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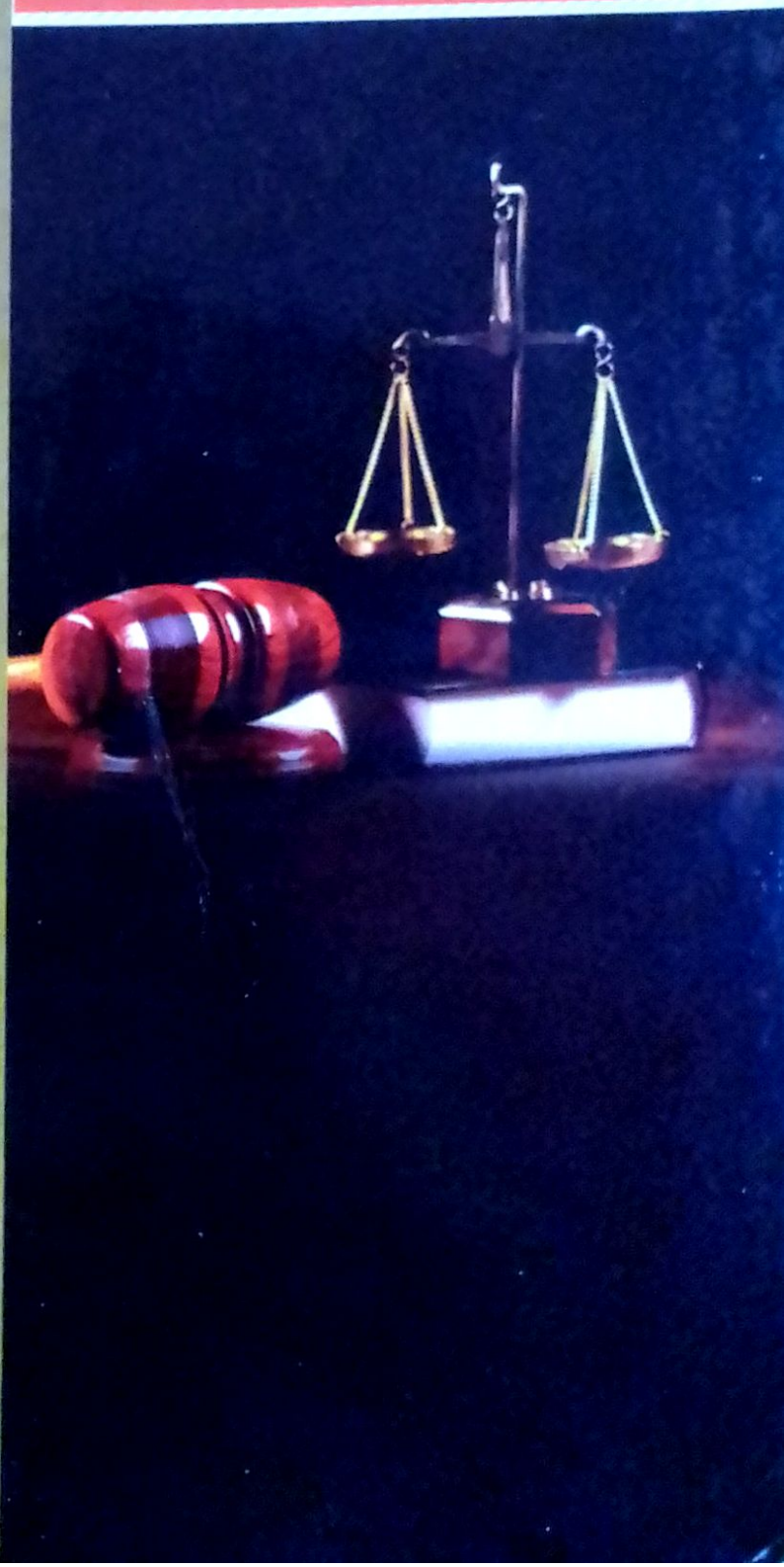

ABACHA v. FAWEHINMI: RE-EVALUATING FUNDAMENTAL RIGHT IN THE FACE OF LEGAL POSITIVISM

* F.O. Iloh Ph.D & **D. I. Njoku Ph.D

1. Introduction

It is trite to say that fundamental (human) rights has come of age, as an academic course of study, and more importantly, as a pragmatic movement both in municipal jurisdictions and globally, in the twenty-first century. The concept of human rights is closely allied with ethics and morality. Those rights that reflect the values of a community will be those with the most chance of successful implementation. Positive rights may be taken to include those rights enshrined within a legal system, whether or not reflective of moral considerations, whereas a moral right is not necessarily enforceable by law.

One may easily discover positive rights.[1] In about half a decade after Nigeria got out of colonial rule, the country fell into evil days- the military, the uninvited early morning sun, venturing into places, distant and unknown, came into power. In all, the country has so far experience military dictatorship, with it untoward incidence than constitutional democracy. Among the main unenviable peculiarity of *militocracy* is the notion of decrees, a very dreaded nightmare - that is an antithesis of civil life: "By the end of ... came in the Military *via coup d'etat* suspending the Parliament (Legislature) and taking over both the Executive and Legislative power of the state. The Judiciary was left untouched but the Fundamental Rights in the Constitution were suspended."[2] The excerpt above is apt as regards the situation obtained in a military rule in Nigeria. As the Military incursion into governance was through the force of arms and succeeding thereby it was their style to make decrees by which they govern superior to the Constitutions. The net result is clear. Whereas the Constitution was the fountain of all laws where any other law is in conflict with it, it is void, the military Decrees now become superior to the Constitution. One of Nigeria's fore-most jurists, of the apex court, puts it graphically: "It is therefore clear that once the military regime got entrenched in governance it is natural for self-preservation to promulgate decrees that curtail liberties, a very unfortunate legal

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* LL.B, BL, LL.M, Ph.D, Legal Practitioner, Law Teacher, Faculty of Law, Ebonyi State University, Abakaliki, Nigeria. e-mail: ilohfriday@gmail.com; phone: 08061527156, 08056436125

** LL.B, BL, LL.M, Ph. D, Legal Practitioner and Law Lecturer, Faculty of Law, Ebonyi State University, Abakaliki, Nigeria. donikenjoku@gmail.com. Phone: 08035608673

[1] Malcom N. Shaw, International Law, (Cambridge University Press, 2003) 5th edition, p.248

[2] Per Belgore, J.S.C., Abacha v. Fawehinmi (2000) 6 NWLR (pt. 660) p.299.

situation."[3] Decrees ordinarily by its very nature are draconic, but beyond this, they contain ouster clauses to bar interference by the judiciary.

So far, given what has been said, it is crystal- clear that military rule is no friend to fundamental rights. This was the background, like every military junta, of the dark-goggled General, Sani Abacha. Abacha, upon gunning his way into power in November 1995, practically persecuted human rights activists. He would arrest them, then, hound them into his gulag. In the face of this Nebuchadnezzarite-monster, many a human rights activists fled the land. It came to pass that the government of Abacha, ruthless as ever, clamped down on the gadfly, Chief Fawehinmi, fore-most human rights crusader.[4]

In this discourse, the writer is poised to scrutinize the case of *Abacha v. Fawehinmi*, bothering on fundamental rights invasion of the late legal icon, Gani Fawehinmi. The scrutiny sought to be done here, is against the backdrop of legal positivism. In this wise, the writer will look into the case, from the trial court through the Court of Appeal to the Supreme Court, particularly the split decision of the apex court on the cross-appeal. The writer will try and see whether the apex court was greatly influenced (or influenced at all) by the postulation or precepts of legal positivism. This discourse is essentially an analysis in jurisprudence.

2. Rights and Fundamental Human Rights.

In a discourse of this nature, it apposite to look up rights by way of definition or description generally, and then, human rights since it is the pivot upon which the discussion rotates. Like almost, if not all concepts in law, the definition of what is a right is much given to strenuous jurisprudential argument. There are definitions, hypotheses as there are scholars. Our aim here is not to engage in sterile disputations. Therefore, the definition of Salmond[5] that right is: "An interest recognized and protected by the law, respect for is a duty and disregard of which is wrong" is a convenient springboard in a discourse of this nature. In the view of Holland: A capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.

Jurists, scholars, political philosophers come to see right as originating from diverse sources. As a result, we talk of school of jurisprudence. The Natural Law view,

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[3] Per Belgore, J.S.C., *Abacha v. Fawehinmi*, Supra, p.299

[4] Chief Fawehinmi, popularly called Gani by admirers was a fore-most human rights crusader, a thorn in the flash of Successive military government in Nigeria. He was called to the Nigeria Bar in January, 1965, became a Senior Advocate of Nigeria (SAN) in 2005. He died in 2009

[5] Osborn's Conaise Law Dictionary, eight edition, p.293 Still on rights, see W.N. Hohfeld, 'Fundamental Legal conceptions as Applied to Judicial Reasoning', 23 Yale Law Journal, 1913, p.16. see Tony Nwazuoke, 'Introduction to Human Rights,' (published by copycraft International Ltd), 2006, chapter one.

as expressed in the traditional formulations of that approach or by virtue of the natural rights movement, has been appropriately described thus:

> certain rights exist as a result of a higher law than positive or man-made law. Such a higher law constitutes a universal and absolute set of principles governing all Human beings in time and space. The natural rights approach of the seventeenth century, associated primarily with John Locke, founded the existence of such inalienable rights as the rights to life, liberty and property upon a social contract marking the end of the difficult eruditions of the state of nature.[6]

The natural law theory, unlike the opinion of some antagonists, is not grandiloquent. This theory, according to a learned author enabled:"recourse to be had to a superior type of law and thus was able to provide a powerful method of restraining arbitrary power."[7]

The natural law approach according to its critics has some shortcomings. This, it seems, accounted for its rejection by some philosophers, especially of the school of legal positivism. Positivists argued, and are still arguing, that it is non-empirical and of diffuse methodology. Be that as it may, however, it is noteworthy that it proved of immense value in the last century in the establishment of human rights within the international community as universal principles. Positivism as a legal philosophy and movement is the converse of the natural law precepts. Positivism as a theory emphasizes the authority of the state and as such left little place for rights in the legal system other than specific rights emanating from the constitutional structure of that system.[8]

Similarly, many definitions and descriptions abound with regard to fundamental rights. There seems to be no generally accepted definitions. Whatever is the definition, one point of major agreement is that these species of rights belong solely to human beings. And all that is needed to have them is the human nature.[9] A scholar, defining human rights, puts it thus: "Demands or claims which individuals or groups make on society, some of which are protected by law and while others remain aspirations to be attained in the future."[10]

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[6] Malcom N. Shaw, 'International Law', supra, p.248

[7] Ibidem. The italics is by the writer for emphasis. The portion of the quotation in italics will be dealt upon *anon.*

[8] See Lloyd, Introduction to Jurisprudence, 8th edition., London, Sweet and Maxwell, chapter five.

[9] See, Tony Nwazuoke, 'Introduction To Human Rights Law,' supra, for what is human rights and the difference between Human rights and fundamental rights. However, in this disanse, human rights means fundamental rights and vice-versa.

[10] Osita Eze, 'Human Rights in Africa: Selected Problems,' Lagos, Macmillan, p.5

3. A Review of the Case of *Abacha v. Fawehinmi*

This is one case that is well celebrated. Apart from the fact that the appellant. victim of human right abuse, Chief Gani Fawehinmi, is a fore-most human right crusader, the case stirred much agitation, even outside the domain of legal circle. The Nigerian Court of Appeal rightly observed:

> It may also be mentioned that this appeal was allowed to be heard out of turn because it involves matters of extreme public interest dealing with the enforcement of fundamental rights of a citizen...
> When this is a matter of constitutional importance not only dealing with the validity of a statute but also dealing with matters of high constitutional importance affecting the jurisdiction of a High Court and the liberty of an individual.[11]

The facts of this case are straight forward. The respondent, Chief Gani Fawehinmi, is a legal practitioner of over thirty one years (as at the time the facts occurred) experience, an author, publisher, human rights activist, pro-democracy campaigner and the National Co-ordinator of the National Conscience Party (NCP). On Tuesday, 30th of January, 1996 at about quarter after five O'clock in the morning, a horde of police and State Security Service (S.S.S) officers of the appellants (General Sani Abacha, Attorney-General of the Federation, State Security Service, Inspector – General of police), fully armed with guns, invaded his residence. Without presenting any warrant of arrest or giving any reason there-for, they arrested the respondent and took him away to the S.S.S. Lagos State office at Shangisha, Lagos and detained him for about a week without allowing anybody to see him. Thereafter, he was secretly transferred to Bauchi Prison and detained thereat.

As a result of the foregoing, an application for the enforcement of the appellant's fundamental rights was filed at the Federal High Court, Lagos on behalf of the appellant. He sought for a declaration that his arrest and detention constituted a violation of his fundamental rights guaranteed under section 31,32 and 38 of 1979 Constitutions and articles 4,5,6and 12 of the African Charter on Human and People's Rights (Ratification) and Enforcement) Act.cap.10, Laws of the Federation of Nigeria. Secondly, he sought for a declaration that his detention and continued detention without being taken before a court on a charge constituted a gross violation of his fundamental rights guaranteed under the constitution and African charter on Human and Peoples, Rights.

The respondent also sought a mandatory order compelling the appellants to release him immediately; an injunction restraining the appellants from further arresting.

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[11] Per Musdapher, J.C.A., Fawehinmi v. Abacha (1996) 9 NWLR (pt. 475), p.739

detaining or in any other manner infringing on his fundamental rights; and ten million naira damages for the unlawful and unconstitutional arrest and /or detention of the respondent. After leave was granted and service of the appropriate processes effected on the appellants (who were respondents at the trial Federal High Court), they filed a preliminary objection to the action challenging the competence of the suit. The reasons given for the objection were:

a. By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by state security (Detention of persons) Decree No.2 of 1984 (as amended) and further by section 4 of the afore-mentioned Decree No.2 of 1984(as amended), the respondent/applicants are immuned to any legal liabilities in respect of any action done pursuant to the Decree.

b. The Federal Military Government (Supremacy and Enforcement) at Powers Decree No.12 of 1994 and Constitution (Suspension and Modification) Decree 107 oust jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.

c. That the Honourable court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

The trial Federal High Court, (Nwaogugu, J) found:

1. that the Inspector-General of Police has been given the power to detain a person by the provisions of the state Security (Detention of person) Decree No.2 of 1984 as amended by the State Security (Detention of person) Amendment Decree No.11 of 1994 .
2. That the court cannot question the legality of the Detention Order since it was made by the appropriate authority under the Decree.
3. That any provisions of the African Charter on Human and Peoples' Rights which is inconsistent with Decree No.17 of 1993 (the grundnorm) is void to the extent of its inconsistency.
4. That the African Charter on Human and Peoples' Rights has no legs to stand on it own under the Nigerian law. It cannot be enforced as a distinct law as a distinct law as such, it is subject to our domestic law and ouster.

Given the above findings of the learned trial Judge, the Court concluded that it cannot entertain the matter as it lacks jurisdiction.

4. The Jurisprudential View of the Judgment

What influenced the trial court's findings and decision? The fulcrum of the objection raised by the respondents, Sani Abacha and others, is that a decree in existence ousted the jurisdiction of the Court to hear the matter. The main thesis of this discourse, for emphasis, is to analyse this case against the background of legal positivism. The writers are of the opinion that the attitude of the Court, the Supreme Court, on the cross-appeal of Fawehinmi, the respondent/cross-appellant, was greatly influenced by the positivist postulation of jurisprudence. This attitude, however, is not of the majority opinion, which is the judgment of the court, but rather of the *dissenting* three Justices. Ideally, it may appear that one need not bother about minority view. This is not in all cases. An instance is readily found in the writing of the legendary Lord Alfred Denning. It has to do with the case of Liversidge v. Anderson[12].

Against the background of the Second World War, the British Government came up with Regulation 18B. In a nutshell, this regulation empowers the Secretary of State, if he has reasonable cause to believe any person to be of hostile origin or association, to order the detention of such person. Liversidge had been detained in prison under the said Regulation 18B. He then brought an action in the courts for false imprisonment. This put on the Home Secretary the burden of justifying the detention. In his defence, the Home Secretary pleaded that Liversidge was detained under Regulation 18B. The Home Secretary pleaded that he had 'reasonable cause to believe' that Liversidge was of hostile associations and that it was necessary to control him. Thereupon, Liversidge asked for 'particulars' of the grounds on which the Home Secretary had 'reasonable cause to believe' that Liversidge was of hostile associations and that it was necessary to control him. Thereupon, Liversidge asked for 'particulars' of the grounds on which the Home Secretary had 'reasonable cause to believe' all the judges in all the courts, but Lord Atkin, held that Liversidge was not entitled to the particulars. This dissent of Lord Atkin was made a critique of by no less a person than Lord Denning in one of his books.[13]

The interpretation of the law in common law jurisdictions is exclusively the preserve of judges.[14] Nigeria is a common law country. To a very large extent, the law is actually what judges decide is the law.[15] Many factors culminate to affect a judge's perception of the law, often times these facts are not obvious but rather in the 'backyard' of his mind; the obvious factors are, for instance, the principle of judicial precedent (*stare*

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[12] (1942) AC

[13] Lord Denning, 'Landmarks In the Law,' London, Butter warths, 1984, pp.230-233

[14] See, Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 6 (1) – (6)

[15] Generally, American realism view law from the standpoint of what courts may decide. For further reading on this, see, Lloyd's Introduction to Jurisprudence, supra, chapter 10.

decisis) and settled principles of law –of Common law and equity. However, beyond these factors, the mind of judges (and judges have very articulate minds) are greatly influenced by the legal philosophy they ascribe to. This in turn affects judicial attitude or posture.

In the case at hand, there was a cross-appeal by the respondent (appellant in the Court of Appeal). The cross-appellant, Chief Gani Fawehinmi, through his counsel raised four issues. From a careful reading of this case, it will be observed that the main issue is whether the trial Federal High Court has jurisdiction to entertain the suit. Uwaifo, J.S.C., who also sat on the appeal, aptly captured this when he, at the conclusion of his judgment, said: "From the totality of the discussion of both the appeal and cross-appeal, the central question is whether the trial court has jurisdiction to entertain the suit. This was what was sought to be determined by the preliminary objection raised against the suit."[16]

The question of jurisdiction arose because the respondent (at the trial Court) maintained that Decree No. 107 of 1993 ousted the jurisdiction of the court to hear and determine the reliefs brought by the applicant (who later became the respondent /cross-appellant at the Supreme Court). The applicant's reliefs were, in the main, that the respondent breached some provisions of the African Charter on Human and Peoples' Right (domesticated into the *corpus* of Nigerian municipal law.) So, the question of jurisdiction of the trial court turns on the pivot of whether the Decree 107 of 1993 prevails against the African Charter. If it is held that it prevails over the Charter, then the Court will have no jurisdiction. Therefore, in determine which of these two laws is superior, their (the laws) status is incidentally discussed. Ejiwunmi J.S.C., who also heard the appeal, rightly perceived this to be so when he, in his judgment, said: "I think the simple question that must be determined is whether indeed the African Charter on Human and Peoples' Right, now cap.10 of the Laws of the Federation of Nigeria indeed enjoys a higher status than the municipal laws of Nigeria."[17]

Now, having said this much (identifying the central issue), the next thing is to analyse the judgment of the judge/justices in order to see how inclined (or otherwise) to legal positivism.

5. The Court of Appeal

The trial Federal High Court manned by Nwaogugu, J., upon the hearing of the preliminary objection, threw out the application of the applicant. It is the opinion of this writer that the learned trial Judge was influenced by the positivist school of

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[16] Abacha v. Fawehinmi, supra, p.352.
[17] Abacha v. Fawehinmi, supra, p.356. Italics by the writer for emphasis.

jurisprudence. The writer is strengthened in this opinion given the fact that the preliminary objection did not prove that African Charter was specifically ousted by the Decree. But it appears that the learned trial judge reasoned that since the Decree suspended fundamental rights in the 1979 Constitution, and the rights in the African Charter being similar to the ones in the Constitution. it then follows that the charter was suspended.

The Court of Appeal took a different view. The three justices[18] that sat on the appeal unanimously agreed on the status of the African Charter on Human and Peoples' Rights. The Court found that notwithstanding the fact that chapter ten was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree 107 of 1993 or No.12 of 1994 cannot affect its operation in Nigeria. In this context, Musdapher, J.C.A., who delivered the lead judgment, said: "Now Article 1 of the Charter provide: The member states of the African Union parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to accept legislative or other measures to give effect to them"[19]

Having cited article I of the Charter, the learned Justice of the Court of Appeal appraised the Charter:

> The member countries –parties to the protocol- recognized that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly the promulgation of chapter 10, the Nigerian State attempted to fulfill its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and the detention of the appellant on the facts adduced clearly breached the provisions of the Charter and can be enforce under the provisions of the Charter. The contracting states are bound to establish some machinery for the effective protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the international Commission. *All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of*

[18] Musdapher, Muhammad, Pats-Acholonu, JJ.C.A.

[19] Fawehinmi V. Abacha, p.747. This portion of the judgment was cited for approval by Ejiwunmi, J.S.C, in Abacha v. Fawehinmi, *supra*, p.355

superiority as enunciated in Labiyi v. Anretiola (1992) 8 NWLR (pt.258) 139".[20]

These writers beg to differ (on the swipe[21] taken of Musdapher, J.C.A. by Achike, J.S.C.). The quoted portion of the judgment for which Musdapher, J.C.A. got a rebuke, is the same dictum for which he got a nod from Uwaifo, J.S.C., who also heard the appeal to *wit*:

> I do not think to pay due regard to the African Charter, even though it is now part of our municipal law, will be in conflict with the decision of this Court in Labiyi v. Anretiola (1992) 8 NWLR (pt.258)139. Obviously the African Charter now falls within the category of laws made by the National Assembly. But like the experience under the European Economic Communities Act, 1972 in regard to the policy towards the European Economic Communities Treaty, by comparison, the African Charter cannot also be submitted, as I hope I have shown, to the sheer vagaries of any other municipal or domestic law. We cannot be so different from other countries in this matter.[22]

The position of Musdapher, J.C.A. is not a lone voice; his other learned brothers agreed with him. Pats-Acholonu, J.C.A, lent his voice:

> By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal and as Bello, C.J.N. said in Ogugu v. State, its violability becomes actionable. *Indeed in the realms of jurisprudence and citizens' right to seek for remedy where there is a violation of right and law, it cannot be said that*

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[20] Fawehinmi v. Abacha, Supra, p.747. Italics by the writer. The portion of the dictum above that is embolden drew the ire of the Supreme Court's Justice, Achike, J.S.C: "With the due respect to Musdapher, J.C.A., it is an inexcusable judicial disrespect or arrogance to deny the subsistence of the hierarchical order of superiority of Nigerian laws as adumbrated by the Supreme Court in Labiyi case. This posture of the lower court is more startling in the absence of any convincing reason given for that far-reaching proposition of the law when the doctrine of precedent, *stare decisis*, of great antiquity, embedded in the English common law, and indeed, an integral part of our law which is anchored in good reason, logic and commonsense and has not been demonstrated to be manifestly to be out of step with modern development in law should be blown away by a side- wind. There is therefore no basis whatsoever for the lower court not to have followed the decision in Labiyi case. Had the lower court done so, notwithstanding that the African Charter is a legislation with inter-national incorporated treaties, it remains at par with other municipal legislation. The elevation of the African charter to a "higher pedestal " and the denial of the continued validity or authority of Labiyi case by the lower court is totally absurd, untenable and unwarranted."

[21] See Abacha v. Fawehinmi, supra, p.317

[22] Per Uwaifo, J.S.C., Abacha v. Fawehinmi, supra p.347. Italics is by the writer for emphasis.

no remedy exists. The intention of chapter ten is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and adopts the full content and import of the convention or Charter but has gone the extra mile of incorporating same into our municipal law.[23]

It should be pointed out that the said Decree never specifically suspended the African Charter on Human and Peoples' Rights. This fact weighed heavily, rightly too. on the mind of the Court of Appeal.[24] It is common place that there is a presumption that a superior court established under the law cannot have its jurisdiction ousted unless there is a statute specifically, directly and unambiguously ousting the jurisdiction of the court. The Court of Appeal and the majority judgment of the Supreme Court rightly considered this fact. Musdapher, J.C.A. said:

> But, there is a presumption that a superior court established under section 6 of the constitution of 1979 has jurisdiction to entertain all matter brought before it. A statute ousting the jurisdiction of the court must be direct and unequivocal.[25]

Pats-Ancholonu, J.C.A., on his own part, agreed with Musdapher, J.C.A. and, so said that there was no suspension of the provision of African Charter and the incorporating Act.

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[23] Fawehinmi v. Abacha (1996) 9 NWLR (pt. 475) p.758. Italics by the writer for emphasis. Achike, J.S.C., got irked by this quote; he said: "Pats-Acholonu, J.C.A in his concurring judgement (to the lead judgement of Musdapher, J.C.A.) stated pointedly: 'By not merely adopting the African Charter but enacting it into our organic law, tenor and intendment of the preamble and section seem to vest that Act (i.e. African Charter) with *a greater vigour and strength than mere decree for it has been elevated to a higher pedestal*'With the utmost respect to his Lordship, the italicized part of the above except neither readily lends itself to easy comprehension nor is it in consonance with the law. No authority was given in support of this far-reaching proposition. On the contrary, the proposition is manifestly at variance with section 12 (1) of the 1979 Constitution which stipulates that 'no treaty between the Federation and any other country shall have the force of law except to the extend to which any such treaty has been enacted." Indeed, in enacting the African Charter as an Act of our municipal law and as a schedule to the only two sections of the Act, i.e. cap. 10 LFN, 1990, a close study of that Act does not demonstrate, directly or indirectly, that it had been "elevated to a higher pedestal "in relation to other municipal legislation. The provision of the only two sections of Cap. 10, LFN, 1990 incorporating the African Charter into our municipal law are conspicuously silent on a "higher pedestal" to which the learned justice of the lower court arrogates to the African charter vis-à-vis the ordinary laws. The general rule is that a treaty which has been incorporated into the body of the municipal laws rank at par with municipal law. It is rather startling that a law passed to give effect to a treaty should stand on a "higher pedestal" above all other municipal laws without more, in the absence of any express provision in the law that incorporated the treaty into the municipal law." (Abacha v. Fawehinmi, supra, pp. 317-318.)

[24] A fact that was never critically considered by the minority decision at the Supreme Court.

[25] Fawehinmi v. Abacha, supra, p. 734. Italics by the writer for emphasis.

During the consideration of the Appeal, the issue of whether the court can enquire into the circumstances or background that led the Inspector General of Police to believe that Chief Gani Fawehinmi is a security risk was raised.[26] It was submitted that the Inspector-General of police in the exercise of his discretion was subject to courts in the manner that discretion is exercised. In other words, the decision of the Inspector-General of Police in Signing the Detention Order is reviewable by the courts. This issue was exhaustively considered by Musdapher, J.C.A in his lead judgment and Pats-Ancholonu, J.C.A.[27]

However, on the issue, they both differ from each other. While Musdapher, J.C.A. held that the Inspector-General of Police's power is unquestionable, Pats-Acholonu, in a well articulated judgment said:

> Another point I wish to discuss is that the Detention of Persons State Security to be appreciated by the people on whose behalf it is made, it is to be understood that the donee as well as the detaining authority should be able to show the appellant is a security risk to the state. By this I mean he is accountable to the public whose duty it is to discern whether the detention order was made in good faith. *The new trend in this area of law now imposes on the detaining authority the duty he owes to Nigerian citizens to be ready to explain his actions if not, an order of mandamus might lie. In such a case he should be precluded from taking any protection under the ouster clause, if it is found that the detention order is not in compliance with the statute.*[28]

The writer is of the opinion that Pats-Acholonu's, J.C.A. position on the issue, is better[29] as it is in line with what obtains in other legal climes.

6. The Supreme Court

Like as was done unto the Court of Appeal, the task here is to analyse the posture of the Supreme Court vis-à-vis the cross-appeal and examine whether indeed the position of the Court was swayed by legal formalism. Since the military *coup d'etat* of January 15th, 1966, there has been much controversy as to whether indeed that military coup was a revolution in which case it amounted to a change in the legal order. This idea was not lost on the Supreme Court; in fact, one of the justices[30] appreciated and analysed it so well:

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[26] This issue was also considered at the supreme court

[27] Though Mohammad, J.C.A, concurred with the judgment of Musdapher, J.C.A and Pasts-Acholonu, J.C.A, he did not consider the issue.

[28] Fawehinmi v. Abacha,k supra, p.764, per Pats-Acholonu, J.C.A, italics by the writer for emphasis.

[29] This issue was also considered by the Supreme Court, see Achike, J.S.C., Pp.323-324. Achike, J.S.C. held that the IGP power cannot be inquired into.

[30] See the judgment of Belgore, J.S.C, dissenting on the cross-appeal in Abacha v. Fawehinmi, supra,p.229

> By the end of 1983 there came in the Military via the usual coup d'etat suspending the Parliament (Legislature) and taking over both the executive and Legislative power of the state.
>
> The judiciary was left untouched *but the fundamental Rights in the Constitution were suspended. As the Military incursion into governance was through the force of arms and succeeding thereby it was their style to make their decrees by which they govern superior to the Constitution. The net result is clear. Whereas the constitution was the fountain of all laws, where any other law is in conflict with it, it is void, the Military Decrees now became superior to the Constitution.*[31]

It is indeed true, as shown in the excerpt of the Jurist above, that once the military comes uninvitedly like the early morning sun, the Constitution (or some portions of the Constitution considered unfriendly) is suspended and consequently the grundnorm changes. *However, the contention of this writer, which was pointed by the majority judgment, is that ouster of jurisdiction must be direct and specific.* The minority judgment is not of this perception. They (Justices of the minority judgment) thought that since it was military regime, any law that appears to go contrary to military decrees must be of no effect. In other words, they implied ouster of jurisdiction. They cause under the influence of legal positivism. One would have thought that given the explicit narrative in the judgment of Belgore, J.S.C., he ought to have held that the court's jurisdiction was intact he said:

> It is therefore clear that once the military regime got entrenched in governance it is natural for self-preservation to promulgate decree that curtail liberties, a very unfortunate legal situation. As the Decree of the Military regimes always contain ouster clauses to bar interference by the Judiciary, the Judiciary made earlier skirmish in 1970 in Lakanmi's case but the military descended heavily on the judiciary by Decree No. 28 of 1970 called supremacy Decree."[32]

Then the learned justice of the Supreme Court threw up his arms in despair: "The only way to stop these military overwhelming curtailments of freedoms is to make their coup fail, but once they are in control, it was a futile effort to adjudicate where jurisdiction is clearly ousted by decree"[33]

"Is jurisdiction *clearly* ousted by the Decree?" The answer is of course in the non-affirmative. This was clearly brought home in the words of Belgore, J.S.C:

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[31] Abacha v. Fawehinmi, supra, p. 299, Italics supplied by the writers for emphasis.
[32] Abacha v. Fawehinmi, supra, p. 299
[33] Ibidem. Italics supplied by the writers for emphasis.

Thus the *coup d'etat* of 1983 December and the Constitution (Suspension and Modification) Decree of 1984 put into abeyance the Fundamental Rights in the Constitution, which as. have said earlier is a forerunner of the adoption of the charter and of course the Charter and itself by implication. Coup d'etat is a treasonable offence but that is only when it fails. *The Charter just as The Fundamental Rights in The 1979 Constitution was by Implication Suspended*[34]

These writers submit that a statute nay a statute with an international flavour, embodying rights (fundamental human right) cannot be suspended by implication. The learned Justice did not stop at suspension by implication. He averred: "If the Charter was not suspended even by implication, it would have run counter to the Decree of the Military which in essence makes the charter void."[35] On the other hand, the majority judgment,[36] in the opinion of the writers, took a better view. It is the opinion of the writers that it is more in accordance with the law. As was pointed out earlier, the majority decision on the cross-appeal undertook a *strict interpretation of the law*. This position was and is still correct. In this context, the judgment of Ogundare, J.S.C. who read the lead judgment, needed be looked into here. Hear him:

> Now section 4 of the State Security (Detention of Persons) Act provides:
>
> 4(1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.
>
> (2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly section 219 and 259 of that Constitution shall not apply in relation to any such question.[37]

After looking up the law, he continued and remarked:

> Be it noted that while chapter IV of the Constitution was suspended for the purposes of the Act, no mention was made of chapter 10 which was then merely in existence. I would think that chapter 10 remained unaffected by the provisions of section 4 (1). A treaty is not deemed abrogated or modified

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[34] .Ibidem. Italics by the writers for emphasis.
[35] Ibidem.
[36] Ogundare, Iguh, uwaifo and Ejiwunmi, JJ.S.C.
[37] Abacha v. Fawehinmi per Ogundare, J.S.C.

by later statute unless such purpose has been clearly expressed in the later statute-se Cook v. United States, 288 Us 102.[38]

The learned law Lord, said he was further convinced to hold the position above given the provision of section 1 of chapter 10 which provides:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Right which are set out in the schedule to this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.[39]

He held that it was thus enacted that *all* authorities and persons exercising *legislative, executive* or *judicial powers* in Nigeria are enjoined to give full recognition and effect to the African Charter.[40] That is, the plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any provision of the Constitution (Suspension and Modification) Decrees enacted between 1989 and 1999. It remained in force throughout this period.[41] He then concluded thus: "The position then is that the courts' jurisdiction to give "full recognition and effect to the African Charter remained unimpaired."[42]

It is noteworthy to state that the decree by it provision preserve (save) the African Charter (Chapter10). This is provided for in sections 16(1) (2) and 17 of the Constitution (Suspension and Modification) Decree No.107 of 1993. These saving provisions were well considered by the majority decision. In fact, in a well considered judgment of Ogundare, J.S.C, who delivered the lead judgment, the jurist reasoned thus:

> By these provisions,[43] Chapter 10 [44] remained in force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any decree made after the commencement of Decree No.107 of 1993. Chapter 10 was not;

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[38]. Abacha v. Fawehinmi, supra, p.292
[39] Abacha v. Fawehinmi, supra, p292
[40] Ibidem
[41] Ibidem
[42] Ibidem
[43] "these provisions" refers to section 16(1) &(2) and 17 of the constitution (suspension and Modification) Decree No. 107 of 1993
[44] "Chapter 10" refers to the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federation of Nigeria,1990

inconsistent with any provision of the 1979 Constitution or any such decree[45]

7. Conclusion.

In the nature of human political settings, positivism flourishes in stable social conditions but its shortcomings always become obvious in troubled times. This writer ventures to say that nothing, perhaps, could be more troubling than military rule in Nigerian political turf. In the case, Abacha v.Fawehimi, under consideration, one of the Justices of the Court of Appeal appreciated the shortcoming of legal positivism. That was Pats-Acholonu, J.C.A. In his analytical judgment, he pointed out that:

> It should be noted that since the end of the Second World War when legal positivism or juridical formalism was made nonsense of by the despotic regimes of Third Reich [46] and Fascist Italy, and the U.N. Universal Declaration of Human Rights was enthroned, there is growing tendency in most jurisdictions to protect as much as possible the fundamental rights of people in times of peace in particular.[47]

The learned Jurist lamented that: "It is a pity human nature has not learnt anything from certain practices perpetrated in the Third Reich Germany. There is still ruling us, as it were, School of Empirical positivism which unwittingly seeks to enthrone despotism."[48]

This discourse has so far examined the case of *Abacha v. Fawehinmi* in the context of legal pluralism. Analytical positivists are not concerned with the morality, history, or sociology of law, but only with the structural analysis of law and legal concepts.

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[45]. Per Ogundare, J.S.C., Uwaifo and Ejiwunmi, JJ.SC both agreed with Ogundare, J.S.C. that sections 16 (1)&(2) an 17 retained (saved) chapter ten (see p.347&359, Abacha V. Fawehinmi, supra importantly, it is noted that the dissenting judgment (Achike, Belgore and Mohammed, JJ.SC) never referred nor examined these saving provisions.

[46] "Third Reich"- the German state during the period of 1933-1945.

[47] Fawehinmi v. Abacha (1996)9 N.ULR. (pt. 475)p.760

[48] Fawehinmi V.Abacha, supra, p.763.