief is supported by judicial decisions. For instance, in the *Velasquez Rodriguez v. Honduras*, decided by the Inter American Court of Human Rights Case, the court held that states violate human rights when they allow private persons or groups to act freely and with impunity to the detriment of rights guaranteed under the convention.

The distinctive regulatory problem posed by TNCs is their ability to operate as an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units – parent, subsidiary, sister and cousin companies – that make up the TNC group. The second disaggregated structure is the global system of separate nation states in which those corporations are registered and do business. Although decision-making within a TNC often occurs within a vertically integrated command structure, that same degree of integration is not available to regulators. Since the parent and subsidiary companies are legally distinct, they must be subject to separate and independent systems of inspection and regulation. In practice, companies are not subject to the discipline of shared liability, since in most instances the parent company is not liable for the activities of the subsidiary. The principle is stated in the UK House of Lords decision in *Salomon vs. Salomon & Co Ltd* and is followed in most of the countries of the world. In theory there is no court anywhere in the world that exercises jurisdiction over all the components of a TNC doing business in three or four continents. In these circumstances the

TNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order.

4.3.2 The Power of Corporations: Between Benevolence and Malevolence

Kinley & Tadaki (2004: 933) argue that TNCs are the driving forces of the global economy – their financial powers and influences are enormous and buy them considerable political leverage, both in domestic and international affairs. With regard to their political leverage, Monbiot (2000:11) posited that:

“The struggle between people and corporation will be the defining battle of the twenty-first century. If the corporations win, liberal democracy will come to an end. The great social democratic institutions which have defended the weak against the strong – equality before the law, representative government, democratic accountability and the sovereignty of parliament – will be toppled.”

In their key findings, Anderson and Cavanagh (2000: ii) revealed the shocking dimension of corporate financial power globally:

“Of the 100 largest economies in the world, 51 are corporations; only 49 are countries (based on a comparison of corporate sales and country GDPs). The Top 200 corporations' sales are growing at a faster rate than overall global economic activity. Between 1983 and 1999, their combined sales grew from the equivalent of 25.0 percent to 27.5 percent of World GDP. The Top 200 corporations' combined sales are bigger than the combined economies of all countries minus the biggest 10. The Top 200s' combined sales are 18 times the size of the combined annual income of the 1.2 billion people (24 percent of the total world population) living in "severe" poverty. While the sales of the Top 200 are the equivalent of 27.5 percent of world economic activity, they employ only 0.78 percent of the world's workforce. Between 1983 and 1999, the profits of the Top 200 firms grew 362.4 percent, while the number of people they employ grew by only 14.4 percent. A full 5 percent of the Top 200s' combined workforce is employed by Wal-Mart, a company notorious for union-busting and widespread use of part-time workers to avoid paying benefits. The discount retail giant is the top private employer in the world, with 1,140,000 workers, more than

twice as many as No. 2, DaimlerChrysler, which employs 466,938. U.S. corporations dominate the Top 200, with 82 slots (41 percent of the total). Japanese firms are second, with only 41 slots. Of the U.S. corporations on the list, 44 did not pay the full standard 35 percent federal corpo-rate tax rate during the period 1996-1998. Seven of the firms actually paid less than zero in federal income taxes in 1998 (because of rebates). These include: Texaco, Chevron, PepsiCo, Enron, Worldcom, McKesson and the world's biggest corporation General Motors. 10. Between 1983 and 1999, the share of total sales of the Top 200 made up by service sector corporations increased from 33.8 percent to 46.7 percent. Gains were particularly evident in financial services and telecommunications sectors, in which most countries have pursued deregulation”.

The power of corporations ought to be aligned with the emergent power of global finance, in which corporations such as banks also play critical roles. On the emergent powers of global finance, Dowell-Jones and Kinley (2011: 185) argue that “the global financial system has expanded so rapidly and become so integrated that it is now the pre-eminent driving force shaping patterns of world trade and economic growth, which critically underpin human rights realization. World gross domestic product (GDP), roughly \$60 trillion, is dwarfed by even individual segments of the financial markets. Notional derivatives exposures alone are over \$1,100 trillion, nearly twenty times world GDP, and the daily turnover in the foreign exchange markets is in the \$4 trillion range.”

Global corporate and financial powers are clearly on the increase as a result of the forces of globalisation and privatisation, among others. Clapham (2006) discusses these forces in support of the case for widening the net of responsibility for human rights. The first – globalisation, especially its economic aspect – has highlighted the power of large corporations and their limited accountability in law for human rights abuses.

Clapham (2006: 5) quotes Thomas (1998: 163) as suggesting that “Globalisation is privileging the private over the public sphere and over the commons. It is eroding the authority of the states differentially to set the social, economic and political space. It erodes the capacity of states in different degrees to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state activity.”

Clapham (2006:5) further expounds that the force and speed of globalisation have meant that an individual state's role is seen as changing due to the growing importance and pressures of global forces outside the state's control, and social justice is therefore seen as increasingly threatened. It should be noted, however, that the problem is not caused by globalisation per se but the way governments respond to globalisation. There is something chaotic about the wave of globalisation, and this is created by the absence of regulation. International law built on state-centric foundations is part of the problem. In fact, international law is complicit because its capacity to control non-state actors is doubted as a result of its foundational assumptions. Globalisation is excused because it offers alternatives: apart from a top-down globalisation model, there is a counter-model, a bottom-up process that has the capacity to galvanise people at the grassroots level. A growing number of actors across national divides are currently being mobilised in opposition to top-down globalisation. Hence, Clapham (2006:7-8) writes:

“If one regards globalisation in terms of top-down effects of more open markets for transnational actors, as well as the opportunities created by bottom up network of global demands, one could start to exploit the dynamics to ensure better respect for human rights. To demonise globalisation or the World Trade Organisation, per se, is to let those with international responsibility off the hook. Analysing globalisation highlights changes and developments in various sectors – but human rights abuses are committed by legal entities, not by an abstract phenomenon named globalisation.”

According to Clapham (2006) privatisation is another driver of rising corporate power, and what it seeks to achieve is to de-emphasise the role of the state. Key infrastructure and services previously run by the state are now being sold to private actors – individuals and corporations – hence the privatisation of water, electricity, telephone networks and even prisons. The problem that arises is how to hold these private actors in the service of the public accountable for breaches of human rights, considering that international responsibility is constructed on the basis of state relations. Tied to this point is also the issue of over-regulation since privatisation is built on the foundation of deregulation, i.e. less law and more market freedom.

Reflecting on privatisation highlights the possible dangers for human rights protection of the simple transfer of certain state activities to the private sphere. It does not mean that

privatisation as such is a violation of human rights, or that the purpose of privatisation necessarily violates human rights obligations – the issue is twofold. First is that the non-state actor in control of the private activity now has human rights claims that the old state actor could not make; for example, claims by commercial companies in respect of property rights have proven successful in situations where the previous public owners would have had no such claim. Second, through privatisation, governments may decrease their human rights accountability for the sector concerned.

In defence of globalisation and corporate power, Wolf (2004) presents a contrasting viewpoint about the power of TNCs, which, he argues contrary to the views of Anderson and Cavanagh (2000), are not bigger and more powerful than countries. According to Wolf (2004: 221), the two researchers committed what economists would regard as “an elementary howler,” as they confused gross sales with GDP. Calculating the value-added of companies rather than the value of their sales makes a huge difference, as the value-added of most companies, notably those in manufacturing, mineral extraction and retail, makes up a small proportion of sales. The argument of Wolf (2004) is that had Anderson and Cavanagh (2000) used this method, they would have come up with a different result; consequently, Wolf (2004:223) states that the claims that companies are bigger and more powerful than countries are not just wrong factually but misconceived totally. Wolf also used the facts that countries, unlike companies, have “coercive control over territory” in addition to the reality that for TNCs to survive they must prosper in a marketplace which thrives on competitiveness. In addressing Monbiot’s fears about the survival of liberal democracy in the face of corporate power, Wolf concedes that massive wealth, including giant corporations, makes a mockery of the ideal notion of democracy as a “system allowing an active body of homogenous citizens to reach collective decisions on all matters that concern them, through deliberation and ultimately voting.” Wolf (2004: 230-245), however, points to the fact that we now live in a ‘pluralist democracy’, where the interests of power blocs tend to dominate. According to Wolf, critics are right to argue that corporations are among those interests, but corporations are not alone, as trade unions and campaigning groups also exercise similar influence. The author also considers the allegation that TNCs exploit poor countries and workers, cautioning that “to be upset over poverty is entirely justifiable; but to block a route out of it in response is not” (Wolf 2004: 239).

To resolve the conflicting viewpoints above, and to reflect on the need for legally binding TNCs with regard to their RTD obligations, it may be better to look towards studies and cases that focus on their impact on people, especially those in developing countries, where the ‘coercive powers’ of the state may be minimal and regulatory aspects of competition law non-existent.

The Ogoni case (Nigeria) and the Bhopal case (India) are illustrative in this instance. In both cases we see the oppressive powers of multinational corporations soaring over and above the human rights protective mechanisms of the state. In both cases too, victims (people) encountered “all the major obstacles that, over the years, have impeded the process of bringing MNCS to justice for infringing human rights” (Deva: 2012: 25). These obstacles, according to Deva (2012:25), in relation to the Bhopal case (India), are the lack of specific human rights obligations for corporations, inadequate or fragile regulatory frameworks, the unwillingness or incapacity of states to pursue MNCs vigorously, the economic leverage that MNCs enjoy in influencing regulatory initiatives, the (non-) liability of a parent corporation for human rights abuse by its subsidiaries, corporate misuse of the doctrine of forum non conveniens, the use of litigation delay as a defence, the large number of victims, many of whom could be poor and/or illiterate, the absence of, or difficulties in imposing, effective sanctions against MNCs and inherent hurdles in the criminal prosecution of MNCs and their executives.

In carefully studying the Ogonis’ struggle for justice against multinational oil companies, we see access to justice impeded by almost all the obstacles enumerated by Deva (2012) above. In the next section, I focus on how TNCs impact on poverty in Nigeria, by drawing from the Ogoni cases against the Royal Dutch Shell.

4.3.3 TNCs and Poverty in Nigeria: The Cases against Royal Dutch Shell

For the Ogoni people of Nigeria, oil has become a curse – and many scholars and activists (Madeley 1999; Okonta & Douglas 2003; Christian Aid 2004) agree with them. The case against Royal Dutch Shell has become synonymous with cases against big businesses in poor countries. In the Nigerian case study, the futility of relying on a poor state as a protector of the human rights of the poor when threatened by big businesses seems to have been tragically

exposed. The Nigerian case is particularly relevant, as it opens up the paradox of poverty and wealth and the dangers posed to human existence by big and unaccountable corporations, who more often than not collude with weak states to deny communities their rights to existence, in order to leverage selfish corporate economic interests. Nothing demonstrates better the dangers that unregulated big businesses can pose than the alleged complicity of Royal Dutch Shell in the ‘state murder’ of Ken Saro Wiwa and other Ogoni environmental rights activists. The legal conundrum that victims of corporate rights abuse often face is evident in the following court cases, which put beyond doubt the urgency for a new legal accountability framework for TNCs.

4.3.4 Oronto Douglas vs. Shell Petroleum Development Company Limited

In this case the applicant, a close associate of Late Ken Saro Wiwa, sued Shell at the High Court in Nigeria. The applicant argued for the legal protection of the right to a safe environment guaranteed by Article 24 of the African Charter. The applicant’s contention was that in defiance of environmental impact assessment law the defendants had engaged in the construction of a hazardous liquefied natural gas plant, without undergoing a satisfactory environmental impact assessment study – a conditional precedent for such a construction. The applicant’s case was thrown out in the preliminary stages, because the court was of the view that the applicant lacked standing to sue. The High Court’s view was informed by the traditionalist jurisprudence that insists on reaching TNCs through their host states.

In *SERAC vs. Nigeria*, a Nigerian NGO filed a communication before the African Commission alleging the breach of right to life, health and a safe environment, the right against non-discrimination and the right to property and related rights, all of which could be seen collectively as a ‘right to development’. SERAC’s case against Nigeria was based mainly on the operation of Royal Dutch Shell in Ogoni. Shell was not party to the African Charter, and the only way to reach it was via host states. The African Commission found that Nigeria was grossly negligent in regulating private entities involved in the exploration of oil in the country, and it held that the right to life of the people of Ogoni had been violated. The terrorising and killing of the Ogonis, and the destruction of their farmland and livelihoods, were seen as tantamount to a denial of the fundamental right to life. The African Commission relied on its field mission to Nigeria, attended between 7 and 14 March, 1997, during which they witnessed first-hand the deplorable situation in Ogoniland. The African Commission’s

far-sightedness in synthesising socio-economic and cultural rights as a form of right to life was remarkable, and it aligned with judicial activism in India at the same time under Justice Bhagwati.

A key deficiency in the Africa Commission's ruling was the fact that TNCs such as Shell could not be reached directly, in order to account for their complicity in the gross abuse of the human rights of the Ogonis. In addition, the Commission lacked the power to compel Nigeria to take any positive action or pay compensation to the victims. The hope of granting justice to the victims through a 'weak' and 'compromised' host state was bound to fail, leaving the Ogoni people with rights but no remedy!

The desperate search for justice for the victims of rights abuses in Ogoni culminated in the recent case of *Wiwa & others vs. Royal Dutch Shell* under the eighteenth-century US Alien Torts Claim Act. The facts of the case strike at the heart of the development crises in Nigeria. In that case, Ken Wiwa, the son of the late Ken Saro Wiwa, the Nigerian environmentalist and writer who was executed by the Nigerian military government alongside others, sought for justice in the United States using the 1789 Alien Torts Claim Act (ATCA). The choice of venue and the use of the archaic ATCA demonstrate the desperation of the appellants to find a way of legally holding Shell to account, as there was little or no legal regime to call the corporation to account locally. The kernel of the plaintiffs' complaint was that Royal Dutch Shell colluded with the Nigerian military government to dispossess the Ogoni people of their land and to unleash environmental war on their community, thus leading to the brutal execution of Ogoni crusaders of justice (the 'Ogoni Nine') on the trumped up charges of the murder of the 'Ogoni Four'.

What is legally significant for our purpose here is the clear difficulty that the plaintiffs faced in the search for relevant law, locus standi and a forum of convenience. The only law at their disposal was the US ATCA of 1789. It is equally significant the way that Royal Dutch Shell sought to avoid responsibility on the basis of a lack of jurisdiction as well as the alleged absence of international law on the subject.

The case was settled out of court, with Royal Dutch Shell accepting to pay the unprecedented compensation of \$15.5 million to the plaintiffs as well as agreeing to establish a trust for the Ogoni people. In the next subsection, I will briefly examine the Bhopal case in India to

further support our case of corporate lawlessness and the urgency for corporate accountability.

4.3.5 The Bhopal Case in India

There is a rich body of literature on the Bhopal Case (Baxi, U. and Paul, T (eds) 1986; Veena, D. 2000; Darmody, S. 1988; Deva 2012). My purpose here is not delve into the details of this interesting case but to highlight similar trends in support of my case for imposing human rights obligations on non-state actors despite the seeming barriers imposed by orthodox international law.

The Bhopal case was sparked off by the event of 2 December, 1984. On the night of that day, there was a massive leakage of toxic gases from the Union Carbide Corporation's (UCC) storage tanks at Bhopal Chemical Plant. Although there are conflicting reports on the number of dead and injured, the number of casualties, from whichever report one chooses to rely on, is quite huge. The official government's revised report in 2003 puts the figure of dead at 15,248, whilst Amnesty International estimates that "between 7,000 to 10,000 people died within three days of the gas leak" and over 20,000 to date (Deva 2012:31). It is not surprising, therefore, that Deva (2012:45) refers to Bhopal as a site of victims' struggle for justice against UCC-UCIL— a "symbol of corporate impunity for human rights violations."

Deva (2012: 26-32) analyses of the context of UCC's entry into and operations in India, and the facts behind the gas leakage and its human rights implications follow a similar storyline to that of the Nigerian Case Study. In both cases, the pre-entry stage negotiations between the 'investor' corporations and the local state are characterised by unequal bargaining power. The states, desperate for foreign investments, are shown as occupying weaker positions at the negotiation table. The implication of this factor is that rules are waived to pave the way for foreign investment. Once in operation, MNCs tend to operate without adequate regard for the rights of the people, and weakened states with frail or destabilised regulatory mechanisms are usually unable to exercise proper oversight with a view to protecting their citizens' rights. Consequently, when events like the Bhopal tragedy strike, MNCs, their subsidiaries and governments of the host states trade blows amongst each other regarding blame while the victims that bear the brunt of the failure of governance/regulation are the citizens, many

whom may be poor and incapable of fighting their way through the torturous legal processes that may, after all, fail to offer the desired redress.

The Indian and Nigerian cases above are remarkable, as they put beyond doubt the fact that in developing countries TNCs are not only the harbingers of FDI but also huge contributors to the destruction of lives and livelihoods. On another note, these cases practically illustrate the power of TNCs, especially in developing countries. They demonstrate that any human rights framework that fails to incorporate the legal responsibility of TNCs will be found grossly inadequate, especially as weak states tend to turn a blind eye or collude with transnational entities to trample on people's rights. To impose effective legal accountability on non-state corporate entities would require a new reading of international law. In the next subsection, I focus on exploring the proposed map for a new approach to international law. Having exposed the inadequacies of the orthodox approach in the light of concrete realities, subsection 4.4 below interrogates the case for an alternative approach informed by alternative theories and methods of international law.

4.4 Counter-Hegemonic International Law as an Imperative

There seems to be a high level of consensus among scholars of international law that reference to states and similar political entities, non-self-governing peoples and individuals as 'established' legal persons "does not exhaust the tally" of agencies active on the international scene. Clapham (2006) cites TNCs and international organisations as falling to some extent within the "controversial candidature of subjects of the law," while Alvarez's (2005) captures the uncertainty surrounding legal personality in this realm. In the *Reparation for the Injuries Opinion*, ((1949 I.C.J. 174) however, the International Court of Justice had to examine whether the UN had the capacity to bring action against a state, where an agent of the UN suffered injuries as a direct consequence of the failure of state responsibility. The court concluded that the organisation was an international legal person with rights and duties. This judgement veered from the traditionalist viewpoint that sees legal personality from an essentialist state perspective. The issue of international organisations as legal persons seems to have been sealed by the reparation opinion.

With regard to other non-state actors such as TNCs, the controversy is far from over. According to Clapham (2006: 76), there remains "a strong resistance to including entities

such as TNCs in discussions about subjects of international law – some scholars leave the subject open.” Clapham (2006: 77) quotes Pierre-Marie Depuy to suggest that corporations enjoy temporary and limited status on the international level. Kinley and Tadaki (2003) were also of the view that it is possible to invest in a TNC’s sufficient international legal personality to bear obligations as well as exercise rights.

The helpful formula put forward by Clapham (2006) brings a new perspective to the issue. In the author’s own words:

“We have an international legal order that admits that states are not the only subjects of international law. It is obvious that non-state entities do not enjoy all the competences, privileges and rights that states enjoy under international law... We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.”

Put differently, Clapham (2006) suggests the imperative for shifting attention from the nebulous doctrine of personality to capacity. If we move beyond the self-imposed, formalistic legal problems of subjectivity and concentrate on capacity, our task becomes easier. TNCs clearly have the capacity to bear human rights obligations. It is in recognition of this capacity that TNCs have continued to feature as bearers of rights and duties in international law, despite the confusing doctrine of legal personality. For instance, Article 2 of the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions states that “Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”

The use of the extensive term ‘legal persons’ here clearly goes beyond states. The International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment place responsibilities on businesses by extending their reach to ‘legal persons’. Both conventions specifically define the persons liable as “any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions.”

Note that the norms talk of ‘party’ to the convention. The OECD is a *voluntary mechanism* so the question is asked, can human rights obligations be imposed on non-state actors, whether they want it or not?

The Universal Declaration on Human Rights (UDHR) places responsibility on both governments and other ‘organs of society’, which include actors beyond the state, and it could be argued that it includes non-state actors. Several other treaties build on the UDHR in extending human rights obligations to non-state actors, either directly or indirectly. For instance, Article 18 of the Declaration on Human Rights Defenders states that “individuals, groups, institutions and nongovernmental organisations have an important role to play, in protecting and promoting human rights.” Article 2 on the Convention on the Elimination of All Forms of Racial Discrimination (RACE Convention), creates obligations for states, institutions, groups and individuals. Article 2(e) of the Convention on Elimination of All Forms of Discrimination against Women requires state parties to “take all appropriate measures to eliminate discrimination against women, by any person, organisation or enterprise.” Article 4(c) of the same convention requires state parties to exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by states or private persons. The Option Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict specifically addresses armed groups, distinct from the armed forces of the state.

There are a series of treaties on individual responsibility, such as the Genocide Convention. Article 1 of the Convention on the Prevention and Punishment of Crime of Genocide, in creating the crime of genocide, whether committed in time of war or peace, defines ‘persons’ capable of committing the offence to include rulers, public officials or private individuals. The Nuremberg Rules, the Convention on Apartheid, the Convention against Torture and the Rome Statute for the Establishment of the International Criminal Court have similar provisions imposing responsibility on private individuals.

In addition, although the ICCPR & ICESCR impose duties on states, the Committee on Economic, Social and Cultural Rights has interpreted their respective covenants to bind businesses with regard to rights to adequate food, health and privacy (Weissbrodt and Kruger 2005: 315-350; Clapham 2006: 29-32).

In light of the above it is clear that although TNCs may not stand on an equal footing with states, they have high capacity to enjoy rights and bear duties under international law. Hence, the ‘legal impossibility’ argument cannot stand the test of constructive reasoning under the realities of today, where some non-state actors are more powerful than states. The problem that remains, however, is that although the logic of ‘legal impossibility’ may be shown to be unreasonable, it may still continue to remain the norm, not because it is reasonable but because it is supported by powerful states. The implication of this assertion is that the theory of resistance may not be enough, unless it is backed up by a new method of engagement with the capacity to counteract the influence of dominant powers.

4.5 ‘Radical’ International Law and the Challenge of useful Strategies

According to Rajagopal (2003:162), one of the four issues to which a theory of resistance in international law must pay particular attention is “using what strategies?” – the relationship between reformist and ‘radical’ resistance. Reformist or radical strategies are targeted at counterbalancing predominant international law, which thrives on alienation. I use ‘alienation’ here in the Marxist sense, as it is one of the three flaws of capitalism in Marxist theory. The predominant theory of international law, which I earlier interpreted as ‘profit over people’, is clearly founded on ‘triumphant’ liberal capitalism. According to Elster (1986: 41), alienation can be described very broadly as the lack of a sense of meaning. Elster argues that a lack of self-realisation is a form of alienation. If this takes the form of an unsatisfied desire for self-realisation, it could provide motivation for action. The overemphasis on theories and the avoidance of the place of action raises deep questions about the viability of alternative international law.

The implication of this avoidance or neglect of action among critical international law scholars has been laid bare by the compelling question put forward by Bowring (2011:1): “What is radical in ‘radical international law?’” What do we really mean when we write about ‘radical’ international law or ‘resistance’ in international law? This question becomes more compelling when one takes a critical look at the proliferation of legal theories that are so well-articulated in almost transcendental language, yet so empty in terms of their ability to change anything on the ground. This question also becomes troubling when one realises to one’s consternation that a gulf exists between the history of law and the theories and

wordings thereof. Although lawmakers, lawyers and judges continue to spend time endlessly reforming laws and creating better enforcement mechanisms, the record of history presented by historians of law points to the uncomfortable fact that the greatest triumphs of law were not founded on the vibrancy of normative or even theoretical language. Mazower (2004:380) puts it beautifully as follows:

“Lawyers, especially in empiricist Britain, shy away from the hint that the origins of legal regimes lie in a set of cultural, political and ideological struggles; their practice is to interpret texts, moving from document to document, rather than to soil themselves with the dirty laundry of backstage diplomatic shenanigans... What is significant... is not the fact that heroic individuals made a difference, but rather that international human rights turned out – rather unusually – to be an area of post-war politics in which individuals on the fringes of political life found they had a certain scope of action...”

From the Magna Carta (1215) via the Bill of Rights (1689), the American Declaration of Independence (1776), the French Declaration of Rights of Man and of the Citizens (1789), the Russian Revolution (1917) to the new right to development (1986), the ingredients of triumphs are far removed from the ornate rooms of legal draftsmen and the intimidating arena of legal interpretation. Rather, law seems to triumph in the theatre of oppression and opposition. Hunt (2007: 3), who offers an incisive analysis of the paradoxical origins of human rights, posits that “rights... would never have become human rights without revolution. What political theorists take to be the dividing line between present-day democracy and totalitarianism – the guarantee of individual human rights – had its origins in revolutions.” In light of this notion, and over four centuries of law in action, it remains a mystery why many continue to look up to law in theories for answers to the contradictions of modernity. The predominant forces that interpret international law to secure their advantages will not suddenly disappear simply because someone is theorising about a ‘radical’ or a Third World approach to international law (TWAIL). The established structures in place are so firmly rooted in the perpetuation of predominance that the force of theory alone may seem like an attempt to pull an elephant along with a cotton sewing thread. How will theory alone, for instance, deal with the power of veto that is the preserve of five superpowers, four of which were once also powerful colonial superpowers?

Bowring (2008: 9, 2011) reinforce the position that the right to self-determination is “the revolutionary kernel of international law.” By virtue of this emphasis, it is clear that although the author offered alternative definitions of ‘radical’ as “cutting to the root of a problem; or a kind of ‘immanent critique’, pushing a concept in a new direction,” the definition that the author seems to consider most useful is that which implies action as a mechanism for cutting to the root of a problem. In absence of action, critics of the dominant order may be pushing the concept of alternative theories in a new direction, without achieving any ‘radical’ change.

The revolutionary right of self-determination, though prone to multiple interpretations (Cassese, 1995:32; Oloka Onyango 1999), retains a salient characteristic, namely its capacity to galvanise people to take action. To this effect, this right could be interpreted as democracy by other means, with a high capacity to challenge the predominant theories of international law that are pioneered by a few powerful minorities against the spirit of participation. This domineering class often chooses which way they intend to expand their interpretation to meet their needs. Hence, when it was feared that the established rules of collective self-defence might hinder the commitment to launch the war against terror, the paradigm in Article 2(4) and 51 of the UN Charter had to shift to give prominence to the ‘Bush’ doctrine of pre-emptive self defence, hence “legitimizing” the use of force by other means – raw power.

Whilst these predominant views of international law continue to gather strength in action, the alternative perspective of radical international law seems stuck in high-sounding theories. The fortunes of the alternative theories of international law could change dramatically by leveraging the right to external self-determination, “the revolutionary kernel of international law” in Bowring’s apt formulation. External self-determination offers viable tools to challenge the continued production of disadvantage and alienation. Self-determination, popular movement organised opposition and other similar devices may be the most concrete ways of explaining what is radical in radical international law, as theory alone cannot counter established advantages. It must, however, inspire concrete actions on the ground to become viable tools in the hands of the multitude that paradoxically remain at the periphery as a result of well-crafted ideologies like that of the legal personality doctrine.

4.6 Conclusion

This chapter has demonstrated that an over-reliance on states as the sole duty bearers of RTD is at the heart of the rise of human rights violations which hinder development in the poorest and weakest countries. Secondly, the doctrine of legal personality that hitherto justified the exclusion of non-state actors such as TNCs has been overtaken by a constructive analysis of international law and current global realities. The only impediment to ascribing legal responsibilities to non-state actors such as TNCs is the struggle between power and powerlessness. If international law is to continue to remain relevant to Nigeria and many Third World countries, a more constructive interpretation of it is imperative. Put differently, international law would need to be interpreted in such a way that it transcends the current delimiting orthodoxies. The theory of resistance, outlined above as fundamental in countering the dominant theories of international law, is encumbered in our increasingly materialistic world, where the traditional ‘being mode’ (Fromm, 1985) of existence seems to have been jettisoned in preference to the ‘having mode’ (Fromm, 1985), where everyone seems to be in mad rush to accumulate more and where success is measured on the ‘barometer’ of the value of land and other properties that one has been able to accumulate by fair or foul means. In such a setting it is always difficult for theoreticians to capture the imagination of the ordinary folks on the streets of Third World countries. Collective amnesia, which is often induced by the preponderating nature of the dominant theories of international law, is such that indignation soon melts into acceptance in the fashion of “if you cannot beat them, join them.”

I draw the curtain on this chapter by positing that for the theory of resistance to challenge effectively the dominant theory of liberal utopianism, the battle must first be won in the minds of people. One of the first important steps to achieving this end is a holistic review of the curricula of Third World universities. A Nigerian professor of constitutional law, Professor R.A.C.E Achara, in his book *The Constitution as a Junction of Force and Law*, calls attention to the epistemological poverty of constitutional law scholarship in Nigeria. According to Achara, “textual fetishism” is the greatest hindrance to construing the constitution, as it enslaves the student to written forms and precludes him from understanding the meta-constitutional influence of ‘preponderant forces’ in a polity. A similar criticism could be levelled against the study and teaching of international law in Third World countries, as the overemphases placed on the dominant theories of international law and international relations have tended to render alternative theories redundant. If international

law is to continue to remain relevant to the poor and powerless, empowering them to take their future in their own hands (self-determination) instead of waiting endlessly for salvation, promised and postponed, the dominant theories of international law must be placed side by side with the counter-theories. The juxtaposition here should be aimed at uprooting the trap of hegemony by creating strong solidarity amongst the alienated who are fired up for action, targeted at creating a new world order of collective peace and progress. In the next chapter, I shift focus to another important international question. With the fall of the Berlin Wall, the ascendancy of neoliberal capitalism is no longer in doubt. The implication of this point is that the economies of nations have become inextricably tied together. Hence, economic regulations at the national level must be considered in the context of the global. The questions that current reality raises concern not only benefits but also downsides, for instance the possibilities of incompatibility and consequent ruin at the national level. My task in the next chapter is therefore to examine critically the fears that ‘constitutional’ neoliberalism, a variant of capitalism, may in fact be a trap to development in weaker states such as Nigeria. Thereafter, I will also examine the seemingly tangible and intangible drivers of neoliberalism – TNC and global capital – and seek to analyse how they may impact negatively on RTD and therefore constitute traps.

Chapter 5

The Trap of Neoliberal Capitalism

5.0. Setting the Scene:

Defining or assessing a concept as pervasive as neoliberal capitalism is bound to be controversial. Trajectories of success are easily counter-balanced by those of failures. Conceptual and contextual analyses may diverge. In the trigger quotation below, I juxtapose the views of De Soto (2000:62) and Stiglitz (2010: 77-79) with a view to opening up the difficulties of evaluating neo-liberal capitalism; a challenge that we must confront here. In the below juxtaposition, it is striking that what de Soto (2000) analyses as the ‘genius’ of the West, that is, the capacity of properties to ‘lead a parallel life, doing economic things they could not have done before’ within a Western capitalist system is viewed by Stiglitz (2010), in the context of current global financial crises as the ‘great scam of the 21st century’.

<p>De Soto (2000: 62) <i>Mystery of Capital: Why Capitalism Triumphs in the West and Fails everywhere Else</i></p>	<p>Stiglitz (2010: 77-79) <i>Freefall: Free Markets and the Sinking of the Global Economy</i></p>
<p>“...The six effects of an integrated property process mean that Westerners’ houses no longer merely keep the rain and cold out. Endowed with representational existence, these houses can now lead a parallel life, doing economic things they could not have done before... the genius of the West was to have created a system that allowed people to grasp with the mind values that human eyes could never see and to manipulate things that hands could never touch... The only way to touch capital is if the property system can record its economic aspects on paper and anchor them to a specific location and owner. Property, then, is not mere paper but a mediating device that captures and stores most of the stuff required to make a market economy run.”</p>	<p>“The wheelings and dealings of the mortgage industry in the United States will be remembered as the great scam of the twenty-first century... Through a process known as securitization, the mortgage had been sliced and diced, packaged and repackaged, and passed on to all manner of banks and investment funds around the country. When the house of cards finally collapsed, it took some of the most venerable institutions along with it: Lehman Brothers, Bear Stearns, and Merrill Lynch. But the travails did not stop at U.S borders...Ultimately; the financial instruments that the banks and lenders used to exploit the poor were also their undoing. The fancy instruments were designed to extract as much money as possible from the borrower. The securitization process supported never-ending fees, the never-ending fees supported unprecedented profits, and the unprecedented profits generated unheard-of bonuses, and all this blinded the bankers.”</p>

This chapter argues that the question put forward by De Soto (2000) as to why capitalism triumphs in the West and fails everywhere else is no longer as helpful as the question: why is capitalism failing everywhere and what can be done about it? Drawing from the current architecture of international finance and the ongoing global financial crisis, the chapter interrogates the following propositions: a) that neoliberal capitalism is a meta-constitution that dictates the privileging of ‘profit over people’ and (b) that for RTD/MDGs to bear the desired fruits, this ‘man-made’ neoliberal framework must be reconstructed in an evolutionary manner. I explore the option of reconstruction by proposing a rediscovery of the Keynesian variant of capitalism, abandoned at the Bretton Woods Conference in 1944, as well as the institutionalisation of what Dunning (2003) calls “responsible global capitalism” (RGC). I relate neo-Keynesianism and RGC to the emerging theory of ‘Africapitalism’ (Elumelu, 2013).

On structure, subsection 5.1 onward focuses on understanding the trapping nature of neoliberal capitalism in the light of the ongoing global financial crisis. Section 5.2 analyses the concept of a meta-constitution with regard to neoliberalism, while Section 5.3 focuses on the World Bank’s anti-human rights foundational structure which encourages the coexistence of a free market and poverty. Section 5.4 examines the way forward. In concluding this introduction, it is important to note that although this chapter does not specifically discuss the IMF and the WTO, it views the three IFIs – the World Bank, the IMF and the WTO – from the perspective of a trinity, such that the charges of violence, democratic deficit and the fostering of an unregulated capitalist development model (Anyanwu, 1992) apply to all three institutions with equal force. As a flash point, the role of the IMF in Nigeria’s structural adjustment crisis of 1986-1993 has been well documented by a long line of scholars (Anyanwu, 1992; Ibhawoh, 1999). The continuing impact of the IMF in dictating the policy preferences of Nigeria towards the rapid deregulation of its downstream oil sector has also been well-discussed in academic literature and in the media. It has been argued that the January 2012 removal of oil subsidies by the Nigerian government, without consultation with the Civil Society and Nigerian Labour Congress, was a bid to meet the expectations of the IMF and possibly secure a favourable Article 4 bill of health that investors often look for when deciding on a favourable investment climate. The 2012 subsidy removal caused massive social unrest and continues to bite down hard on the poor in terms of increased costs of food, transport and household fuel, to mention but a few, despite the government’s marginal concessions. For a country with unenforceable socio-economic rights, grand

corruption and zero safety nets for the poor, the overall negative impact of a fast-paced removal of oil subsidies, on the prodding and backing of the IMF, is quite discernible (Amanze-Nwachukwu and Ugeh, 2009). However, the Hayeks, Friedmans and Nozicks of our global age would struggle to find any rationale for the reoccurring SAP-motivated mass action in Nigeria. For them, the removal of oil subsidies is a natural course of ascendant neoliberalism, a constitutionally protected economic system in Nigeria. In fact, these ‘liberals’ would argue that such a removal is long overdue, as the state’s role must be constitutionally limited to that of a ‘night watchman’. In their judgment, therefore, the popular movement against subsidy removal is not only illogical but also immoral. In contrast, however, the Keyneses, Beveridges and Akes of our postmodern time would be scandalised that a country with such a massive army of unemployed youths, high levels of political corruption and the yawning absence of safety nets for her teeming poor could venture into such an ‘illiberal’ and ‘immoral’ policy. Such is the nebulous nature of liberalism(s), which the next section of the chapter focuses on unravelling.

5.1 Neoliberalism: Toward a real-life interpretation

If the question ‘what is ‘neoliberalism?’’ is asked, the questioner may open up huge controversies that may lead to confusion. Boas and Gans-Morse (2009), in their incisive investigation into a similar question, distilled three divergences of opinion on the use of the term which seem to support the possibilities of controversies and confusion. First, ‘neoliberalism’, according to Boas and Gans Morse (2009), is employed asymmetrically across ideological divides, in that it is used frequently by those who are critical of free markets, but rarely by those who view marketisation more positively. Secondly, the authors posit that neoliberalism is often left undefined in empirical research, even by those who employ it as a key independent or dependent variable. Thirdly, the term, according to Boas and Gans Morse (2009), is effectively used in many different ways, such that its appearance in any given article offers little clue as to what it really means. To obviate such controversies, one may wish to understand ‘neoliberalism’ in action. Consequently, I suggest a shift from theoretical deconstruction to understanding the real-life issues that confront people daily, irrespective of where they live. If one refocuses on the reality of huge and increasingly upward global capital that outstrips global GDPs vis-à-vis the paradox or contradiction of dwindling personal savings, the growing loss of confidence in financial and regulatory institutions, the constant fear of loss of jobs and of being perpetually trapped in poverty, the tendency for a fresh and more engaging analysis may be enhanced. We observe this effect in the works of scholars such as Dowell-Jones & Kinley (2011:183-210), who are able to expose the lacuna between global finance and human rights with a view to remedying the “deficit of scrutiny and accountability for the majority of financial activity” at the heart of neoliberal capitalism. In the works of scholars like Dowell-Jones & Kinley (2011), it is easy to observe, from the real-life devices they employ, that the core tenets of capitalism may stand in opposition to the notion of comprehensive human rights.

Hernando De Soto and Joseph Stiglitz, both economists of high standing, also represent the new approach of construing an economic term by relating it to what it does. The juxtaposition of De Soto (2000) and Stiglitz (2010) in the trigger quotation above is significant, as both draw from similar live cases to achieve divergent interpretation of neoliberal capitalism. De Soto's (2000) work, analysed in Chapter 1 of thesis, is significant for capturing, among other things, the immense capacity of neoliberalism to generate capital in order to explain the success of capitalism in the West. Conversely, De Soto sought to demonstrate that the failure of capitalism outside the West is a problem of 'defective capital'. From the "facts and figures [he] collected block by block and farm by farm in Asia, Africa, the Middle East and Latin America" (De Soto 2000:5), the author sought to convince everyone that the reason why capitalism is winning in the West and failing everywhere else is purely and squarely the forms in which capital is held. In his exposition, the regions of failure are marked not by the absence of capital but by the 'defective forms' in which capital is held. Hence, in these regions of failure, 'defective capital' cannot be employed as efficient oil on the wheel of capitalism. By contrast, in the West, De Soto marshals another reality of capitalism with which we can easily connect: "every parcel of land, every building, and every piece of equipment or store of inventories is represented in such a way that connects them to the rest of the economy, enabling their owners to use their assets in creating securities, like mortgage-backed bonds" (De Soto 2000: 6-7).

Barely 10 years after the publication of his *Mystery of Capital*, what De Soto had chronicled as the 'genius of the West' became capitalism's greatest undoing. Stiglitz (2010: 77-79), quoted above, captured this paradox as 'The Mortgage Scam' (Chapter 4) and 'The Great American Robbery' (Chapter 5) among others. What was hitherto thought of as the 'genius' of Western capitalism, in Stiglitz's analysis, combined and led to the current global recession. Stiglitz (2010) is equally remarkable for presenting current economic reality in which neoliberalism in its dogged pursuit of capital, privatisation and deregulation has been exposed as a threat, a tool for exploiting the poor; in fact, a trap to development. For those who view reality from Stiglitz's perspective, the question that is of interest is why is neoliberalism failing everywhere? It is doubtful whether anyone living the reality of today could still ask 'why is capitalism triumphing in the West and failing everywhere else?' Drawing from Stiglitz's perspective, matching tales of woes amidst wealth could be represented. From the bitter tales of the local Nigerian farmer, who is unable to feed his family, one finds a matching experience of the British and American poor whose reliance on a safety net has

become increasingly precarious as governments can no longer afford to support them. The enormity of their experiences of ill-being amidst wealth may vary because of their locations, but the unsatisfactory feelings of ill-being are very similar.

Remarkably, both perspectives acknowledge the illimitable potential of capitalism to generate wealth and seem to dismiss the possibility of a further challenge made by communism or socialism. Stiglitz (2010:219) puts it as follows: “the fall of the Berlin Wall in 1989 marked the end of communism as a viable idea. The problems of communism had been manifest for decades, but after 1989 it was hard for anyone to say a word in its defence.” On his own part, De Soto (2000:1) opens his investigation into the *Mysteries of Capital* by stating unequivocally that “... capitalism stands alone as the only feasible way rationally to organize a modern economy. At this moment in history, no responsible nation has a choice.” The ‘no responsible nation has a choice’ thesis re-echoes Fukuyama’s (1992) ‘end of history’ proposition. Instructively, Stiglitz’s school of thought does not approve De Soto’s ‘no responsible nation has a choice’ thesis or Fukuyama’s (1992) ‘end of history’ proclamation, all of which were geared toward the elevation of ‘market fundamentalism’, another term for neoliberal capitalism, as the final stage of development. The reformist perspective that Stiglitz represents challenges the constitutionalisation of the neoliberal variant of capitalism; an ideological attempt aimed at silencing vibrant options within the capitalist mode. Hence, Stiglitz (2010:219) argues that “September 15, 2008, the date that Lehman Brothers collapsed, may be to market fundamentalism (the notion that unfettered markets, all by themselves, can ensure economic prosperity and growth) what the fall of the Berlin Wall was to communism. The problems with the ideology were known before the date, but afterward no one could really defend it.”

From the foregoing, it is argued that a better appreciation of the pervading nature of the current economic system would require this new approach – escaping the entrapment of high-sounding theories to make sense of our everyday struggles; our existential realities that are marked by the constant tension and synthesis between the ‘being’ and ‘having modes of living. To this effect, the near collapse of the global economy and the ongoing struggle to keep it afloat, including the recent capital market turmoil and the removal of oil subsidies in Nigeria, the propping up of UK and American banks with taxpayers’ money, the threat of loss of depositors’ savings in Cyprus and the decrease in foreign aid budget, provide more familiar and discernible axes for construing the challenges that humanity faces across

divergent locations. In each of these axes, we notice a common thread: the diminishing relevance of the local and the pervasive importance of the global. In responding to financial/economic crises, it is not surprising that we observe a confluence of action, namely deregulation when the going is good and regulation when the going gets tough. Put differently, when the economy is booming, banks, for instance, can ride under the wings of a free market in generating capital. They may employ all forms of ‘ingenious’ instruments to this end such as ‘securitisation’, which ‘slices and dices’ mortgages and derivatives to squeeze out yet more capital value from the packaged and repackaged capital. They may prefer to pay whatever bonuses they deem fit for their ‘smart’ executives that have led the way in creating and recreating this additional capital. However, when the going gets tough, the role of government is suddenly remembered: failing banks, for instance, are ‘nationalised’ and propped up by taxpayers, and in the worst case scenarios depositors may lose their savings. By approbating and reprobating, the current neoliberal structure presents itself as a tool of exploitation in the Marxist sense. Its exploitative capacities have been accentuated by the shrinking of borders. I argue, therefore, that the realities of poverty and wealth that confront us daily are occasioned by the predominant but exploitative economic order that governs every aspect of our lives, irrespective of time and place. This economic order thrives on massive inequality. Hence, we see in Nigeria about 20 per cent of the population controlling 80 per cent of the nation’s oil wealth and driving the political and economic future of the country. At the global realm, we observe a similar trend whereby about 20 per cent of the world’s population controls 70 per cent of global wealth (Bourguignon and Morrisson 2002; Milanovic 2005; Ortiz & Cummins 2011). Just as the wealthy and powerful in Nigeria are able to influence the political, economic and social arenas to their advantage, the prosperous and dominant nations have been leveraged by the power of veto and weighted voting in key transnational institutions that drive a neoliberal politico-economic system. It is this reality that Falk (1999) aptly describes as ‘predatory globalisation’. Wachtel (1972:187) offers an explanation for the massive inequality we notice both at the national and transnational realms. In his words, “poverty and inequality have an important role to play in capitalism; these conditions are by no means entirely dysfunctional.” For Wachtel, therefore, the interaction between poverty and inequality is contradictory and not paradoxical. Stiglitz (2010:110) corroborates this diagnosis by stating that “as a system, capitalism can tolerate a high level of inequality, and there is an argument for why the inequality exists: it is the way to motivate people.”

In the light of the above, I argue that by internalising inequality, neoliberal capitalism strikes at the heart of law, especially those aspects of law that seek to enhance distributive justice. By placing an invisible market at the centre and reducing the regulatory authority of government under the doctrine of a free market, what neoliberalism achieves in effect is to constrain the egalitarian and regulative potential of law by ensuring that laws and regulations play subservient roles. Property laws are well established in almost every jurisdiction and recently also in international law (TRIPS), because these laws facilitate the entrenchment of neoliberal capitalism. On the other hand, the right to development and other socio-economic aspects of human rights laws are clearly marginalised. Attempts have been made to rationalise this marginalisation by employing the argument of ‘polycentricism’, but it has been demonstrated by Hirvonen (1998) that polycentricism or indeterminacy are recurring challenges in all laws. Therefore, limiting polycentricism to socio-economic and development rights is simply dubious. Sovereignty and democratic autonomy also lose their meanings under the prevailing economic order. The ‘overriding’ logic is that the preservation of the market will enhance the easy movement of ‘capital’ across the world and improve civil and political rights everywhere. Under this logic, the free market and free world are used interchangeably, with little or no consideration given to the flipside of that argument whereby a free and unregulated market may pave the way for the greedy and powerful to exploit the poor. The coexistence of a free market and abject poverty and the ceaseless cycle of boom and bust raise serious challenges to the ‘free market-free world’ thesis.

Therefore, in the light of the current global crisis and my theoretical framework, I conclude this section by stating that one way to deepen our understanding of neoliberalism is to draw from real-life experiences. In these real-life cases, we encounter a sociological reality that breaks down the seemingly complex notion of neoliberalism in a way that tends to minimise if not eliminate controversies. But understanding neoliberalism as a simplified concept may not translate into knowing where the traps are hidden. A crucial key to understanding the trapping aspects of these realities is to interpret them from a constitutional point of view. I argue that the reason why people struggle to understand these realities with which they live is because the realities of capital and capitalism have never been discussed nor agreed upon. The choices that we are constantly presented with at the breakfast table seem to be non-existent on the table of neoliberalism. As well captured by De Soto (2000:68), quoted above, capital is an ‘unseen’ force. The tendency to manipulate the ‘unseen’ is usually very high indeed. Hence, when the term ‘constitutional neoliberalism’ is used, efforts are made to

represent the reality of the imposition of an ideology that seems to govern from above, leaving the governed with no choice. The drivers of these realities are both seen and unseen forces; consequently, confusion is deepened by the tendency to focus only on the 'seen' forces as a mechanism of making sense of the realities that cut across all aspects of life: economic, social and political. This is the imperial nature of economics on which Stigler (1984) reflected. In the next section I seek to employ the second key, in order to expose the constitutional dimension of neoliberal capitalism.

5.2 Neoliberalism: a meta-constitutional interpretation

The economic order that was hitherto thought of as a question of national preference has been overtaken in a manner un-contemplated by the national constitutional order. Provisions such as section 16(2) of the Constitution of Nigeria (1999) seem to have been superseded by the reality of neoliberal capitalism. This meta-constitutional reality leaves the states with no option, thus negating the constitutionalised need for states to choose an economic system that does not concentrate wealth in the hands of a few. The current global economic order seems to be set in stone through a free market and the private and institutional ownership of the means of production. This state of affairs was brought about by globalisation, a force that cannot be seen, yet its impact reverberates across boundaries. It has changed the face of constitutions and constitutional law-making. The national presumption that makes the constitution the act of the people has been lost. Globalisation by institutionalising deregulation and privatisation has broken the barriers of national boundaries and in their stead planted a global constitutional framework that is imposed from above. Therefore, capitalism is not just an economic system but a meta-constitutional order.

In analysing capitalism as a constitution, the word 'constitution' is used analytically and not literally. Achara (2005), as analysed earlier, argues that the problem with constitutional law scholarship in Nigeria is an over-attachment to the literary notion of the constitution. "Legal textualism," or "textual fetishism," according to Achara (2005:55), "is probably the single most debilitating phenomenon in any quest for a truly realistic theory construction in the field of constitutional law." To confront this problem, Achara (2005) introduces the notion of a 'preponderant force' which offers another perspective for construing the constitution beyond the written word.

Achara (2005) does not, however, go as far as Nicol (2010) in interpreting the transnational dimensions of these preponderating forces. Whilst Achara (2005) is limited to the analysis of constitutional law in Nigeria, Nicol (2010) focuses on the constitutional protection of capitalism, using the United Kingdom as a case study. One salient advantage of employing the methodological device of case studies in dealing with a subject with such a multidimensional nature like capitalism is that in analysing one defined case, we may illuminate other similar cases. Nicol's work illuminates our understanding of the constitution beyond its British locale, as it offers analytical tools for a deeper understanding of the paradox of poverty and plenty in Nigeria by exposing the philosophical and tactical poverty of trying to reform the local constitution, without bothering about the meta-constitution.

Deconstructing the Idea of a Constitution in Nicol (2010)

According to Nicol (2010:5):

“Our very idea of ‘the constitutional’ remains heavily dependent on the assumption that the state is the basic constitutional unit... Thus, the British constitutional scholarship for the most part tends to focus on Britain’s internal institutions... Under the conditions of globalisation the established academic boundary lines no longer correspond to patterns of contemporary governance. The state no longer possesses the primacy it once enjoyed, and it becomes necessary to draw the transnational regimes... within the scope of the constitution.”

In support of the above proposition, Nicol (2010: 5-11) marshals three levels of argument. First, there has been an expansion of the scope of transnational regulation, which now intrudes into what was hitherto the state's only concern. Consequently, more and more aspects of economic policies are set at the transnational level. The previously reserved power of the state to make choices between distinct economic policies has gradually been challenged, as states are tied to neoliberal globalisation, behind which lies marketisation.

The entrenched international doctrine of “*pacta sunt servanda*” (the rule that in exercising their sovereign rights, states should conform to their obligation under international law) has been strengthened by the logic of globalisation. Drawing support from Jackson (1988 :77), who views that national sovereignty is no longer a magic wand that one waves to ward off

any engagement in the international system, Nicol (2010) demonstrates the powerful nature of transnational constitutional law and its high capacity to exercise influence over and above democratic logics.

With the growing influence of TNCs, orthodox ideas about the constitution may need to be expanded to incorporate them accordingly. In support of this thesis, Nicol (2010: 11) cited Gavin Anderson, who, in his book *Constitutional Rights After Globalisation* (2005), argues that TNCs merit inclusion in our notion of a constitution, because for that notion to be complete it must include how society is organised and how it functions (the regimes of power).

The implications of including TNCs within the meaning of the constitution have been well-articulated by Nicol (2010: 11) as follows:

“Under the expanded conception of the constitution, a constitutional scholar can treat corporate power as contingent and contestable, just like any other feature of the constitution. Corporations are not therefore distanced from governance by being perceived as ‘independent actors’; rather, they are treated for what they are: governing institutions. Such inclusion opens up a possible invested relationship between the constitution and democracy. The greater the degree of policy entrenchment the less open to democratic contestation. There is a danger therefore that elections are increasingly providing window-dressing for an entrenched reality.”

Nicols’ (2010) overall analysis of these unorthodox ideas and dimensions of a transnational constitution is significant, in that they demonstrate the weakening of democratic choices, elected governments may not have the options we ascribe to them and privately-elected persons may be willing to push for a welfare state but they may be unable to do so because of the force of a meta-constitutional reality.

This exposes the limitations of statist ideology, by bringing into the equation other loci of powers such as multinational corporations. In addition, it opens up a gap in Keynesian ideology which emphasises strengthening state regulation to address the pitfalls of the market. States may no longer be able to police the market alone. It draws our minds to the powerful influence of multinational corporations, which are increasingly setting

constitutional rules whilst standing beyond constitutional scrutiny. Furthermore, considering that Nicol (2010) focused on an established democracy, his work, by implication, brings to the fore the deep challenges faced by other weaker democracies in Nigeria and Africa.

A Nigerian student of Nicol (2010) must be wondering “if meta-constitutional forces could have such a hold on Britain (Nigeria’s colonial master), reaching deeply into its national economic policy, shaping its contours and determining its limits” (Nicol 2010: 152), then is it not time to jettison in their entirety Nigeria’s constitutional claims to supremacy and autochthony? Could it be that, unknown to the Nigerian masses, their country may have been re-colonised surreptitiously by the constitutional might of ‘capital’ and big multinational corporations?

Thoughts such as those above could be countered by resorting to the logic of voluntarism and the capacity of the state to withdraw from such transnational constitutions. Nicol (2010) considered these usual arguments against the notion of a transnational constitution, i.e. the question of consent and the ability to withdraw. In rejecting such arguments Nicol (2010) argued that the ability of states to withdraw from international obligations does not negate the fact that those transnational laws bear the status of a constitution.

Nicol (2010) also called attention to the entrenchment of membership of these organisations. According to him, some globalisation scholars have argued that a process of ‘denationalisation’ has taken place whereby the authority of the state has been replaced by markets and by regional and global forms of governance, leading to a relationship of interdependence that is costly to break. Membership of these regimes, according to Nicol, forms a package of deals in which individual elements cannot be ‘unpicked’ from the whole, and this in turn constitutes an entrenching device. Whilst states are free to change course, the World Bank has pointed out that they need to calculate the costs and benefits of withdrawal, including the threats of international censure (World Bank, 1997: 101). Little wonder why Stiglitz (2002) suggests that to understand what went wrong with globalisation we need to focus on the World Bank, the IMF and the WTO. In the next section, I turn attention to a case study of the World Bank, arguably the most significant institution in the trilateral architecture on which neoliberal capitalism is erected.

5.3 The World Bank: The Seen Driver of a Global Constitutional Project?

“Some call it the best, some call it the worst, but no one escapes its influence...” (Cheryl Payer 1982:15).

In analysing the World Bank as a case study of global constitutional law-making, three underlying questions need to be answered. What impact has this institution had in promoting the human rights of the poor? Are there institutional or constitutional difficulties that may impede this institution from delivering to the poor? What can be done to increase its pro-poor impact and reach?

The World Bank, formerly known as the International Bank for Reconstruction and Development, is an influential financial institution. It is certainly the richest and largest development institution in the capitalist world. The bank employs over 10,000 professionals and provides over \$20 billion a year in cheap loans to the developing world. It is generally considered as the “best” and it provides the dominant model that other aid and financial institutions imitate (Payer, 1982: 18). Analysts, whether from the left or the right, at least agree with the fact that it is impossible to discuss development today without reference to the World Bank, which clearly remains the pivotal instrument for combating poverty, as it wields considerable influence over the economic policies of developing countries. It is not surprising, therefore, that Payer (1982), in analysing the World Bank as the foremost international development agency, stated “some call it the best, some call it the worst, but no one escapes its influence.”

Three-Pronged Impetus

The World Bank emerged out of a series of crises. Its place in today’s world would be better appreciated through the prism of three important stages of crises that seem to support the thesis of Ulrich Beck’s (1992) global risk society.

Created in 1944, the rationale was that failure to reconstruct Europe in a successful way would invariably lead to economic dislocation and precipitate another war. This fear of another war was also at the heart of the UN Charter, which is premised on saving succeeding generations from the scourge of world conflict, which twice in our lifetime has brought untold sorrow to mankind.

The second stage rationale came to the fore in 1960, following the Cuban Revolution of 1959. What this crisis threw up was that failure to pay particular attention to the plight of poor countries would push them into the communist camp, with the attendant implication on global security. The International Development Association (IDA), an important organ of the World Bank, came into being during this phase to focus specifically on the interests of the poorest of poor countries. Nigeria is a leading member of the IDA.

History: Vision and Mission and Human Rights Concerns

The World Bank behaves very much as a 'bank', albeit one dealing in poverty reduction, structural reform and social development businesses (DfID, 2000:52, Darrow 2003: 3). Appearances differ from reality, though, so the role of the scholar is to be able to separate the two entities. It is, however, difficult to do so successfully because one must dig deep and avoid the temptation of absorbing a single story, no matter how persuasively presented. The first look at the World Bank's website or the innumerable, well-written and presented reports of its work in developing countries such as Nigeria throws up only one seemingly unimpeachable verdict: the World Bank is an extremely influential organisation that is genuinely fighting poverty in Nigeria and other developing countries. To test this verdict and to be sure that this first look is not a mirage, this writer wishes to use a double tool analysis.

First, I utilise a legal tool that is aimed at examining the foundational law involved in setting up the World Bank, to determine if the institution's structure and legal history actually support its declared mission of poverty eradication. Secondly, I draw insights from Cammack (2002) in order to examine the World Bank's signature World Development Report for a 10-year period and to test whether in fact its commitment to poverty eradication is a first order priority.

Founding Philosophy

The Bretton Woods Conference was dominated by the US, which emerged as the only superpower after World War II. The negotiations were generally in the US's favour, while Third World nations were still under colonial rule and were largely unrepresented. When they joined in and clamoured for a new world order, the IDA came into being to focus on their

plight and divert their attention away from seeking a way out through a more democratic framework.

The World Bank's Articles of Association can only be understood by reference to this history, but its policies have shifted over the years. From the initial emphasis on economic development, the bank now emphasises the human content of development. James Wolfensohn's tenure is remembered for its comprehensive development framework (CDF), which brought this new thinking to the fore. It is curious, however, that its Articles of Association remain static in comparison its ever-evolving policies and practices. The process of amendment is understandably tough, as gaps are sought to be closed by seeking elastic meanings to the bank's Articles and also by relying on the charisma of leaders like Wolfensohn. It is the considered view of this writer that in understanding the role of the World Bank in poverty, it is important to revert back to foundational issues such as its constitution and the real intentions of its drafters. The argument here is that 'you cannot put something on nothing and expect it to stand'. Moreover, there is a limit to how far a rule can be stretched, and this opens up the ever-present clash between restrictive interpretation and the principle of effectiveness in the interpretation of treaties in international law.

Articles of Agreement: Looking beyond the Shadows

The declared mission of the World Bank is "working for a world free of poverty." The bank focuses on the achievement of the Millennium Development Goals, which call for the elimination of poverty and sustained development. The goals provide targets and yardsticks for measuring results. The bank's mission is to help developing countries and their peoples reach these goals by working with the bank's partners to alleviate poverty. The bank, according to its web profile, is aimed at "addressing global challenges in ways that advance an inclusive and sustainable globalisation—that overcomes poverty, enhance growth with care for the environment, and create individual opportunity and hope."

The poor, as we know them, are not only poor because they do not have material resources, but also because they lack other capacities and are unable to be what they want to be (Sen 1999: 87). Furthermore, they are powerless and voiceless and are often discriminated against in all fields of human endeavours. More often than not, their ability to access justice is encumbered by their poverty. An organisation that seeks a world free of poverty must be

seen, as a necessity, as an inward-looking organisation that jettisons those structures and processes that make people powerless and deny them a voice. Such an organisation needs to promote the dignity of the human person, which is specifically targeted by poverty. A focus on poverty is a public interest issue.

The first point of entry, therefore, in analysing the role of the World Bank beyond what is stated in their mission statement is NOT to look at the loans and grants that it gives to poor countries, often accompanied by stringent ‘conditionalities’ that serve as a chilling effect for countries to pursue a welfare agenda, but to critically evaluate the legal instrument setting up the World Bank, its Articles of Association and to find out how it is structured to promote equality and tackle powerlessness. Again, one cannot put something on nothing and expect it to stand. To this effect, we will consider the following aspects of the World Bank’s Articles of Association: design and pre-article issues; the purpose of the bank; membership; the appointment of key officials; shares and power; voting; politics and economics; accountability and legitimacy; amendment procedures and its relationship with the United Nations.

Design and Pre-Article Issues

Historically, the World Bank was not designed with the aim of promoting the equality of states. Planners who conceived the institution were haunted by the depression of the 1930s and the breakdown of international trade and investment which was its consequence or, as they believed, its cause (Payer 1982: 22). The major objective of setting up the bank, according to Oliver (1971: 3), was to provide a world within which competitive market forces could operate freely, unhampered by government interference. According to Payer (1982: 22), it was the expectation of the founders that the bank’s primary function would be to guarantee private investments. It was conceived as a “safe bridge” across which private investments could move again into distant and politically volatile territories that had appeared much too risky since the debacle of the 1930s. Put differently, the rationale for setting up the World Bank was simply to promote and institutionalise, on a global level, a neoliberal variant of capitalism.

Who were the Original Founders?

The World Bank was designed primarily by officials of the US government, notably Harry Dexter White, working under Secretary of the treasury Henry Morgenthau, with a minor input from Lord Keynes of Great Britain. The US was the only superpower at that time and the only feasible source of 'loanable' funds.

As expected, the US influence was quite huge. At the time of its founding, it held over 37 per cent of the voting power. The bank's charter, Article V, Section 9, provides that the principal office of the bank shall be located in the territory of the member holding the greatest number of shares. This paved the way for the bank to be located in Washington DC.

Payer (1982:23) writes:

“The choice of Washington over New York reflected the victory of the US view that the World Bank should be subject to close control by national governments over Keynes's hopes that they could be operated as autonomous, technocratic institutions divorced from the vicissitudes of national politics.”

The Purpose of the Bank

Article 1 of the World Bank's Articles of Association defines its purposes as follows:

(i) To assist in the reconstruction and development of members' territories by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors, and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

The Bank shall be guided in all its decisions by the purposes set forth above.

The cardinal purpose of the World Bank today, as declared in its mission statement, is poverty eradication, to work for a world free from poverty through capitalist investment and growth. Its work in the reconstruction of territories ravaged by war was successful. The World Bank has, however, struggled in its mission to eradicate poverty. Its declared tool for measuring success via the Millennium Development Goals could be employed as a basis for testing its success in its primary purpose of poverty reduction. It is generally agreed that most developing countries, including Nigeria, are currently far from achieving the cardinal targets of the MDGs. The question that naturally arises is why is it, despite all the monies being thrown at the issue of poverty in developing countries, that the problem remains serious?

From the above purpose, the World Bank seeks to leverage private foreign investment to fight the war against poverty, which raises serious issues. Private investment, by its very nature, targets a “return on investment.” How realistic is it to use this type of investment in the public interest task of tackling global poverty?

Shares and Voting

Decisions at the World Bank and IMF are made following a vote by the Board of Executive Directors, which represents member countries. Unlike the United Nations, where each member nation has an equal vote, voting power at the World Bank and the IMF is determined by the level of a nation's financial contribution. Therefore, the United States has roughly 17 per cent of the vote, with the seven largest industrialised countries (G-7) holding a total of 45 per cent. Because of the scale of its contribution, the United States has always had a dominant voice and has at all times exercised an effective veto. At the same time, developing countries have relatively little power within the institution, which, through the programmes and policies they decide to finance, have a tremendous impact throughout local economies and societies. Furthermore, the president of the World Bank is by tradition an American, and the IMF president is a European.

Foch (2007) discusses in a revealing manner the World Bank's formal rules of governance. The author states that, theoretically, each of the bank's member states is represented within the decision-making process, but in practice it is otherwise. Indeed, the article demonstrates that in reality the democratic imbalance in favour of the most developed countries (MDCs) is caused by the voting system of the WB, which is much stronger than it appears. In the first place, the analysis of the formal decision-making process demonstrates that the voting system is such that a coalition of particularly coordinated countries – the eleven countries of the G10 – can, on its own, constitute a majority permitting them to vote decisively on all issues. This implies that the remaining 174 members have no influence on voting results. Thus, this minority coalition alone is in a position to approve loans and their attached conditions. In the second place, four features of the World Bank's governance which protect and re-enforce the power of this coalition are found. On the one hand, this analysis provides some explanations for the failure of various initiatives made to increase the voice of the less developed countries (LDCs). On the other hand, it identifies several means of increasing the power of these countries in the institution. The main interest of this study shows that the democratic imbalance caused by the voting system is more important than it seems. Indeed, not only do the World Bank's formal rules of governance give the G10 the voting weight at all three levels of decision-making, but several governing features also permit the G10 to protect and re-enforce the power that they already have. Due to their right of veto, the MDCs can notably block any reform proposals.

Developing countries on which the bank focuses most of its ‘development’ energy have practically no voice in the organisation. The constitutive document of the bank is erected on the foundation of ‘economic realism’. Libertarian or equalitarian views are outside the thinking here. The paradox is how can an institution that is constitutionally built on inequality fight poverty and the inequality that it generates?

Looking beyond Law: the World Bank’s Human Development Reports

The World Bank is without doubt a leading development partner in Nigeria. According to the bank’s programme overview:

“The World Bank is helping to fight poverty and improve living standards for the people of Nigeria. The World Bank had approved more than 130 International Bank for Reconstruction and Development (IBRD) loans and International Development Association (IDA) credits to Nigeria for a total amount of more than US\$10.5 billion. The commitment value of the 29 ongoing projects is about US\$4.5 billion.”

The paradox that appears irresolvable is that despite the WB’s continued support, in addition to Nigeria’s oil resources and massive potential, the country remains far from realising the Millennium Development Goals – objectives and results do not seem to match. Furthermore, engagement with civil society, in relation to its poverty eradication mission, does not seem to be as strong as it should be, and external oversight seems lacking. Most rural communities that desperately need to benefit from the bank’s loans rarely do so, fuelling the suspicions that it is possible that the Bank’s real mission may not be poverty eradication, strictly speaking; perhaps it may be playing a role as a ‘knowledge bank’ to enhance a national strategy for fighting poverty.

A closer study of the World Bank’s flagship annual publications in the past 10 years further raises the suspicion that it may be hiding under the cloak of attacking poverty to attack the poor. Professor Paul Cammack’s article ‘Attacking the Poor’ confirms this suspicion. I followed Cammack (2002) by carefully studying the World Bank’s World Development Reports from 1990 to 2000 and arrived at the conclusion that these reports throw up a different programme that is far from being poverty-oriented. Behind these apparently

progressive aims of poverty eradication there stands a commitment to a project that Karl Marx once described as “the entanglement of all peoples in the net of the world market,” its principal objective being to deliver an exploitable global proletariat into the hands of capital. This involves drawing the poorest of the world’s population into the workforce, providing basic health and education and focusing particularly on young women – lending the process its emancipatory tinge. But the larger part of this strategy, in which its central logic is betrayed, is to deny the poor any alternative and to create a reserve army of labour markets across the greater part of humanity (Cammack 2002: 125). The gospel of liberalisation and deregulation is pushed down the throat of poor countries in a way that denies them any alternative. The World Development reports have been employed as the megaphone of capitalism – and without any alternative. For instance, if one deconstructs the 1990 WDR on poverty, with a view to separating reality from illusion, what one will see is a call for the creation of a global proletariat from which labour can be efficiently extracted. The 1990 report, according to Cammack (2002), sketched out a comprehensive framework within which proletarianisation could be accelerated:

“The evidence in this report suggests that rapid and politically sustainable progress on poverty has been achieved by pursuing a strategy that has two equally important elements. The first element is to promote the productive use of the poor’s most abundant asset—labour. It calls for policies that harness market incentives, social and political institutions, infrastructure and technology to that end. The second is to provide basic social services to the poor. Primary health care, family planning, nutrition and primary education are especially important” (World Development Report 1990: 3).

The 1991 report, *Challenge of Development*, advocated the vertical and horizontal expansion of markets and set out a strategy for developing countries that assigned the state a vital supporting role. The 1993 *Investing in Health* proposed market-friendly mechanisms that might deliver a proletariat fit for work.

The 1995 report, *Workers in an Integrating World*, looked at conditions that might facilitate the untrammelled exploitation of labour by capital across the globe. It ruled out minimum wage legislation in middle- and low-income economies with large agricultural or informal

sectors; instead, it proposed that health and safety legislation should be governed by market principles and set at a level where “costs are commensurate with the value that informed workers place on improved working conditions and reduced risk,” stipulating that trade sanctions were not to be used to enforce even the most basic workers’ rights. The report then described the ideal form that labour organisation should take: trade unions striving to involve workers in activity that improves efficiency and productivity; they should not act as ‘monopolists’ or oppose programmes for structural adjustment and reform. Effective unions, from the World Bank’s point of view, eliminate the need for large-scale state regulation and intervention, and they help firms to extract more surplus value from workers. Furthermore, they do not distort labour markets or protect jobs.

The 1996 report, *From Plan to Market*, addressed floundering post-communist countries and, after a consideration of appropriate strategies for ‘transition’, laid out the necessary institutions of a market economy. Whereas the previous report had addressed the need to subject workers to competitive labour markets, the focus here was *upon creating a legal framework that would force capitalists to compete, through the definition and enforcement of property rights*: “Transition requires changes that introduce financial discipline and increase entry of new firms, exit of unviable firms, and competition.” Workers and capitalists alike were to be subjected to market rigour, while the strategic objective of privatisation was to reorganise ownership to respond to capital’s needs.

The 1997 report, *The State in a Changing World*, returned to the role of the state in the new international capitalist regime, building on the succinct formulation the bank had offered at the beginning of the decade. The stress now, however, was on the adoption and legitimisation of this model, with the report simultaneously providing the recipe for the disciplinary state and the rhetoric for selling it to the people. It outlined a policy hierarchy in which macroeconomic discipline was guaranteed by strong central control over policy and spending, locked in place through an independent central bank and further reinforced through subordination to multilateral organisations such as the IMF, the WTO and the World Bank itself. It then explained how discipline was to be spread throughout the system by building contracts and internal competition into direct public provision and by contracting out to private and nongovernmental providers wherever possible. Within this framework, it assigned a triple role to the strategies of ‘decentralisation’ and ‘participation’ – these were expected to exert pressure on the state for the efficient delivery of essential services, make sure that the

costs of such services were shared with the ‘beneficiaries’ themselves and induce people to experience tightly controlled and carefully delimited forms of pro-market activity as empowerment: “The message, here as elsewhere, is that bringing government closer to the people will only be effective if it is part of a larger strategy for improving the institutional capability of the state.” The goal, then, was to bring government closer to the entrepreneur and to lock the rest of the population into the discipline of the market (constitutionalisation).

From the foregoing, it is safe to conclude that the World Bank is not structured to eradicate poverty as a public interest concern. The bank is in place based on the need to further private capital, with the hope that it will trickle down to the poor. This foundational problem is so embedded as to obviate the bank’s superficial poverty eradication efforts via project lending and the promotion of investment. It is structured to be owned by the rich and powerful, who fund it and in turn expect “fair returns on their investment.” Oversight and accountability regimes are lacking, thus making it extremely difficult for the bank to hear the ‘Voices of the Poor’, even when it commissions researches on the very same subject. Charismatic leaders, such as James Wolfensohn, have helped in repackaging the bank’s work on poverty, but there is a limit that such leadership can go to in the absence of supporting structural mechanisms – when the base is weak, structures erected atop the base will also be weak.

5.4 Towards a New World Order

Following on from the previous section, how practical is it to talk about a right to development framework that shares duties across states and non-state entities? The World Bank and its sister organisations, the WTO and the IMF, which are the drivers of the global economy, were not structured to deliver on the social questions of poverty in a legally accountable manner. These organisations were erected on the Hayekian model which sees social rights as a distortion of liberty and encourages the triumph of entrepreneurship – private capital unimpeded by the illusion of redistribution. The triumph of this neoliberal model over the Keynesian formulations at the Bretton Woods Conference in 1944 meant that the war against poverty, at the global level, was in fact lost 66 years ago. Whilst at the national level some rich countries have erected national safety nets to assuage the pains of neoliberalism, for their citizens but not for aliens, in the international realm it is like a ‘jungle out there’, where only the fittest survive. As noted earlier, Falk (1999) aptly describes this

‘jungle out there’ as “predatory globalisation.” Scholars like Donnelly (1985), who dismiss the UN declaration on the right to development as a grand illusion, are talking about an inconvenient truth backed up by the historical and concrete realities of deepening poverty and inequality, all of which play into the hands of the predators (exploiters). Our initial proposition – that for the UN Declaration on the Right to Development or the Millennium Development Goals to bear the desired fruits, the ‘man-made’ neoliberal framework must be reconstructed – cannot be more valid. The urgency for reconstruction is hinged on the now established thesis that neoliberal capitalism is a meta-constitution that dictates the privileging of ‘profit over people’ in a way that is akin to the constitutional violence thesis explored in Chapter 2 of this thesis. In the next section, I focus on the way forward, i.e. how to reconstruct neoliberalism to provide a more level playing field upon which the right to development or MDGs may be erected.

5.4 (a) Dealing with multiple visions on the way forward

The Marxist’s challenge of capitalism driving ‘development against capitalism’ was inspired by the urgent need for a new order, and it also offers an initial starting point for analysis. This chapter draws from Marxist critiques of capitalism, i.e. the flaws of inefficiency, exploitation and alienation, in exposing the pitfalls of neoliberalism, but on the way what illuminates this chapter’s recommendation is not the Marxist-inspired ‘development against the capitalism model’. The critical challenge that must be confronted first is whether or not it is possible to redeem capitalism by creating structural purification ‘silos’ that sift and redistribute the unprecedented wealth that capitalism generates, in such a way as to uproot the evil of chronic poverty which reduces human existence to that of a beast. ‘Development alongside capitalism’ is attractive because of its capacity to increase dialogue instead of suspending it.

The ongoing global discourses on the right to development and the Millennium Development Goals, within neoliberal international law, may seem like grand illusions, but they are pointers to the capacity of dialogue and networks in creating counter-hegemonic solidarity and driving evolutionary change in spite of divergent theoretical boundaries. As demonstrated by Keynes and Beveridge, in challenging capitalism the ‘alongside capitalism model’ draws insights from Marxian perspectives and can be leveraged to create a global safety net for chronically poor people, wherever they reside.

5.4.2 Neo-Keynesianism, Alliance Capitalism and Africapitalism

There is a case to be made that had the vision of John Maynard Keynes, the British representative at the Bretton Woods Conference, triumphed, the IMF, WB and WTO we see today would have been very different institutions under the watchful eyes of the UN. Alvaro de Regil (2001), in his article ‘Keynesian Economist and the Welfare State’, unearths the history and politics of the era in a way that supports our earlier analyses. According to him, Keynes, together with William Beveridge, an influential UK economist who developed a model of the Welfare State, sought to present a welfare model at the international realm, but their proposals were met with stiff opposition by Samuel Morgenthau, the US Secretary of the Treasury. Curiously, the US stood in opposition despite the popularity of Keynesian economic thought among US academics and policymakers. Alvaro de Regil reports that two main reasons account for this situation. The first is the US’s desire to maintain her imperialist hold, and second is the fear that as the most successful economy in the world it would have to bear a higher burden in financing such a model. As a result, the US did not want an IFI structure that it could not control.

When in 1994 a conference on ‘Rethinking the Bretton Woods Institutions’ was called, the mistakes of 1944 stood out clearly. With the ongoing global financial crisis, history is being repeated: a market left on its own will lead to doom. The calls for rediscovering Keynes therefore remain ever-compelling. The recent ‘nationalisation’ of banks in the UK and President Obama’s health reform in the US represent but an instance of the current wave towards the Keynesian model. Neoliberalism has continued to be presented as a retrogressive system that reinvents the already discredited market fundamentalism of the ‘Smithian’ era. The narrow conceptualisation of citizenship stands in the way of rediscovering Keynes at the global level.

As a way forward, this chapter urges for a rediscovery of Keynes, with an added bonus being the inclusion of non-state actors. When Keynes wrote his manifesto, the power of multinational corporations, for instance, was quite minimal, hence his emphasis on state planning. The “alliance capitalism” that Dunning (2002) writes about should include the alliance of market, government and multinational entities. On what this would mean in concrete terms, we find illumination from Brown (2003). Gordon Brown, the former British prime minister, in “Government and Supranational Agencies: A New Consensus,” analyses

the four building blocks for reconstructing the current but failed neoliberal structure. The first is “an improvement in the terms for which the poorest countries participate in the global economy and actively increasing their capacity to do so.” The second is the adoption of high corporate standards by the international business community and their engagement as partners in development. The third is the “adoption of an improved trade regime essential for developing countries’ participation on fair terms in the world economy.” The fourth building block is another Marshall Plan at the global level. Brown (2003: 325) puts it this way:

“Stability, investment and trade are the main long-term drivers of global prosperity, but not all will benefit without a fourth building block, namely a substantial transfer of additional resources from the richest to the poorest countries in the form of investment for development. Here the focus should not be on aid to compensate the poor for their poverty, but on investment that builds new capacity to compete and address long-term causes of poverty.”

The problem with this plan would be its implementation. The implications of Brown’s proposal would mean a total restructure of IFIs, currently rooted in the dictatorship of the wealthy minority, the almost crude rolling back of the state and the insulation of transnational corporations from legal accountability. The pathways for such a radical reform may be fraught with bumps and potholes, but they are not impossible. The urgency for such reform in a ‘global risk society’, where many are being driven to violence by chronic poverty and exclusion (alienation), cannot be overemphasised. It is urged that governments, IFIs, civil society and the private sector work together towards such a reconstructive model.

Interestingly, there are models for partnership that could be strengthened to address the recurrent issues of non-participation, dominance, dictatorship and inhumanity that continue to bedevil the current economic order. The law would play an important role in this restructuring, such that when the World Bank or IMF declares that a world without poverty is their goal, it would have to be reflected in their constitutive documents. Law would also be helpful in solidifying Brown’s fourth building block. The current practice of seeing aid as charity has failed to galvanise the resources needed to fight the war against poverty. Sharing duties across states, corporate entities and individuals in a legally accountable manner would be critical in pushing the ‘new global deal’ for the reform of the current failed order.

Underlying the neo-Keynesian model discussed above is the need to balance entrepreneurship

with ethics, hence apportioning a role for governments in order to correct the injustices of the market.

The interesting notion of ‘Africapitalism’ (Elumelu, 2012) was inspired by the need to humanise neoliberal capitalism. One of the key tenets of ‘Africapitalism’, as laid bare in the 2012 White Paper, is the need for the private sector (local and multinational) to “break free from the historical tendencies of exploitation and extraction of wealth (i.e. rent-seeking), and instead focus on generating profits through wealth creation.” Put differently, ‘Africapitalism’ negates the “rugged individualism of neoliberalism and urges the need for long-term investments” that not only generate returns on investments but “build up communities and create opportunities to emerge from extreme poverty.”

From the foregoing analysis, it is clear that the main pitfalls of neoliberal capitalism revolve around the dual deficits of morality and accountability. For ‘Africapitalism’ to create the desired impact, a framework that creates a dynamic relationship between profit and social capital has to be erected. For a country like Nigeria, one of ‘capitalism’s last frontiers’ with a non-existent social safety net, there is an urgent need to get the balance right between the ‘private’ and ‘public’. Collective action will be critical; therefore, the state, private entities, individuals and communities have crucial roles to play. Nigeria would certainly benefit from the work of Keynes in further critiquing and developing the emerging theory of ‘Africapitalism’. The trilateral relationship between private entities, the state and non-estate entities, envisioned in Africapitalism, must confront and internalise one of the key morals that Stiglitz (2011: 289) drew from the global financial crisis: “voluntary arrangements will typically not suffice (simply because there is no ‘enforcement’, no way to make people behave as they should). But worse, rugged individualism combined with rampant materialism has led to the undermining of trust.”

To sum up, drawing from a selected study of the World Bank, this chapter has shown that the current neoliberal order, which dictates the global economy, has been structured to deepen poverty and not lessen it. Left as it is, neoliberalism is a trap for RTD and MDGs. Drawing from this case study of the World Bank and the ongoing global financial crisis, the chapter exposed the underlying issues of dominance and exclusion which make it impossible for poor countries to benefit from the system as currently structured. On why poor countries, most of which are democratic, are not voting with their feet, the chapter follows Nicol (2010: 152-

154) to show the preponderance of the neoliberal constitution that locks in countries. The preponderating nature of this meta-constitution is such that the pains of disentanglement may be more severe than maintaining the status quo. On the way forward, I have proposed a rediscovering of neo-Keynesianism at the global level. I have discussed this new Keynesian model, in the process drawing strength from Dunning's (2003) responsible global capitalism. The four key building blocks in structuring a new international order were equally discussed in the light of Brown (2003). I have also related the emerging notion of 'Africapitalism' with the reformist ideas that run through neo-Keynesianism and RGC. The chapter concludes that for a new global deal to mean anything for the poor there is an urgent need for a holistic restructuring of the foundations of IFIs. It is reiterated that in the absence of the restructuring of this meta-constitutional neoliberalism, the notion of RTD in international law may continue to provide talk shop forums for the poor and dispossessed whilst they remain trapped in their perilous situation. In the next chapter, I draw from the new theories of resistance discussed in Chapter 4, in order to test the plausibility of transcending corporate voluntarism, that is, the thinking that the only 'legal' model for holding corporations responsible for poverty rights is through corporate social responsibility (CSR), a model at the whims and caprices of the same corporations whose actions against the poor are in issue.

Chapter 6

The Trap of Corporate Voluntarism

6.1 Setting the Scene

In Chapter 4, I argued the case for holding transnational corporations (TNCs) accountable for the right to development (RTD). In a globalised world characterised by two interrelated tendencies – the diminishing capacity of sovereign nations and the increasing capacity of non-state actors (Hobe 2002) – the over-reliance on states as the sole subjects of international law misses the point and shields powerful actors from responsibility. Jochnick (1999: 59-60) puts it as follows:

“The narrow focus of human rights law on state responsibility is not only out of step with current power relations, but also tends to obscure them. The exclusive concern with national governments not only distorts the reality of the growing weakness of national-level authority, but also shields other actors from greater responsibility... International human rights law perpetuates the notions that private actors are, and by implication should be, only accountable to states, not individuals, and that other states are, and should be, only accountable to their own populations... The demystification of human rights, both in terms of their economic and social content and their applicability to non-state actors constitutes a critical step towards challenging the conditions that create and tolerate poverty.”

In this chapter I pursue the issue of how best to hold TNCs accountable, by looking beyond the current soft law regime of the Declaration on RTD and the voluntarism of corporate citizenship. First I analyse the structural challenges that hinder CSR in Nigeria. Following this, I analyse key declarations, norms and Guiding Principles on corporate social responsibility at the international level. Here, the thesis calls attention to the possibility of holding TNCs accountable on the basis of re-imagined customary international law whilst arguing for a legally enforceable RTD treaty that translates the compact on corporate social responsibility into corporate social accountability (CSA). The framework envisioned will

provide a shared legal accountability option that strategically incorporates transnational entities and strengthens the current weak duty model of RTD.

The chapter is structured into two main sections. Section 6.2, below, examines the nature of TNCs and the competing ideas of corporate social responsibility and corporate social accountability. The purpose of this section is to review critically how this clash of opinions has played out in the efforts (both at the national and international levels) to make transnational corporations respect the human rights of people. In Section 6.3, I analyse the structural challenges that numb the efficacy of CSR in Nigeria. Under this section, I also critique international legal regimes on CSR and argue for an accountability mechanism for CSR on the basis of a reimagined international law.

6.2 (a) The Nature of Multinational Corporations and the Challenge of Regulation

As discussed in Chapter 4, TNCs are so called because they go beyond one nation. The draft norms on the responsibility of transnational corporations and other business enterprises with regard to human rights (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2) defines a transnational corporation as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their own country of activity and whether taken individually or collectively.”

Holding corporations, especially the transnational variant, accountable for human rights has always been problematic. The difficulty of regulating MNCs is reflective of the perennial challenges of attaching criminal accountability to corporations. The fictitious nature of corporations, coupled with the doctrines of separate legal personality and limited liability, often stand in the way of regulation. These attributes tend to be accentuated when dealing with MNCs that operate across many jurisdictions. With regard to MNCs and dilemmas of regulation, Deva (2012:50) puts it as follows:

“...The regulation of conduct is a difficult task, more so when one has to regulate a fictitious legal person. Not only do individuals tend to lose ‘some of the ordinary internalized restraints’ when placed in an organizational structure, but some major sanctions that can be invoked to control human beings are also unavailable against

corporations. Furthermore, as we are dealing with the regulation of not mere corporations but MNCs, such fiction becomes multi-layered and could be called ‘fiction infinite’ because by and large there are no limits on how an MNC can structure its operations through a web of parent, subsidiary and affiliate sister concerns. This legal leeway ipso facto makes MNCs difficult regulatory targets. Another related reason is provided by the twin vintage principles of corporate law: the principle of separate legal personality and limited liability... modern MNCs take full advantage of them to escape the clutches of regulatory initiative.”

6.2 (b) Corporate Social Responsibility or Corporate Social Accountability?

In the light of the above challenges of regulating MNCs, it is not surprising that two schools of thought have emerged on how to hold corporations responsible for human rights. The corporate social responsibility (CSR) school argues for a voluntary regime that gets corporations to behave responsibly, out of either ethical or bottom-line consideration (Karlner & Bruno 2002: 14). This is the approach favoured by the Earth Summit and UN Global Compact. The viewpoint here is that there is no need to over-regulate TNCs to avoid the risk of losing the FDI that enhances growth. The second school, known as ‘corporate social accountability’ (CSA), doubts the efficacy of securing compliance through negotiation and therefore insists on getting corporations to behave responsibly or face the legal consequences of their actions. These divergent viewpoints have been explored by scholars such as Ratner (2001), Redmond (2005), Alston (2005) and Emberland (2006). For scholars who insist on corporate accountability, voluntarism is at the heart of corporate lawlessness. For them, growth without human survival means nothing, as “the human person is the central subject of development and should be the active participant and beneficiary of development” (DRTD, Article 1).

Interestingly, some of those pushing for the switch from corporate social responsibility to corporate social accountability were originally in favour of the former. Christian Aid, for instance, has changed its views on CSR and now argues for ‘giving teeth’ to the ethical commitments of companies by moving beyond CSR, which does not and cannot go far enough, to CSA, which insists on corporate legal obligations in order to uphold international standards (Christian Aid 2004: 56). How have these clashes of opinions played out in the

national and international efforts to make transnational corporations respect people's rights?

At the national

(Nigeria) level and for most developing countries, the challenges of regulating MNCs seem more onerous. This is because in most developing countries the close interaction between host states and TNCs may serve as a disincentive to regulation. Regulation under such an arrangement may be tantamount to a government constraining itself and limiting rent accumulation. I now turn my attention to analysing the challenge of CSR in Nigeria.

6.3 CSR and the Power Question in Nigeria

Nigeria presents an interesting case study of the power dynamics in the discourse and practice of CSR. Three main factors account for this. First is the coexistence of oil wealth and chronic poverty in Nigeria. As aptly captured by Okonjo-Iweala (2012:21), "... despite its substantial oil earnings—estimated at US \$300 billion since the 1970s—Nigeria remains mired in poverty, with high rates of adult illiteracy, maternal mortality, and infant mortality." Nigeria, according to this writer, is expected to be "one of the sub-Saharan African countries that will not meet the Millennium Development Goals by 2015." The second interrelated factor is the globally acclaimed struggle of the oil producing communities of Nigeria. The Ogoni case, which revolves around incessant allegations of human rights deficits caused by oil exploration and related activities in Nigeria, symbolises this struggle. In almost all the court cases on this issue, the people of Ogoni are usually on one side (the plaintiffs) whereas the oil companies and their joint venture partners, the Nigerian State, are usually on the other (the defendants). What makes the case of the Ogoni remarkable is the stark reality of the role of oil in the economic survival of Nigeria vis-à-vis poverty and the pains it is said to cause. This paradoxical situation has been ably discussed at length in the 'oil-curse' literature and related reviews (Karl 1997; Ross 2001; Rosser 2006; Watts 2010). The third factor is the contradiction of corporate success and chronic poverty. Whilst Nigeria remains off-track as far as achieving the MDGs, the country is rightly identified as one of the 'bottom billion' countries that is now becoming the 'fastest billion' (Robertson, 2012). As an emerging global economic power, Nigeria also attracts a multiplicity of corporations (local and transnational) from non-oil sectors such as telecommunications and construction. I focus on TNCs because of their more commanding influence and financial position. Apart from oil TNCs, Nigeria hosts other powerful TNCs in these other non-oil sectors. MTN, the South African mobile

telephone operator, for instance, has continued to record unprecedented turnover from its operation in Nigeria. In analysing MTN's 2010 financial results, Osae-Brown (2011) writes:

“The MTN Group's financial results show that the Group's total revenues globally for 2010 stood at N2.57 trillion (115 billion rand) while earnings before interest, taxes, depreciation and amortization (EBIDTA) stood at N1.07 trillion (48 billion rand).

A break-down of the Group's results however shows that MTN Nigeria, which remains its biggest operation, also contributed the most to the Group's revenues and profits in 2010.

MTN Nigeria made total revenues of N749 billion in 2010, 29% of the Group's total revenues in 2010... Analysis of MTN Group's profit after tax for 2010, however, shows its West and Central Africa operations – made up mainly of MTN Nigeria and MTN Ghana – contributed N269 billion (12 billion rand) or 71% of the Group's profit after tax of N377 billion (16.83 billion rand).

... analysis of the MTN Group's West and Central Africa revenue figures shows that MTN Nigeria alone contributed 66% of the region's revenues...

Analysts say this is likely to translate into MTN Nigeria contributing nothing less than 70% of MTN Group's West and Central Africa profit after tax, which means that profit after tax for MTN Nigeria could be as high as N188 billion, making it the most profitable company in Nigeria.”

Similar trajectories of resounding corporate successes are discernible in the financial reports of many other TNCs in Nigeria, a reality that highlights the country as a hugely profitable investment destination. From the foregoing, it is easy to observe that in Nigeria two dominant loci of powers, namely the state and multinational corporations, hold sway. Their shared experiences of financial breakthroughs, well-encapsulated in the 'fastest billion' theory, contrast sharply with that of the generality of Nigerians (another potential power block) who are supposed to be the subject and beneficiaries of development (Article 1 of DRTD). From the point of view of RTD, therefore, one is struck by the inverse relationship between development-resource potential and the diminishing reality of resource availability. This

trend of ‘missed opportunities’ compels a shift of focus: from laws on paper to underlying structural challenges that often diminish laws’ effectiveness.

Looking beyond the shadows of laws

In light of the above background, the perspective I find relevant in the discourse of CSR in Nigeria concerns effectiveness, an angle which tends to expose the complex power play at work. Why is it that corporate successes are not ‘trickling down’, despite voluntary and non-voluntary mechanisms for CSR in Nigeria? To what extent are capital, capitalism and the nature of the state implicated? It is not contested that in a classical capitalist setting businesses are not traditionally set up as ethical organisations, as their overriding objective is to maximise shareholders’ value. What is implied, therefore, is that encouraging businesses to “behave ethically and contribute to economic development whilst improving the quality of life of the workforce and their families as well as of the local community and society at large” (Helg, 2007:7) would require intervening in the market via effective legal and related frameworks. To what extent is Nigerian law structured as a market intervention mechanism?

From a Legal to a Structural Framework

On the important question of a legal framework for CSR in Nigeria, scholars (such as Amao 2008, 2011; Mordi, Opeyemi, Tonbara and Ojo 2012) have done extensive and engaging analyses of the provisions of the country’s company laws, torts and human rights on CSR. The CSR Bill before the Nigerian National Assembly (a Bill for an Act to provide for the establishment of the Corporate Social Responsibility Commission) has also been analysed and reform initiatives marshalled out. A consensus that is shared by all the analysts is the need to strengthen the legal framework to deliver better results. For instance, following his rigorous analysis of the possibilities that Nigerian company law offers as a tool for controlling MNCs, Amao (2008: 101) lamented that “despite the potential of domestic company law as a tool for controlling MNCs, Nigerian Company Law also failed to develop to meet modern realities in companies operations.” The author expressed dismay at this turn of events. In his words, “considering the importance of CSR and the control of MNCs within the Nigerian context, it is rather surprising that there has been no significant attempt to utilize the potential of company law in this respect” (Amao, 2008: 102).

For most scholars of CSR and law in Nigeria, there is general agreement that there is a problem with implementing its legal framework on CSR. Hence, CSR in Nigeria is yet to deliver the desired result to the Nigerian people. The reality of ineffectiveness, which has occasioned the clamour for legal reforms, also calls attention to another perspective – stepping aside from legal analyses, as far as possible, in order to expose the systemic challenges that stand in the way of any CSR law. These challenges are fundamental and border on power and powerlessness. I argue that until these fundamental challenges are adequately addressed, no amount of tinkering with subsidiary legislations or the creation of further laws at the local level will bear the desired fruits. The reason is simple: these new or ‘reformed’ laws would most likely be tantamount to the biblical seed that “fell on rocky places, where it did not have much soil,” such that when the seed sprang up quickly, “because the soil was shallow, the plants were scorched and withered because they had no root” (Matthew 13:4-5-6NIV). Put differently, without an enabling environment, no CSR laws can work magic. Idemudia (2010: 137) is spot on here: “CSR efforts cannot transform political and economic structures that create conditions in which inequalities and injustices persist.”

In the next section I therefore examine these fundamental challenges from the prism of constitutional law. As established earlier in Chapter two of this thesis, my notion of constitutional law includes and transcends the texts of the constitution in order to locate the de-facto constitution, i.e. the role of power and influence in predetermining constitutional frameworks.

Systemic Challenge 1

The Nature of TNCs in Nigeria Perpetuates Unequal Bargaining Power

In developing countries like Nigeria, there are ample historical and current realities that support the thesis that corporations are becoming more powerful than states. In some developing countries, corporations have even had a hand in constructing the state: “The flag,” it is said, “followed the trade.” Historically, TNCs were one of the key facilitators of colonialism in Nigeria. The Royal Niger Company, for example, paved the way for the eventual colonisation of Nigeria, which is why the nation was nearly named ‘the Territories of the Royal Niger Company’ (Meek, 1960). Post-independence, MNCs hosted by Nigeria have been usually richer than the host state. The expertise and wealth they bring are desired to give real value to the resources that host states desperately need. Unequal bargaining

power is thus created. Strict legislations are watered down to encourage these corporate entities to invest. The role of law as a strict regulator is therefore de-emphasised as law is pushed to a subservient position vis-à-vis the need for economic growth. These economic imperatives then become the de facto regulator. This is the key for construing the challenges of CSR in Nigeria. This key also helps to explain why the same corporations act differently with regard to CSR, depending on where they are located.

Systemic Challenge 2

The Market Fundamentalist Constitution Negates CSR, ab initio

When called upon to proffer a solution to a legal problem in one aspect of law, it is tempting to lose sight of the dynamic inter-linkages of all laws, especially the overriding status of the constitution in a federation. The constitution is the backbone of laws in Nigeria. A spinal injury, when not fatal, is usually a life-changing situation, which is why the constitution in its very first section declares its supremacy and offers a measure for testing the validity of all laws. It is important that one understands the philosophy underlying the Nigerian constitution because this philosophy offers a critical tool for critiquing the effectiveness of other subsidiary laws, such as company law, torts law and environmental laws. The underlying philosophy is acute liberalism – the promotion of property rights over and above socio-economic rights. I use ‘acute’ advisedly because unlike the situation in international constitutional law, where liberal theory has been challenged and a seeming compromise reached at the Vienna Conference of 25 June 1993³⁰, Nigerian constitutional law is firmly constructed around strict liberalism. The current wave of economic globalisation, in negating the seeming compromise at Vienna, appears to evaporate all hopes of social justice in developing countries such as Nigeria. It is not surprising, therefore, that as one of ‘the last frontiers of capitalism in Africa’, Nigeria’s capitalist development seems retarded. Whilst the logic of ‘the invisible hand of the market’ has been challenged in advanced capitalist settings by economists such as Keynes, Beveridge and Stiglitz, Nigeria seems stuck with the questionable logic of the market with absolutely no safety nets. In Chapter 5 of this thesis, I analysed the complexities involved in the economic choices set before the country. Market pressures constrain law and democracy and hence limit any available options. Rights to

³⁰ The Vienna Declaration and Programme of Action, adopted by consensus, emphasises, among others, that all human rights are of equal importance, hence seeking to remove the binary that seemed to separate Civil and Political rights from economic, social and cultural rights, especially during the Cold War era.

shelter, environment, education and health are first and foremost presented as second or third class rights. It is true that some activist and intellectually endowed judges have been able to draw a connection between these unenforceable rights and fundamental rights in cases such as *Attorney General of Ondo State v. Attorney General of the Federation* [2002]; *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd*[2005], but the fact that these crucial rights are not patent in the constitution enables critics to raise layers of polycentric challenges against their enforceability. Moreover, their non-patent nature within the constitution speaks volumes for the philosophy underlying the ‘supreme’ constitution. This philosophy creates a perception which is easily picked up by big businesses. Consequently, the question is how can a government that has treated these rights as less compelling enforce corporate social accountability, which is usually at odds with the overriding objective of businesses to maximise profits for their shareholders? If the government is not willing to set the ball rolling in providing basic amenities such as a good transport system, access to affordable health and care for the weak and elderly, which corporate entity will take the first step? The constitution being the most important law in Nigeria sets the tone for every other law, and at present this fundamental law cannot provide the desired enabling environment for CSR.

Systemic Challenge 3

The Nature of the Nigerian State Inhibits CSR

Nigeria has been aptly described as a “mono-commodity rentier state” (Idemudia 2010: 135). The capture of the state by a few powerful elites and corporate interests is motivated by the logic of accumulation. According to Idemudia (2010: 135-136), “by virtue of a number of decrees and laws, Nigerian central government is the principal recipient of oil rent. This rentier economy fosters a rentier mentality that affects both the nature of state and its role in governance.” Elaborating on the implication of this statement, Idemudia (2010:142) posits that “the rentier nature of the Nigerian state means that oil revenue is central to its existence. Consequently, the profit motive of oil TNCs is in symbiosis with governmental interest in rent accumulation. Hence, oil TNCs are often placed to influence government and have their interest privileged over the interests of local communities.” In such a setting, a strict focus on the wording of the constitution in the search for a grundnorm may mean that one loses sight of the ‘grundfact’ of powerful interests with the capacity to set and re-set mechanisms for determining the priority of interests. Another way to present the unfortunate situation in

which Nigeria has found itself is to represent the ‘rentier mentality’ that Idemudia (2010) refers to as an inverted pyramid (Figure 1) into which one could throw in all the main evils of the Nigerian political space, namely chronic corruption, primitive accumulation and governance deficit, violence (ethnic and religious) and weak regulatory regime.

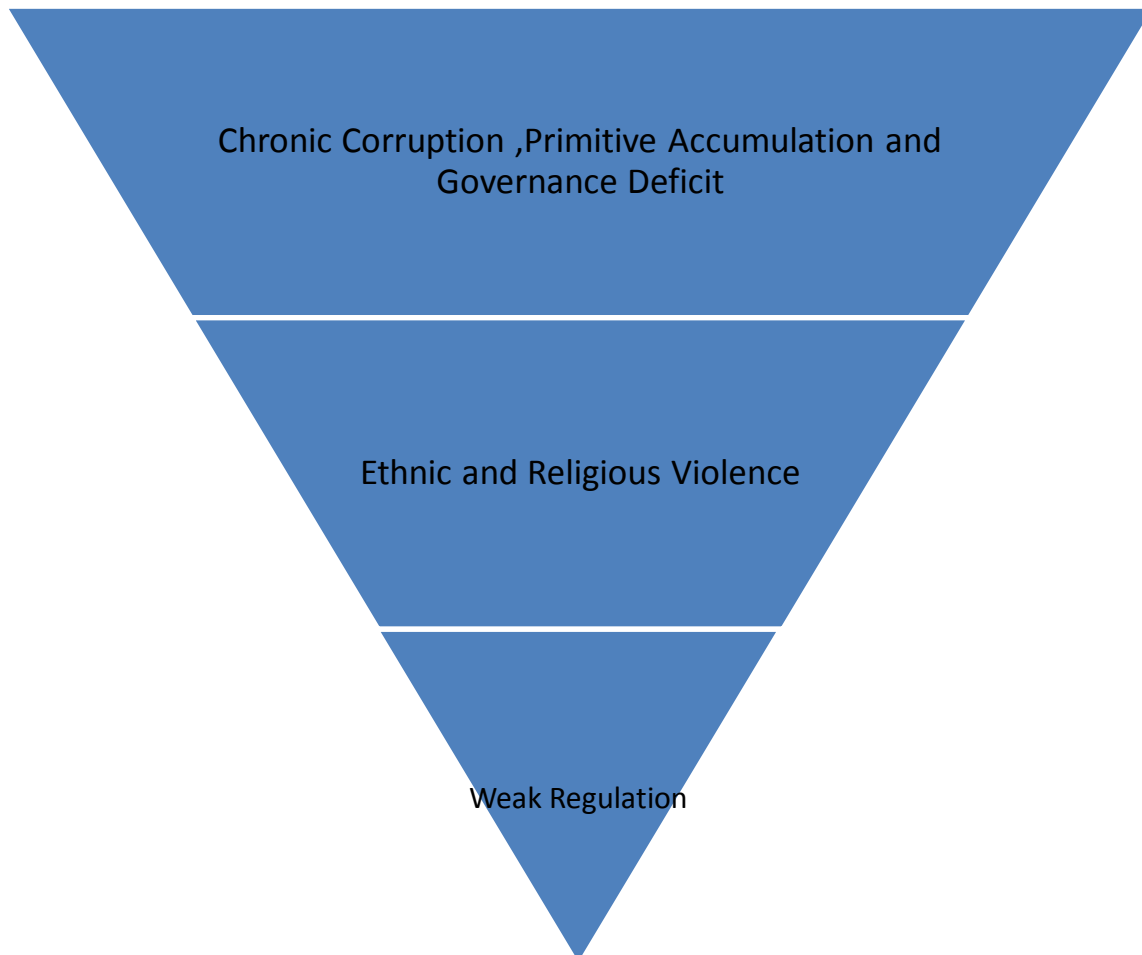


Figure 5: Inverted pyramid illustrating the crucial importance of transparent governance as a determinant of the nature of any regulatory regime.

From the foregoing, it is clear that any CSR regime in Nigeria, in order to be effective, must seek to challenge the established vested interests in the country. The ‘third force’ in the tripod-like power dynamics in Nigeria is populated by the Nigerian people. In a working democracy, this ‘people power’ ought to be able to contest the privileging of a few elites and corporate interests. The nature of the Nigerian state and the seemingly elusive nature of TNCs pose huge challenges. However, it ought to be appreciated also that the state and TNCs have the capacity to play important roles in development. It is therefore urged that the

objective of this critique be not lost, that is, how to balance the seemingly divergent interests and create a mutually profitable and beneficial arrangement for the Nigerian people, the Nigerian state and investors in Nigeria. The only viable way forward is to build an alliance of forces and draw strength from local, regional and international legal norms and global civil society mechanisms with a view to counteracting the systemic challenges faced by the country. This view is in line with Idemudia's (2010) recommendation that in "places like Nigeria, global regulation should be backed up by social and technical capacity building of civil society (i.e. social forces) to enhance its relative ability to contest issues, seek accountability and influence the state" (Idemudia 2010:149). In the next section I focus my analysis on CSR in the international realm. I examine select CSR mechanisms that have been created with a view to critiquing their effectiveness, and I explore the option of an accountability regime that rides under the wing of a reimagined notion of legal personality in international law.

6.4 International Level

Five major efforts at corporate social responsibility and accountability stand out: The OECD Guidelines on Multinational Corporations, the ILO Tripartite Declaration, the UN Global Compact for MNC, the Norms for TNCs and the Guiding Principles. I will concentrate on only four of these efforts: OECD Guidelines on Multinational Corporations, the UN Global Compact, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights and the Guiding Principles on Business and Human Rights. I have chosen these four because they seem to cover the key characteristics of the two competing models.

6.4 (a) OECD Guidelines for Multinational Enterprises

The Organisation for Economic Corporation and Development (OECD) has been described as the 'rich man's club'. The OECD provides a restricted setting for very rich industrialised countries to compare notes, share experiences, collaborate on issues of common interest and coordinate domestic and international policies (Salzman 2000: 776). It is made up of rich countries whose members produce two-thirds of the globe's products and services. Salzman also reports that, although not voiced openly:

“... it is important to understand that many OECD delegates think of the closed-door meetings of the OECD as a welcome alternative to what is often viewed as the developing country-dominated and politicised United Nations system” (Salzman, 2000: 777).

The forerunner of the OECD was the Organisation for European Economic Cooperation (OEEC), which was formed in 1947 to administer American and Canadian aid under the Marshall Plan for the reconstruction of Europe after World War II. The OECD took over from the OEEC in 1961. Since then its mission has been to help its member countries to achieve sustainable economic growth and employment and to raise the standard of living in member countries while maintaining financial stability – all this in order to contribute to the development of the world economy. Its founding convention also calls on the organisation to assist sound economic expansion in other countries and to contribute to growth in world trade on a multilateral, non-discriminatory basis. A core mission of the OECD is to “enhance the contribution of international investment to growth and sustainable development worldwide, by advancing investment policy reform and international cooperation.”

The ‘OECD Guidelines for Multinational Corporations’ were drafted to promote investment and to ensure that the negative aspects of such investments are curtailed by following laid down procedures. The OECD on its website describes the Guidelines for Multinational Enterprises as “the most comprehensive instrument in existence today for corporate responsibility multilaterally agreed by governments.” According to the organisational website, “adhering governments – representing all regions of the world and accounting for 85% of foreign direct investment – are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate’.

The OECD Guidelines on MNEs – recommendations addressed by government and applied to MNEs – provide **voluntary** principles and standards for responsible business conduct consistent with applicable laws (OECD 2011: 3).

These guidelines would be better appreciated if they were analysed from the context of the era in which they were produced. The events of the 1970s created a need for regulating TNCs. Salzman (2000: 788) writes that following the revelations in the early ‘70s, of wide-

scale unethical and illegal activities perpetrated by MNCs, the UN, ILO, OECD and national governments focused on the need to influence their behaviour. Salzman cites the despicable involvement of ITT and other US companies in the 1973 Chilean coup, which overthrew President Allende, and also the series of bribes that Lockheed paid Japanese politicians for military contracts as examples of such corporate lawlessness that created the urgency for regulation. What is significant in the examples cited is that they all involve criminal activities. Military coups constitute huge stumbling blocks to development in most developing countries, and corruption is also at the heart of the development calamity in most of these nation states. It is curious that the OECD Guidelines for MNCs, which was said to have targeted action against such corporate behaviour, with such a massive negative impact on security and development chose the route of 'voluntary principles'. In fact, Clapham (2006: 201) reports that the guidelines were simply an add-on to the inter-governmental Declaration on International Investment and Multinational Enterprises. The target was on the promotion of 'international investment', which, depending on who is interpreting it, could also mean 'corporate profit making' at the expense of poor people.

It would be unwise, however, to dismiss the guidelines without taking a second look at their provisions which cover a wide range of issues such as competition, information disclosure, financing, taxation, science and technology. For instance, Chapter III on Disclosure provides:

“Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”

TNCs are urged to disclose basic and material information such as their name, location and structure; address and telephone number of the parent enterprise and its main affiliates; MNC percentage ownership, directly and indirectly in these affiliates, including shareholdings between them; the financial and operating results of the company; company objectives; major share ownership and voting rights; board members, key executives and their remuneration; material foreseeable risk factors; material issues regarding employees and other stakeholders; governance structures and policies. This information, though crucial to ensuring the effective

monitoring of MNCs by stakeholders in host countries, may not be easily obtainable. For instance, in some countries with a culture of secrecy, access to these pieces of information could prove problematic, hence the continuing clamours for a workable Freedom of Information Act in developing countries.

Chapter V of the guidelines deals with the environment and urges MNCs to comply with environmental regulations within the framework of national laws and international law and to maintain a system of environmental management appropriate to the enterprise. Chapter IV deals with bribery and urges MNCs to desist from giving or receiving bribes as well as to enhance the transparency of their activities in the fight against bribery and extortion. Chapter IX, on competition, urges MNCs to conduct their activity in a competitive manner within the framework of applicable laws and regulations.

From the foregoing it is clear that the OECD guidelines represent a package of worthy pronouncements, but the problematic question is to what extent will these pronouncements be adhered to by an MNC that is primarily motivated to make profits? The laws of the host countries on which most of these MNCs are based may be weak and non-existent in some respects, such as competition.

The implementation of the guidelines commences at national contact points (NCPs) within national governments. This is the initial stage for the consideration of the issues and conflicts arising under the guidelines. If the discussion at the NCP fails to resolve the issue, the next stage comes into being, namely the involvement of the OECD Committee on International Investment and Multinational Enterprises (CIME). This body responds to issues passed on by the NCP, by interpreting the relevant portions of the guidelines. Any decision made by CIME has no binding effect. We will now examine these stages in some more detail.

Adhering countries shall set up national contact points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned with all matters covered by the guidelines so that they can contribute to the solution of problems which may arise. National contact points in different countries shall cooperate, if such a need arises, on any matter related to the guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other national contact

points are undertaken. Furthermore, they shall meet annually to share experiences and report to the Investment Committee (OECD 2000:44).

The Investment Committee shall periodically, or at the request of an adhering country, hold exchanges of views on matters covered by the guidelines and the experience gained in their application. The committee shall periodically invite the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC) (the advisory bodies), as well as other nongovernmental organisations, to express their views on matters covered by the guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held at their request. The committee shall be responsible for clarifying the guidelines. Clarification will be provided as required. If it so wishes, an individual enterprise will be given the opportunity to express its views, either orally or in writing, on issues concerning the guidelines involving its interests. The committee shall not reach conclusions on the conduct of individual enterprises, and it shall hold exchanges of views on the activities of national contact points with a view to enhancing the effectiveness of the guidelines (OECD, 2000:44).

OECD Guidelines and Missed Opportunities for Development

The first thing to note about the implementation strategy of the OECD guidelines is that they are based purely on a voluntary system, and as such they fall within the CSR school of thought. This explains why the language used throughout the guidelines is that of exhortation. The dual processes of implementation are so weak that even the judgements of CIME do not mean anything to the parties. CIME only uses the cases before it as a means of interpreting a portion of the guidelines, in order to clarify a position for the future. What this means is that those whose rights have been affected by complaints before CIME will have to wait almost endlessly for redress.

It is not surprising that trade union leaders have dismissed the guidelines as a ‘paper tiger’, whilst some scholars have called attention to a premeditated plan to use the guidelines as a means of pre-empting and watering down the stricter and more comprehensive UN Code of Conduct on TNCs under negotiation at the same time (Salzman 2000: 793).

Considering the dominance of rich countries in the OECD, it could be argued that the impact of the guidelines on the poor was bound to be minimal, as the priorities of OECD countries would not necessarily be the same as those of poor countries, where most of these TNCs operate. The OECD presumption of a working national legal system that could serve as a check seems mistaken, as most of the countries in the Southern Hemisphere that bear the brunt of TNCs' human rights breaches have weak legal systems. The tendency for MNCs to use their clout and bribe their way through proceedings is also very high in these poor countries. Considering the power and resources held by OECD countries, it could be said that these guidelines constitute a missed opportunity for poor people in poor countries, who suffer on a daily basis the negative impact of MNCs operating on their territory.

6.4 (b) A Critical Appraisal of the UN Global Compact and UN Norms on Corporate Responsibility

On 26 July, 2000, on the initiative of the UN Secretary General, Kofi Annan, corporate bodies, the UN and civil society organisations were brought together in a public private partnership (PPP). The aim was to mainstream principles of corporate citizenship, and by so doing catalyse action in support of broader UN goals, including the Millennium Development Goals (MDGs). The UN reports that “never before in history has there been a greater alignment between the objectives of the international community and those of the business world. Common goals such as building markets, combating corruption, safeguarding the environment and ensuring social inclusion, have resulted in unprecedented partnership and openness between business, governments, civil society, labour and the United Nations” (UN Global Compact Office 2008).

In celebrating its tenth anniversary, in June 2010, the GC Office declared as one of its key milestones the fact that the initiative had gone global:

“Only 47 companies were present at its launch, in July 2000. Today, the UN Global Compact is the world's largest voluntary corporate sustainability initiative with over 8,000 business participants and non-business stakeholders from 135 countries” (GC Annual Review 2010).

The UN Norms on Corporate Responsibility, proposed by the UN Sub-Commission on Human Rights, sought to translate the Global Compact principles into law, with the aim of holding corporations accountable for the principles already contained therein. The UN Norms strategy, however, was opposed by corporate interests and could not secure the state support required for it to be adopted by the UN.

The question that needs to be answered here is why is it that despite the similarity between the GC and the UN Norms, the GC seemed to have become very popular among corporate entities, whereas the UN Norms on Corporate Responsibility failed to secure the required support and was summarily eclipsed? In the light of this question, how far can the GC go in helping us to define the right to development obligations of TNCs?

My thesis is that the popularity of the GC over the Norms tells us more about the psychology of powerful corporate entities and the power of public relations over concrete, verifiable actions. This thesis will be tested through a critical analysis of background theories based on both norms and purposes and the processes they adopted.

Kofi Annan's speech at the World Economic Forum in Davos on February 1, 1999, led to the formation of the Global Compact. A close reading of this speech is critical in understanding the underlying philosophy that led to the emergence and popularity of the GC. The speech retraced the recent efforts of the UN to reach out to corporate entities, with the objective of encouraging a 'creative partnership' between the UN and the private sector. This part of history is important, because the UN's relationship with business from the 1950s to the end of the Cold War has been well-captured as a movement "from hostility to partnership" (Therein & Pouliot 2006: 57-60).

Annan argued that a partnership between the UN and private bodies would be mutually beneficial because the everyday work of the United Nations helps to expand opportunities for business around the world – just as the know-how and resources of private actors help to further many of the objectives of the UN. On the basis of the above logic, the Secretary General challenged business leaders to enter into a global compact of shared values, which would give a human face to the global market. The acknowledgement that the global market needed a human face is an open indictment to the ascendant model of neoliberal capitalism

and top-down globalisation, which critics had already spoken of as anti-people and anti-poor. Mr Annan, like Clapham (2006), argued that the problem was not globalisation per se but the fact that we underestimated its fragility and failed to “adjust to them, let alone guide the course they take.” Mr Annan’s problem analysis could be easily summarised as a failure of regulation.

Looking back into the history of the Great Depression and how safety nets were used to limit economic volatility and compensate the victims of market failures, Annan argued that today’s challenge is to design a “global compact, to underpin the new global economy.” As such, he called upon leaders to “embrace, support and enact a set of core values in three areas: human rights, labour standards and the environment.” These values were seen as ‘core’, as they derive from pre-existing core values defined in the international Bill of Rights, UDHR, ICCPR, ICESCR including ILO Declarations, the Rio Declaration and the United Nations Conference on the Environment and Development in 1992.

On further rationalisation for action, Mr Annan pointed to the growing pressure for legal accountability and restriction, and he argued that his proposal was compliance. In his words:

“There is enormous pressure from various interest groups to load the trade regime and investment agreements with restrictions aimed at preserving standards in the three areas... These are legitimate concerns. But, restrictions on trade and investment are not the right means to use when tackling them. Instead, we should find a way to achieve our proclaimed standards by other means. And that is precisely what the compact I am proposing to you is meant to do.”

A close reading shows that Mr Annan seemed to prefer the reasoning of the CSR school of thought, and he believed that “restrictions would translate into loading the system and blocking investment.” It could be argued that he was encouraging corporate leaders to choose the ‘smart option’ of voluntarism and avoid the gathering storm of corporate accountability demands. Nevertheless, if one is in doubt about the Secretary General’s policy preference, the speech goes further in specifying the terms of the agreement and outlines what is expected from business entities. The expectations to meet human rights, as well as labour and environmental standards, were all couched in the moral persuasion, “You can.”

To further encourage corporate entities to do what they could, Annan offered to assist them in incorporating those values into their mission statements and corporate practices. The UN would also facilitate dialogue between corporate entities and other social groups to find viable solutions to the concerns they might have.

The speech reiterated the mutual benefits that could be derived and called attention to the significance of the active commitment and support of corporate entities in driving the UN agenda. Furthermore, Annan urged businesses to choose a global market option that was NOT driven by the calculation of “short-term profit and consequent neglect of the fate of losers, but one which has a ‘human face’ and accepts responsibility for global vision and leadership.”

6.4 (c) Contradictions

Kofi Annan’s speech recognised the danger posed by top-down globalisation and realised the need and urgency to counter it accordingly. His speech clearly identified three key areas that required urgent attention if this top-down globalisation were to be countered, by allowing a ‘human face’ to shine through. The speech went further to draw a nexus between these three key principles and the underlying principles of the UN, including the UDHR, which is so cardinal that it is said to have reached the status of ‘jus cogens’, imposing obligations ‘erga omnes’. The speech pointed to the centrality of businesses as levers and the fragility inherent in the business model. Curiously, the speech preferred the mechanism of ‘moral suasion’ which calls on businesses to de-emphasise profits in preference to putting a human face to globalisation. Considering that the central goal of businesses is to make profit, this call to de-emphasise the profit drive seems bound to be overlooked in a majority of the cases. The power structure that is evident in the sharing of an agreement obligation is also an issue of concern – business enterprises have the power of the purse, whereas the UN has the platform for dialogue and sharing knowledge. Is it not possible that a corporate entity with a high inclination to breach human rights could sign up to the compact, appear to meet the formal requirements of compliance with said compact and use the UN as a cover to further engage in environmental or human rights abuse?

It is my considered view, on the basis of the above speech, that the compact envisioned would be weak in terms of meeting the objectives of those who are vulnerable to human rights abuse by corporations. The victims of corporate abuse would be unable to hold

corporations accountable and they would have to wait for them to choose to meet their obligations at their convenience. I challenge this position by looking into the policy and practice of the Global Compact ten years on.

6.4 (d) The Ten Principles

A company joining the initiative is expected to, among other things, make the Global Compact and its principles an integral part of its business strategy, incorporate the Global Compact and its principles in the decision-making processes of the highest-level governance body (i.e. the board), contribute to broad development objectives (including the Millennium Development Goals) through partnerships and submit an annual report on its activities relating to the Ten Principles detailed in Box 2, below.

Human Rights: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.

Labour: Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment: Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Box 2: Ten Principles of the Global Compact

How do Companies Join?

According to DfID's analysis of the Global Compact, three steps are involved in participating in the compact. The company that wishes to become a member must read the online application guidelines. The second step stipulates that the company must prepare a letter of commitment signed by the chief executive to the Secretary-General of the United Nations, expressing commitment to the UN Global Compact and its ten principles, engagement in partnerships to advance broad UN goals and the annual submission of a Communication of Progress (COP). The third step is to complete the online application form and upload a digital copy of the letter of commitment signed by the highest executive (the name of the chief executive who signed the letter must correspond with the entry in the online registration form). There is also a financial commitment to demonstrate, as the companies are expected to make a regular annual contribution to support the work of the UN Global Compact Office.

According to the Global Compact Document:

“Participation in the Global Compact offers the following benefits, among others. It offers a platform for businesses to share and exchange best and emerging practices and to advance practical solutions and strategies to common challenges. It also offers the opportunity to advance sustainability solutions in partnership with a range of stakeholders, including UN agencies, governments, civil society, labour and other non-business interests. Furthermore, it gives access to the UN's extensive knowledge of and experience with sustainability and development issues. As a participant, a company is expected to set in motion changes to business operations so that the Global Compact and its principles become part of strategy, culture and day-to-day operations, publicly advocate the Global Compact and its principles via communications vehicles such as press releases, speeches, etc. and to annually report on progress in implementing the ten UN Global Compact principles through a public corporate report (e.g. a sustainability or annual report). “

To assist companies in communicating progress, the UN has introduced resources designed to help them continuously improve their performance in implementing the Global Compact principles. These resources include the Global Compact self-assessment tool, the Global Compact management model, the blueprint for corporate sustainability leadership and implementation guides specific to each Global Compact issue area (human rights, labour, the environment and anti-corruption).

The positive picture painted about the UN Global Compact in the series of UN documents on subject needs to be viewed from a critical perspective in order to draw objective conclusions. History offers an important tool for this exercise. Utting (2000: 2-3) unearths this history of restraint and embrace that characterises the UN Business relationship in the past three decades in a way that enables us to place the GC in perspective of a "profound" change, it seems to represent in the UN-Business Partnership. According to Utting (2000:2-3):

“In the 1970s, amidst calls for a New International Economic Order, work began on drafting an international code of conduct to regulate the activities of TNCs. The United Nations Centre on Transnational Corporations (UNCTC) was mandated to carry out this normative work. It also monitored the activities of TNCs and provided developing countries with advice about how to deal with TNCs. Rightly or wrongly, the TNCs were perceived to be responsible for key aspects of underdevelopment and to exert undue influence over many Third World States.”

Continuing, the author states that:

“The 1980s, however, also witnessed a significant shift of approach. Partly reflecting the influence of neoliberalism, UN policy towards TNCs changed course. Instead of trying to regulate foreign direct investment (FDI), UN agencies like UNCTAD sought to facilitate the access of developing countries to FDI. Deregulation was encouraged...In recent years, UN-Business relations have entered a new phase as many agencies and other UN bodies strive to develop partnerships with large corporations or projects and programmes funded by corporate philanthropists.”

The Global Compact is the offspring of this soft era of embrace in the UN-Business relationship. In the light of the above history, questions therefore need to be asked: on what basis can we justify UN-Business partnership considering the seemingly clear dissonance in the core objectives of the UN and those of business entities? Who stands to gain in this newfound partnership: Business entities, UN as an organisation or the people?

To that effect, Utting (2000:3) offers an interesting response:

“UN-business partnerships are usually justified in terms of resource mobilisation and the promotion of certain values and forms of governance. They provide a means of tapping the funds, technology, competencies, creativity and global reach of the business community and employing these for developmental and ethical goals. They may also serve to raise the profile of human rights, labour standards and environmental issues, in a world which appears more concerned with market economics and corporate profitability than people-centered development.”

Striking a balance between the pull of corporate profitability and people-centered development creates a dilemma similar to that between the ‘being’ and ‘having’ modes of existence analysed earlier. As argued by Jasudowicz (1994: 24) there is no iron curtain dividing the two. Resources are needed to sustain the being. Corporate profitability could be harnessed for people-centered development. In the light of this, the challenge of how to properly navigate through the multiple options/temptations of regulation, deregulation, non-regulation and over-regulation may be quite demanding/inviting hence the contradictions that seem underlie corporate responsibility/accountability frameworks.

In light of the above, it is not surprising that the Global Compact was created as a soft model of corporate citizenship and therefore contrasts sharply with the UN Norms on TNCs (analysed below). Membership is voluntary and companies are often motivated to join, not out of a deep desire to advance human rights but out of self-interest in appearing to be good citizens and networking with the UN. In his ‘development at risk’ article, Zammit (2003:75) vented the viewpoints of critics of the UN’s GC. In her analysis two issues are of concern. First is that the UN risks being tainted by associating with unsavory corporations involved in the GC. Secondly, an opportunity to network with the UN may serve as a public relations tool, which enables the companies to benefit from ‘blue-washing’ on the basis of their association with the UN (Bruno & Karliner, 2000).

Three major challenges facing the Global Compact have been identified (Nolan 2010), namely conceptual clarity, the accountability deficit and the limitations of a voluntary approach. On the issue content, the compact’s principles are framed in very broad terms that favour corporations by arming them with a multiplicity of defences to avoid responsibility. For instance, Principle 1 asks businesses to “support and respect the protection of

internationally proclaimed human rights within [their] ‘sphere of influence’.” The exact human rights which businesses should support and respect are not specified, and there is no definition of what is meant by ‘sphere of influence’ either, thus encouraging restrictive reading by corporations keen to avoid any form of obligation. Similar things could be said with relation to Principles 2, 7, 8 and 9, a situation that led Nolan (2000: 16) to conclude that:

“... the principles do not constitute a sufficient basis for designing enforceable standards and are beneficial more from the point of view of acting as yet another indicator in global arena.”

When this content inadequacy is contrasted with the Norms, the distinction between the two entities becomes more palpable, as the Norms use terms of obligation, such as ‘shall’, whereas the GC prefers open-ended statements that create an escape route for corporations.

The accountability deficit in the GC flows from its lack of conceptual clarity, and there are no stringent means of monitoring compliance. Critics of the GC increasingly point to the fact that its weak regulatory process hardly advances the course of human rights. The recent oil spill in the Gulf of Mexico by a compliant member of the Global Compact, British Petroleum, seems to have exposed the accountability deficit inherent in the GC arrangement. After an initial denial, the GC office accepted that BP was a member of the GC and had met all reporting guidelines, but this did not negate BP’s role in what was described as the “biggest environmental disaster in US history, with a huge impact on human and aquatic lives” (BBC, June 10, 2010)

One issue that stands out in the BP Gulf of Mexico oil spill (a far cry from the daily but unreported oil spills and gas flaring in Nigeria and other developing countries) is the fact that the voluntary approach currently promoted by the UN is a limited construct, inasmuch that it cannot substitute a regulatory framework. The continued involvement with the UN in promoting the so-called PPP is fraught with risks. As (Utting, 2000:8) rightly observed:

“The danger with such a situation is that the partnership may end up serving the purpose of legitimising big business rather than substantially improving the environmental and social performance of TNCs and other companies.”

The global reach of the GC, as celebrated in its tenth anniversary, is yet to translate into dealing with the perennial problems of corporate lawlessness. It may, however, have served the interest of diverting attention from the more rigorous framework of the UN Norms on transnational corporation, raising deep questions about where the UN really stands. In the next section, I take a careful look at the Norms and investigate the possibility of using this framework as a basis for proposing a more accountable regime via the RTD mechanism

6.5 UN Norms on Transnational Cooperation: A Giant Leap for RTD?

The “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (E/CN.4/Sub.2/2003/12/Revs.2) were adopted by the UN Sub-Commission on the promotion and protection of human rights in 2003. The Norms, in combination with the Official Commentary, constitute what Hillemanns (2003) refers to as “an authoritative guide to corporate social responsibility,” as they are “the first set of comprehensive international human rights norms specifically aimed at and applying to transnational corporations and other business entities (companies).” Continuing, Hillemanns (2003) writes “they set out the responsibilities of companies with regard to human rights and labour rights, and provide guidelines for companies in conflict zones. They prohibit bribery and provide obligations with regard to consumer protection and the environment. General provisions of implementation include the obligation to provide reparation for a failure to comply with the Norms.” Despite their perceived ground-breaking provisions, the UN Commission on Human Rights considered the Norms in 2004 but did not approve them and said they lacked ‘legal standing’. This outcome contrasts sharply with Hillemanns’ adulations which heralded their formulation, as well as the opinions of other scholars, such as Kinley & Chambers (2006), on their viability as a ‘big leap forward’ and being the next necessary logical step after the UN Global Compact.

In light of the above, the first step in analysing the Norms is to see them from a conflict perspective, a conflict between two important blocks of duty bearers and duty holders – a conflict marked by a clash of priorities. Whilst pro-poor development voices like Hillemann (supra) and Chakraborty (2005) have described the draft Norms as “an imperfect step, albeit in the right direction,” others are of the view that the norms are categorically illustrative of an “anti-business agenda, designed to hold back the economic and social advancement of developing countries.” To make sense of all these notions we need to enquire more carefully

into the contents and enforcement mechanisms of these Norms and reflect on the areas of differences between them and other well-received initiatives such as the UN Global Compact.

6.6 Content Analysis

6.6 (a) The Preamble

It has become customary for international law standard-setting documents to begin with preambles. Serving as an introduction to the texts that follow, preambles are useful tools for interpretation, as they tend to indicate the intent of drafters and also expose the underlying justification or pedigree for the standards being set. According to Orgad (2010), in his recent work ‘The Preamble in Constitutional Interpretation’, presented at the 2010 Hart Conference on Constitutionalism, “Preambles present the historical narrative behind the constitution’s enactment, together with the core principles and values.”

It is not surprising, therefore, that the preamble to the Norms on TNCs clearly articulates the case for norm-setting in this regard. It notes that TNCs and other business enterprises “have the capacity to foster economic well-being as well as the capacity to cause harmful impacts on human rights of individuals...”

Demonstrating that the Norms are not a ‘stand-alone’ framework, the preamble traces their pedigree to a line of international law, from the UN Charter through to the Universal Declaration of Human Rights, to the more recent articulations of the Declaration on the right to development, the Rio Declaration on the Environment and Development and the UN Millennium Declaration, among others.

The preamble also presents the Norms as a necessary logical step forward and enumerates other UN efforts on corporate social responsibility such as the Tripartite Declaration of Principles Concerning TNCs and the UN Global Compact.

One significant issue that stands out clearly is that contrary to the views contested in the earlier section of this chapter, to the effect that TNCs are sorts of ‘outlaws’ in the law of nations, TNCs and other organs of society, as well as individuals, have been within the purview of international law since the adoption of the UN Charter, shortly after the Second

World War. It is also important to note Hillemanns' observation that the process leading to the adoption of the Norms was inclusive and the consultation broad, as they were drafted after comments and recommendations made by a wide range of stakeholders, including governments, NGOs and the business community, had been received.

6.6 (b) the Substantive Provisions

In its General Obligation (part 'A'), the Norms provide that states have a primary responsibility to "promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international and national law, including ensuring that TNCs and other business enterprises recognise and respect human rights." This provision puts beyond doubt that the essence of 'casting the net wider' is not to suspend the primary responsibility of states – TNCs, other business entities and states share responsibilities with regard to human rights. Parts B to G of the Norms provide for the human rights duties of TNCs and other business entities, with respect to the right to equal opportunities and non-discriminatory treatment, the right to the security of persons, the rights of workers, respect for national sovereignty and human rights, consumer protection and environmental protection. The obligations imposed on TNCs and other business entities within their respective sphere of authorities are not extra-ordinary, having been provided for in one form or the other in preceding UN treaties and declarations. As such, why is it that 'rational' derivative norms that seek to protect individuals and peoples, many of whom are voiceless and powerless, from the dangers that are likely to result when their interests conflict with the profit drive of powerful TNCs and other business entities, could be derided as a mechanism for "holding back economic and social advancement of developing countries?" Who is better placed to know where the shoe pinches: the person that wears the shoes, the manufacturer or the observer? Why is it that similar things were not said about the Global Compact that articulated similar principles, using the model of public private partnership (PPP)?

The answer seems to lie in Section H of the Norms, which, realising that partnership between unequal parties may be problematic, deviated from the popular model of voluntary corporate citizenship and sought to provide for a more accountable framework with the capacity to open a floodgate of 'third party monitors' and likely costly litigation that may clog the wheels of the capitalist drive for profits.

Under the implementation section, multiple channels of accountability are imposed. As a preliminary step, TNCs and other business entities are obliged to adopt internal rules of operation in compliance with the Norms. These rules need to be reflected in their dealings with contractors, sub-contractors, suppliers, distributors, natural or other legal persons who enter into a contract with them. What this implies is that apart from the need to create workable internal rules to govern these entities, there is a likelihood of vicarious liability for failing to mirror these rules in their dealings with suppliers, distributors and many others. Moving further, a new layer of accountability was created in paragraph 16. The TNCs and other business entities would be monitored externally by independent bodies like the United Nations, with the input of stakeholders such as the NGOs. The TNCs are also required to conduct periodic evaluations of the human rights impacts of their own activities.

In addition, the implementation section calls on states to establish and reinforce a necessary legal and administrative framework to ensure TNCs' compliance. A legal and administrative framework as used here goes beyond the PPP model of the Global Compact, so it is further provided that the Norms shall be applied by national and international courts and tribunals, with a view to determining damages and reparations to persons and communities that may be affected by the breach of the Norms. In the same paragraph, the Norms state that TNCs and other business entities shall provide "prompt, effective and adequate" reparation to victims of rights abuses occasioned by TNCs breaching the Norms. Note the use of 'shall', which signals the transformation of voluntarism to obligation.

6.6 (c) From Voluntary to Legally Accountable Norms for TNCs: Re-imagining International Law Obligations

Although the UN Norms on TNCs were suspended in 2004 following the opposition of and lobbying by big businesses and powerful states, there is a need to revisit them. As the world continues to face new and emerging threats to global peace in the form of non-state actor terrorism, man-made environmental catastrophes and climate change, world leaders continue to renew the consensus on 'making poverty history'. The centrality of PPP in this regard is no longer contested, and no one entity can go it alone. The Millennium Summit's declarations that set out key development targets, all of which targeted empowering the human person and breaking the shackles of abject poverty, were overwhelmingly adopted by both state and non-state actors such as TNCs, the World Bank, the WTO and NGOs. MDGs are synonymous

with the RTD framework, but whilst one receives overwhelming acclaim, the other receives outright rejection by powerful states and entities. What is lacking in the many consensuses on international development is the urgency for translating global development agreements into a concrete, enforceable legal document, in order to draw a line between rhetoric and reality.

With regard to RTD, two traditional sources of international law, namely customary international law and conventions, offer important mechanisms for this translation task. But, in order to effect this, we need to think outside the box and reinterpret traditional sources of international law in the light of globalisation (Schreuer 1993).

6.6 (d) Customary International Law for TNC Obligations

Article 38 of the ICJ Treaty, dealing with primary sources of international law, refers to “international custom as evidence of general practice accepted as law.” General practice and acceptance are seen from the perspective of states. To prove the emergence of customary international law, the elements of duration, uniformity, generality of practice and *opinio juris et necessitas*, i.e. the recognition by states of a practice as being obligatory, must be carefully analysed (Brownlie 2003: 6-12)

In the *North Sea Continental Shelf Case (ICJ Report, 1969)*, the ICJ was strict in requiring proof of *opinio juris*. In establishing whether customary international law has emerged, an entity may still be able to disprove it by showing itself as a ‘persistent objector’ or ‘subsequent objector’, as Norway did in the *Fisheries Case (ICJ Report, 1951:116)*. In this case Norway argued that certain rules were not rules of international law and, if they were, they did not bind Norway, which had “consistently and unequivocally manifested a refusal to accept them.”

At the traditional state level, custom is quite fluid. With regard to non-state actors, traditional international law has no place for their practice as leading to the emergence of customary international law. It is my argument, however, that theories of traditional international law have to be reimagined in the light of the current global reality. The fact that the UN now sits around the same table with non-state actors such as corporations, which sign up to an UN-initiated ‘Compact’, shows that a “fundamental shift has occurred” (Nolan 2010). The events of September 11 and the consequent declaration of the ‘War on Terror’ against non-state

actors fly in the face of traditional international law and equally signal the need for a paradigm shift.

The need for this major shift has equally been well-argued by scholars (such as Jochnick 1999; Schreuer 1993 and Clapham 2006). Moving human rights obligations beyond the state-centric paradigm will serve two purposes. First, it will challenge the reigning neoliberal extremism that infects much of the public discourse about development and poverty and also provide a legal framework with which to hold the most influential non-state actors – corporations, financial institutions and third party states – more accountable for their role in creating and sustaining poverty (Jochnick 1999: 57).

In the light of the need for a paradigm shift, could the ‘Global Compact’, one of the most popular model of corporate responsibility, serve as a basis for holding that a reimagined customary international law of TNC responsibilities for RTD has emerged or is emerging? As earlier reported, in celebrating its tenth anniversary, in June 2010, the Global Compact Office declared as one of its key milestones the fact that the Global Compact initiative had gone global:

“Only 47 companies were present at its launch, in July 2000. Today, the UN Global Compact is the world’s largest voluntary corporate sustainability initiative with over 8,000 business participants and non-business stakeholders from 135 countries”(GC Annual Review 2010).

It could be argued that all the elements of custom are present here, as the growing numbers of companies that sign up to the GC voluntarily accept to address issues of human rights within their spheres of operation. The duration of ten years and the substantial uniformity required by the GC, a uniformity that could also be demonstrated using other voluntary norms such as the OECD’s guidelines, could be a basis for arguing that a customary international law on TNCs’ obligations toward RTD has emerged. What prevents a litigant from going to court to argue that certain actions of a transnational oil company, for instance, contradict its practice as shown in its key documents and acceptance of the UN’s GC?

Although admittedly there would remain difficulty with regard to sustaining this argument, without first and foremost changing the mind sets of actors, including judges, with regard to

the shifting paradigm of international law, there remains some merit in opening up this avenue of holding corporations legally responsible for human rights abuses on the basis of what they agree to and the expectations that are consequently created. I shall now turn to the Guiding Principles on Business and Human Rights (GP), which heralded the resumption of dialogue following the rejection of the norms and the consequent deadlock in 2004. The Guiding Principles were aimed at offering a pragmatic solution to the ‘voluntary-compulsory’ paradigms that have stood in the way of progress. The GP would enable us to reflect on whether lessons have been learned from earlier efforts in the search for an authoritative global standard on corporate social accountability.

6. 7. From Norms to ‘Normicide’: A Critique of the Current Status of Corporate Accountability

The purpose of this section is to examine the current status of corporate accountability, following the rejection of the ‘Norms’³¹ on TNC and reflect on consequences. Analyses are structured as follows: subsection 6.7(a) offers a background to the issues, sub-section 6.7(b) focuses on Prof. John Gerard Ruggie’s Mandate on subject in the context of his theoretical framework. Sub-section 6.7(c) examines the Guiding Principles on CSR in the light of systemic challenges in Nigeria. The concluding part reflects on the implications of Ruggie’s GP and ongoing efforts.

6.7(a) Background: A ‘Black Box’ is at the centre of international law making.

The predictability of suspension of action in absence of consensus or adequate aggregation of interests could be described as the ‘black-box’ at the centre of international law. The proposed framework of Norms on TNCs and other Business enterprises was abandoned in 2004 on the account of that ‘black box’ which encases power and powerlessness. This structural challenge of international law, that is, its tendency to leverage the interests of core states and their entities is at the centre of its current analyses as a trap. Critics, however, realise that international law also offers a forum for discussion and taming power, hence its

³¹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2, available at: <http://www.refworld.org/docid/403f46ec4.html>

presentation as a tool³². Both elements however, seemed curtailed by the deadlock that followed the abandonment of the ‘Norms’ on TNCs. Therefore, the decision of the UN to appoint Prof John Ruggie with a mandate to clarify the facts and propose future directions was, momentous indeed. It signalled the resumption of dialogue on corporate accountability after several years of gridlock.

6.7(b) Ruggie’s Mandate and Theoretical Framework

The Mandate for a special representative on human rights and transnational corporations and other business enterprises was laid out in the Human Rights Council Resolution 2005/69³³. The Resolution “requests the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years”. The person so appointed, in this context, Prof. John Ruggie, “shall submit an interim report to the Commission on Human Rights at its sixty-second session and a final report at its sixty-third session, with views and recommendations for the consideration of the Commission”.

Prof. Ruggie’s mandate was set out as follows:

- “(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;

³² See Chapter 4 of thesis for a fuller analysis on ‘trap and tool’ elements of international law as well as the proposal for a theory of resistance in international law.

³³ UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, 20 April 2005, E/CN.4/RES/2005/69, available at: <http://www.refworld.org/docid/45377c80c.html>

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises”

According to Ruggie, (2013: xlviii) this mandate “evolved in three phases. Neither of the latter two was foreordained; each required specific Council renewal. The first from 2005 to 2007 was the ‘identifying and clarifying phase’.

Following the successful reception of the work in phase 1, the second mandate phase was launched and lasted from 2007-2008. At the end of the second phase in 2008, Ruggie stated that he returned with “only one recommendation: that the Council respond favourably to the Protect, Respect and Remedy Framework³⁴ I elaborated in that year’s report, on the premise that the most urgent need was not for a shopping list of items but for a foundation on which thinking and action could build.”

Following the warm reception of Ruggie’s Framework, the third phase of the mandate evolved as a result of Council’s extension of the mandate for three years³⁵. The focus of this third phase was to “provide concrete and practical guidance” for the implementation of the Framework. According to Ruggie (2013: xlviii) “that is how I came to present the Guiding Principles in 2011-comprising thirty-one principles, each with a Commentary elaborating its meaning and implications. The Council endorsed the Guiding Principles, again unanimously. At that point I had reached the six-year maximum term limit for any mandate-holder, and an expert working group was appointed to oversee the next phase.” The United Nations OHCHR’s overview of the Special Representative’s mandate³⁶ corroborates Ruggie’s three-phase perspective of his mandate. To be able to properly analyse the Guiding Principles within the context of this research, I shall seek to understand Ruggie’s theoretical framework.

³⁴ For resources on Ruggie’s ‘Protect, Respect and Remedy Framework’, including the full text of Ruggie’s Framework, see: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

³⁵ Human Rights Commission Resolution 8/7. Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporation and other business enterprises, Adopted on 28 June 2008 without a vote. To download a PDF copy of this resolution follow: <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>

³⁶ “Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Overview. 2005-2008”. <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>

The next section examines this with the view of sifting parameters for constructive assessment.

Ruggie’s analytical framework:

In his recent publication (Ruggie, 2013) on how he executed his mandate, the author made it clear that underlining his proposal for Guiding Principles on corporate accountability was a commitment not to norms, but to “normicide”, which I interpret as the killing of positive law (Ruggie, 2013:54). The notion of ‘killing law’ as a way forward re-echoes some central themes in the preceding analyses of this thesis³⁷. However, in Ruggie’s strict formulation, ‘Normicide’ was his emphatic rejection of doctrinal law-inspired insistence on a legally binding architecture of corporate accountability in international law. It is important that we do not lose sight of the ‘norms’ that is ‘killed’ in Ruggie (2013). Whilst, Cover (1986) and Achara (2005) reflected on the tendency to ‘kill’ the ‘socio-legal and political norms’ when legalistic norms are privileged; Ruggie in a seeming response chose to ‘kill’ the doctrinal, legalistic norms in course of fulfilling his mandate. In his words:

“In my first report to the Human Rights Commission, I concluded... that the Norms suffered from ‘exaggerated legal claims and conceptual ambiguities’, and that they ‘were engulfed by [their] own doctrinal excesses’... they constituted ‘a distraction from rather than a basis for moving [my] mandate forward’...” (Ruggie, 2013: 54).

It is crucial to observe also, that in his use of ‘normicide’, Ruggie was emphatic about his rejection of ‘legalistic norms’ because of what he termed, inter alia, its “exaggerated legal claims and conceptual ambiguity”. Ruggie, was however aware that there are other

³⁷ For instance in our analyses of ‘constitutional violence’ in Chapter 2, we encountered the term ‘jurispathic’ in Cover (1986: 1607), where the author argued that when faced with conflicting meanings and multiple interpretative options, judges are more likely to adopt an interpretative method largely targeted at suppressing one meaning (in favour of powerlessness) and promoting the other (in favour of power). Judicial ‘jurisgenesis’ (that is, judicial interpretation of laws) therefore, becomes an avenue for fulfilling a “jurispathic” (law-killing) role. We also encountered a similar idea of ‘normicide’ in our analyses of the ‘constitution’. Achara (2005) had argued that in interpreting the ‘constitution’, we must avoid the allure of “textual fetishism”, that is the tendency to view the constitution from the strict angle of what is written. I argued that for us to better construe the ‘constitution’ we may have to ‘kill’ the legalistic notion of the constitution, in order to locate the real constitution in the other realities of the socio-political and socio-economic.

competing norms, hence his 'normicide' was not tantamount to complete abandonment of all norms. In his introductory, Ruggie, (2013: xlii), stated as follows:

"The successful expansion of the international human rights regime to encompass multi-national corporations must activate and mobilize all the rationales and organizational means that can affect corporate conduct. Thus, I made it clear from the outset that I would follow a course I called principled pragmatism: 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what worked best in creating change, where it matters most in the daily lives of people'..."

From a jurisprudential point of view, 'Pragmatism' which Ruggie has elected to follow belongs to the school of thought known as American realism. In his incisive treatment of this subject, Cotterrell (2003:178) writes:

"In an orthodox pragmatic conception, knowledge is 'true' to the extent that it is useful: that is, validated in experience. Indeed, there may perhaps be no better criterion of truth, in a pragmatist perspective, than the practical success of ideas in action: in this sense, knowledge is successful practice."

In his further chapter, titled: 'the deconstruction and reconstruction of law', Cotterrell (2003:253) elucidates further as follows:

"Pragmatism at its most optimistic suggests that 'human nature is not fixed within its present depressing parameters' (Luban 1994:127). This is because pragmatist antifoundationalism proclaims a new freedom from deterministic, constraining, fixed ideas about history, society and law. The traditional speculations of philosophy can be discarded. Knowledge, scaled down to no more than practical ideas that works in context, sets out to solve the problem of the future unconstrained by the intellectual baggage of the past. As an instrumentalist approach to knowledge pragmatism coexists easily with instrumental views of law... American pragmatist legal theory tends to portray law as an empty vessel that can be filled with any content, no longer needing the moral underpinnings that philosophy might once have asked to provide (Luban 1994:136)..."

By contrast, much recent postmodernist legal theory in Britain, at least, sees this emptiness as a moral challenge and a cause for apprehension. Pragmatism seems

generally unattractive in this context because it usually fails to engage theoretically with profound moral issues about the nature of contemporary law.”

From the foregoing, it is clear that context is crucial and every effective assessment must be located within a context. In the analyses that follow, therefore, I critique the adequacy/viability of Ruggie’s vision within the parameters of his mandate and his understanding of that mandate. In doing so I am conscious of the fact that the proposed ‘killing of norms’ does not imply the liquidation of all ‘norms’. To hold otherwise would mean doing a disservice to the notion of ‘norms’ since clearly legal norms are but one aspect of norms. Ruggie’s ‘principled pragmatism’ also offers another parameter for assessment. To this end, Cotterrell’s (2003) theoretical elucidations of the high points and low points of pragmatism may offer useful auditing tools. So limiting myself to Ruggie’s ‘Principled pragmatism’ framework, I ask: how far can the Guiding Principles (GP) go in pragmatically resolving the challenge of corporate abuse within the context of an irresponsible state, like Nigeria? Before we confront that question, it is important to understand the crux of the GP.

6.7(c) The Guiding Principles on TNC and other Businesses

The UN Guiding Principles on TNC is the elaboration of Ruggie’s tripartite Framework of ‘Protect, Respect and Remedy’. The GP incorporates Commentaries, such that it may look like repetition attempting to run further commentaries on the Rules. For our purpose here, it is important to note that what the GP achieved was to reinstate the principles underlining international human rights law that is that the state has the primary responsibility to protect its citizens from the breach of human rights irrespective of whether the source of breach is from public or private entities, including MNCs. To this effect, Guiding Principles 1-10 were focused on elaborating these cardinal duties of the state.

The ‘Respect’ aspect of the Framework was targeted at the role of business. The perennial challenge in international law has been how to expand human rights obligations to include businesses. The Guiding Principles in elaborating the ‘Respect’ framework focused on how companies should ensure that they respect human rights, advising the use ‘due diligence’ procedures to ensure that companies comply. It is important to note that the term used is ‘responsibility’ not ‘duties’. The Guiding Principles 11-24 elaborate on the companies’ responsibility to respect human rights. A careful study of these sections and accompanying

Commentaries show that the GP are clearly targeted at compliance through voluntary means and not via the imposition of any legal duty on corporate entities.

The final aspect of the ‘Framework’ revolves around ‘Remedy’ that is putting things right whenever breaches occur. The Guiding Principles 25-31 elaborate on both judicial and non-judicial ways of putting things right in the aftermath of corporate human rights breaches. Both States and Companies have roles to play in event of breaches. Guiding Principle 31 is targeted at the effectiveness criteria for non-judicial grievance mechanisms of both states and non states. Effectiveness criteria involve elements like, legitimacy, accessibility, predictability, transparency and rights-compatibility.

The Human Rights Council in its Resolution 17/4³⁸ endorsed the Guiding Principles on Business and Human Rights with an overwhelming majority. In paragraph 6 of this Resolution, a “Working Group on the issue of human rights and transnational corporations and other business entities, consisting of five independent experts, of a balanced geographical representation” was set up to take matters forward. Furthermore, paragraph 12 of Resolution 17/4 also established a “Forum on Business and Human Rights under the guidance of the working Group to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.” According to the preliminary Report (A/HRC/20/29, 10 April 2012)³⁹ of this Working Group the “landmark decision’ of the Council to adopt the Guiding Principles unanimously was “the first time an intergovernmental body of the United Nations had endorsed a normative document on the previously very divisive issue of business and human rights. The endorsement by the Council effectively established the Guiding Principles as the authoritative global standard for preventing and addressing adverse impacts on human rights arising from business-related activity.”

³⁸Human Rights Council Resolution 17/4. Available at: UN OHCHR http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/17/L.17/Rev.1

³⁹ Report of the Working Group on Right to Development. Available at: UN OHCHR <http://www.ohchr.org/EN/Issues/Business/Pages/WGEventsStatements.aspx>

Critique of the Framework and Guiding Principles.

The Framework and Principles have generated a lot of comments⁴⁰. The overwhelming acceptance by key stakeholders is quite phenomenal. Ruggie's demonstrable commitment to research, dialogue, consultation and 'road-testing' of proposals are quite remarkable and clearly played crucial roles in launching a new phase of dialogue on this sensitive project.

Despite the obvious positives, critics are of the view that the Guiding Principles' failure to provide a compulsory accountability regime for companies is a huge dent that may stand in the way of success (Bilchitz 2010; Human Rights Watch 2011; Deva 2012; Albin-Lackey 2013). States' duties as primary duty bearers of rights have always been known. The gap in human rights and business has been how to create an accountability regime that recognises the power and role of corporations, especially the multi-national variants in our contemporary world. The reality of our situation today is that companies, especially multi-national ones are almost becoming 'outlaws'. These entities are becoming too powerful to be controlled by many host states. The 'tragedy' of our situation, however, is that mainstream international law does not seem to have been created to deal with this kind of challenge. This reality is quite dumbfounding considering the entrenched legal personality doctrine that clearly favours the profit maximization interests of corporate entities. Bilchitz (2010: 208) critiques this paradoxical position of allowing corporations to reap benefits of corporate veil whilst avoiding the accompanying burdens that should go with it in the event of culpable harm. In his words:

"It is clear...that corporations are essentially entities created and regulated through law in order to attain a number of social and individual benefits that flow from their separate legal personality. Clearly, should the advantages of corporate personality be accompanied by grave social harms, then, there would be a need for legal restrictions to be placed on corporations to guard against those harms. Such harms may in fact arise from the very fact that the focus of corporate activity has often been upon achieving value for its shareholders without imposing full responsibility for its action upon these very shareholders: some have argued that "this creates a structure which is

⁴⁰ For commentaries, see Business and Human Rights Resource Centre: <http://www.business-humanrights.org/Documents/UNGuidingPrinciples/Commentaries>

pathological in the pursuit of profits (Corporate Watch, 2006; Bakan, 2004) ”.

Human Rights Watch, reacting to the failure to fill this gap of legality in the framework of GP was unequivocal that “an opportunity to take meaningful action to curtail business-related human rights abuses” had been “squandered” (Human Rights Watch, Press Release June 16, 2011). On the same point, Deva (2012:108) despite his more favourable outlook concludes that the “quest to build consensus diluted the robustness of GP in humanizing business”. However, the GP in his analyses still “provide useful guidance to companies and other stakeholders.” In a recent article, Albin-Lackey (2013) referred to the Guiding Principles as a “failed approach to corporate accountability.” Despite the overtly critical tone of Albin-Lackey’s article, it is remarkable that the writer acknowledges the contributions of the Guiding Principles in the following words:

“The principles mark a real step forward in some ways, not least because they have secured remarkably strong buy-in from companies that just a decade ago would have disputed the idea they even *have* human rights responsibilities. A potentially useful and practical guide to companies that want to behave responsibly, they bring us closer than we have ever been to a shared understanding of how businesses should think about at least *some* of their core human rights responsibilities. The principles also emphasize a crucial point that could prevent many real-world human rights problems if companies take it up effectively and in good faith...”

The author’s disappointment with the Guiding Principles was hinged on the failure to provide an accountability regime for corporations. The re-cycling of the failed voluntary regime comes with a huge price: obstruction of systematic change. In demonstration of this, Albin Lackey writes:

“The world’s dearth of binding human rights rules for companies has consequences. When companies stand in for absentee governments, in whatever role, things tend to end badly. Decades of failed development efforts led by oil companies in Nigeria’s oil-rich Niger Delta have proven that point with brutal eloquence, and it holds equally true in other contexts...”

The Guiding Principles and the challenge of corporate impunity in Nigeria

Nigeria is indeed a 'perfect' demonstration of the problem with the 'Protect, Respect and Remedy' Framework of the GP. As demonstrated in subsection 6.3 of this thesis there are underlining reasons why Nigeria and many other weak states have historically failed to discharge their duties in this respect despite being well aware of these duties. First, is that the nature of TNCs that operate in Nigeria perpetuates unequal bargaining power, such that the role of law as a strict regulator is often de-emphasised in order to leverage the search for economic growth. Second is that the market fundamentalist constitution of Nigeria negates CSR, *ab initio*. Put differently, Nigeria is an acutely liberal state that is still experimenting with classical capitalism, the type with no human face. In Nigeria, unlike many Western States, there is no social system. In this setting, the Biblical quotation 'to your tents Oh Isreal' rings true. To be poor here is like a death sentence. True to its strong liberal leanings, the Nigeria constitution is structured as a chasm separating first and second generation of rights. The so-called third generation of rights (right to development) is too distant and not accounted for. The abysmal failure of governments at all levels in Nigeria to provide basic social amenities, like access to good roads, access to health, water and light could be 'infectious'. Big corporations, even the few good ones may be tempted to re-prioritise. They may reflect along this line: "If government of the people does not care for its own people, why should we?" The third structural challenge in Nigeria is the nature of the Nigeria State. It is a 'rentier' state with a 'rentier' mentality. Rents from oil encourage massive political corruption and allied organised crimes. The profit interests of the MNCs and the corrupt tendencies of many public officers tend to co-join. In a setting like Nigeria, it my considered view that the 'Protect, Respect and Remedy' framework cannot drive appreciable change.

6.7(d) Consequences

The above perspective does not however, detract from the fact that Prof. Ruggie has made an impressive impact with the scholarly and politically sensitive manner he executed his mandate. In the context of his mandate and his analytical framework, Prof Ruggie has achieved an encouraging feat. He made it abundantly clear that he was not following the legal accountability pathway, knowing full well that it would be deadlocked like the predecessor 'Norms'. He chose to follow the path of 'principled pragmatism'. As analysed above, a key

critique against pragmatism as revealed by postmodernist tradition in Britain, is the fact that pragmatism “usually fails to engage theoretically with profound moral issues about the nature of contemporary law” (Cotterrell 2003:253). Although it may be rationalised that the mandate constrained in-depth examination of long term questions around the systemic failures of mainstream international law, one may still argue that the quest for resolving the challenges posed by corporate human rights abuse must have to engage with these profound questions, no matter how long it may take. Quick fixes may provide palliatives without providing the needed cure.

It must be noted however, that Prof. Ruggie presented the Guiding Principles as the ‘end of the beginning’, advising that “more detailed work will be required...” (Ruggie 2013: 126). This is a mark of rare wisdom. Therefore, no matter how construed, Prof Ruggie has brought everyone back to the negotiation table. The Open-Ended Working Group on business and human rights is now in place to take matters forward. A Forum on Business and Human Rights, under the guidance of the Working Group is equally up and running. Faced with the options of dialogue or no dialogue, many people that desire change would most likely vote for dialogue depending on the cost-benefit analysis. On the question of cost, Bilchitz(2010) has also advised that human rights crusaders must maintain a red line. According to Bilchitz (2010: 217)

"Understood in the light of the desire to achieve consensus, Ruggie’s minimal proposal may be likely to garner more support than would recognition of binding and more expansive duties, such as were contained in the Norms, yet, the costs involve accepting a very serious reduction in what we can expect of corporations or hold them accountable for. And, indeed, in respect of a world suffering severe economic inequality and deprivation, this can impact negatively on the human rights and well-being of millions of individuals. This is a cost that human rights defenders should not assent to."

It is remarkable that despite the criticisms against the GP, the many positive elements of the framework seem to be driving the model forward. Accordingly, the Open Ended Working Group on Business Human Rights is currently working on the GP at the same time that the Open Ended Working Group on RTD is also busy with developing the RTD framework. Prof Ruggie advised that we “must activate and mobilize all the rationales and organizational means that can affect corporate conduct...” (Ruggie, 2013: xlii). To this end, it would be

interesting to see more synergy among UN Working Groups on related subjects, like Business, Human Rights and RTD. It is my considered view that the Guiding Principles be developed in such a way that they could create some level of legal accountability regime for corporate entities that would ultimately be incorporated in the RTD framework. In the DRTD, 'states' were mentioned more than 13 times in the 10 article declaration on RTD. There were no mentions of 'corporations' at all with respect to RTD duties. The opportunity for multi-level, multi-sector interactions on these issues should be utilised to drive lasting change not just in business, human rights and development, but in international law and global governance generally. In the next sub-section, I sum up analyses on the trap of corporate voluntarism, the central subject of this chapter.

6.8. Conclusion

The gaps in the RTD duty framework cannot be closed by the mere adoption of voluntary mechanisms which encourage TNCs to adopt ethical codes of conduct. At the international realm, voluntary norms, such as the 'Global Compact' and 'Guiding Principles' can only be useful if seen as means to an end. At the national (Nigerian) level there is urgency for confronting first and foremost the systemic challenges that stand in the way of regulation. Rent accumulation has created three levels of power blocks: the state, MNC and the people. In developing countries, the close ties running across the interests of the elites and MNCs have tended to limit the viability of law as a tool for regulating CSR. Confronting this power imbalance at the national level would require an enlightened populace committed to expanding the democratic space. In such a setting, the populace would need to connect to a global civil society movement and also draw inspiration from global regulations, all of which would enable 'the third force' (Florini, 2000) to enhance its skills in contesting issues, seeking accountability and influencing the state. To this effect, the chapter argues for the utilisation of an RTD framework, a synthesis of socio-political, economic and cultural rights, still in the making, as an exceptional mechanism and an opportunity for translating voluntary codes of conduct into a concrete, independently verifiable and accountable mechanism which can create a win-win position for transnational entities, host states and poor communities. This perspective is supported by recent scholarship on the subject. For instance, contrary to the widely held views that corporations may lose out under legally enforceable CSR duties, the International Council on Human Rights Policy (2002) offers an influential analysis which reveals the many advantages that could accrue to companies under the legally enforceable CSR duty model.

In the final analysis, it needs to be reiterated that human rights lose their appeal, if they are only constructed from the perspective of the rich and powerful, as the voluntary codes of conduct for TNCs had tended to do. The ongoing violent resistance against Shell and the Nigerian government by the Movement of the Emancipation of the Niger Delta⁴¹ derives inspiration from the perception that the human rights of the local community have been overlooked by the government and oil companies. Baxi (1999:101) was right to reason that:

“... the real birthplaces of human rights are far removed from the ornate rooms of diplomatic conferences and are found rather in the actual sites (acts and feats) of resistance.”

The essence of human rights, worth pursuing according to Baxi (2002), is “to give voice to human suffering, to make it visible and ameliorate it.” The publicised failure of local and international laws to provide a dependable mechanism to hold TNCs responsible for human rights is at the heart of the development crises in many countries of Africa. In the light of the analysis in this chapter, there is a case to be further explored, as to whether this anomaly could be corrected by adopting a treaty on RTD.

Paradoxically, one of the motivating factors for the 1970 clamour for a New International Economic Order (NIEO) was the issue of how to curtail the excesses of TNCs. We are back to where we started off because, in the words of Edmund Burke, as quoted in Dalrymple (2006:486), “those who fail to learn from history are always destined to repeat it.”

⁴¹ Nigeria’s 50th anniversary of her independence from Britain, held on October 1, 2010, was marred by a fatal bomb attack in the capital city Abuja. MEND claimed responsibility for the attack. A spokesperson for the group argued that the attack was meant to call attention to the plight of the Niger Delta people, who, despite the fact that their lands produce over 80% of Nigeria’s wealth, still struggle to meet basic existential needs. Although there seems to be a political element to this action, the reoccurring issues of discontent in the Niger Delta, as a result of the injustice of oil exploration, seem to be the greatest impediment to Nigeria’s survival as one nation.

Chapter 7

Conclusions and Consequences

Right to development as a normative framework has ‘only paradoxes to offer’⁴². I have argued that to deepen comprehension of the irony that RTD tends to represent in both national and international law, we have to closely interrogate the interrelationship between law and economy in our today’s ‘liquid modernity’ (Bauman 2000). Two levels of conclusion flow from the preceding analyses: law, constitutional law, the normative purveyor of RTD, is both a trap/inhibitor and a tool/accelerator of development, and a synthesis of both perspectives will be crucial in constructing or reconstructing a new socio-legal and economic order. This thesis contributes to knowledge at two levels: Nigeria and globally. Four thematic areas of impact are theory, method, pedagogy and substance of constitutional law.

In this concluding section, analyses are structured as follows: first, a tripartite thematic model is employed in interpreting law’s compromised status in a capitalist setting as laid out in this thesis. Following this, the alternative perspective of law as a tool for contesting priorities within the economic, social and legal orders is equally distilled. The final part of this chapter is targeted at a post-critique articulation of the significance of this research and a projection on further areas of research on RTD.

7.1 Thesis 1: Law is a Trap

Constitutional Law – the hierarchically superior norm that provides a measure for validating every other law – has been exposed as a subservient paradigm, cowering under the shadow of imperial economic order. The notion of a politically neutral state, which liberal tradition celebrates, is contradicted by the alignment of statist interests with those of the powerful, property-owning minority. Illustratively, this thesis has demonstrated that the concepts of ‘right’ and ‘development’ that seemed to underlie the liberal notion of liberty and equality

⁴² Douzinas (2000: 21) employs the phrase ‘only paradoxes to offer’ to argue that “the whole field of human rights is characterized by paradoxes and aporias.” At Note 40 of Douzinas (2000), the author traces the history of the usage of this phrase. According to him “the phrase comes from a letter of Olympe de Gouges, the author of the 1791 Declaration of Rights of Woman and Citizen. Joanne Scott in *Only Paradoxes to Offer: French Feminists and Rights of Man* (Cambridge, Mass., Harvard University Press, 1996) at 4 uses the expression to describe the position of women in revolutionary France.” In this conclusion, I use the phrase in the Douzinian sense, but with a particular focus on RTD.

before the law was out of sync with the priorities of the reigning economic order and the statist interpretation of liberty and equality. This interpretation of law as a trap was pursued under the three related themes of inadequacy, violence and force. The theory of ‘preponderant forces’ (Achara 2005:407) was specifically employed, in the case of Nigeria, as a device for interpreting ‘law’ meta-textually, that is locating ‘law’ in the context of power and influence. By employing this tool, we are able to reveal the fluid nature of the often overrated text of the constitution by accounting for the meta-texts; the overwhelming influence of power blocks that more often than not are able to re-work the literal constitution by stealth. Sub-sections 7(a) to (c), that follow are therefore, targeted at the interpretation of this research using the analytical tools of inadequacy, violence and force.

7.1 (a) The Inadequacy of Constitutional Norms

In Chapter 1 of this research, I analysed the challenges of employing law as a means of construing the social dilemmas that poverty and wealth represent. The key lesson from this chapter is that RTD as a normative framework may be more important for what it masks than for what it reveals. What is masked is the determining role of the economy in the fulfilment of right and development ideals. As such, the orthodox method of studying the relevance of law via analyses of legal provisions and precedents may tend to imbue laws with transcendental qualities, which in reality they may not possess. On the relevance of what is masked in the notion of the right to development, Chapter 1 analysed the conceptual challenges and controversies of ‘rights’ and ‘development’. The notions of rights and development are prone to multiple meanings. Hence, ‘development’, which ordinarily may be conceived as ‘progress’ or ‘good change’, has been derided by post-development scholars as a fraud, a mechanism for exercising dominance over the poor and powerless by keeping them perpetually restive as they continue to hope for better days ahead. Similar controversies bedevil the notion of human rights, so the chapter analysed the distinction being drawn between imperial rights and poor rights. Theoretical debates around RTD, as exemplified in the Alston versus Donnelly debate, equally revolved around the divide between imperial rights and poor rights. The implication of this for RTD as a legal norm is that the central notions of ‘right’ and ‘development’ will remain deeply contested, especially in a polarised setting where consensus is based on the consent of states, a key driver of neoliberalism: “inanimate entities that neither bleed nor starve nor are forced to flee for their lives” (Scobbie 2010:85).

Building on the above perspectives, this thesis also sought a theoretical map that would guide its analysis in such deeply contested subject areas. We were confronted yet again with the struggle between human rights as a public right that empowers all and an economic order structured on private, selfish interests (the empowerment of a few). Theoretical framework options in property and poverty law were critically explored using de Soto (2000) and Williams (2006) as theoretical markers. De Soto's property law model was contrasted with Williams' (2006) poverty law paradigm. The adoption of the latter was justified in the light of the research priority of resolving the role of power and dominance in perpetuating poverty. The poverty law theoretical and methodological⁴³ frameworks were preferred for their capacity to explode the myth of law's neutrality in the perennial struggle between power and powerlessness.

This preference yielded results as law's bias and consequent inadequacy were revealed across the entire thesis. As an illustration, in analysing chronic corruption and how it has impacted on development in Nigeria, (Chapter 3 of thesis), we have seen that although the evil of chronic corruption is at the heart of violence in Nigeria, the capacity of the Nigerian criminal justice system to tackle it effectively was becoming increasingly doubtful. The failure of the criminal justice system, to grapple with a crime as serious as chronic corruption, has been cited as one of the major causes of development conflicts in the country. In the light of our analytical framework and data analysed in this thesis, the most plausible explanation for the failure of law to deal effectively with chronic corruption must be located in the perennial struggle between power and powerlessness. Since chronic corruption in Nigeria is a crime of the powerful, any valid legal response to corruption must distance itself from the negative influence of power. In Nigeria and other last frontiers of capitalist societies, laws generally favour the interest of the powerful; thus, creating a distance between law and power in order for law to deliver even-handed justice is often problematic, if not impossible. As a result, in Nigeria, where laws have stood up to power with regard to chronic corruption, it has always been a very difficult and laborious process to maintain watertight accountability standards throughout the long process involved in the criminal justice delivery system. A few instances

⁴³ The methodological model employed was informed by the need to decolonise methods, encourage originality and constructively study law, not just as law but as a resource for societies. The prospect of law as a tool would be dependent on how far this device could go in overtaking the established orthodoxy that privileges property over people – having over being

of success may end up being flashes in the pan. In Nigeria's modern law system, immunity clauses are used to shield people in positions of power from being held accountable for the sacrilege of chronic corruption. At the official end of their immunity, these powerful people employ their influence to frustrate the criminal justice system. Put differently, with regard to chronic corruption in Nigeria, the criminal justice system must grapple with dual dimensions of immunity clauses in order to be effective: *de jure* and *de facto*. The *de jure* immunity clause in the constitution is tied to the tenure of the public servant and could be resolved via constitutional reform or a resort to mere delay in initiating prosecution. It is however, at the *de facto*, structural level, that the criminal justice system confronts a more troubling, in fact, unravelling challenge. The *de facto* immunity thrives in the persistence of inequality wherein to be rich and powerful, in a weak state, offers a seemingly impenetrable barrier to accountability for chronic corruption. In the next section, I employ the related theme of violence to further interpret this research.

7.1 (b) The Violence of Constitutional Norms

Constitutional norms are not only inadequate but tend to become violent as well. This is because of the confluence of interests that determines law's priorities: states, powerful people and corporations (Chapters 2, 3 and 4). Taken together, a key lesson that filters through from our analyses in Chapters 2 to 6, in relation to the violence theme is that law, both at the national and international realms is often employed by people and nations in power as an instrument for maintaining their hold on power. At the national as well as international levels, our analysis showed that constitutional law, despite its wide claim to represent the people, was usually constructed by a few privileged people to give legal stamp to their own preferences. In the Constitution of Nigeria (1999), the device of the justiciability and non-justiciability of rights is used as a tool for excluding the poor. In international law, the device of 'soft and hard' laws is employed to draw a radical distinction between laws that matter to the 'international community' and laws that do not really matter. The criteria for defining and determining an international or civilised community and what matters and what does not matter to these communities are not dependent on what the common people think or prefer rather it is based on the balance of power. The basis of relationships in international law exists via states whose priorities and those of their common citizens may stand in stark opposition. The implication is that when we are presented with a declaration like 'right to development', the true meaning of the declaration cannot be unravelled by analysing its contents. The provisions of the declaration may contain monumental provisions, such as the

UN Declaration on the Right to Development (1986), which cleverly constructed an important bridge between individual rights and collective rights (Article 1) and prioritised human beings over material things (Article 2). These provisions, however, translate into nothing concrete because they are not supported by a few powerful countries/entities or by the economic order that privileges their interests. These perspectives of law are significant from another related angle, namely the meaning of democracy. The trite notion of democracy as a representative government is questionable as a result of unequal playing field imposed by the determining economic base. At a time when democracy is being advocated as the best form of government, within a liberal constitutional framework, it is quite absurd that laws, at all levels, continue to remain tools in the hands of a very few people, nations and corporations with access to large properties. Law, contrary to what many may believe, does not set the agenda, and the 'Rule of Law' may have been superseded by the Meta 'Rules of the Market' in our late, 'liquid' modernity. The subversion of rules of law (regulation) by market forces (deregulation) could be quite telling as the egalitarianism presumed in the former is negated by inequality that underpins the latter. Pashukani's 'commodity-form' theory as analysed earlier is a classic demonstration of how the market empowers a few and alienates those who may have little or no commodity to exchange. In a setting where there are pronounced gaps in the rule of law, these gaps tend to combine with the greed of a few leading, ultimately to structural violence: "avoidable impairment of the fundamental needs..."(Galtung, 1969:169). Nigeria is chosen as a case study because; in this setting we see the brutal reality of how inadequate and violent constitutional law constrain human flourishing. In the next section, therefore, I employ the theory of 'preponderant forces' as the third and final tool for interpreting the paradox of wealth and chronic poverty in Nigeria as laid out in this thesis. Overlaps are bound to occur but what is special about this interpretive tool is its unique capacity to lift the veil and account for 'unseen' barriers that may masquerade as flawless agents of change.

7.1(c) 'Preponderant Forces' in Nigeria are change barriers

The theory of "Preponderant Forces" (Achara 2005:407) as employed in Chapter 2 of this thesis offers another critical tool for interpreting the meta traps that hinder development in Nigeria. This theory is very relevant as it aids deeper understanding of Nigeria's political economy and how it constrains development. It helps us to unravel the underlining nature of the challenges in Nigeria and opens up, specifically, the multiple implications of our analyses

in Chapters 2 and 3 of thesis and how these analyses are interlinked with other chapters. In chapters 2, 3 and 5, I have critiqued the foundational elements that constitute these ‘preponderant forces’. At this point, however, it is crucial to check that we have clearly identified who or what these “Preponderant Forces ‘are and the nature of their impact: foundational or supportive. From the analyses in Chapters 2, the main ‘preponderant force’ is the Nigerian state, the “primary duty bearer of RTD’ in the light of Article 1 of DRTD. The ‘rigged’ texts of the Constitution, which the state employs to perpetuate its predominance also fall within the category. From Chapter 3, we can identify Nigeria’s second colonialists (some political office holders and their collaborators). In Chapter 4 we confronted the ‘preponderant force’ of hegemonic international law. Finally, from our analyses in Chapters 5 and 6, we can conclude that, neoliberal capitalism, of the classical variant, TNCs and other drivers of neo-colonialism are also all within the ‘preponderant forces’ category. Although the forces identified from Chapter 4 and 6, play supportive roles, it is important not to lose sight of the symbiotic relationships that these ‘preponderant forces’ enjoy and the accentuation of their impacts by what Falk (1999) called ‘predatory globalisation’. In reality, therefore, the line between foundational and supportive ‘preponderant forces’ may be blurred. The next section is aimed at drawing some interpretative conclusions with regard to some foundational forces already identified.

Nigeria: a ‘Failed’⁴⁴ or Irresponsible State?

The picture of state that is emerging from our analyses of traps is that of an irresponsible state in alliance with other forces of varying degrees of irresponsibility. Although, it is tempting to employ the popular terminology of ‘failed state’⁴⁵ despite the critiques of scholars and

⁴⁴ The ‘Failed State Index’ (FSI) is produced annually since 2005 by the Fund for Peace. Twelve indicators, like ‘mounting demographic pressure’, ‘vengeance seeking Group Grievance’, ‘Violation of Human Rights and Rule of Law’, ‘Legitimacy of State’, ‘Poverty, Sharp or Severe Economic Decline’ are used to aggregate scores. On methodology, the organisation’s website, <http://ffp.statesindex.org/methodology> states: “The Failed States Index (FSI), produced by The Fund for Peace, is a critical tool in highlighting not only the normal pressures that all states experience, but also in identifying when those pressures are pushing a state towards the brink of failure. By highlighting pertinent issues in weak and failing states, the FSI — and the social science framework and software application upon which it is built — makes political risk assessment and early warning of conflict accessible to policy-makers and the public at large... The FSI is based on The Fund for Peace’s proprietary Conflict Assessment Software Tool (CAST) analytical platform. Based on comprehensive social science methodology, data from three primary sources is triangulated and subjected to critical review to obtain final scores for the FSI...”

⁴⁵ In 2013 FSI, Nigeria is ranked 16 out of 178 countries. Pressure assessment is ‘High Alert’. In all the 12 indicators that the FSI uses, Nigeria’s scores alternated between ‘poor’ and ‘weak’ According

commentators like Ross (2013) and Ezrow (2013) that the notion of ‘failed’ state as a ‘failed concept’, the term that I find more useful, in interpreting this emerging scenario in Nigeria is the notion of ‘irresponsibility’. The Nigeria state has abandoned, to a large extent, its primary responsibility for its main constituents. As demonstrated in this thesis, with regards to poor rights, the Nigerian state, having ran roughshod the ‘social contract’ with the Nigerian people is clearly not a covenant-keeping state (See particularly Chapter 2 of thesis as illustrated by re-reading sections 13 to 24 of the Constitution of Nigeria, 1999 in the light of the social dilemmas of chronic poverty, zero safety nets and massive political corruption). The ‘rentier’ mentality of the Nigeria State has undoubtedly led to the leveraging of the ‘things’ paradigm over the ‘people paradigm’ (Chambers, 2010:3). As summed up by Katsouris and Sayne (2013: viii) in a recent Chatham House publication: In Nigeria’s case study, “a dynamic, overcrowded political economy drives competition for looted resources. Poor governance has encouraged violent opportunism around oil and opened doors for organised crimes.” The consequence of Nigeria state’s irresponsibility is evident in the country’s woeful development records. Chambers, (2010: 13) is unequivocal that “many of the errors and failures of development policy and practice have stemmed from the dominance of the things paradigm.” In Nigeria, the abysmal results have been shown in the constitutionalisation of poverty and the massive production and reproduction of ‘surplus humanity’. Hayden’s (2009) ‘political evil’ thesis and Galtung’s (1969) ‘structural violence’ category cannot be more apt. The immediate implication, in the light of this research, is the weakening of the central plank for the success of RTD, that is, the state as the primary duty bearer of RTD⁴⁶

Left at this level of interpretation, state, being an inanimate entity that cannot breathe nor bleed becomes too distant with the risk of shielding the forces in alliance; the forces that determine the nature of state we critique. In the case of Nigeria, thesis has identified two levels of these not- too- distant- forces as Nigerian elites, the second colonialists (Chapter 3)

to Fund for Peace: “Over a five-year period, Nigeria has on-the-whole worsened. Nine of the twelve indicators have worsened since 2008, with Human Flight the only indicator score to improve. The most significant worsening has been experienced in Refugees/IDPs, Economic Decline, and Human Rights.” See: <http://ffp.statesindex.org/nigeria>

⁴⁶ Note that in the 10 articles of the DRTD ‘State’ was mentioned more than 13 times in course of attributing duties/responsibilities. For illustration, see the Preamble to DRTD, Articles, 2(3), 3(1) and (2); 4; 5; 6(1) and (3); 7; 8 (1) and (2).

and their colluding multi-national entities (Chapter 6). ‘Rents and profits are what unite them.’ Neoliberal capitalism of the classical variant is their operational architecture (Chapter 5). The Nigerian second colonialists are powerful individuals; some are occupying sensitive political positions whilst others are ‘entrepreneurs’ generating ‘*Profits of Doom*’ (Loewenstein, 2013) or ‘vulture capitalists’ in the Luxian sense (Lux, 2010). The multi-national entities, as analysed in Chapter 4 and 6, are mainly in the extractive sectors of Nigeria’s mono commodity economy. These entities have taken advantage of the weakened or absent regulatory systems, both in national and international law, to pursue profit with little or no consideration of the Nigerian people; the surplus 100 million plus Nigerians who are entrapped in the revolving door of chronic poverty.

Therefore, in the light of the data analysed in this thesis, it can be deduced that the economic base that holds law at all levels is primarily structured to perpetuate power asymmetries in order to continuously produce surplus humanity, whose poverty and exclusion fall outside the major concerns of law. The coexistence of poverty and wealth is not paradoxical but contradictory – poverty and inequality are logical consequences of the proper functioning of market fundamentalism (Wachtel 1972:194). Law, especially constitutional human rights law, and in this respect RTD, purports to be a tool for promoting equality and enhancing human wellbeing. This purported objective of law is antithetical to the overriding objective of constitutional neoliberalism: a higher order norm. This is the key for construing the significance of the traps, the paradoxes that inspired this thesis. Each and every trap that militates against the realisation of RTD as analysed in this thesis and distilled in this conclusion, is an illustration of constitutional law’s struggle for relevance under the shadow of an economic order that imposes itself as a supra order. ‘Right to development’, seen from this angle, is therefore a ‘misnomer’. Consequently, Donnelly’s (1985) categorisation of RTD as a dangerous delusion may not after all be diametrically off the mark. Similarly, the denunciation of ‘development’ and ‘right’ by post-development and critical legal scholars seems quite logical and corroborative of Marxist impressions that revolutions are not made by law. Nevertheless, the questions that were not fully explored by these critical viewpoints are the questions of time, space and the possibilities of social change. The ‘tool’ dimension of law embedded in the variables inspires another layer of the thesis.

However, on the basis of this first-level reflection, this thesis has demonstrated that with particular reference to Nigeria the interaction between law and the economic order appears starker. As one of the last frontiers of capitalism, Nigeria's capitalist development has been shown as retarded. The social revolution that led to the institutionalisation of the social welfare state in Europe lacked any parallel in Nigeria, and such revolutions may now never occur because of the new wave of economic globalisation. The continuing implication is that Nigeria's oil wealth continues to fuel chronic corruption whilst the majority of Nigerians wallow in destitution. The Constitution of Nigeria (1999), which ought to lead the way in the 'catch-up' social revolution, was shown to be a trap to development because it is so far away from the people; it seems to lack the revolutionary element that could galvanise the people to positive action, i.e. empowering the people to give meaning to the foundational notion of 'we the people', which ought to imply that 'power belongs to the people'. The constitution, in tracing its origin from dictatorship and a strong overdose of liberal philosophy, has failed to communicate to the generality of the Nigerian people, hence the suggestion for the abrogation of this constitution in Ogewewo (2000) referred to earlier. The abrogation I envision in this thesis is, however, at the structural level. Constitutions may be written and revised several times, yet they may be unable to confront the 'noble lies' embedded in the structure of the constitution. On the basis of the above reflection, law, human rights and RTD are like traps, incapable of inspiring the populace to stand up against the dictatorship of a few statist and non-statist powerbrokers.

7.2 Thesis 2: Law is a Tool...

Inspired by the 'tool' paradigm of law, as embedded in legal interpretation/ascertainment and legal provisions relating to freedom of speech, freedom of assembly, freedom of information and other counter-hegemonic elements in law, this thesis is of the view that reforms of both the literal and meta constitutional laws are possible. The main target of reform is at the institutional level that is, "changing the rules and relationships that underpin power, resource allocations, conflicts and social and economic processes in Nigerian society". (Heymans and Pycroft, 2003:36).

The starting point for reform is to understand that law (constitutional, meta-constitutional or economic) is only an instrument to aid human beings to realise their potentials; law is not the destination but it can offer a pathway to the end point. Its main rationale is not etched in its

present but in its future. Therefore, law – at all levels – is a space of contestation. This is where I differ from the literal interpretation of Marxism, which seems to present law as a mere tool in the hands of a repressive ruling class. Law, in my view, is also a tool in the hands of the oppressed majority, only equity does not aid the indolent. As aptly captured by Pathak (1994: 3138), “in social processes, no institution is autonomous. Being organic to the society it is always constrained and conditioned by social forces. Thus social forces impinge on the state and the state articulates social interests through the institutions of the state in the language of law. Law, once made informs the very social dynamics which made it... Law is a trajectory shaped by social relations...”

The property law model that is currently privileged in law is a selective framework that negates the totality of the human person and the dynamic unity between the ‘having’ and ‘being’ modes of existence. The social processes that impinge on law have the capacity for contesting the privileging of property over and above people. On that basis, law is a tool.

The traps analysed in this thesis were occasioned by the failure of the prevailing economic order to reflect the core dynamic interrelationships between ‘having’ and ‘being’. In the current order, law’s role appears to have been clouded by private and selective interests. Reform is, however, possible because the economic base that currently subjugates law and delimits its potential is not the end of history. The law of the people, when properly located, has within its arsenal illimitable tools for aligning forces with other human institutions in order to escape the prevailing imperial hold of neoliberal capitalism and by so doing transform itself into a tool for human development. The plausibility of legal reform challenges the notion of the dependency of laws as analysed earlier.

A key legal reform issue, as earlier analysed is the problem of hierarchy in the national and international order. The hierarchical structure of national and international norms tends to lose sight of people in society. For law to play a role in human development there is an urgency to address this hierarchical structure and mainstream equality, transparency and participation.

At the international level, the international law of post-World War II was built on two parallels: universalism was employed on the political side of the construct whereas radical inequality illuminated the economic aspect. With the rapid collapse of this false parallel, the

successes recorded in the political realm have been tainted by failures in the economic/financial realms. It has therefore become an urgent requirement to fashion a new transnational constitutional order that will not discriminate between the political, the economic or the social. The right to development will become practically meaningful when the new constitutional orders, both at the local (Nigeria) and international levels, become realities. The trap of capital could be remedied by mainstreaming openness, participation and accountability into the operation of neoliberal capitalism and by so doing ‘giving capitalism a human face’. As recommended, in Chapter 5, the rediscovery of the Keynesian variant of capitalism, the institutionalisation of what Dunning (2003) calls “responsible global capitalism” (RGC), and the emerging theory of ‘Africapitalism’ share the need for giving a human face to capitalism, that is emphasizing transparency, participation and accountability. The prospects of reforming meta-constitutional forces are closely related to their chameleonic nature as distilled below.

“Preponderant Forces” as Change Drivers

The concept of ‘irresponsibility’ ‘violence’ or ‘evil’ should not cloud the dialectical relationship between ‘evil’ and ‘good’ as illustrated in the anonymous quote⁴⁷: ‘there is so much good in the worst of us and so much bad in best of us...’(Knowles 2004:19). The paradox that sustains the logic of change is that these same forces that we critique as ‘preponderant forces’ are chameleonic in nature. They also have the potentials to become ‘drivers of change’ (Heymans and Pycroft, 2003). The Nigerian state, despite all its negative attributes does not show any sign of disappearing. The Nigerian state has not failed, in fact; on the contrary, the Nigerian state has shown astonishing attributes of resilience despite the realities of unravelling irresponsibility, fragilities and violence. Heymans and Pycroft (2003:36) make a compelling case on the continued relevance of the Nigerian state as follows:

“First, while dysfunctional, the state has direct control over most oil revenues, and the concentration of national wealth within the state is the principle cause of poverty in Nigeria. Achieving pro-poor changes in the behaviour of the state is likely therefore to have impact on poverty reduction as a result of the size and scale of resources

⁴⁷ According to Oxford Dictionary of Quotation edited by Knowles (2004): “this quote is attributed among others, to Edward Wallis Hoch (1849-1945) on the grounds of it having appeared in his Kansas publication, the Marion Record, though in fact disclaimed by him” (Knowles 2004:19).

controlled by the state. Therefore, the state cannot be ignored and change strategies need to engage state agencies, work through points of entry, and explore and enhance beacons of hope within these agencies. Second, pro-poor change requires institutional reform— changing the rules and relationships that underpin power, resource allocations, conflicts and social and economic processes in Nigerian society. As much as state-driven pro-poor policy would fail due to fundamental weakness of the institutions of government, any other agent-focused strategies will achieve only superficial and short-term impact if they do not deal these underlying relationships”.

Similarly, the Nigerian second colonialists’ class is populated by elites that have amassed knowledge, experience and wealth, though, in many cases, questionable wealth. Also, the role of MNCs in adding value to Nigeria’s crude resources cannot be doubted. The expertise and technology they bring along are critical to Nigeria’s growth.

For the meta-constitutional traps, engineered by the preponderant forces in Nigeria, the key reform challenge is at the ‘level of engagement’ aimed at taming these forces. Re-asserting the power of the multitude and engaging multiple actors, to drill in nuances to the binary of things and people in such a way that the human person becomes the subject, the *raison d’être* for development may be the most viable way forward. Building on that perspective, it is the considered view of this thesis that the envisioned new national and transnational order could only be realised, not by a stand-alone lofty normative ideals but by a vigilant populace that is disposed to realise the future of human rights, that is, in the words of Banakar (2013:24), “putting ethical conflicts inherent in the global market economy under the spotlight and demanding solutions.” To achieve these solutions, the vigilant populace must engage with the ‘preponderant forces’ with a view to harnessing their latent potentials for change and diminishing their patent capacity for ‘evil’.

On the scheduling of action, it is my considered view that the new national order must be, first and foremost, activated to prepare the ground for the triumph of the emerging transnational order. The usual method of overlooking the challenges at the national level and focusing on the international legal order is like putting the cart before the horse. This method risks playing into the hands of unaccountable local leaders, who could go on milking their countries dry while encouraging their citizens to wait and clamour for ‘manna’ from abroad. This device is also at odds with the emphasis of RTD on states as primary duty bearers.

In Nigeria, the first development lesson that must be taught from cradle to grave is that its development is primarily the responsibility of the state, her corporate entities and Nigerians themselves. Any state that deceives herself into thinking that development is a gift that is handed over from one country to another will find herself paying the very dear price of keeping her citizens perpetually enslaved. Should the Nigerian state neglect her duties to her citizens by frittering development resources through chronic corruption, it is the responsibility of the Nigerian people (the vigilant populace) to resist that choice by drawing from the tool element in people's law. The theory of resistance is embedded in national, regional and international law, and this theory needs to be activated by a vigilant populace. This perspective of states as primary duty bearers and the rights of the people to determine the course of development flow directly from the UN Declaration on RTD. This does not, however, neglect the convergence of the challenges at both the national and international levels, which may mean that success at the local level cannot be complete without removing structural challenges at the transnational level which may militate against complete success. The same argument of drawing from people's power to resist oppression is equally relevant at the international realm.

The ongoing trade-offs and negotiations at the transnational level through the vehicle of the Open-Ended Working Group on RTD would certainly help in creating a richer understanding of RTD and securing a greater level of purchase, even from countries that may seem to be in firm denial of RTD. For instance, despite the US's consistent opposition to RTD, it was able to erect a Millennium Challenge Account that shared a lot of similarities with the principles of RTD. It is paradoxical that whilst some states that claim to support RTD remain inactive in terms of taking practical steps to address the RTD of their own citizens, some countries, even when opposing RTD as a norm, have taken more practical steps, no matter how little, towards the actualisation of the RTD of non-citizens. This paradox of negation and acceptance offers an opportunity for a radical shift from the North-South divide tendency of the Cold War to creating consensus across the varying layers of power in a globalised world.

It is urged that the strategy of enhancing dialogue and consensus be targeted at the eventual development of an RTD treaty. Although the treaty option would not necessarily resolve all the structural challenges of RTD, it would help to vent the dual perspectives of law creation and law ascertainment and limit the polycentric obstacles that often block people's

engagement with RTD. In international law, a treaty, unlike a declaration, tells two stories concerning ‘law’s creation and law’s ascertainment’. As laid out by Koskenniemi (1991:4):

“International lawyers tell two stories about international law – a subjective story about its origin in State as the representative of the self-determining nation’s will and interest and the objective one about its present existence in a number of fixed, empirically verifiable places... The former explains that the rights and duties of States are artefacts, reflections of inter-State bargaining and not something imposed on States from divine or natural order... Such a subjective perspective of law-creation cannot exhaust the meaning of international law. International law is not only a psychological study into what States think and believe law should be, or an economic analysis of what might lie in their interest (however much different legal theories may have stressed the importance of such pursuits). In addition to the story of international law’s ‘political foundations’, there is also the narrative which fixes the rights and duties of States in places where they can be verified regardless of anyone’s political views. This is the story of the judicial function or more generally of the law-applier. It speaks about treaties, custom and general principles... The two stories add up to a social conception of international law.”

In the next section, I reflect on the contributions of this research to knowledge, within and beyond its locale.

7.3 Contribution of Research to Knowledge

Although Leedy and Ormand (2010:7) argued that research is rarely conclusive, because “in exploring an area, one comes across additional problems that need resolving, and so the process must begin anew,” I will first of all attempt to conclude this research by reflecting on its contributions to knowledge. Following this, I will call attention to further areas of research that may shed more light on the notion of RTD in international law.

Philips and Pugh (2005:35) offer engaging insights into what is meant by ‘an original contribution to scholarship’ in the context of the requirements for the award of the degree of Doctor of Philosophy (PhD). Two levels of contributions could be distilled from their analyses. First level relates to works that offer a ‘paradigm shift’ in any discipline. According

to the authors, works like that of Einstein's Theory of Relativity and Karl Marx's *Das Kapital*, belong to this level. However, the authors noted: "the theory of relativity (a classic example of a paradigm shift in relation to post-Newtonian physics) was not Einstein's PhD thesis (that was a sensible contribution to Brownian motion theory). *Das Kapital* was not Marx's PhD (that was on the theories of two little-known Greek philosophers" (Phillips and Pugh 2005:36). The second levels of contributions I distil from their analyses are as follows: applying a theory in a different setting and giving voice to something that is de-emphasised.

Leshem and Trafford (2007), also offer interesting insights on the question of 'contribution to knowledge' in the context of PhD. The authors, in their illuminating analyses argue that "engaging with conceptual frameworks is an essential pre-requisite for candidates in order to achieve doctorateness in their thesis." Continuing, they affirmed that conceptual frameworks are the pathways through which doctoral candidates provide their examiners with the answer to such question as "why does the thesis make a contribution to knowledge?" (Leshem and Trafford 2007: 103).

In the light of the above insights from Phillips and Pugh (2005) as well as Leshem and Trafford (2007) I do not intend to claim that this thesis has offered a 'paradigm shift' like Einstein's theory of relativity that changed the course of scientific inquiry. I argue however, that this research has contributed to knowledge along the second levels analysed in Phillips and Pugh (2005). Thesis' contributions emerge from its conceptual framework that is the paradigms of property law and poverty law. My contributions to scholarship are at two levels: national (Nigeria) and global although some contributions cut across the two.

Level 1: Contribution to Knowledge in Nigeria:

Theoretically, the link between law and poverty in Nigeria has never been well assessed, if at all. This gap in knowledge has so much to do with way law is conceptualised and taught in Nigeria, that is, from a purely positivist perspective. With regard, to Nigeria, therefore, this research is novel and offers a critical tool for construing the role of law in a situation in which chronic poverty co-exists with opulence and corruption. Theoretically, RTD as analysed in this thesis offers a framework for a more rounded appreciation of human rights, development and the role of the state. In so doing, it provides analytical tools for challenging the narrow but popular econometric view of human rights and development, especially in the light of the

presentation of economics as an imperial science that pre-determines the role of law in a classical capitalist setting, like Nigeria. As argued in the theoretical framework of this thesis, the predominant view of human rights as represented by De Soto, Hayek, Mises, Friedman and colleagues is that human rights consist in primarily protecting individual freedom against potential hostile states. In the Hayekian view, “liberty is the state in which a man is not subject to coercion by the arbitrary will of another or others... Liberty describes the absence of particular obstacles-coercion by other men... It does not assure us of any particular opportunities, but leaves it to us to decide what use we shall make of the circumstances in which we find ourselves” (Hayek, 1960: 11, 19). Consequently, Hayek interpreted the very concept of social justice as a threat to individual freedom. This perspective has been at the heart of the privileging of civil and political rights over economic, social, cultural and development rights. It was from this theory that Donnelly drew an insight that categorised RTD as an insidious threat. State duties with respect to human rights under this paradigm were to be limited to that of a night watchman. As ably captured by Fredman (2008:6), behind this view of human rights “is a set of particular values: a conception of freedom as absence of interference, a characterization of the State as separate from and opposed to the individual, and a principle of state neutrality as far as individual moral choices are concerned. Although there is a widespread acknowledgment that state can play a positive role in modern society, these values are not located in positive duties generated by human rights, but in political sphere, where contested distributive decisions can be decided through democratic process.” As analysed in this thesis, the Nigerian Constitution (1999) was founded on the above reasoning. It imbibed the whole theory of libertarianism unreflectively. Despite its wide claim to autochthony, the so called home-grown constitution failed to factor in the reality of greed, primitive accumulation, impunity and challenges in justice delivery system. As equally revealed, despite the constant invocation of indivisible human rights in international law, rights relating to the development, economic, social and cultural spheres have been shown, especially in the Nigeria’s case study as the “Cinderella” of human rights (Fredman 2008: 2). It is significant that the thesis critiqued the dominant perspective of human rights in Nigeria and promoted another paradigm of human rights which has been shown to be very unpopular. The relevance of the contrast between the dominant and the emerging lies in the demonstration that the framework embedded in the notion of RTD contradicts positivistic, predominant values, as they produce too limited a view of human rights, equality, and participation. The thesis therefore contributes to an emerging thinking in human rights and provides a new tool for critiquing liberalism in law and economic order.

Pedagogy, that is, the method and practice of teaching, is another area of contribution. The thesis would impact on the method and practice of teaching constitutional law, especially human rights and international law in Nigeria. Poverty law as a module is nonexistent in Nigeria despite the country's chronic poverty level and high political corruption. As a result of this gap, libertarian theories set in Western countries, with mature democracies and more efficient legal systems, are imported hook, line and sinker into Nigeria with fatal results. As demonstrated in Chapter 2 and 3 of thesis, 'progressive realisation test' and resource argument do not apply to Nigeria because of the prevalence of corruption and the reality of impunity, waste and irresponsibility. As a result of poor funding, poor teaching environment and the consequent low morale these lacks engender, faculties of law tend to focus scarce resources on traditional subjects. Socio-legal courses are yet to capture adequate attention in the training of Nigerian lawyers in spite of the fact that in a setting, like Nigeria, law and lawyers need to connect with the agonies of poverty and economic injustice, if they are to remain relevant as forces of change and development. Furthermore, in the current practice of teaching international law in Nigeria, one observes that over emphases seem to be placed on the dominant theories of international law. As a result, alternative theories are often rendered redundant. The result is that the dissonance between the 'political' and 'economic' in international law making may lie unnoticed. If international law is to continue to remain relevant to the global commons, empowering them to stand up against injustice and contest priorities within the law, the dominant theories of international law must be placed side by side with the counter-theories of resistance. By juxtaposing the two paradigms of hegemony and resistance in international law, knowledge will be deepened and people's interaction with international law will be better enhanced. In the light of the above, I argue that the theoretical and methodological insights that thesis offer will, hopefully, inspire an alternative perspective in teaching human rights, constitutional and international law in Nigeria and possibly create a new class of leaders who would inspire a critical mass to legitimately challenge the disordered priorities of the Nigerian state and its political leaders.

Significantly also, this thesis is being presented at a time of disenchantment in Nigeria. From the north to the south and from the east to the west of the country, we observe a large group of alienated and surplus Nigerians. At the heart of their alienation lies the failure of governance at local, state and federal levels to address their basic existential needs despite the country's access to huge oil resources and FDI. For the teeming population of alienated

Nigerians who are incensed by the massive scale of political corruption and the consequent production of ill-being, there are dangerous tendencies competing for attention. As an illustration, terrorism as represented by the militant group which goes by the name ‘Boko Haram’ (Western education is sinful; not allowed) is becoming a recruitment resource for the disenfranchised. The Boko Haram Group’s professed aim, according to a recent report by the Human Rights Watch (2012), is to “rid the country of its corrupt and abusive government and institute what it describes as religious purity.” Consequently, the group has practically declared war on the Nigerian state, indiscriminately attacking all institutions of governance as well as committing heinous crimes of mass murder exemplified by the recent senseless massacre of school children and teachers in Yobe State (Uwaezuoke, 2013).

The second device in this ‘war’ is hostage taking, which is now becoming big ‘business’ as a result of the huge ransoms that the hostage takers usually receive. This thesis challenges these violent tendencies by offering an alternative, that is, a bloodless and legitimate revolution. I follow this path conscious of the unassailable fact already established in Arendt (1970: 44-46) that what never can grow out of violence is “power,” which she defined as the human ability not just to act but also to act in concert. As laid out in Arendt (1970: 53-54), “in a head-on clash between violence and power, the outcome is hardly in doubt,” – violence and terror will certainly fail.

One of the contributions of this research to Nigeria, therefore, is the proposal for legitimately harnessing the power of the multitude. The first step I follow is at the level of elucidation, namely opening up the depth and breadth of the challenge of chronic poverty amidst surplus wealth as well as identifying the sources of oppression: local, national and transnational. As argued in Chapters 2 and 4, law, constitutional law at all levels is included in these sources of oppression; however, law’s role is double-faced, being both an instrument of oppression and also of emancipation. Common people who are mere victims are not included in this thesis as sources of oppression. Terrorism and crimes cannot resolve the fundamental challenges posed and neither can they lead to a new order. Terrorism and crime target the vulnerable, who are mere victims in the complex power play that pauperises the majority of Nigerians. Those who bleed and die as a result of terrorism in Nigeria are usually the common people who are eking out a living in one of the most unequal countries in the world. The revolution I envision in this thesis is an intellectual one. It requires project management skills and the public enlightenment, organising, networking and galvanising of the people to reclaim power via

legitimate means. Law, paradoxically, offers a space for this course of action. Freedom of speech, communication and information are legitimate ingredients for building a coalition of excluded Nigerians who are committed to wresting power from the hands of a few and investing the same in the hands of the people. The huge gain of globalisation is that this coalition at the local, Nigerian level can easily connect with similar coalitions at the global level. Cross fertilisation of ideas and the sharing of skills will ensure success, not only at the local, Nigerian level but also at the global level, where similar struggles for rights and development are also raging. In the next section, I focus on the contributions of this research to knowledge globally. However, it should be noted that in some areas the divide between the local and global could be blurred, hence the compound term ‘glo-local’.

Level 2: Contribution to knowledge, globally...

Right to Development’ in international law is a law in the making. This thesis contributes to understanding the challenges that RTD must resolve to be effective. The impact of this thesis on this point would be better appreciated in the context of current discourse on RTD. What stands out from these ongoing debates is that unlike other established regimes of human rights, RTD is yet to generate adequate doctrinal tools. In fact, there are only 10 articles in the entire (1986) Declaration, thus giving little room for strictly textual, statutory interpretation. The Open Ended Working Group⁴⁸, assisted by the High level Panel on RTD⁴⁹ is currently adding flesh to the bare bones of the law. Ways of developing and implementing the RTD regime are currently being explored. From the Report of its fourteenth session held on 13-17 May 2013, the Working Group is currently revising and refining ‘RTD criteria and operational sub criteria’ as submitted to it by its High Level Panel (A/HRC/15/WG.2/TF/2/Add.2). Studying the Compilation of submissions received from Governments, group of governments and regional groups (A/HRC/WG.2/14/CRP.4), one

⁴⁸ The Open –ended Working Group was established by the Commission on Human Rights, in its resolution 1998/72, and by the Economic and Social Council, in its decision 1998/269. Visit: <http://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx> for resources and data on the Working Group.

⁴⁹ The high-level task force on the right to development was established by the Commission on Human Rights, in its resolution 2004/7, and the Economic and Social Council, by its decision 2004/249. The task force held its last session on 14-22 January 2010. See <http://www.ohchr.org/EN/Issues/Development/Pages/HLTFSession6th.aspx>

observes varying levels of understanding of the relevance and impact of RTD. In commemoration of the 25th anniversary of the United Nation's Declaration on RTD, the UN has announced that it has completed work on a landmark publication, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*. The book will be launched on 4 December 2013. According to the introductory, the book presents "for the first time a wide range of in-depth analytical studies by more than 30 international experts covering the context, meaning and application of this right and its potential to shape human rights and development policy and practice."⁵⁰ This thesis is therefore timely. Its analyses of the underlying challenges that RTD confronts would certainly contribute to the knowledge of this emerging framework of Right to Development in international law.

Furthermore, thesis contributes insights to the often problematic issue of how best to study local people, especially those that are sidelined. Drawing methodological insights from Sousa Santos' (2007) 'Epistemology of the South' and Smith's (1999) *Decolonizing Methodologies*, this research has presented RTD not only through analyses of known sources of positive law but also by delving into the unique context of the people that live in poverty. By following that route, the world view of indigenous people, as revealed in names, songs, idioms and culture, was analysed and interlinked with the creation of a just normative order.

Methodologically, therefore, thesis offers a tool for contextualising local knowledge and employing it as a mechanism for interpreting research from the "eyes of people being studied" (Bryman 2004: 279). Qualitative research method⁵¹ which I employed in this thesis is already an established method of investigation in social research. However, in Bryman's (2004: 279) analyses of the need and challenge of 'seeing through the eyes of the people being studied' in qualitative research, the author notes that "many qualitative researchers have suggested that a methodology is required for studying people that reflects these

⁵⁰ According to OHCHR website "The book contains some 500 pages and is available in English only. A short introduction presenting key components of the book is available in all six official UN languages.
See: <http://www.ohchr.org/EN/Issues/Development/Pages/RealizingaVisionforTransformativeDevelopment.aspx>

⁵¹ Bryman (2004: 266) describes it as "an inductive view of the relationship between theory and research, whereby the former is generated out of the latter; an epistemological position described as interpretivist...and on ontological position described as constructionist..."

differences between people and objects of the natural science.” The method of drawing meanings from local names, idioms and practice of worship, as used in this research, is not a popular method of researching law. Thesis has demonstrated how local Nigerian names could aid us in defining development and settling once and for all the tendency to over-emphasise the thing over the being. Thesis has also shown how the words used in African traditional religious worship could aid our understanding of Universal Declaration of Human Rights. In promoting methodological pluralism thesis has also demonstrated how to contextualise local knowledge so that it can co-exist with established methodology and produce a holistic knowledge.

Finally, this thesis and the process of writing it have changed my understanding of law in the context of a larger normative universe. As one who cut his teeth in law, at the positivist (Black and White) end, it was indeed a learning curve. This thesis would have benefitted more if I was first trained, as a sociologist or an anthropologist before learning law. In course of my doctoral research, I have endeavoured to turn my weakness in sociological theories into strength. At times, this process meant closing my statute books, case reports and legal viewpoints of most publicised jurists (my comfort zones) and searching for norms in the bosom of the social(my discomfort zones). The learning process continues beyond this research, especially as this journey has also taught me, that the term ‘learned’ may be a misnomer in a “runaway world” as Giddens(2002) described it. In such a world, learning, in the true sense of the word is never ending, ever continuing, involving multiple loops of re-learning and ‘net-learning’, so that dots of knowledge could connect and create change symmetry. It is my hope, therefore, that the strength of this work and follow-up actions would inspire others to join hands, hearts and heads and affect people’s lives positively. On this note, therefore, I rest my case: that constitutional law, at all levels, is both a trap and a tool. Hence, on the underlining question ‘what role can law play in resolving the paradox of chronic poverty amidst surplus wealth?’, my answer is that its only significant and consistent role in this regard borders on the space it offers for pulling people on the margins together, in order to push for their common agenda and interest. It is remarkable that although entrapped within an economic order that prioritises the interest of a few, constitutional law nevertheless offers a space for galvanising the multitude to challenge the absurd pecking order in law and the economy. The people, especially working as a coalition through social movements, will have a crucial role to play in the birth of a new order by calling attention to the absurdity of

the current order, resisting domination and insisting on the creation of a more representative order in which law, the economy and ethics interpenetrate and checkmate each other. The future of law and the fate of the majority that are now treated as surplus within the current dominant order will be dependent on the further development/activation/utilisation of this ‘tool’ element in law.

7.4. Further Research⁵²

Research is rarely fully conclusive. In exploring RTD in international law, I have been captivated by a multiplicity of research imaginations. For instance, I have reflected on the continued relevance of ‘sovereignty in international law’: is the notion of sovereignty a responsibility, an emerging or settled concept in international law? I have also been captivated by Zifcak’s (2010) analysis to the effect that “the Responsibility to Protect (R2P) has succeeded humanitarian intervention as the primary conceptual framework within which to consider international intervention to prevent commission of atrocities.”

According to this viewpoint, R2P shifts the emphasis from states to people; hence, sovereignty as a responsibility under R2P engages tripartite actions:

- a) Responsibility to prevent by leveraging human rights, international aid and development.
- b) Responsibility to react.
- c) Responsibility to rebuild.

Reflecting on the Responsibility to Protect, I have been ruminating on whether international law could develop a nexus between the controversial UN Declaration on the Right to Development (1986) and the seemingly more popular paradigm of R2P (2001).

Over and above all of these elements, I feel that the right to self-determination, referred to in Chapters 2 and 4 of this thesis, seems to be the missing link in this thesis. Although provided for in Article 1(2) of the Declaration on the Right to Development, there is no clear mechanism for deep engagement. The statist emphases of the declaration will need to draw strength from the non-statist underpinnings of the right to self-determination. Karen Knop’s

⁵² See Appendix 3 for an outline proposal.

(2002) illuminating study, *Diversity and Self-determination in International Law*, captures this advantage of the right to determination as follows:

“The problems faced by differences of culture and gender for the interpretations of international law are exceptionally acute for self-determination because its interpretation directly affects non-state groups as well as states. Moreover, the groups involved including the colonized, ethnic nations and indigenous peoples and women within these groups, tend to be marginalized both internationally and domestically.”

It is also instructive that whilst the Declaration of the Right to Development (1986) is considered as ‘de lege ferenda’ (law as it ought to be), the right to self-determination is considered as a peremptory norm (*jus cogens*) which imposes obligation *erga omnes*.

This realisation must have inspired Salomon (2008) to recommend a merger in the following words:

“... the right to political self-determination was the meta-right of the twentieth century... the right to ‘self-determined development’ is the meta-right of the twenty-first century... the right to development is defined by the prominent external dimension, with its legal parameters taking shape in the period of indefensible world poverty (2008: 25).”

The right to self-determination as a tool for realising the right to development will require a more focused research, a tentative proposal for which is contained in Appendix 3.

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Appendix 1:

The UN Declaration on the Right to Development (1986)

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized.

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights.

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter.

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development.

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources.

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind.

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.

Considering that international peace and security are essential elements for the realization of the right to development.

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of

development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries.

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development.

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States.

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order.

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals, who make up nations.

Proclaims the following Declaration on the right to development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking in to account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have

an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

Appendix 2

A List of some of the Banks Implicated in the Grand Corruption of Late Gen. Sani Abacha of Nigeria

Australia and New Zealand Banking Group, ANZ, London branch, ANZ, New York, ANZ, Frankfurt, Bank in Liechtenstein A. G. Vaduz, Bank Len, Zurich, Bankers Trust Company, London, Bankers Trust Company, Frankfurt, Bankers Trust Company, New York, Banque Barring Brothers, Geneva, Barclays Bank, New York, Barclays Bank, London, Banque Edouard Constant, General, Banque Nationale De Paris, Geneva, Banque Nationale De Paris, London, Banque Nationale De Paris, Basle, Citibank N. A. London, Citibank N. A. New York, Citibank N. A. Luxembourg, Citibank Zurich, Credit Lyonnais, New York Credit Suisse, New York, Credit Suisse, General, Credit Suisse, Zurich, Deutsche Morgan Grenfell, Jersey, FIBI Bank (Schweiz) A. G. Zurich, First Bank of Boston, London, First Bank of Nigeria Plc, London, Goldman Sachs and Company, Zurich, Gothard Bank, Geneva, Inland Bank (Nigeria) Plc, Lagos, LGT Liechtenstein Bank, Vaduz, Liechtenstein Landesbank, Vaduz, M. M. Warburg and Company, Luxembourg, M. M. Warburg and Company, Zurich, M. M. Warburg and Company, Hamburg, Merrill Lynch Bank, New York, Merrill Lynch Bank, Geneva, Midland Bank, London, National Westminster Bank, London, Nigerian Intercontinental Merchant Bank Limited, Lagos, Paribus, London, Paribus, Geneva, Royal Bank of Scotland, Leeds, Standard Bank London Limited, London, UBS AG, Zurich, UBS AG, Geneva, Union Bancaire Privee, Geneva, Union Bancaire Privee, London, Union Bank of Nigeria, London Branch, Universal Trust Bank of Nigeria Limited, Lagos, Verwaltungs Und Private Bank A. G., Vaduz.

Appendix 3

Is the Right to ‘Self-determined Development’ a Viable Tool in the Fight against Terror?

A Legal Assessment

Research Statement

This proposal builds on my PhD thesis. My purpose in this further research is to investigate specifically the plausibility of a merger between two revolutionary and evolving resources in international law: the rights to development and self-determination as a strategy for transcending the ‘trap’ of violence. The underlying research question is thus: can the right to ‘self-determined development’ inspire concrete positive actions and answers to the frustration of terrorists by counteracting their aggression? On the subject of methodology, this research, like that of Cassese (1995), adopts a modern doctrinal approach that pulls together jurisprudence, politics and history in the service of legal elucidation and interpretation. I will publish a book and five journal articles in the course of this postdoctoral fellowship.

Research Problems

Counterterrorism legislations, both at the national and international levels, are at the verge of losing a crucial battle, namely the war against terror. There is scarcely any region that we turn to today, without being confronted with the trauma of violence. Nigeria, Yemen, Congo, Sudan, East Timor, Eritrea, Ethiopia, India, Iraq, Israeli-Palestine, Afghanistan, Tunisia, Iran, Kenya, Central African Republic, Chechnya and North Caucasus and Pakistan are a few examples of a long line of countries that are embroiled in violent conflict and terror. The human and material costs of conflict and violence are quite astronomical, and cumulatively they push countries off the track of development and increase vulnerability to conflict (World Development Report 2011).

Counterterrorism Laws and the Charges of the Human Rights Deficit

Counterterrorism legislations, such as the US Patriot Act (2001), the UK Anti-Terrorism, Crime and Security Act (2001) and other legal transplants they have inspired around the world, have been critiqued as falling short of fundamental human rights. These laws have

been cited as illustrations of how law carries out violence – a perspective that supports the earlier views of some critical legal scholars such as Hart (1961), Galtung (1969), Foucault (1977), Benjamin (1978), Derrida (1990) and Sarat (2001), who have argued that laws are forms of structural violence. Counterterrorism legislations are arguably failing because they were built on the first look at terror as terror from below and terrorists as less human. Soft power initiatives, “to provide alternative heroes and hopes” (Atran 2010), have no place in mainstream counterterrorism measures; rather, disablement and vengeance define official anti-terror strategies. In the haste to assert authority or brute force, the first look at terror has failed to pose the right questions. The implication is that municipal and international normative frameworks against terror appear degraded.

The Gap in the Literature

To redress the degradation of norms, scholars have focused on how to strike a proper balance between terrorism and human rights, where human rights are defined from the restrictive perspective of individual human rights, which are termed ‘negative rights’ (Lewis 2005; Von Doussa 2006). Reformist efforts have therefore concentrated on how to ensure that counter-terror measures do not prevent the right to movement, to free expression, a fair trial and so on. Getting the balance right has been notoriously problematic, as governments will always insist that the ‘security’ of the generality of people should trump individual human rights. We have seen this argument used in an attempt to justify Guantanamo Bay and extraordinary rendition (Cole 2003; Lavers 2007). This official perspective of the pre-eminence of security over liberty is at the heart of the de facto shift in the construction of Articles 2(1) and 51 of the United Nation’s Charter, on which the peace architecture of the UN is based. The Bush doctrine of pre-emptive self-defence reinterprets established principles against the use of force on the basis that ‘security’ ought to trump established principles; hence, the argument for the reform of Articles 2(1) and 51 post-9/11 (Foot 2008).

Under-conceptualisation of Security

‘Security’, seen from the perspective of human survival and emancipation, is under-analysed in the terrorism and human rights literature. The inhibition is that the logic of ‘security’ is the logic of anti-politics (Jayasuriya 2004). As far back as 1843, Karl Marx, in his essay ‘On the Jewish Question’, argued that that ‘security’ was the supreme concept of a bourgeois society. ‘Security’ is the concept that legitimises any action whatsoever taken by the state, so long as

the action is concluded in the name of ‘security’ (Neocleousa 2007). There is a dearth of scholarship on how international human rights, seen from a positive perspective of ‘security’ (or, if you like, empowerment to avoid the trauma of the evils that have been committed in the name of ‘security’) could be employed as soft power mechanisms for uprooting terror. This is quite disturbing, especially considering that although “terrorism is a complex set of phenomena covering a great diversity of groups with different origins and causes” (Bjorgo 2005:1), deprivation, identity, class structure, increasing individualism and the perception of alienation are reoccurring indices in serious researches into the root causes of terrorism. Although some scholars such as Huntington (1997) have located other root causes in religion and the clash of civilizations, and others like Atran (2010) have employed the tool of cultural anthropology to reveal the role of group dynamics and core cultural values that trump economic considerations, there is a compelling case to be made that at the structural causative level feelings of alienation, deprivation and identity are constant, as they tend to create a sense of frustration leading to aggression (Dollard et al. 1939). It is also instructive to note an interesting trend in studies into the root causes of terrorism, post-Cold War: the de-emphasis on statesmanship and the emphases on culture and group identity (brotherhood).

In light of this point, empowering rights to development and determination would seem to be great prospects for addressing the root causes of terrorism. Identity, participation and interpretation are defining frameworks in the evolving rights of development and self-determination. Karen Knop’s (2002) illuminating study, *Diversity and Self-determination in International Law*, captures this premise admirably:

“The problems faced by differences of culture and gender for the interpretation of international law are exceptionally acute for self-determination because its interpretation directly affects non-state groups as well as states. Moreover, the groups involved, including the colonized, ethnic nations and indigenous peoples and women within these groups, tend to be marginalized both internationally and domestically”
Knop (2002: 3).

Salomon (2008) is also among the few international law scholars that have drawn attention to the prospects of rights to development and self-determination in this regard. In her words:

“... the right to political self-determination was the meta-right of the twentieth century... the right to ‘self-determined development’ is the meta-right of the twenty-first century... the right to development is defined by the prominent external dimension, with its legal parameters taking shape in the period of indefensible world poverty” (Salomon 2008: 25).

Transcending Scholarly Scepticism

This approach, which attaches liberation to rights, must however win the battle against scholarly scepticism. The notions of ‘right’ and ‘development’ have been variously analysed in critical legal scholarship as hugely unhelpful to human liberation (Donnelly 1985; Esteva 1992; Sachs 1992; Alvarez 1994; Banakar 2010; Travers 2010; D’Souza 2010). It is nonetheless argued that the criticisms heaped on ‘rights’ and ‘development’ are informed by misgivings occasioned by the historical failure of these apparently liberating notions to save people in dire need. Instead, ‘rights’ and ‘development’ have stood as empty ideologies that engender ‘frustration-aggression’ in the people they ought to empower. The failure of rights and development to focus on where they are most needed has led to their rejection in critical legal scholarship. To this effect, scepticism in the literature forms gaps that could be transformed into strengths by shifting the analytical framework from ‘property’ to ‘poverty’; from the ‘thing’ to the ‘being’. It is against this background of the ‘decay’ or “degradation of international law” (Carty 1986; Bowring 2008:39) that the urgency for formulating new questions and new solution methods has become paramount. This proposal is therefore aimed at plucking ‘right and development’ from the abstraction of the state and placing them within the reach of human beings – flesh and blood – who are innately desirous of the ‘good life’ in human society.

Research Methodology

The research will employ discourse analysis in studying treaties, ‘travaux préparatoires’, declarations and judicial decisions⁵³ relating to the right to development and self-

⁵³ At the international level, the following treaties will be analysed with their ‘travaux préparatoires’ to sift through and interpret their provisions in relation to self-determination: the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was adopted by consensus by the United Nations General Assembly in 1970, the Declaration on Social

determination. I will also dig deep into the security and human rights literature in the light of history and politics. Potter and Wetherell (1987) define discourse as all forms of spoken interactions and written texts of all kinds, especially political, economic, moral, cultural and legal modes of communication. Discourse analysis is chosen because legal interpretation is primarily cognisable and effectuated through communication. The making, interpretation, selection, adaptation and implementation of laws, especially at the international level, involve discourse. According to Gillespie (2008:683-686):

“Discourse analysis brings human agency into law-making calculus... Discourse analysis holds that laws appear the way they do because people interpret them from particular sets of beliefs, practices and goals, not because laws compel them to reach certain conclusions.”

Using this tool will therefore enable me to tear through the facade of objective international law and contest meanings attached to ‘rights’, ‘self’, ‘determination’, ‘development’ and ‘security’.

Research Outcomes/Publication

I plan to publish a book and at least five journal articles during the first two years of my post-doctorate research engagement.

Progress and Development, the Declaration on the Right to Development, the Vienna Declaration and Program of Action. At the Regional Level, interpretation would be focused on the African Charter of Human and Peoples’ Rights, the Helsinki Final Act (the founding text of the Organisation for the Security and Cooperation in Europe, OSCE) adopted on 1 August 1975, the Helsinki Final Act constitutes The American Human Rights Convention. In addition, cases like Reference re Secession of Quebec, [1998]2 SCR 217, (1980) 37 ILM 1340; Barcelona Traction, Light and Power Company Limited, ICJ Reports (1970), Reparation for the Injuries Suffered in the Service of the United Nations, ICJ Reports (1949), Attorney General vs. Mustafa Ibrahim (1964) 48 ILR and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion).