Chapter 6
The Legal Subject in Modern African Law: A Nigerian Report

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6.1 Introduction

Few would deny that all is not well with African judiciaries.[1] Attention is often focused on the behaviour of the executive and of its agents. Additionally, there is evidence that the populace is rarely agitated by widespread abuse of human rights ranging from the, on the surface, benign, e.g., roughing up suspects, to the serious, e.g., extra-judicial killings. Some have tried to explain the failure of African legal systems by exploring the dominant jurisprudence in them usually associated with legal positivism,[2] or arguing that they are animated by principles that are incompatible with various indigenous African cultures and traditions.

In this paper, I explore an aspect of the inadequate performance of an African judiciary that, in my opinion, is rarely addressed even if it is frequently reported: the violation of the rights of the individual.

[1] The latest instances of alleged judges' involvement in corruption have come from Nigeria and Kenya. "N5bn bribery allegation: Interpol quizzes Chief Justice, six others – As ICPC arrests Akwa-Ibom Chief Judge, electoral tribunal members" was the headline in Nigeria's *Vanguard*, Wednesday, April 21, 2004, and the publication of the price list for Kenyan Judges. "'Price list' for Kenya's Judges", BBC News Online, Friday, October 3, 2003 [http://news.bbc.co.uk/2/hi/Africa/3161034.stm].

[2] See in general the debate on this issue by F.U. Okafor, "Legal Positivism and the African Legal Tradition", (1984) 24 International Philosophical Quarterly 157–164; Olúfẹ́mi Táíwò, "Legal Positivism and the African Legal Tradition: A Reply", (1985) 25 *International Philosophical Quarterly* 197–200; P. C. Nwakeze, "A Critique of Olúfẹ́mi Táíwò's Criticism of Legal Positivism and African Legal Tradition", (1987) 27 *International Philosophical Quarterly* 101–105; Jare Oladosu, "Choosing a Legal Theory on Moral Grounds: An African Case for Legal Positivism", (2001) 2 *West Africa Review* [http://westafricareview.com]. See also B. O. Nwabueze, *Judicialism in Commonwealth Africa* (London: C. Hurst Publishers, 1977), Chap. XIV.

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The violation of the rights of the individual is generalized across different areas of African legal systems. In tort, it is instantiated in the lack of enforcement procedures on the part of the state for judgment rendered in favour of individual plaintiffs against individual defendants. The situation is a lot worse when the losing defendant is the state or any of its numerous branches. The same can be said of administrative law remedies especially where executive proclamations are involved. Of most significance to us in this discussion are the exemplifications of individual rights' violations in constitutional law and criminal law. African governments are not noted for losing cases involving them and their citizens, especially when such cases turn on citizens' complaints against the government's violation of their rights. In Zimbabwe, a particularly notorious situation has developed there in recent years that has seen its government levying war on some of its own citizens: white farmers. The problem is most pronounced in the sphere of criminal law. Violations in criminal law range from the abuse, physical and otherwise, of suspects by police and prison officials, to interminable delays in the trial process, to the lack of access to the services of counsel, to extra-judicial killing.

Given the putative centrality of the individual and her rights to the legal systems in African countries, specifically those within the common law tradition, and the additional fact that in those jurisdictions the law and its agencies are charged, theoretically speaking, *primarily* with the protection of the individual, it is meet to ask why the responsibility is shirked so routinely. The centrality of individual rights explains the path that is followed in this essay. I propose to explore the metaphysical template on which rests the modern legal system in a common law country like Nigeria. That is, I wish to explore the notion of the individual whose protection from the predations of the collective power (the state and its agents) and those of her fellows (either as individuals or groups) is the principal raison d'être of the modern state and its pertinent legal system. This individual is the *legal subject*. What implications does this idea of the legal subject have for the operation of the legal system? What follows from the requirement that the modern legal system dedicate itself to the protection of the legal subject?[3] I argue that, generally speaking, operators of African modern legal systems and scholars of African law and legal theory alike have paid too scant attention to the idea of the legal subject in modern African law.[4]

[3] Incidentally, once it was agreed that a corporation could be adjudged a 'legal person', it became eligible for many of the privileges and forbearances attached to the human legal subject. This merely serves to underscore the centrality of the legal subject to the modern legal system.

[4] For an exception see, Michael Reisman, "The Individual under African Law in Comprehensive Context", in Dr. Peter Nanyenya Takirambudde, ed., *The Individual under African Law*, Kwaluseni, 1982, pp. 9–27. See also, in general, Thierry G. Verhelst, ed., *Legal Process and the Individual: African Source Materials*, Proceedings of the Economic Commission for Africa Conference of African Jurists, Addis Ababa 1971. It is noteworthy in this respect that in their edited collection of essays, *African Law and Legal Theory* (New York: New York University Press, 1995), Gordon R. Woodman and A.O. Obilade did not consider including the legal subject or the problems attached to the idea of the individual in the law, as one of their subject categories. Nor are they likely to have found too many essays had they chosen to address the issue in their collection. Such is the paucity of writings treating of the theme of the individual in African law and legal theory. I do not mean to

As a result, the legal subject is hardly, if ever, the object of solicitation either on the part of practitioners or that of commentators on African legal theory and practice. By the same token, I would like to argue, if we are to make better sense of why African legal systems fail so often and minimize the disutility to individuals, we must begin to take seriously the metaphysical template from which the key pieces of the legal systems are fabricated.

It is not only in cases involving individual rights and the state that the legal subject is barely existent. The case is just as bad, if not worse, in the administration of criminal justice. Whether it is the police, the prisons, or the courts, we are confronted every day, under *both* military and democratic regimes, with evidence of the near nonexistence of the legal subject. And I shall contend that if many of the egregious instances of the violation of the subject that are standard fare in human rights reports and agitation are to be eradicated, or at least reduced, we must take the legal subject seriously. Indeed we, scholars and practitioners alike, must embark on a far-reaching and widespread programme to educate all who have a role to play in the administration of justice in African countries, be they judges or bailiffs, jailers or police officers.[5]

I work with certain basic assumptions that I do not propose to argue for here. If, as I do in what follows, I continually draw my inspiration from Anglo-American or Euro-American sources, it is because that is where the modern legal system in Commonwealth Africa came from and it is in the relevant Euro-American countries that we have the fullest development yet of the logic of law in its modern incarnation. The reason for this last claim will be clear presently.

The dominant legal system in Nigeria is of alien provenance and no amount of nationalist tergiversations will undermine that historical fact. The fact just stated, from my experience, is apt to be misheard or misconstrued. I do not claim that there were no indigenous legal systems before the alien historical movements of slavery, the Atlantic Slave Trade, Islam, Christianity, and Colonialism, reshaped the African land and mindscapes. But, I submit that in Nigeria and other English-speaking countries of Commonwealth Africa, from the vestments of the personnel to the court architecture, from the rules of legislation to those of adjudication, from the procedures for presenting a case to the legalese in which the case is heard, processed and determined, what I call the modern legal system is the dominant system in their municipal jurisdictions and it does not owe any of its roots to the soils of those countries.

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suggest that people do not talk about rights. The problem is that they either talk about rights in purely instrumentalist terms or they are too technicist about them in their discussions. For the most part, little attention is paid to the philosophical foundations of our legal system. This is not a job for lawyers, from among whose ranks most commentators in African law come; it is one for legal theorists and philosophers. Unfortunately, few have been the philosophical interventions in African law in the common law countries. This paper is meant to be one such contribution.

[5] To the already extensive judicial education going on in African countries now must be added the input of philosophers and historians of ideas who can inculcate a sense of the enabling philosophical principles of specific legal practices.

In some parts, there is some contestation between the Islamic legal system and the one derived from the British. In such places, for example, Sudan, it will be wrong to say that the modern legal system is dominant without question. Some might point to northern Nigeria as another exception. I think, though, that in Nigeria, the common law system is superior to the Sharia and the latter must yield when there is a conflict. Needless to say, I do not deny that Africans may have varied some of what they have inherited. That is not what is of moment in this discussion. Thanks to its dominance, all other legal systems of indigenous inspiration are bathed in the ether of the modern legal system and enjoy legitimacy only insofar as they do not conflict with its dictates. If what I have just said is true, or at least plausible, it is absolutely vital that scholars engage the historical source-head of the legal system and become better students of its enabling philosophical underpinnings. Such engagement is designed to expand our repertoire of explanatory models for the crucial failures of our judicatures while pointing us in the direction of possible additional remedies to those already afforded by technical discussions in law, sociology and political science.

In similar fashion, we must take the qualifier "modern" very seriously. Whence came the dominant legal system, for example, Britain, they had at various times feudal law, slave law, tribal law and so on. In taking seriously the moniker "modern" we delimit the boundaries of our exemplar in order thereby to separate and distinguish them from those of feudal and other forms of law. It is in this modern legal system that the legal subject is dominant and supreme.

6.2 The Legal Subject: Definition and Significance

Who is the legal subject and why is she central to modern law? Miranda rights have been in the news lately in the United States of America. Scholars of legal theory and practice are familiar with cases up to and including murder in which the accused have been let go on account of the violation of their Miranda rights by the arresting or the investigating police officer.[6] Certainly, some of those cases rile people and offend their moral sensibility. Lawyers or political theorists or philosophers, on the other hand, often wring their hands and bow before the supremacy of process and hope that the cops will do a better job next time around. I have deliberately chosen this rather mundane principle because it typifies the triumph of procedure over outcome that is one of the hallmarks of the modern legal system.[7] It is customary for

[6] For the latest instance of a State Supreme Court tossing out a murder conviction for failure by police to read a suspect his Miranda rights, see Maura Dolan, "Police Are Rebuked on Miranda", *Los Angeles Times*, 15 July, 2003, A1.

[7] Indeed, the present time, when all of these time-honoured principles are under severe attack in the United States of America by pre-modern forces under the generalship of John Ashcroft, the Attorney General, is the best time to come to a deeper appreciation of those principles in their observance.

radical critics of liberal democracy and its twin doctrine of the rule of law to dismiss both as a sham. Only if we grant that they are sometimes genuine and serve, on occasion, to restrain the excesses of the modern state such as are being exemplified by the Patriot Acts in the United States, e.g., detention without trial, can we lament their prospective loss under conditions created by the aftermath of the attacks of 11 September, 2001. I insist that the reason that we lament their possible loss and resist stoutly any despotic inroads into them is because we are confronted with the dismal prospects of living in a world shorn of the robust protections they offer against the rule of arbitrariness or caprice.

Let us turn our attention briefly to Nigeria. I cite the following from a Ford Foundation funded investigation of the administration of criminal justice system in the country. In their study of the role and performance of the police in the criminal justice system, the authors aver:

> The law requires that a police officer should administer the usual caution[8] before taking down an accused person's statement. Six out of every 10 accused persons (64.8 percent) stated that no caution was administered to them. Quite surprisingly, police responses indicate that only in less than one-tenth of the cases (8 percent) would the accused person be cautioned of his right to remain silent. In the other 9 out of 10 cases (90.2 percent) the allegation is merely explained to him without caution. Arrested persons would therefore usually believe that they were obliged to make statements, and the police themselves probably consider it their duty to extract statements from accused persons. This omission to give the caution is a serious breach of the constitutional right (or option) to remain silent and of Rule IIIa of the Judges' Rules which provides for a caution in these terms.
>
> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.[9]

The fact that the accused persons reported that no caution was administered to them 6 out of 10 times is remarkable enough. The entire book documents in copious, often painful, details the consistency with which various operators of the different divisions of the administration of criminal justice system – the Police, the Courts, the Prisons, the Bar, and the Public – subvert the time-honoured principles designed to serve as safety valves for ordinary citizens against abuse by the state.

The two editors of the volume cited above are very senior members of the Nigerian Bar and both are seasoned and highly regarded scholars. One would have expected some revulsion on their part or at least a measure of righteous indignation at the evidence of malfeasance perpetrated by all sectors of the society in the operation of the criminal justice system. But the following is fairly representative of their reaction from chapter to chapter. Following their indictment of the Police for playing fast and loose with the rule regarding caution, they said:

> That [the omission to give the caution] occurs in so many cases is a sad reflection on police methods. It signifies, at least, that the police are unaware that they have a responsibility to inform an accused person of his right to remain silent after he is charged…

[8] The Nigerian equivalent of the Miranda warning.

[9] M. Ayo Ojomo and I. E. Okagbue, *Human Rights and the Administration of Criminal Justice in Nigeria*, N.I.A.L.S. Research Series No. 1, Lagos:, 1991, pp. 111–112. My emphasis.

> There is obviously urgent need to educate the police properly on their duty to inform an arrested person of his right to remain silent; and that on no account should he be persuaded, urged or compelled to make any kind of statement at all.[10]

In all likelihood, the editors may have taken too seriously the requirement of detachment in their scholarship. Nevertheless, one must protest when it seems as if those who are supposed to chart the path to a more enlightened understanding of the principles that make the modern legal system so appealing adopt what seems at best a lackadaisical attitude towards their flagrant violation by those charged with administering those principles. We are speaking here of a principle the violation of which suffices for acquittal in other jurisdictions animated by the same principles, at least on the surface, as Nigeria's. If the authors are to be believed the problem seems to be one of lack of proper education on the part of the Police. Such an explanation is inconsistent with their other findings that indicate that the problem is not one of lack of education. And if it is, it may have more to do with lack of education respecting the enabling grounds of the requirement that the accused be presumed innocent until proven guilty by a court of law. Police officers do have access to the appropriate information in the course of their training in Police College.

Of course, as is usually the case, many in the criminal justice administration are wont to dismiss as special pleading accused persons' complaints. It is as if they say to themselves: an accused person will say anything to impugn the integrity of the representative of the system. D. O. Adesiyan has observed that although the courts in Nigeria "have stoutly prevented the abuses of power by overzealous public officials," "in some areas, however, the courts have experienced great difficulty in eradicating illegal methods adopted against accused persons. This is so because where the accused persons make allegations, the courts have found it difficult to admit or accept such allegations since such accused persons have had to prove their allegations and this task has never been an easy one for them."[11] The outcome is that the Police have no incentives to clean up their act: they do not stand any chance of losing their cases in the same way that, as we said above, were the same thing to happen in some jurisdictions in the United States or the United Kingdom, the prosecution's case would be in jeopardy. We shall come back to the attitude described by Adesiyan later in this discussion.

What is even more remarkable is that the police would confess to not cautioning accused persons of their rights. Nor is this the only point on which they confess to routine violation of procedure in the study under review. The practice of arresting a suspect's relatives as a way to force the suspect to surrender himself is widespread in Nigeria and the police confess to deploying it. I do not propose to go into recounting the usual diet of gloomy statistics of misbehaviour, often murderous, on the part of those whose responsibility it is to operate the legal system in African countries. What calls for comment is that given the common provenance, at least at the formal level, of the modern legal system in both Africa and Euro-America, in the operation

[10] Ojomo and Okagbue, p. 112.

[11] D. O. Adesiyan, *An Accused Person's Rights in Nigerian Criminal Law*, Ibadan, 1996, p. xii.

of the system in Nigeria, the characteristics for the embodiment of which the modern legal system is justly celebrated do not have the same resonance. Why would one culture let go of a murderer on a technicality while another revels in the breach of that same technicality?[12]

One solid answer to the above question must be traced to the philosophical underpinnings, especially the metaphysical template of the modern legal system. The Euro-American legal system is an integral part of modernity. I identify six essential components of modernity: (1) the centrality of reason, (2) autonomy of action, (3) liberal democracy (4) the Rule of Law, (5) the open future, and (6) a near obsession with novelty.[13] There is no time to discuss these components here. However, I can briefly describe the relevant ones.

At the heart of the philosophical discourse of modernity is the human *individual*. But this is not just any individual. There have always been individuals in human society. But modernity is almost alone in making the individual the basic building block of human society. This characteristic of modernity is easily misconstrued. The modern-inflected idea of the individual is radically different from other conceptions of the individual that preceded it. Not only is the modern individual the basic building block of society, she it is whose personal integrity is held inviolate and whose person and other attributes appurtenant thereto may not be acted upon, interfered with, or otherwise bothered except by her permission. The near-absolute walling off of the individual from his fellows and the artificial nature of social bonds that it engenders are what set this idea of the individual apart from other ideas, especially those regarding the priority and superiority of the group. As those who are familiar with the history of Western philosophy know, outside of ideological posturing, there is little resemblance between what is defended now, for example in the United States, as the idea of the person in society and what the leading lights and originary inspiration of the tradition held to be the best way of being human. Neither Plato nor Aristotle would accept any kinship between their views of what it is to be human and what conduces to the best life for humans and those of their so-called successors in the much-vaunted "Western tradition".[14] That is, the current understanding of the nature and attributes of the individual in the western tradition is a recent development.

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[12] Answers are not lacking in the literature. In addition to poor education, appeals can be made to endemic corruption, lack of adequate equipment and facilities. What follows is meant to augment existing explanations, not supplant them. What is more, it is rarely canvassed by African scholars.

[13] See in general Jürgen Habermas, *The Philosophical Discourse of Modernity*, trans. Frederick G. Lawrence Cambridge, 1990; Stuart Hall, David Held, Don Hubert and Kenneth Thompson, eds., *Modernity: An Introduction to Modern Societies* Oxford, 1996; Bill Bourne, Udi Eichler and David Herman, eds., *Modernity and Its Discontents* Nottingham, 1987.

[14] This is how Reisman made the same point. "Precisely because so many assume that individuality is an ancient and inherent aspect of Western civilization, it important to mention briefly the constellation of trends in order to appreciate that the West only produced the doctrines and practices of individualism at a comparatively late stage in its own development." "The Individual under African law in Comprehensive Context", 11. For a full historical treatment see Colin Morris, *The Discovery of the Individual: 1050–1200*, New York, 1972.

The individual, in her modern construal, who is endowed with reason, leads the best life not only when she allows Reason to structure her life but is also expected to accept things only when they have been cleared by Reason, not revelation, not tradition. There lies the centrality of Reason. According to the philosophical anthropology that undergirds modernity, human beings who are endowed with Reason are essentially *free* beings. That is, freedom belongs to human beings *qua* human beings. One way in which freedom is manifested is through the capacity of humans to express themselves in the world, that is, *act in and on the world*, in large part to attain their desires and interests. *Autonomy of action* refers to the fact that humans are free and that they should be free to act. Since it is in action that our purposes cross and conflict with one another, it is only post-action, not prior to it, that, properly speaking, *law* becomes relevant. Given what I have just said, it should be obvious that any law that is designed to pre-empt action will be an anomaly, a distortion within this legal system. There is no punishment for thought; nor should there be any.

The freedom of the individual is absolute. Of course, I exaggerate a little. But I do so in order to underscore the point that I make later. The absoluteness of the freedom of the individual is best construed in a presumptive sense. It is similar to what we mean when we say that human beings are essentially free. We do not ask human beings to show why they should be free; we ask those who wish to curb human freedom to show why humans should not be free. By the same token, from the assertion that the freedom of the individual is absolute, it does not follow that this freedom may not be curbed; it merely means that anyone, including governments, seeking to curb it must *discharge* the burden of proof that the interference is warranted and can be justified. I would like to submit that successive Nigerian constitutions do not recognize this kind of freedom. They may be full of high fallutin pronouncements regarding the freedom of the individual.[15] In reality, though, beyond the ritual boring retelling of the genealogy of human rights from the Magna Carta on, which narrative is itself inaccurate,[16] there is no serious engagement with the philosophical anthropology which alone gives the relevant principles regarding the nature of the human person and the dignity that pertain to it their pith.[17]

[15] The usual constitutional provisions have been joined in recent times by pan-African pronouncements concerning human rights. See in general, Chidi Anselm Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment", (1998) 8 *Transnational Law & Contemporary Problems* 359; Yemi Akinseye-George, "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights", (2001) 10 *University of Miami International & Comparative Law Review* 159–176.

[16] The narrative is inaccurate because at the time of the proclamation of the Magna Carta, England was a feudal society where talk of freedom of serfs would be a contradiction in terms. The freedom that people ascribe to the Magna Carta is more appropriately traced to the Act of Settlement of 1701 and the 1688 Glorious Revolution that prepared the ground for it. It is a sign of the illiteracy that afflicts our understanding of the history of our inherited Euro-American institutions that we think Englishmen, not to talk of women, have been free since 1215.

[17] It is strictly this philosophical dimension that is of moment here. The numerous discussions of human rights and the expanding discourse about them in Africa do not address this element. They take for granted that the idea of the individual is obvious or unproblematic.

What is more, what they give in the main clauses, they render almost nugatory in "clawback" clauses that typify African constitutional rights provisions. "Clawback" clauses refer to those exceptions that are usually attached to constitutional provisions, especially regarding human rights. For example, when it is said in the Nigerian Constitution that "Every person shall be entitled to respect for his private and family life, his home and his correspondence," the clawback clause in the very next provision states: "Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society – (a) in the interest of defence, public safety, public order, public morality, public health or the economic well-being of the community, or (b) for the purpose of protecting the rights and freedom of other persons." Given that the framers of successive Nigerian constitutions see fit to include in them the clause just cited, one must conclude that such clauses express attitudes that cut across time periods and individual preferences among the framers.

Do Nigeria's constitutional framers mean to suggest that a democratic society, so-called, may interfere with an individual's right to respect for his private and family life, home and correspondence, if such interference is "in the interest of defence, public safety, public order, public morality, public health or the economic well-being of the community?" This is a sure sign that the framers of the constitutions not only did not "take rights seriously"[18] but there is room for doubt that they were aware of the many philosophical conundrums that their proposal might generate. In a sense, they seem to have adopted a crude utilitarian approach in which the rights of an individual may be bartered away for the welfare of the many.[19] I am not aware of much discussion among African scholars of the ethical and political philosophical problems posed by the proliferation of clawback clauses in African rights charters.[20]

In law, the legal subject, possessor of reason, bearer of interest, author of actions, formally inferior to no other, is the object of solicitation. In the modern state, where the state enjoys the monopoly of the legitimate use of violence, the legal subject, such as I have described her, is protected from undue and unnecessary interference from the powers that be. *In the modern state, it is the individual that needs and deserves protection from the state; it is not the state that needs and deserves protection from the individual*. Here is the basis of one of the most important principles of legal operation in the modern state: *the doctrine of the presumption of innocence for the accused until she is proven guilty beyond a reasonable doubt*. The doctrine of

[18] See in general Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

[19] Such an approach was the principal butt of severe criticism by Ronald Dworkin in *Taking Rights Seriously*.

[20] For examples of legal discussion of the problems associated with clawback clauses in the African Charter on Human and Peoples' Rights see, Nsongurua J. Udombana, "Toward the African Court on Human and Peoples' Rights: Better Late Than Never", (2000) 3 *Yale Human Rights and Development Law Journal* 45; Chidi Anselm Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment", (1998) 8 *Transnational Law & Contemporary Problems* 359. These authors are not exercised by the philosophical issues that rivet our attention.

the presumption of innocence is redolent with philosophical presuppositions that we cannot explore in any detail here.[21] It holds sway in all areas of the law. Although it is remarked upon more in criminal law and allied areas, it is no less required in tort. The defendant in tort does not have to prove that her action does not amount to a tortfeasance; the plaintiff is the one who has to prove that *but for* the action or omission of the defendant, she would not have suffered injury.

In Nigeria, I am doubtful that this presumption is taken seriously. It is very easy to see why this is the case.[22] *The doctrine places the burden on the prosecution to prove the suspect/defendant's guilt; it does not require the defendant to prove her innocence*. The burden is not misplaced. The asymmetry involved is fully intended given the philosophical presuppositions. Again, the doctrine's formulators were well aware that the government has all the resources to thwart justice, plant evidence, and frame the legal subject.[23] The subject does not stand a chance against a state whose personnel are determined to find her guilty. Think of it, the individual does not have the material resources to counter those of the society to which the state and its personnel have unrestricted access. It is not as if all what I just said is unknown to both scholars and ordinary folk in Nigeria. What may be at issue is whether or not we know, and if we do, whether or not we take seriously the philosophical underpinnings beneath the dialectic of the individual-state relationship in the modern context.

6.3 The Philosophical Template

We cannot understand the modern state or the modern legal system without a thorough understanding of its enabling philosophical template. The contractarian tradition[24] that backgrounds the modern legal system works with a metaphysics of diremption in

[21] These include the presupposition that freedom is so important that it has to be supported by a fortress of prohibitions and forbearances; hence, the requirement of proof beyond a reasonable doubt. Another is traceable to the Cartesian foundations of the play of doubt in the quest for and justification of knowledge. When there is doubt, the claim involved is hardly ever accepted; when there is no doubt, it is often accepted. The epistemological foundations of this requirement of proof beyond a reasonable doubt must be located in the skepticism about human nature and its cognitive tools, marked as both are by the possibility of error.

[22] Although I do not discuss it here, a full explanation must include the fact that most participants in the legal profession in Nigeria either do not have any familiarity with the Euro-American philosophical tradition or, when they do, take seriously the implications of the tradition for the legitimacy and justification of the practices they engage in as lawyers, judges, law teachers, court bailiffs, prison officers, police officers, and so on.

[23] The history of the United States of America, especially of the long tenure of J. Edgar Hoover at the head of the Federal Bureau of Investigation, is replete with shenanigans of this sort. And the experience of African Americans also attests to the capacity of the government to derail justice by railroading the legal subject.

[24] Typified by John Locke, Thomas Hobbes, David Hume, and Jean-Jacques Rousseau and revivified in our time by John Rawls.

which the individuals that make up the society did not start out with any organic connections. Rather each is adjudged an independent actor, possessed of reason, capable of associating with his fellows on terms that, ultimately, must subserve his interests and enhance his capacity to achieve his desires, whatever those may be. In forming the state, although the individuals are asked to vacate their right to self-help, they reserve the right to withdraw their consent from the state or its appurtenant institutions if the latter are turned to ends subversive of the individuals' several interests.

Simultaneously, in vacating their right to self-help, the associating individuals yield to the state the monopoly of power which it exercises vicariously in their individual behalf. At the bottom of it all is a view of human nature that is anything but rosy. Left to their own designs, on this thinking, humans cannot be trusted to not take advantage of their fellows, or seek to realize their own desires at the expense of the frustration of their compatriots. A suspicious attitude towards human nature explains the wall of privileges and forbearances built around the individual in the modern state. The basic principle is to leave the individual to his own designs as long as he does not impair the ability of others to achieve theirs. This is what is meant by the absolute freedom of the individual. It is what makes it incumbent on anyone, especially agents of the state, to justify interfering with the exercise by an individual of the prerogative of being whatever she wants to be.

What I have just said should be painfully familiar to Nigerian scholars of the western tradition. Many who work in and debate about issues of human rights and the rule of law have been educated in the tradition from which arose the core ideas summarized above. What should call for comment is why as operators of, and commentators on the modern legal system, we, not unlike Ajomo and Okagbue cited earlier, do not evince a robust sense of the rights and entitlements of the individual in African societies and a sense of outrage, beyond mere humanitarian sympathy, when the humanity of even the least among us is assailed by agents of the modern state.[25]

Why is there no hint of embarrassment when the police confess to subverting time-honoured principles on which rests the legitimacy of the institution in which they operate? Why do judges find it easy to abet the subversion of those same principles and sometimes engage in their subversion themselves, as Adesiyan pointed out above?[26] Why do ordinary folk always react with sympathy and not utter outrage when agents of the state brutalize suspects either in the course of making arrests or when suspects, even convicts, are warehoused in prisons that are manufactories for death and disease?[27]

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[25] This attitude is manifested in the repeated, often abject appeals to the Executive for relief; visits by Chief Judges of Nigeria's many states to prisons in their jurisdictions to set suspects free who should not have been in the jails in the first place or who may have spent more time awaiting trial than would be merited were they found guilty of the offences for which they have been charged, and so on. Rarely are sanctions imposed on erring officers for violating rights or the procedures that guarantee them.

[26] See note 11 above.

[27] See Ajomo and Okagbue, *Rights and the Administration of Criminal Justice in Nigeria*. Human Rights reports from Nigeria by bodies like the Committee for the Defence of Human Rights are replete with such charges.

I ask these questions in spite of my awareness of the yeoman efforts of human and civil rights groups in African countries and their sterling achievements in advancing the cause of human rights in the continent. That is a welcome development. But the possibility of entrenching the changes that human rights groups strive for as well as reducing the incidence of the abuses that they protest lies in a deeper comprehension and acceptance of the kinds of principles that we have talked about in this section. The problem is that I do not see fundamental engagements with the philosophical principles that I have described, the infusion of which into the population, especially into the ranks of the operators of the modern politico-legal system, will yield the attitudinal orientations requisite for protecting the individual in her singularity and dignity.

Outside of the ranks of the operators of the legal system – police, prisons, the courts, and the bar – and scholars of it, we may not say that the general public has the requisite education in the history and philosophies of the dominant legal system in common law African countries. So we shall not be concerned with why ordinary citizens do not react with outrage at the subversion of the underlying principles of the legal system framed as they are by what we may call Enlightenment humanism. Nor may we say that operators and scholars alike are not schooled in the enabling traditions to kindle in them the appropriate attitudinal responses to the violations endemic to the Nigerian legal system. Indeed it is the burden imposed by their knowledge that warrants their indictment for not responding appropriately. How then do we account for the non-response?

6.4 Making Sense of Failure to Take the Legal Subject Seriously

Here is a possible explanation. The metaphysics that undergirds the modern legal system is one of diremption, of separation between the state and the individual; between one individual and another; between one state institution and another; between the individual and the group; and so on.[28] In the colonial period when the various institutional elements of the modern legal system were implanted in African countries, the colonial authorities made no efforts towards inculcating the relevant temperament in the Africans who ran the system. In fact, many commentators have pointed out that colonial rule was no school for the rule of law.[29] Certainly, there were Africans who sought to acquire the appropriate education and become imbued with the requisite temperament. The colonial authorities and their apologists in the

[28] It is no accident that discussions of human nature in Euro-American philosophy are dominated by the mind-body problem inaugurated by the founder of modern philosophy: René Descartes.

[29] See Omoniyi Adewoye, *The Judicial System in Southern Nigeria 1854–1954*, Atlantic Highlands, N.J., 1977; J. P. W. B. McAuslan and Y. P. Ghai, *Public Law and Political Change in Kenya*, Oxford, 1970.

academy were quick to demonize them.[30] Many Africans were forced to resort to sometimes qualified but often unreasoned enthusiasm for what they frequently mistook for African tradition, personality, or worldview that they identified with communalism or collectivism. The upshot is that ever since then and up till now individualism, both as a principle of social ordering and a model of explanation of social phenomena, has remained anathema to the imagination of modern Africans, be they scholars or operators of the modern forms of social living, especially in law and politics.

This background partly explains why there is a dearth in African law and legal theory literature of discussions of the philosophical dimensions and implications for practice in law of the modern legacy in the legal system. Nigeria is merely an instantiation of a widespread absence in English-speaking Africa. I do not wish to be misunderstood. There are extensive materials regarding individual rights, the place of the individual in different spheres of law, and so on. What is missing is any indication that African legal scholars are deeply aware of or fundamentally exercised by the metaphysics of the self that yields the legal subject in modern law.

Let us consider an illustration. Nigerian judges love to cite the at-its-time-infamous dissent of Lord Atkins in *Liversidge v. Anderson*:

> I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting that Judges are no respecter of person and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.[31]

Kayode Eso, retired JSC, provides the following gloss on the passage:

> In the operation of the rule of law, the role of the judge cannot and must not be less, judges must stand resolutely to prevent any attempted encroachment on the liberty of the subject by the executive. They must be alert, very alert to see that if ever there is a coercion by the executive, that action must be justified in law and not justified on the whims and caprices of man.[32]

It is easy to conclude that both Lord Atkins and Justice Eso have the same attitude regarding the liberty of the subject. Such a conclusion would be unfounded. Although Lord Atkins's fellow law Lords may have taken a dim view of his pronouncements in *Liversidge*, the fact that we do not come across repeated discussions of the British legal system's failure to take seriously the liberty of the subject, while

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[30] See, for the Nigerian case, Omoniyi Adewoye, *The Judicial System in Southern Nigeria 1854–1954*, Chap. 6.

[31] (1942) A.C. 206. Cited from I. O. Agbede, "The Rule of Law and the Preservation of Individual Rights", in M. A. Ajomo and Bolaji Owasanoye, eds., *Individual Rights Under the 1989 Constitution*, Lagos, 1993, p. 41.

[32] "Judge-Lawyer Co-operation in the Protection of Human Rights," in Ajomo and Owasanoye, eds., *Individual Rights Under the 1989 Constitution*, 84. Footnote omitted.

the same is not true of the Nigerian legal system of Justice Eso, requires us to consider that the principles enunciated by them may not resonate the same way in the two legal systems, their formal similarities notwithstanding. The difference is that for Lord Atkins the sovereignty of the individual makes legitimate the liberty of the subject and the impermissibility of its abridgment without due process. At all levels of his education, Lord Atkins was never left in any doubt as to the sovereignty of the individual and the sanctity of the individual's space. Even if he were a communist, it is not unlikely that he would be concerned with the perennial problem of resolving the tension between the individual and the community. In all circumstances he must come to terms with issues emanating from and surrounding the metaphysics of the self at the heart of modernity.

Justice Eso's social heritage cannot be said to include individualism as a principle of social ordering or of explaining social phenomena.[33] The metaphysics of the self that informs Lord Atkins's stout defence of the liberty of the subject even in a time of war is not part of Justice Eso's quotidian reality. Yes, he may have studied it in school and imbibed it as part of the operation of the law. But that inheritance is a conflicted one. From the time of the second wave evangelization that inaugurated Nigeria's encounter with modernity in the early nineteenth century, the issue of what to do with the individual in the context of African indigenous cultural heritage has been contested. The debate has not abated. So, it is not unlikely that Justice Eso shares the schizoid attitude that attaches to most ex-colonials.

We experience in a conflicted way the heritage of modernity because of its intimate connection to colonialism. We may, as lawyers, adjudge the individualism consecrated in law a good thing or at least a necessary evil. But, in the rest of our lives we have difficulty extending the same approbation to individualism as a principle of social ordering. Therein lies the rub: whether or not we think individualism is good on the whole or is a principle worth defending in the broader spheres of life may be more important than what we think of it in the cloistered space of our professional commitments. It is where we locate the crucial difference in the respective orientations of Justice Eso and Lord Atkins.[34] I am suggesting that in order for the liberty of the subject to become as dominant in the jurisprudence of African legal systems as it is in Euro-America, legal discourse and legal theory must open up to the philosophical discourse of modernity and African philosophers must overcome their aversion to the metaphysics of the self at the base of modernity. To that philosophical heritage we now turn.

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[33] According to his biographers, Justice Eso does share the temperament that is consonant with individualism and may even have acquired it from his father. But that it calls for special mention in the biography corroborates my claim that such a viewpoint is not taken for granted in Eso's cultural milieu. See J. F. Ade-Ajayi and Yemi Akinseye-George, *Kayode Eso: The Making of a Judge*, Ibadan, 2002.

[34] Needless to say, Justice Eso may indeed not be conflicted about the modern heritage. We have ex-colonials who are not. I merely use the two justices in my illustration as types, foil for my argument.

The philosophers of the modern state, from Thomas Hobbes through Harold Laski to John Rawls, in their distrust of human nature, articulated designs of the institutions of the state, especially the legal system, that were meant to insulate the individual from the overwhelming power of the state. They sought to put in place a judiciary whose operators are expected to possess a near superhuman capacity for impartiality and disinterestedness that will enable them to perform their roles as arbiters of disputes between the state and the individual as well as bulwarks against the capacity for self-preference and factional advantage of the all-too-human operators of the state's institutions.[35] But judges, in order to perform their functions excellently, must be imbued with a temperament convergent with their institutional roles as impartial arbiters. They cannot afford to see themselves as agents of the state, civil servants or bureaucrats, that is, nor can they assume that their duty is to safeguard the state against the machinations of the individual.

Given what we have already said about the imbalances of power between the puny individual and the mighty state, any judge who does not proceed from a minimal distrust of, or at the least, some diffidence about, the state is a judge who is not likely to be exercised by despotic inroads by the state into the individual's personal space, be that space physical, intellectual, or moral. I argue that in Nigeria, the requisite temperament is rarely found in even our best judges, jurists, legal scholars, philosophers, and political theorists. I take B.O. Nwabueze to be making a similar point in the following passage.

> In relation to the rights and liberties of the individual, Commonwealth judges have exhibited perhaps the most striking difference of attitude from their American counterparts. With the possible exception of Lords Atkins and Denning, a Holmes, Hughes, Brandeis, Black of Douglas is a figure unknown in the Commonwealth. The insight of American decisions on the conflict between liberty and state authority is altogether lacking. There is not even an appreciation of the kind of problem presented by such cases. Commonwealth judges have approached these cases as they do any other legal problem, applying the ordinary methods of logical deductions to a problem that calls for a sensitive balancing of society's most crucial values – the liberty of the individual and the right of the state to preserve itself. As a result there has been a failure to appreciate the question of choice involved, and the vital role of the Court in bringing about an accommodation between the two values such as would secure to both a meaningful and effective scope. The opportunity has thus been lost for informed judicial creativity.[36]

I chose Justice Eso above in juxtaposition with Lord Atkins precisely because he enjoys a well-deserved reputation as a progressive jurist who, when he served on the bench, did not flinch from judicial activism *in favorem libertatis*. So Justice Eso is in no way typical of the orientation that dominates the African bench. Whether or not he harbours the disjuncture discussed above I do not know. I am merely

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[35] For a discussion of the connection between this view of human nature and the doctrine of the Rule of Law see, Olúfẹ́mi Táíwò, "The Rule of Law: The New Leviathan?" (1999) 12 *Canadian Journal of Law and Jurisprudence*, 151–168.

[36] B.O. Nwabueze, *Judicialism in Commonwealth Africa*, p. 298.

speculating in order to isolate a problem that I think has received little attention, if any, in spite of its importance. For if a progressive jurist like Justice Eso might, in his philosophical predilections away from the law, manifest the disjuncture between his appraisal of individualism in law and in general, how much more can we expect of judges who do not share his robust sense of the liberty of the subject. Individualist explanations are often suspect in Nigerian scholarship and many Nigerians are no less suspicious of individuals, especially those who insist on enjoying the privileges that pertain to individuality.

As G. N. K. Vukor-Quarshie remarks in an analysis of a particularly gruesome rape of justice in Nigeria, the official murder of Ken Saro-Wiwa,

> In contrast, to most Africans only a guilty person would remain silent when accused of a heinous offense, and the existing common law-based rules regarding testimony by an accused must be revised accordingly… Still, we should not jettison the entire criminal law system simply because it is of Anglo-American provenance. Indeed, most of the procedural safeguards and fundamental human rights under the received law have now either become jus cogens under international law or been incorporated in international conventions binding on states parties.[37]

When those who are charged with upholding the presumption of innocence are more suspicious of the suspect than they are of the state, the burden falls on the individual to *prove* his innocence. The fundamental doctrine of the presumption of innocence is subverted if not abandoned. It is as if we are saying to the individual something along the following lines: "How come you are the one arrested out of the many other individuals who could have been arrested, too? The fact that you are here is proof that there is probably something for which you have to answer." This may explain the ease with which Africans collaborate in the subversion of their common humanity by those who are sworn to protect it.

Given the police force's unwillingness to monitor itself and to institute internal mechanisms of accountability, the role of the Nigerian judiciary to act as a check is all the more important. An examination of the justice system's record in dealing with the few cases that have been brought to court is disappointing. The Nigerian judiciary appears unable or unwilling to speedily sanction those officers who have been brought to court, despite overwhelming incriminating evidence. When asked, most Nigerian human rights lawyers can only recall one case in which the courts convicted police officers for the use of excessive force.[38]

After reviewing some of the cases concerning human rights in the post-independence Supreme Court of Nigeria, Justice Karibi-Whyte observed:

> In coming to these decisions the ordinary rules of construction of statutes were applied. The provisions construed were regarded as indeed they were, ordinary statutes of the imperial Parliament or the local legislature as the case may be. No special emphasis was laid on the fact that the liberty of the citizen was involved and that in such cases any benefit of doubt

[37] G. N. K. Vukor-Quarshie, "Criminal Justice Administration in Nigeria: Saro-Wiwa in Review", (1997) 8 *Criminal Law Forum* 87. Footnotes omitted.

[38] Lawyers Committee for Human Rights, *The Nigerian Police Force: A Culture of Impunity*, New York, 1992, p. 10.

> in a decision between the executive and the citizen should be given to the citizen. The court in construing the provisions of such statutes should in all cases, lean towards the liberty of the subject but careful not going beyond the natural construction of the statute. The question that was being asked in all cases was what Parliament meant by the words used? It did not appear that there was at any time any anxiety to safeguard the liberty of the subject.[39]

Many avenues are available to the judge to rationalize his abandonment of the duty of impartiality. He can invoke the doctrine of the presumed constitutionality of legislative acts. He can appeal to the doctrine of political question. However the judge performs the dodge, a failure to appreciate his arbiter role means that the presumption in favour of the citizen is abandoned or attenuated. Karibi-Whyte's lament is instructive because it does not resort to accusing the usual suspects, especially the phenomenon of executive lawlessness, in explaining why the legal subject does not receive the benefit of the doubt premised on what I said earlier about the principle that the primary mode of being of the human individual is freedom and all those who wish to undermine this must prove that their interference is warranted. Karibi-Whyte is saying that Nigerian judges, for the most part, are not possessed of a philosophical temperament that disposes them to rule *in favorem libertatis* in all those situations where there is room, however small, for doubt, especially in cases affecting the liberty of the individual citizen. I am suggesting that if we wish to turn things around, we will need to begin to take seriously the task of creating this orientation and inculcating it in the operators of the modern legal system and ordinary citizens alike.

6.5 Conclusion

One usual way in which people respond to the kind of case at the core of this paper is to suggest that I am trying to turn Nigerians into imitators of the West or that I do not appear to find anything useful in our African heritage. Such a criticism is misaimed. In talking about modern legal system in an African country, we do not need any detours into whether or not we need to embrace any aspect of our heritage.

It is well to remember that none of the rights guaranteed under our Constitution comes as a result of any original thought by Nigerians. Most of those rights had become recognized and enforceable for centuries in some other countries before Nigeria became an independent sovereign State on October 1, 1960. It is only pertinent to say that whilst the inherited English common law had recognized some of those rights, the Universal Declaration of Human Rights in 1948 had put a stamp of universal acceptance to all of them.[40]

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[39] A. G. Karibi-Whyte, *The Relevance of the Judiciary in the Polity – in Historical Perspective*, Lagos, 1987, pp. 58–59. My emphasis.

[40] T. Akinola Aguda, "Judicial Attitude to Individual Rights in Nigeria," in Ajomo and Owasanoye, eds., *Individual Rights Under the 1989 Constitution*, 68.

For those who advance the rejoinder above, I suggest that they must first dispense with the dominant legal system before they will be persuasive. Until Nigerians decide to rid themselves of the common law inheritance, it is only fair that those of us who find some of its philosophical presuppositions to be promotive, within certain limits, of human dignity should insist that Nigerians join the ranks of the beneficiaries of the best that the modern legal system has to offer. Given that Nigerians have not so decided, what I ask is that we take seriously the fundaments on which that system is built and even if we are going to adjudge the principals inadequate, such a judgment should emanate from a sophisticated understanding of how the system is meant to be, in its best form, in the first place. To do so, the operators of the modern legal system must become ardent students of the philosophical foundations of their system and critically embrace them.

Of course, the question of whether or not this is the legal system we ought to have remains on the table. But that this is the legal system we have and if we want it to work in ways that redeem the commitment to the dignity of the human person on which it is putatively built, we must familiarize ourselves with its enabling philosophies. This is the ultimate charge of my exertion in this paper. Left to me, I'd rather have a legal system in which the legal subject is taken seriously than one in which it is not, irrespective of its provenance.[41]

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[41] The original presentation on which this paper is based was made at the 9th Annual Conference of the International Society for African Philosophy and Studies (ISAPS) held at the University of Dar es Salaam, Dar es Salaam, Tanzania, 9–11 April, 2003. An earlier written version was presented at the conference on "Rights in Africa: New Contexts, New Challenges, New Agendas", Program of African Studies, Northwestern University, Evanston, Illinois, U.S.A., 9–10 May, 2003. I would like to thank Seattle University for funding my participation at the ISAPS conference. My appreciation goes to Leni Silverstein for inviting me to participate at the Evanston conference. I would like to thank Kolapo Abimbola for his comments on an earlier version of the paper. My profound gratitude goes to participants at both conferences whose strenuous disagreements with various points in the paper have forced me to rethink some of the earlier formulations and, I hope, present them with less unclarity and extravagance.

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