RIGHT TO POLITICAL PARTICIPATION UNDER THE 1999 CONSTITUTION: A FUNDAMENTAL OR INCONSEQUENTIAL OMISSION?

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Abstract
Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the 1999 Constitution) provides for a catalogue of fundamental human rights which though not exhaustive but appears to be serving the Nigerian people since 1999 fairly. However, one right which its absence from the Constitution should rattle any inquisitive mind is the right to political participation, which in its simplest form is the right to vote and to stand as candidates in elections for all adult citizens. Could the omission of such a right be fundamental or inconsequential for a constitutional democracy? Therefore, this article interrogates the omission of the provision of political rights under the 1999 Constitution and the human rights implications for Nigeria's Constitutional democracy. From a comparative constitutional approach using the Constitutions of South Africa and Kenya as a case study, it contends that the absence of political rights of the people which is the bedrock of constitutional democracies, under the 1999 Constitution is a fundamental omission and has far reaching implications for the right of the Nigerian people to fully and effectively exercise their right to political participation. The obvious implication of this omission is that there is no enforceable right to political participation under the Nigerian Constitution. The right to political participation in a constitutional democracy like Nigeria is so cardinal that it must not a be constitutional footnote right. Its provision must be conspicuous even to a layman just as it is obtainable in progressive constitutions globally. This paper therefore calls for the need for the express inclusion of the rights to political participation in the Chapter IV of the Nigerian Constitution in order to give a real sense of belonging to all players in its democratic project. This is because a democracy without an express constitutional guarantee of political rights is a sham.

Keywords: Nigeria, Political Participation, Constitution, Human Rights

1. Introduction

Nigeria moved from its murky past of human rights violation, lack of respect for the principles of rule of law and separation of powers to the path of democracy on 29 May 1999. Since the breaking of the democratic morning in Nigeria, six general elections have been held till date.[1] It is therefore no longer news to the whole world that Nigerians have been enjoying an unbroken two decades of civil rule, the longest so far since its independence on 1 October 1960.[2] Since it is impracticable for any society to exist without laws, at the point of the military departure, a document was handed over to

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[1] 1999, 2003, 2007, 2011, 2015 and 2019.

[2] The various previous attempts in 1963, 1979 and 1993 were frustrated by largely the military.

Nigerians, which was christened the Constitution of the Federal Republic of Nigeria, 1999, which was meant to regulate the affairs of all Nigerians going forward. Many scholars have continued to attack the 'Nigerianness' of the Constitution and if it is capable of meeting the yearnings and aspiration of all Nigerians.[3] Despite the various vociferous attacks and critics on the 1999 Constitution, it has continued to serve the Nigerian people though it keeps going in and out of the theatre of constitutional amendments.[4]

Chapter IV of the 1999 Constitution provides for eight (8) fundamental human rights, which are strictly the traditional civil and political rights and they are the only rights which are justiciable, while the socio-economic rights are provided for in Chapter II but are declared not to be justiciable by the CFRN.[5]

However, among the various civil and political rights guaranteed by the CFRN, the right which should be the fulcrum of the constitutional democracy, which Nigeria professes to be practicing is curiously absent, that is, the human right to political participation. Democracy without an express constitutional guarantee of the right to political participation is certainly a contradiction in terms. This is because should such a right be breached by either the government or any other individual, where will the human right victims turn to for succor or redress, since the supreme law does not protect them.

Since 1999 till date, elections in Nigeria have experienced exclusion and suppression of voters, most especially in remote areas. In most cases, these excluded or suppressed voters are denied their right to political participation without any fault of theirs. This flagrant abuse of the right to political participation of some of the Nigerian people have remained unattended to, unaddressed and unchallenged in the law court principally because the Constitution guarantees no one the right to political participation but arguably a mere privilege. This undemocratic state of affairs in a democracy calls into question the issue of the status of the political participation as a human right and other incidental matters, such as the issue of legitimacy of government and popular participation in a democracy.

In order to resolve some of the issues raised by the title of this article, this paper is divided into seven sections. Section one is the introduction of the work, section two tackles the

[3] See for example, Akin Oyebode, 'The Integrity of Law', Sixth Professor Alfred Bamidele Kansunmu Annual Lecture, delivered on 15 September 2016, at the Main Auditorium, University of Lagos 7, where the learned author declares thus in relation to the legitimacy of the 1999 Constitution, '[b]eginning with Decree No 24 of 999 which is paraded as the Constitution of the Federal Republic of Nigeria and is inherently illegitimate having been dictatorially foisted on the country…' (on file with the author).

[4] See Nathaniel A. Inegbedion, 'Constitutional Implementation: The Nigeria Experience' in Charles M. Fombad (ed), *The Implementation of Modern African Constitutions: Challenges and Prospects* (PULP, 2016), 25.

[5] See section 6(6) (c) of the CFRN

issue of the status of political participation as a human right under international human rights law. The third section discuses human rights as guaranteed in the 1999 Constitution, while the fourth section looks at the jurisprudence of the Nigerian courts on "non-listed" fundamental human rights. The constitutional guarantee of the right to political participation from a comparative perspective is considered in the fifth section. The sixth segment considers the human rights implications of the non-constitutional guarantee of political rights in a democracy, and the recommendations and conclusion of the work are considered in the final section, which the seventh section.

2. The Human Right to Political Participation under International Human Rights Law

One of the rights that have continued to enjoy recognition in most human rights instrument is the right to political participation. For example article 21 of the Universal Declaration of Human Right (UDHR) provides for the right to political participation.[6] Similarly articles 25 and 13 of the International Covenant on Civil and Political Rights (ICCPR)[7] and the African Charter of Human and Peoples Rights (African Charter)[8] provide for it respectively. Despite being one of the civil and political rights, states have always accorded less importance to it or grossly limited its applications based on arbitrary and discriminatory criteria. It has been rightly argued that while the right to political participation is part of the original human rights agreements, its human right status remains riddled with many controversies both in political philosophies and international law. The centrality of the litany of controversies trailing the human right status of the right to political participation is on whether there should be a right to democracy. While there may exist an undeniable linkage between participatory right and democracy, the right 'need not imply the right to democracy'[9] Gregory H Fox declares more forthrightly thus;[10]

> [T]he right to participate in government is guaranteed in all comprehensive human rights instruments, including the Universal

[6] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b3712c.html> accessed 29 May 2019.

[7] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 <https://www.refworld.org/docid/3ae6b3aa0.html>accessed 29 May 2019.

[8] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html> accessed 29 May 2019; see also article 23 of the Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html [accessed 29 May 2019]

[9] F Peter, 'The Human Right to Political Participation' *Journal of ethics and Social Philosophy* (2013) 7 (No 2) 11.

[10]Gregory Fox, 'The Right to Political Participation in International Law' (1992) 86 *American Society International Law Procedure* 249.

> Declaration on Human Rights, the International Covenant on Civil and Political Rights, the American, European and African Conventions on Human Rights and, most recently, the various documents of the Conference on Security and Co-operation in Europe (CSCE), which are the most comprehensive.

The above dictum demonstrably shows that the right to participate in government or the right to political participation is far from being an orphan in the family of human rights, and more importantly that, it is guaranteed in all comprehensive human rights instrument. This of course makes it crystal clear that participating in government or political participation in decision-making process of a society is a human right. It drives home the point that the right to political participation imposes similar obligations on state parties to respect, protect and fulfill it.[11]

However, despite it being a human right, states in many cases try to rationalise or sometimes diminish it. This is shocking but not surprising because human rights law is seen as a challenge to the notion of state sovereignty traditionally and the right to political participation cannot be an exception.[12] The right to political participation is not only about limiting state sovereignty in particular areas but raises the more fundamental question of who is the holder of sovereign authority within a state. "The sovereign" in recent history has been referred to as those wielding political power. However, the right to political participations maintains that sovereignty lies in the bosom of the mass citizens and rejects in its entirety this *de facto* control test.[13]

Henry J Steiner in his earlier work on political participation as a human right argues that the concept or right to political participation has been an indispensable foundation stone in the post-war construction of human rights law.[14] He argues further that besides the fact that the right to political participation is prominently featured in the full range of international instruments, it is so fundamental to the extent that its absence would make all other rights fall to a perilous existence.[15] That is to say, arguably the right to political participation holds the key to the survival, meaning and enjoyment of all other human rights.

The human right to political participation under international human rights law is a kind of right considered first, instant and active right, which is seen as first among its equals

[11] The African Commission on Human and Peoples Rights in the case of Social and Economic Rights Action Centre (SERAC) V Nigeria (2001) AHRLR 60 (ACHPR 2001) para 44, held that ' Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights- both civil and political rights and social and economic- generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights'.

[12] Fox (n above 8) 544.

[13] ibid 544.

[14] Henry Steiner, Political Participation as a human right *Harvard human rights Year Book* 1 (1988) 77

[15] Steiner (n above 11) 77.

and among the group of rights. This is as a result of the fact that the securing of many other rights remains unrealistic in the absence of the guarantee of the right to political participation.[16] Similarly, the right to political participation serves various important purposes and nourishes the vial ideals of any society.[17]

Flowing from the above, what are the international parameters that must be met for states to be said to have fulfilled their obligations under international human rights law as they relate to the human right to political participation. It is a daunting task in defining the scope and content of this right because there is no agreement from scholars on this point. More so, political participation is a right which is in a continuous state of flux[18]

Fox asserts that the right to political participation places binding obligations on parties to various treaties and conventions where it is provided for. This simply means that state parties are expected to ensure that citizens enjoy the right without any illegitimate restrain, constrain or limitation. The minimum expectations from parties to these treaties in fulfilling their obligations is to ensure that free and fair elections exist and this must be based on universal adult suffrage, with judicious periodic intervals, also, the existence of secret ballot and absence of discrimination against candidates or voters.[19] These requirements must all be present because the absence of any is capable of rendering the right ineffective.

From a minimalistic sense, the contents and the contours of the right to political participation have been said to '…guarantee citizens both the right to vote under equal conditions and at regular intervals in free election and the right to stand for elections'.[20] It therefore suffices to say that right to political participation guarantees to all eligible persons the right to cast ballot and to stand as candidates in elections without any form of discrimination.

Notwithstanding the above, it is equally pertinent to state here that the human right to political participation under international human right law is usually guaranteed to only adult citizens. That is to say, domestic laws or constitutions that provide the right must make it available to all adult citizens and the only citizens that could be legitimately denied this right are children and those in conflict with the law.[21] To do otherwise would certainly bring state parties in conflict with their international obligations under various

[16] ibid 131.
[17] ibid132.
[18] Thio Li-ann, The Right to political participation in Singapore: Tailor-Making a Westminster-modeled constitution to fit the imperatives of "Asian" (2002) 6 Democracy *Singapore Journal of international and comparative law* 242.
[19] Fox (n above 8) 552.
[20] Walter Kalin and Jörg Kunzli, The law of international human rights protection (2009)466
[21] Steven Wheatley, 'Non-discrimination and equality in the right to political for minorities' (2002) 1 *Journal of Ethnopolitics and Minority Issues in Europe* 6.

international treaties which they are parties to. While states are allowed to determine what type of government system that suit them, they must conform to international human rights standards when it comes to the issues of human rights that are secured in international human rights instruments.

3. Human Rights under the 1999 Constitution of the Federal Republic of Nigeria (as amended

The constitutional guarantee of human right to the Nigerian people did not begin with the 1999 Constitution. Going down memory lane, constitutional human rights guarantee can be traced to the recommendations of Henry Willink's Commission of the need to have a long list of human rights and this was accepted by Constitutional Conference of 1958.[22] Human rights provisions were thus included in the 1960 and 1963 Nigerian Constitutions.[23] One wonders why the issue of human rights became a real issue at the time when colonialism was about to be ended in Nigeria and not when it was in full force. A scholar has argued rightly, that, colonialism and human rights are two parallel lines that are incapable of meeting because the crux of colonialism is to suppress, subjugate and plunder the people of the colony, including their human rights.[24] Thus, human rights considerations were of little or no value to the colonisers, including those of Nigeria.

However, the 1979 Constitution is touted to be one that brought about the constitutional advancement to the issue of human rights in Nigeria. Unlike previous Nigerian constitutions, it contained well-articulated fundamental human rights, made provision for the Fundamental Objectives and Directive Principles of State Policies (FODPSP) and contained cherished constitutional principles such as the rule of law and separation of powers.[25] The life span of the 1979 Nigerian Constitution was however cut short by the military coup of 1983.[26]

The Military in 1998 decided it will return the Nigerian state to the path of civil rule in 1999 and for this to happen there would be need for a constitution to regulate the affairs of the Nigerian state. This led to the fashioning of the current 1999 Constitution. The rightness or wrongness of process that gave birth to the 1999 Constitution is not the bill of this article as many authors have in numerous articles commented on same. It rather sets out to consider the rights guaranteed under it and queries the absence of the right to political participation.

[22] Olu Awolowo, 'Meaning, Nature and Evolution of Rights in Nigeria' in Olusesan Oluyide and Olu Awolowo (eds), *Rights* (Throne-of-Grace Limited Publishers, 2006) 7.
[23] ibid.
[24] Onye Gwe-Wado, 'Fundamental Human Rights and Corresponding Civic Obligations under the 1999 Constitution' in IA Ayua, DA Guobadia and AO Adekunle (eds), *Nigeria: Issues in the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies, Lagos 2000)190-191.
[25] Olufemi Soyeju, *Rudiments of Nigerian Law* (2005)274.
[26] Kehinde M. Mowoe *Constitutional Law in Nigeria* (Malthouse Press Limited, 2008) li.

The 1999 Constitution can be said to be a replica of the 1979 Constitution except for the fact that it contains forty-three (43) new provisions or amendments.[27] The fundamental human rights guaranteed by it are largely the same with those provided for under previous constitutions.[28] It specifically provides for just eleven (11) fundamental human rights which are the traditional civil and political rights.[29] Another scholar disagrees with the fact that the 1999 Constitution is on all fours with the 1979 Constitution but rather is an epitome of constitutional change. He contends that the making of the 1999 Constitution is an express departure from past experimentation on constitutional-making process in Nigeria though both the 1979 and 1999 Constitutions have some things in common.[30] Besides the recognition of fundamental human rights under the 1999 Constitution, there is also the FODPSP which contains rights which can be categorised as economic, social and cultural rights under Chapter II.[31] Generally speaking, the only rights that are justiciable under the 1999 Constitution are those contained in Chapter IV, section 46(1) provides that '[a]ny person who alleges that any of the provisions of this chapter has been, is been or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress'. The operative phrase is 'in this chapter', that is, redress is only available to victims of rights guaranteed under the chapter. On the other hand, rights provided for under chapter II are not justiciable under the 1999 Constitution by virtue of section 6 (6) (c) which provides that the judicial power:

> Shall not, except as otherwise provided by the Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution…

The above provision is certainly a grave and rude affront on the judicial powers as guaranteed under the Constitution. It resonate the idea of outer clauses which should only exist in military decrees and not a democratic Constitution. In a democracy, the judges should not only be said to be independent but should be seen to be independent and act independently without any restriction on their thoughts or legal reasoning on matters brought before them. Also, section 13 of the Constitution declares all organs governments, all authorities and persons including the judiciary to have the responsibility of observing and applying the provisions of Chapter II.

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[27] See generally, Charles Mwalimu, *The Nigerian Legal System, Public Law* (vol. 1) (2005) 207.
[28] Soyeju, (n above 25) 309.
[29] Olu Awolowo, (n above 22) 7, 1. Life, 2. Dignity, 3. Liberty, 4. Fair hearing, 5. Privacy, 6. Thought, conscience and religion, 7. Expression and the press, 8. Assembly and association, 9. Movement, 10. Freedom from discrimination and 11. Right to property.
[30] JV Achimu, 'The Legitimacy of Constitutional Change: The Enactment of the 1999 Constitution' in IA Ayua, DA Guobadia & AO Adekunle (eds), *Nigeria: Issues in the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies, Lagos 2000)1.
[31] These rights include right to education, health, environment and others; see Gye-Wado (n above 24)193-194.

While there is no concurrence of opinions among scholars on the most appropriate interpretation of section 13 and the implementation of the Chapter, it has however been argued that since the section places responsibly and duty on all organs of government, '[i]t is therefore a contradiction in terms to take away, in another breath, the right to enforce the duty and responsibility in terms of section 6(6) (c), this will amount to absurdity, which the courts have always condemned'.[32]

Notwithstanding the above strong and persuasive arguments of the need for the courts to give similar or equal force to rights contained in Chapter IV and Chapter II, the Nigerian courts including the Supreme Court of Nigeria have always held that by virtue of section 6(6) (c) of the 1999 Constitution, all issues in Chapter II are not justiciable.[33]
It must equally be mentioned here that besides the rights guaranteed by the 1999 Constitution, other rights that accrued to Nigerians are those contained in the African Charter on Human and Peoples Rights (African Charter). The African Charter is now part of the body of laws in Nigeria by virtue of its domestication in accordance with section 12 of the Constitution. The Supreme Court has however stated in *Abacha & Others v Fawehinmi*[34]that while the Africa Charter is now part of the Nigerian law; this does not make it to be at par or superior to the Nigerian Constitution. In that, where there is a conflict between the provisions of the African Charter and the provision of the Constitution that of the latter would prevail but the provisions of the former is superior to other legislation.[35] This decision while it is palpable faulty in the light of international human rights law, it nevertheless remains the law as far as rights adjudications are concerned in Nigerian courts. Nigerian courts have refused or are unwilling to recognized rights guaranteed by the African Charter but not provided for under Chapter IV as not being justiciable. The practice is antithetical to the principle of *pacta sunt servanda* and against the purpose and purport of the African Charter.[36]
Furthermore, it can be submitted without equivocation that the rights that are available and justiciable under the 1999 Constitution in the Nigerian courts are those guaranteed under Chapter IV and any other international human rights instruments which have been ratified and domesticated which provisions are not in contradiction with the provisions of the Constitution. By necessary implication, human rights which have not been secured by the Constitution, in that they have been grouped under the fundamental human rights chapter are nonstarter. Such rights are incapable of being enforced through the principal

[32] See Nathaniel A Inegbedion, 'Constitutional Implementation: The Nigeria Experience' in Charles M. Fombad (ed), *The Implementation of Modern African Constitutions: Challenges and Prospects* (Pretoria University Law Press, 2016) 41.
[33] *A.G.,Ondo State v. A.G.,Fed* (2002) 9 NWLR (Pt.772) 222.
[34] (2001) AHRLR 172 (NgSC 2000).
[35] *Abacha & Others v Fawehinmi* (n above 33) para 15.
[36] John Dugard, *International Law: A South African Perspective* (4th edn.) (JUTA, 2011) 423.

instrument for the enforcement of fundamental rights in Nigeria, as will be seen shortly. They are at best rights for agitation but not litigation in Nigerian courts strictly speaking.

4. The Jurisprudence of the Nigerian Court on the Enforcement of "Non-Listed" Rights

The Fundamental Rights Enforcement Procedures Rule (FREP Rule) became operational on 1 January 1980 in Nigeria. This was made by the then Chief Justice of Nigeria (CJN) Justice Fatai-Williams pursuant to section 42(3) of the 1979 Constitution.[37] The said section which is now section 46(3) of the 1999 Constitution empowers the CJN to make rules in relation to the practice and procedure for the enforcement of fundamental human rights in a High Court. The 1979 FREP Rules has been attacked in many fronts because of its rigidity and alleged formalisation of technicalities in the enforcement of fundamental human rights in Nigeria.[38]

However, in 2009 the then CJN of Nigeria made new FREP Rules, which is more progressive, rights-friendly and highly flexible and became operational 1 December 2009.[39] The most revolutionary innovation in the 2009 FREP Rules is that it urges judges to take cognisance of the provisions of human rights treaties which Nigeria has ratified when coming to a decision on the enforcement of human rights.[40] This article does not really focus on the attitudes of the Nigerian courts on the procedures for the enforcement of human rights but on substantive issues. That is, how the Nigerian courts approach the existence of a violation or not of fundamental rights.

The Nigerian courts have always followed a formalistic and very narrow approach to human rights adjudication unlike the Indian courts. Rights not expressly guaranteed under Chapter IV are seldom recognised as worthy of protection by the Nigerian courts except for some few isolated decisions from the lower courts.[41] For example, if an eligible voter is excluded from voting in an election due to the refusal or inability of the electoral body to bring electoral materials to where he stays and he is aggrieved and he intends to sue the government under the FREP Rules for the violation of his right to vote, he would not succeed in his claim because political rights are not part of the listed fundamental human rights guaranteed by the 1999 Constitution.

[37] Enyinna Nwauche, 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules2009: A fitting response to problems in the enforcement of human rights in Nigeria? (2010) 10 *African Human Rights Law Journal* 503.

[38] ibid 503.

[39] ibid 503.

[40] See Abiola Sanni, 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *African Human Rights Journal* 511-531.

[41] *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005)

Thus, for a litigant to succeed in pursuing his fundamental rights claims through the FREP Rules, he must show that '…the substantive action or primary claim is a violation of his fundamental rights. If such a claim is secondary, subsidiary or incidental through the rules would be incompetent…'[42]

The above principle of law has been reiterated by the Supreme Court of Nigeria in plethora of cases, in that where the main issue of contestation is incidental or ancillary to fundamental human rights, suing through the rules will fail woefully. In *Tukur v Government of Gongola*[43] *State* and *Tukur v Government of Taraba State*,[44] the appellant claims of unlawful dismissal and improper disposition from the employment of the respondent respectively, where the allegation of breach of the right to fair hearing flowed from. It was held by the Supreme Court that the trial court lacked the jurisdiction to entertain the suits because since the right to employment is not one of the listed rights and therefore it cannot be brought through the FREP Rules. The suits were declared incompetent and the rights sought not enforceable under the rules. A similar decision was reached in the case of *Sea Trucks Nigeria Ltd v Anigboro,* where dismissal from employment was the main crux of the claims of the appellant, the Supreme Court held that since fundamental human rights claim only flowed from his main claim which was his prayer for reinstatement to his job, the use of FREP rules was inappropriate and consequently the suit failed.[45]

The Supreme Court in the case of *West African Examination Council v Omodolapo Yemisi Adeyanju* restated the position of the law on enforcement of "non-listed" rights in the 1999 Constitution using the FREP Rules.[46] The brief fact of the case is that the respondent was a candidate in the November/December, 1995 Senior School Certificate Examination conducted by the appellant. The appellant was subsequently admitted to the University of Lagos based on a notification of result signed on behalf of the Head of the National Office of the appellant by one Wumi Ajiboye. The appellant is said to have obtained two distinctions, five credits and a pass in the examinations because as shown in the notification of result she sat for nine subjects. While the respondent was in Part Three (300 level) in the University of Lagos, she was informed in April 1998 by the appellant through a letter signed by one N.A Onadeko that the notification of result earlier issued to her was cancelled. All efforts by the respondent to secure a reversal of the cancellation failed. Consequent upon which the respondent filed a suit against the appellant at the Lagos State High Court, which was commenced under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

[42] Kehinde M. Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Limited, 2008) 551.
[43] (1987) 1 S.C 333
[44] (1997) 6 NWLR (Pt. 510) 549.
[45] (2001) 10 WRN 78.
[46](2008) 9 NWLR (Pt. 1092) 270.

Among her claims at the High Court were for a declaration that the cancellation of the result of the respondent by the appellant was null and void as same violated the respondent's right to fair hearing, an order quashing the decision of the appellant to cancel the respondent's result and compelling the appellant to furnish the admission office of the University of Lagos the purportedly cancelled results of the respondent in the said November/December 1995 Senior School Certificate Examination.[47]

The case was dismissed by the trial court on the fact that the issue of fundamental rights did not arise in the respondent's suit but the Court of Appeal allowed the appeal and granted the reliefs sought by the respondent at the trial court. This made the appellant to appeal to the Supreme Court and the Court unanimously allowed the appeal. According to Mohammed, (J.S.C as he then was) (who read the lead judgment in the case):

> Coming back to the case at hand, it is not difficult to identify the principal complaint of the respondent in her application before the trial court. It is a claim for the alleged wrongful or unlawful cancellation of the Senior School Certificate Examination results of the respondent. The principal relief sought was the restoration of the respondent's results by the appellant which the court below in allowing the respondent's appeal ordered the appellant to do. The ancillary or subsidiary reliefs sought by the respondent including the quashing of the decision of the appellant to cancel her results and order compelling the appellant to furnish the admission office of the University of Lagos with the said results. It is observed that the alleged breach of the respondent's fundamental right flowed directly from the main complaint of the respondent that the cancellation of her result was done without affording her a fair hearing. The alleged breach of the respondent's fundamental right is therefore only ancillary subsidiary to the main claim. A party seeking relief under section 46(1) of the 1999 Constitution and Order 1 rules 2 & 3(1) of the Fundamental Rights (Enforcement Procedure) Rules must ensure that the main relief and consequential reliefs points directly to a fundamental Rights under Chapter IV of the 1999 Constitution and a clear deprivation of the same by the other party being sued.[48]

From the above dictum of the learned jurist, it goes without saying that no matter the importance of a claim or right, once the claimant cannot trace it to one of the listed rights in Chapter IV of the 1999 Constitution; the suit will be struck out, once same is brought

[47] See the fact of the case at pages 272-273.
[48] See page 295 of the case (Emphasis added).

through the FREP Rules.[49] By necessary implication, a right not listed under Chapter IV does not enjoy the status of being fundamental in Nigeria and not justiciable in Nigerian Courts. Also, it is not enough for a non-listed right to be tied to a listed rights or for listed rights to be stretched so as to accommodate a non-listed right in order to be a able to sue through the FREP Rules. For example, the right to freedom of association guaranteed under section 40 of the 1999 Constitution will be impossible to be used as a ground to secure the right to vote through the Rules, because the right to vote is not one of the listed rights under Chapter IV of the 1999 Constitution. Thus, fundamental rights not listed under Chapter IV are proverbial "orphans rights", non-justiciable and enjoy no constitutional right protection whatsoever under the 1999 Constitution generally. Redress for human rights not classified as fundamental human rights under the 1999 Constitution such as political rights may be sought through other means but not through the FREP Rules, which is the principal instrument for the enforcement of fundamental rights in Nigeria.

5. Comparative Perspective on Constitutional Guarantee of Political Rights

Nigeria is not the only former British Colony in Africa that practices democracy, countries like South Africa, Kenya, Botswana, Mauritius and Zimbabwe are also democratic states. Among these countries, the Constitutions of Kenya and South Africa would be considered on the guarantee of political rights. The choices of these two counties are based on the fact that, apart from having a large population like Nigeria, their Constitutions are not only the most recent but also the best constitutional models in Africa.

South Africa

The Republic of South Africa (RSA) moved from the dark days of apartheid regime to democratic rule in 1994, because majority of South Africans on the basis of their race were prohibited from voting before 1994.[50] The people of the RSA made for themselves a Constitution that reflect the wishes, aspirations and the tenets of their new state, which is known as 1996 Constitution of the Republic of South Africa.[51] Among the founding values of the Constitutions are; '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.[52]

The Constitution therefore makes no pretense about the fact that the style of government which it will regulate would be one that is democratic, guarantees adult suffrage, and

[49] See page 296.
[50] See Pierre De Vos & Warren Freedman, (eds), *South African Constitutional Law in Context* (Oxford University Press, 2014) 560.
[51] Known as Act 108 of 1996, adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.
[52] See article 1 (d) of the Constitution of the RSA.

allows for regular elections, multi-party system among other things. To adopt any other practice would be contrary to the Constitution and in violation of its supremacy clause.[53] Chapter II of the RSA Constitution provides for a Bill of Rights, which is very expansive and deeply detailed, as it contains both traditional civil and political rights and socioeconomic rights.[54] Therefore, the threshold for measuring and determining the constitutionality of all governmental conducts are the Bill of Rights and other provisions of the Constitution.[55] This goes to show the centrality of the Bill of Rights to South African democratic order.

The Bill of Rights specifically provides for political rights in article 19. Article 19 (3) provides as follows;

> Every adult citizen has the right-
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
> (b) to stand for public office and, if elected, to hold office.

One striking feature of political rights as guaranteed in the 1996 Constitution of the RSA is that the rights are available to only adult citizens and non-nationals or children are not entitled to them.[56] Commenting on the importance of the right to vote as guaranteed in the Constitution of the RSA, it has been said that, '[t]he right to vote, therefore, is symbolic of our citizenship and represents a practical manifestation of how the Constitution recognises and protects the dignity of every citizen'.[57]

Thus, the constitutional guarantee of the right to vote to all adult South African is a tacit recognition of the right to dignity as the main stakeholders in their democratic project. Interestingly, the right to vote is even extended to prisoners.[58] While many Nigerians did not suffer violation of their political rights on the basis of race, but were denied their rights during the military era.

Similarly, in South Africa, 'all citizens of the Republic of above the age of 18 years are generally entitled to stand for elections to the National Assembly, the provincial legislatures as well as municipal councils. As such, they are entitled to stand for election as President of the Republic or the chairperson of a municipal council'.[59] The various political rights guaranteed by the RSA Constitution are certainly in recognition of the dark history of the Republic and 'are important not only because they are aimed at

[53] Section 2 of the Constitution of the RSA.
[54] Some of the socioeconomic rights are Environment (art. 24), Housing (art. 26), Health care, food, water and social security (art. 27), Education (art. 29) etc.
[55] Wessel le Roux, 'Descriptive overview of South African Constitution and Constitutional Court' in Oscar Villera, Upendra Baxi and Frans Viljoen, (eds), *Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013) 143.
[56] Pierre De Vos & Warren Freedman, (n above 50) 561.
[57] ibid 570.
[58] See Penuell Maduna, 'Political Rights' in MH Cheadle, DM Davis and NRL Haysom, (eds), *South African Constitutional Law: The Bill of Rights* (LexisNexis South Africa, 2002) 278.
[59] ibid 281.

preventing the wholesale denial of political rights from ever taking place again, but also because they are aimed at giving effect to the system of representative democracy enshrined in the Constitution'.[60] This goes to show that the guaranteed rights in a given constitution must not only reflect the history of the people but must also be a mirror through which the system of government which it professes must be seen, as rightly seen in the case of the Constitution of the RSA.

Kenya

The 2010 Kenyan Constitution (KC) is one of the good things that have happened to the history of constitutional making in Africa.[61] The 2010 KC contains a detailed Bill of Right which is presented as integral part of the democracy of Kenya and the structure for economic, social cultural policies.[62] Just like its South African counterpart, the Bill of Rights provides for rights across three generation of rights; it has been rightly described as 'a collage of all generation and genres of human rights, a rare development in municipal law'.[63] Besides guaranteeing other civil and political rights, the KC provides specifically for political rights under article 38. On the right to vote and stand as candidate in an election, article 38(3) provides as follows:

> Every adult citizen has the right, without unreasonable restrictions—
> (a) to be registered as a voter;
> (b) to vote by secret ballot in any election or referendum; and
> (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

The political rights from the above are limited to citizens and they must be adult. Adults or those who have reached the age of majority under Kenya law are persons who have attained 18 years, that is, any citizen who has attained the age of 18 is not under any form of disability and therefore eligible to enjoy all political rights guaranteed under article 38 of the KC.[64] The securing of political rights of the citizens of Kenya is reflective of the constitutional commitment to the ideals of constitutional democracy where the political participation of the people is key and central to its survival.[65]

[60] Pierre De Vos & Warren Freedman, (n above 50) 577.
[61] See generally J Kangu Constitutional law of Kenya on devolution (Strathmore University Press, 2015).
[62] John Osogo Ambani and Morris Kwinda Mbondenyi, 'A New Era in Human Rights Promotion and Protection in Kenya? An Analysis of the Salient features of the 2010 Constitution's Bill of Right' in Morris Kwinda Mbondenyi, and Others (eds), *Human Rights & Democratic Governance in Kenya: A Post 2007 Appraisal* (Pretoria University Law Press, 2015) 22.
[63] ibid 23.
[64] See sec 2 of the Kenyan Age of Majority Act Cap 33 of 2012.
[65] Parts of the preamble of the 2010 KC states thus; 'RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'.

6. Human Rights Implications of Non-Constitutional Guarantee of Political Rights

The importance of constitutional rights in any society cannot be overemphasised, just as political rights' guarantee in a democracy should not be seen as a luxury but necessity. Human [political] rights and democracy could be said to be two sides of same coin because 'it is difficult to imagine democracy on a national scale without the right of citizens to take part freely in politics'.[66] The codification of rights in a constitution could be said to be the limit to which a particular state wishes to be bound, that is such a state would only be ready to be held accountable for only those rights which it has expressly secured in its constitution. Thus, states are only bound by legally binding provisions and only on those provisions can they be held liable in cases of violations.[67]

Therefore, constitutional or legal guarantee of human rights would 'allow for access to justice, the apportionment of responsibility, accountability, and aims at eradicating impunity and its framework provides a clear basis for advocacy and answerability'.[68] Without an express guarantee of a right, attempting to secure same is futile and judicial vindication of victims of such a right in cases of violation is non-existence.[69]

If one of the pivotal roles of a constitution is to declare the design and parameters on how a society is to be govern, then a constitution that professes constitutional or representative democracy should show this in the list of fundamental rights which it guarantee by specifically providing for one of the core rights of any democratic regime.[70] The enjoyment and guarantee of political rights in a democratic society is too important to be made speculative or having the garb of privileges, they should and ought to be among the fundamental rights guaranteed because without them democracy would not only stammer but in the long run would fall down and die. Okoloise has rightly pointed out that, '[t]he fragility of many African states requires that the law and the constitution remain the last hope of the individual. Consequently, the legal codification of rights is arguably a sure means of enforcing their protection'.[71] Therefore, while non-constitutional guarantee weakens and, in most cases, renders human rights nugatory, constitutional guarantee of rights serves as a springboard for the respect, protection, fulfilling and promotion of them.

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[66] Lucianna Thuo, 'Deeping and Sustaining Electoral Democracy in Kenya: Lessons from Ghana' in Michael Addaney & Michael Gyan Nyarko, (eds), *Ghana @ 60: Governance and Human Rights in Twenty-First Century Africa* (Pretoria University Law Press, 2017).

[67] Frans Viljoen, 'Disciplinary Beyondness: A background to the Conference and Collection of papers' in Frans Viljoen, (ed), *Beyond the Law: Multi-Disciplinary Perspective on Human Rights* (Pretoria University Law Press, 2012) Xiv.

[68] ibid Xiv –Xv.

[69] ibid xv.

[70] David Bilchitz, 'Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in Joseph' (2010) 3 *Constitutional Court Review* 45.

[71] Chairman Okoloise 'Contextualising the Corporate Human Rights Responsibility in Africa: A Social Expectation or Legal Obligation?' (2017) 1 *African Human Rights Yearbook* 201.

While it is true that a constitution no matter how elaborate and expansive it may be, is incapable of providing for all laws, rules and regulations needed in a society to function optimally, it cannot be denied that a democratic constitution should at least makes provision for two main democratic rights, which are the rights to vote and to stand as candidates in elections.[72] It can be said without any equivocation that a constitution which is being operated in a democracy which makes no provision for political rights among its listed rights is a great disservice to the human rights of the people and big draw towards the deepening of democracy. Such an error should not be overlooked but be corrected once discovered. Without the direct constitutional protection of political rights in a democracy, such rights remain nothing but a gift, this is because political rights are the keys to the door of democracy, without their express constitutional guarantee, it remains shut in practical sense. The human right to political participation in a constitutional democracy must not be a constitutional footnote right but an elaborate fundamental human right in the constitution.

7. Recommendations and Conclusion.

It has been shown that since 29 May 1999, Nigeria has been practicing democracy which is being regulated by the 1999 Constitution. However, while Nigerians have been voting and some contesting for various elective offices it is sad to note that among the listed rights guaranteed under Chapter IV of the 1999 Constitution, there is no provision for the political rights or the right to political participation. The implication of this omission as discussed above is that such rights are neither justiciable nor do they enjoy the status of being classified as fundamental human rights. Thus, their violation under any guise is incapable of being redressed in court through the FREP Rules.

Though the current FREP Rules appear to have ambitions that are contrary to the main argument of this paper, but they are what they are, mere ambition. The Nigerian courts are not prepared to give decisions that would be *ultra vires* of the clear provisions of the 1999 Constitution. And they will only continue to regard only rights listed under Chapter IV as the fundamental and worthy of any judicial protection, no more, no less.
Notwithstanding the fact that Nigerians have been exercising the right to vote since 1999, the right to vote is not a fundamental right but rather some sort of privilege given to them by the State. The absence of such a right in a democratic Constitution can never be treated as inconsequential but a fundamental omission because it goes to the root of the democratic system in place as guaranteed by the Constitution.

[72] Charles M. Fombad 'Problematising the issues of constitutional implementation in Africa' in Charles M. Fombad (ed.) The Implementation of Modern African Constitutions: Challenges and Prospects (Pretoria University Law Press, 2016) 13.

The framers of the 1999 Constitution rather unfortunately downplayed the importance of express constitutional guarantee of political rights in a democracy. They only provided for eligibility criteria for contesting for political offices, which are neither sufficient not adequate to fully secure the political rights of the Nigerian people. The provision of eligibility criteria for elective positions in any constitution is distinct from the express provision of political rights and both should never be treated as same. Similarly, providing for such rights in a subsidiary legislation is to say the least a highly preposterous state of affair. Without the exercise of political rights by the people, there would be no democracy, and democracy without the constitutional guarantee of political rights is a mirage.

Therefore, the following recommendations are necessary for Nigeria's democratic experimentation to live up to its billing among the comity of democratic states.
Mainly, Chapter IV of the 1999 Constitution should be amended to include an express political rights provision as seen in the case of South Africa and Kenya. Such rights should be guaranteed to all adult citizens, which is 18 years. There should be no further distinction among adults in enjoying the rights save for those who are in conflict with the law or those incapable of exercising the rights.

Second, the existing provisions containing criteria for various elective offices should be amended by removing the age requirement but making attainment of the age of majority the sole criteria. This of course would not only open up the political space for all youth but would be in tandem with international best practices. It is one ways of upscaling human rights standards and keeping up with Nigeria's international human rights obligation under the African Charter and other international human rights which it is party to.
In conclusion, it is strongly believed that should the above recommendations be implemented by the Nigerian State, it would further make the Nigerian Constitution more democratic, human rights centered and above all, make it a true reflection of democratic system in practice. While it must be quickly submitted here that the actual and direct constitutional guarantee of political rights to all adult citizens would not be a magic wand for the actual respect and protection of them by the state, it is nevertheless a veritable tool for the agitation and eventual actualisation of them by citizens and other concerned parties.