

Public declaration of assets in Nigeria: Conflict or synergy between law and morality?

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Summary

The Nigerian Constitution seeks to prevent corruption and abuse of office through its provisions on the declaration of assets by public officers. Although they are not obliged to do so, many public officers have publicly declared their assets. This has in turn put pressure on others to do so. In forging a synergy between the law and practice of asset declaration in Nigeria, the paper examines the human rights implications of the recent trend and proffers suggestions for improvement.

1 Introduction

Before he took his oath of office as the President of the Federal Republic of Nigeria on 29 May 2007, President Umaru Musa Yar'Adua had declared his assets and liabilities as required by the 1999 Nigerian Constitution.¹ After about a month in office, on 28 June 2007, the President made his asset declaration public in fulfilment of his electioneering campaign. Records show that he also publicly declared his assets when he was elected as Governor of Katsina State in 1999. President Yar'Adua declared assets of N945 446 116 million.² President Yar'Adua, who said he was planning a Freedom of Information Bill that would make it mandatory for all public officers to declare their assets publicly, explained that the Code of Conduct Bureau had advised him

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¹ See para 11 of the Fifth Schedule to the 1999 Nigerian Constitution.

² *The Punch* 29 June 2007 4.

against making his assets public as this would put pressure on other public officers to do so.³

Since the President's public declaration of his assets, mixed reactions have been expressed by Nigerians. These range from the sublime to the ridiculous. His action has also attracted commendation and a considerable dose of cynicism and skepticism.⁴ A few days after the public declaration, the Kogi state Governor, Ibrahim Idris, former Governor of Zamfara state and Senate minority whip, Sanni Ahmed, and Governor Gbenga Daniel of Ogun state declared their assets publicly.⁵

One major fallout of the public declaration of assets by President Yar'Adua is the pressure being mounted on all his lieutenants and other public officers to do the same. The worst hit was the Vice-President, Dr Goodluck Jonathan. Nigerians naturally expected him to follow the footsteps of the President by declaring his assets publicly even though there is no legal obligation on him to do so. When they realised that the Vice-President was reluctant to declare his assets, formal calls were made to him. The calls were rebuffed by the Vice-President, who claimed that he had already declared his assets before the Code of Conduct Bureau, more than seven times as Deputy-Governor, twice as Governor and once before taking an oath of office as the Vice-President.⁶

In an editorial entitled 'The Vice-President's Assets',⁷ the *Guardian* newspaper asked if the Vice-President's reluctance was due to his attempt to conceal something from the public and urged him to act without further delay. It continued:⁸

By hiding under the letters of the law, the Vice-President lays himself open to a charge: Does he have something to hide? Morality is not law, but sometimes perception may be more important than morality. He should see this as an opportunity to cleanse his image. And he needs not pollute the issues by turning this into a matter for partisan politics.

The Vice-President caved in to pressure and made his assets declaration of N295 304 420 million public on the following day,⁹ probably after reading the editorial. Going by the public outrage against the Vice-President for his delay in making his asset declaration public, should penal sanctions attach to the failure to make an asset declaration public in Nigeria as opposed to a failure to declare assets? This brings to the fore the age-long conflict between law and morality.

Law is a set of rules aimed at regulating human conduct. It is usually, but not always, backed by sanctions. Morality, on the other hand, is a distinct domain of normative thinking about action and feeling, the

³ As above.

⁴ For the different reactions, see *This Day* 3 July 2007 7; *The Nation* 10 July 2007 48. *The Guardian* 10 July 2007.

⁵ *The Guardian* 1 August 2007 1.

⁶ *The Guardian* 7 August 2007 1.

⁷ As above.

⁸ *The Vanguard* 9 August 2007 1.

whole domain being the subject of ethics.¹⁰ Both law and morality are founded in norms essential to the well-being of society — thus has theft developed from the concept of private property. Moreover, morality and law occupy common ground, as numerous infringements of the law are also morally abhorrent.¹¹

Questions concerning the proper limits of the law are of particular interest to thinkers in the Western political tradition of individualism. In this tradition, the law is regarded as an instrument of coercion and the problem is to define the scope of the law in such a way that it fulfils its necessary purpose at minimum cost to individual liberty. The debate therefore centres on the proper end of legal coercion. Two law-limiting strategies are commonly adopted: the practical and the moral.¹²

As the most important ends of human life (salvation of the soul, or its secular equivalent, moral integrity) are taken to require the uncoerced ‘inward’ assent of the individual, the effective scope of the law is significantly limited on practical grounds by the regulation of ‘outward’ behaviour. On the moral question concerning what behaviour ought to fall within the purview of the law, conservatives contend that the society has a right to enforce its moral values by criminalising whatever behaviour its members regard as ‘sinful’.¹³

There can be little doubt that moral considerations do influence rules of law, but this aspect has to be distinguished from the question regarding how far laws should give effect to moral attitudes.¹⁴ Lord Mansfield went as far as to assert ‘that the law of England prohibits everything which is *contra bonos mores*’,¹⁵ but other judges have been more cautious.¹⁶ Also worth consideration is the question: On what basis should a failure to declare assets publicly, as opposed to a failure to declare it as stipulated by the Code of Conduct, attract criminal sanction? Is it on the basis of Mill’s harm-to-others principle or Dias’s calculus?¹⁷

Failure to make one’s asset declaration public after submitting the asset declaration form to the Code of Conduct Bureau does not in itself constitute any harm to anyone. It is only harmful when people hide behind the fact that members of the public do not have access to the declaration to make false declarations in order to cover up assets illegally acquired in corruption or abuse of office. This means that, although there is no legal obligation to publicise a declaration of assets

¹⁰ 1E Craig (ed) *Routledge encyclopedia of philosophy* (1998) 544.

¹¹ B Jones ‘A’ *level law* (1981) 4.

¹² Craig (n 10 above) 460.

¹³ As above.

¹⁴ RMW Dias *Jurisprudence* (1985) 215.

¹⁵ *Jones v Randall* (1774) 1 Cowp 17 39; *R v Delaval* (1963) 3 Burr 1438.

¹⁶ Eg Scrutton LJ in *In Re Wigzell, ex parte Hart* (1921) 2 KB 835 859.

¹⁷ For further explication on this, see HLA Hart *The concept of law*, cited in LB Curson *Jurisprudence* (1995) 234-235; Dias (n 14 above) 111.

in Nigeria, the refusal to do so is potentially harmful to the country. This view is strengthened by the fact that most public officers being tried for or convicted of corruption are found to have made a false declaration of their assets. This is engendered by the *lacunae* contained in the constitutional provisions on the declaration of assets in Nigeria, to which we now turn.

2 Constitutional provisions relating to asset declaration in Nigeria

2.1 Code of Conduct

Provisions on the declaration of assets by all public officers in Nigeria are entrenched in the Code of Conduct for Public Officers, contained in Part I of the Fifth Schedule to the 1999 Nigerian Constitution. The Code was first introduced into the Nigerian Constitution in 1979. It is meant to prevent corruption and abuse of office and to ensure transparency in public officers. Public officers for the purposes of the Code include the President¹⁸ and the Vice-President¹⁹ of the Federation, the President and Deputy-President of the Senate, the Speaker and Deputy-Speaker of the House of Representatives and Speakers and Deputy-Speakers of Houses of Assembly of states and all members of legislative houses,²⁰ Governors and Deputy-Governors of states,²¹ the Chief Justice of Nigeria, justices of the Supreme Court, the President and justices of the Court of Appeal, and other judicial officers and all staff of courts of law,²² the Attorney-General of the Federation and Attorney-General of each state.²³ Ministers of government of the Federation and commissioners of governments of the states,²⁴ Chief of Defence staff, Chief of Army staff, Chief of Naval staff, Chief of Air staff and all members of the armed forces of the Federation,²⁵ the Inspector-General of Police, the Deputy-Inspector-General of Police and all members of the Nigerian Police Force and other government security agencies established by law,²⁶ the Secretary to the government of the Federation, Head of Civil Service, Permanent Secretaries, Directors-General and all other persons in the civil service of the Federation or of the

¹⁸ Para 1, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

¹⁹ Para 2, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁰ Para 3, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²¹ Para 4, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²² Para 5, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²³ Para 6, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁴ Para 7, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁵ Para 8, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁶ Para 9, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

state,²⁷ ambassadors, high commissioners and the other officers of the Nigerian missions abroad,²⁸ the Chairperson, members and staff of the Code of Conduct Bureau and Code of Conduct Tribunal,²⁹ the Chairperson, members and staff of local government councils,³⁰ the Chairperson and members of the boards and other governing bodies and staff of statutory corporations and of companies in which the federal or state government has the controlling interest,³¹ all staff of universities, colleges and institutions owned and financed by the federal state or local government councils,³² and the Chairperson, members and staff of permanent commissions or councils appointed on a full-time basis.³³

It is curious to note the wide description of public officers in the Nigerian Constitution, which includes political office holders, but excludes special advisers at the federal and state levels. This is a grave omission as the offices of special advisers are established by the Constitution.³⁴ They assist the chief executives in the discharge of their functions and they play active roles as members of the executive. The implication of this omission is regrettable, but it is partly remedied by the fact that, by their oath of office, special advisers undertake to abide by the Code of Conduct.³⁵ According to Nwabueze,³⁶ the Directive Principles of State Policy and the Code of Conduct for public officers enshrined in the Nigerian Constitution perhaps represent the best attempt to give constitutional force to the democratic principles of the people and the republican ideal of civic virtues and political morality.³⁷

Acts prohibited by the Code include a public officer putting himself in a position where his personal interest conflicts with his duties and official responsibilities,³⁸ holding two posts from which he is being paid from public funds³⁹ and engaging or participating in the running of any private business, profession or trade when employed on a full-time basis.⁴⁰ This does not prevent a public officer from acquiring

²⁷ Para 10, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁸ Para 11, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁹ Para 12, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³⁰ Para 13, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³¹ Para 14, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³² Para 15, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³³ Para 16, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³⁴ See secs 161 & 196 of the 1999 Nigerian Constitution; see also JOA Akintayo 'Pension rights of political office holders in Nigeria' (2005) 4 *University of Ibadan Journal of Private and Business Law* 107.

³⁵ See secs 152 & 196(4) of the 1999 Nigerian Constitution; see also Akintayo (n 34 above) 107.

³⁶ BO Nwabueze *Ideas and facts in constitution making* (1993) 156.

³⁷ As above.

³⁸ Para 1 Part I, Fifth Schedule to the 1999 Nigerian Constitution.

³⁹ Para 2(a) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁰ Para 2(b) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

an interest in a private businesslike partnership. What he cannot do is to at the same time hold a managerial post or other position in such an undertaking.⁴¹ A public officer is, however, allowed to engage in farming. According to Aguda, the permission granted a public officer to engage in farming under the Code could lead to difficulties in enforcement because farming includes large-scale enterprises.⁴² The exemption given to farming might not be unconnected with the need to boost agricultural production in Nigeria.⁴³ Furthermore, any allegation that a public officer is engaged in private business must be strictly proved. It is not enough to find in possession of a public officer a form containing the names of directors of a company also bearing the public officer's name.⁴⁴

The Code also prohibits operations of foreign accounts by the President, Vice-President, Governor, Deputy-Governor, Ministers, commissioners and members of the National Assembly and Houses of Assembly of the states.⁴⁵ It prevents public officers, after retirement and while receiving a pension from public funds, from accepting more than one remunerative position as Chairpersons, directors or employees of a company owned or controlled by the government or any public authority.⁴⁶ Nor shall a retired public officer receive remuneration from public funds in addition to his pension and the emolument of such one remunerative position.⁴⁷ Retired public officers who have held offices as President, Vice-President, Chief Justice of Nigeria, Governor and Deputy-Governor of a state are also prohibited from service or employment in foreign companies or enterprises.⁴⁸ According to Akande, this provision is necessary in the overall interest of national security so that foreign powers might not use their financial power to undermine the security of the nation by getting the confidence of such top functionaries of the state.⁴⁹ However, to bar them for life from exercising their fundamental right of such employment 'is not justifiable', continues the professor. Akande then suggests that the ban should be limited to a number of years, preferably eight years after they have left office. After such a long period, if they have not been forgotten as having secrets which might be useful to foreign power, Akande

⁴¹ *Nwankwo v Nwankwo* (1995) 30 LRC 24 33.

⁴² O Aguda *Understanding the Nigerian Constitution 1999* (2000) 247.

⁴³ IB Lawal 'The code of conduct and the fight against corruption in Nigeria: A conspectus' (2006) 2 *Abakaliki Bar Journal* 107.

⁴⁴ *Onyeukwu v The State* (2000) FWLR (Part 6) 983.

⁴⁵ Para 3 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁶ Para 4 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁷ The justification of this provision is seriously doubted with the recently-introduced contributory pension scheme by the Pension Reforms Act of 2004.

⁴⁸ Para 5 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁹ JO Akande *Introduction to 1999 Nigerian Constitution* (2000) 522.

contends, 'then perhaps the country does not deserve the security which it is seeking to protect'.⁵⁰

By paragraph 6 of the Code, a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. He is, however, allowed to accept gifts or benefits from relatives and personal friends 'to such an extent and such occasions as are recognised by custom'. This provision seems to justify the acceptance of 29 new vehicles worth N174 700 000 million donated to President Musa Yar'Adua as a presidential campaign gift and similar gifts in the Vice-President's asset declaration.⁵¹ According to Akinseye-George, the non-prohibition of gifts recognised by customs may be exploited to continue with the practice of corrupt gift-giving. The situation is made worse by using 'relatives' and 'personal friends' to describe persons whose gift the public officers may be allowed.⁵²

The relationship between bribes and gifts is not devoid of controversy. According to Rose-Ackerman, gift-giving and bribery will be more common if legal dispute resolution mechanisms are costly and time-consuming, if legal guarantees are not possible, and trust is correspondingly more important.⁵³ The offence of bribery can be circumvented on the grounds that money given is based on altruistic considerations. This therefore creates a problem in drawing a line of demarcation between where the gift ends and bribery begins.⁵⁴ This is because the latter is a corrupt practice, while the former is not. Furthermore, gifts and bribes have one important similarity. In neither case can a disappointed individual go to court to demand payment or insist on the performance of the implicit contract. Alternative methods of ensuring compliance must be made if one wishes to induce others to act.⁵⁵ Moreover, when corruption becomes endemic, bribes lose much of their moral stigma in the eyes of those concerned. They blur the borderline between honesty and dishonesty, truth and lies.⁵⁶ In the absence of moral markers, the system becomes truly sick.⁵⁷ Bribery can also be distinguished from extortion. The crime of extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either patrimonial or non-patrimonial nature, from another by subjecting the latter to pressure which induces him to hand over the advantage.⁵⁸

⁵⁰ n 49 above.

⁵¹ See *The Punch* 29 June 2007 54 and *The Vanguard* 9 August 2007 1, respectively.

⁵² Y Akinseye-George *Legal system, corruption and governance in Nigeria* (2000).

⁵³ S Rose-Ackerman *Corruption in government* (1999) 92.

⁵⁴ As above.

⁵⁵ As above.

⁵⁶ B Lightower *Corruption: Who cares?* (2008) 30.

⁵⁷ As above.

⁵⁸ CR Snyman *Criminal law* (1995) 372.

One of the most important provisions of the Code of Conduct relates to the declaration of assets by public officers. By paragraph 11 of the Code, every public officer shall immediately after taking office and thereafter, at the end of his term of office, submit to the Code of Conduct Bureau a written declaration of his properties, assets and liabilities and those of his unmarried children under the age of 18 years. The asset declaration form also requires a public officer to declare the assets and liabilities of his spouse. Any statement in such declaration that is found to be false by any authority or person authorised in that behalf to verify it is deemed to be a breach of the Code.⁵⁹ Similarly, any property or asset acquired by a public officer after the declaration which is not fairly attributable to income, gift or loan approved by the Code is deemed to have been acquired in breach of the Code unless the contrary is proved.⁶⁰ Furthermore, a public officer who does any act prohibited by the Code through a nominee, trustee or other agent is deemed *ipso facto* to have committed a breach of the Code.⁶¹ The National Assembly may, however, exempt any cadre of public officers from the asset declaration provisions, if it appears to it that their position is below the rank which it considers appropriate for the application of those provisions.⁶²

The asset declaration provisions have met with considerable criticism. While it is acceptable that a man may be able to declare his wife's assets and liabilities on the assumption that he knows about them, or, at worst, can force them out of her, 'one is skeptical about the assets of children', argues a critic.⁶³ It is further contended that an independent, self-sufficient child would not want parents to interfere in his private matters. Furthermore, if the children are also public officers, this would amount to a double declaration that may cause unnecessary and avoidable paper work for the Code of Conduct Bureau, more so when the Code of Conduct contains ample provisions against a false declaration.⁶⁴

As awkward as this provision is, its inclusion might have been influenced by the country's experience during the First and Second Republics when public officers did not only corruptly acquire assets through their friends and relatives, but also through their under-age children, as witnessed in *Lakanmi v Attorney-General, Western Nigeria*.⁶⁵ Many public officers are also engaged in similar acts during the present dispensation. This explains why the Deputy-Governor of Akwa-Ibom State, Chris Ekpeyong, was impeached by the state's House of

⁵⁹ Para 11(2) Fifth Schedule to the 1999 Nigerian Constitution.

⁶⁰ Para 11(3) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

⁶¹ Para 13 Fifth Schedule to the 1999 Nigerian Constitution.

⁶² Para 14(b) Fifth Schedule to the 1999 Nigerian Constitution.

⁶³ Akande (n 49 above) 55 56.

⁶⁴ As above.

⁶⁵ *Lakanmi v Attorney-General, Western Nigeria* (1971) IUILR 218.

Assembly for allegedly acquiring landed property abroad in the name of his under-age son and failing to reflect this in his asset declaration form during his first and second terms in office. He was later allowed to resign after the intervention of the political leaders in the state.⁶⁶ The provision, therefore, seems 'reasonably justifiable in a democratic society'.

There seems to be some air of uncertainty, at least in practice, about the time frame for the declaration of assets and submission of the asset declaration form to the Code of Conduct Bureau. For instance, the asset declaration form of the Vice-President, Goodluck Jonathan, shows that he declared his assets before Justice Muktar Dodo of Abuja High Court on 30 May 2007, a day after taking the oath of office.⁶⁷ There appears to be some slight variations in the constitutional provisions on declaration of assets and submission of the declaration forms in respect of political office holders. While political office holders are prohibited from performing the functions of their offices until they have declared their assets and liabilities and have subsequently taken and subscribed to the oath of allegiance and oath of office,⁶⁸ paragraph 11(1) of the Code of Conduct requires every public officer to declare his assets 'within three months' of the coming into effect of the Code or 'immediately after taking office'. Public officers are also obliged by the Code of Conduct Bureau to return their asset declaration forms within three months.⁶⁹ This seems to give the impression that the asset declaration forms of all public officers, including political officer holders, should be returned within three months. Many political office holders have hidden under this false impression to delay their asset declaration for months after assuming office and performing official functions.⁷⁰

The confusion about the correct interpretation of the provision seems to stem from the three months transition period allowed to public officers who were already in service before the Code of Conduct was introduced. The period of three months granted public officers to return their asset declaration forms further strengthens this view. From the foregoing analysis it seems correct to state that, while other public officers are expected to declare their assets immediately after taking office, political office holders are prohibited from performing the functions of their offices until they have declared their assets. Since the declaration of assets precedes the taking of oath of office and oath

⁶⁶ *The Nigerian Observer* 20 July 2005 4.

⁶⁷ *The Vanguard* 9 August 2007 1.

⁶⁸ See secs 140, 185, 52, 94 & 152 of the 1999 Nigerian Constitution on the President, Governor, Members of the National Assembly, Members of State Houses of Assembly and Special Advisers.

⁶⁹ This is contained on the asset declaration form.

⁷⁰ Eg, in July 2007 the Code of Conduct Bureau cried out that many state governors were yet to declare their assets about two months after assumption of office; *The Nation* 9 July 2007 1.

of allegiance, *a fortiori*, a political office holder cannot, strictly speaking, legally assume office before declaring his assets.

However, the reality points otherwise. Many political office holders do not declare their assets until months after assuming office and performing official duties. This raises some pertinent questions about the legal status of such official functions performed in default of the constitutional provisions on asset declaration as a condition precedent. Are those official duties void, voidable or valid? For administrative convenience, since most of those actions would have already altered the legal position of many innocent persons, it is submitted that, while sanctions should be applied to the erring political office holders for intentionally breaching the provisions of the Constitution, their previous actions should be presumed valid because of the presumption of regularity in official actions and business.⁷¹ The view has been expressed that the National Assembly should use its powers under paragraph 14 of the Code of Conduct to drastically reduce the number of public officers who have to submit asset declarations to the Code of Conduct Bureau considering the large number of public officers in local government and the federal civil service.⁷² It is argued that on purely administrative grounds, leaving aside any undue influence, it is doubtful if more than a very negligible part of asset declaration papers already in possession of the Code of Conduct Bureau can be put into any systematic use five years after submission.⁷³ The storage and retrieval system, it is further contended, would seem to be beyond the administrative capacity of the country at present. Besides that, the larger the number of forms the Bureau has to process and utilise in monitoring the conduct of public officers, the less effective the Bureau will be in checking anybody.⁷⁴ On the grounds that corruption of the junior staff is only made positive by the corruption or lack of vigilance of their superiors, it has been proposed that offices below grade level 8 be exempted from submitting asset declarations while their superiors should be held accountable for their lack of probity.⁷⁵ It has, however, been suggested that the National Assembly should be cautious in applying the exemption clause and should instead consider the actual duties being performed by the public officers rather than the post held.⁷⁶ As pragmatic as the view sounds, the problem with it is that it gives too much discretion to the National Assembly. Breaches of the Code of Conduct are reported to the Code of Conduct Bureau.

⁷¹ See sec 149(c) of the Evidence Act, Cap E 14 Laws of Federation of Nigeria, 2004.

⁷² Aguda (n 42 above) 249-250.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ Akande (n 49 above) 105.

2.2 The Code of Conduct Bureau

The aims and objectives of the Code of Conduct Bureau include the establishment and maintenance of a high standard of morality in the conduct of public business and ensuring that the actions and behaviour of public officers conform to the highest standards of public morality and accountability.⁷⁷ The Bureau consists of a Chairperson and other members, each of whom shall not be less than 50 years at the time of appointment and shall vacate office at the age of 70 years.⁷⁸ The Chairperson and members of the Bureau are appointed by the President subject to confirmation by Senate.⁷⁹ With the exception of *ex officio* members, no person is qualified for appointment as a member of the Bureau if he is not qualified or if he is disqualified as a member of the House of Representatives, if within the preceding ten years he has been removed as a member of the federal executive bodies listed in section 153 of the 1999 Constitution⁸⁰ or as the holder of any other office on the ground of misconduct.⁸¹ Where a person employed in the public service of the federation is appointed as Chairperson or member, he is deemed to have resigned his former office from the date of the appointment.⁸²

The functions of the Bureau include receiving asset declarations from public officers,⁸³ examining the declarations in accordance with the requirements of the Code of Conduct or any law,⁸⁴ retaining the custody of such declarations and making them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe,⁸⁵ ensuring compliance with and, where appropriate, enforcing the provisions of the Code of Conduct or any law relating thereto,⁸⁶ investigating the complaint and, where appropriate, referring such matters to the Code of Conduct Tribunal,⁸⁷ appointing, promoting, dismissing and exercising disciplinary control

⁷⁷ Sec 2, Code of Conduct Bureau and Tribunal Act Cap C 151 Laws of Federation of Nigeria, 2004.

⁷⁸ Paras 1(a) & (b) Part I Third Schedule to the 1999 Nigerian Constitution.

⁷⁹ See sec 154(1) of the 1999 Nigeria Constitution.

⁸⁰ The Federal executive bodies are the Code of Conduct Bureau, the Council of State, the Federal Character Commission, the Federal Civil Service Commission, the Independent National Electoral Commission, the National Defence Council, the National Judicial Council, the National Population Commission, the National Security Council, the Police Service Commission and the Revenue Mobilisation and Fiscal Commission.

⁸¹ Secs 156(1) & (b) of the 1999 Nigerian Constitution.

⁸² See *proviso* to sec 156(b)(2) of the 1999 Nigerian Constitution.

⁸³ Part I para 3(a) Third Schedule to the 1999 Nigerian Constitution.

⁸⁴ Para 3(b) Third Schedule to the 1999 Nigerian Constitution.

⁸⁵ Para 3(c) Third Schedule to the 1999 Nigerian Constitution.

⁸⁶ Para 3(d) Third Schedule to the 1999 Nigerian Constitution.

⁸⁷ Para 3(e) Third Schedule to the 1999 Nigerian Constitution.

over the staff of the Code of Conduct Bureau⁸⁸ and carrying out other functions as may be conferred on it by the National Assembly.⁸⁹

In order to guarantee their independence and effective performance of their duties, the remunerations and salaries of the Chairperson and members of the Bureau are a charge on the consolidated revenue fund of the Federation.⁹⁰ Similarly, in exercising its power to make appointments or to exercise disciplinary control over persons, the Bureau is not subject to the direction and control of any other authority or person.⁹¹ Furthermore, the Chairperson and members of the Bureau can only be removed by the President acting on an address of a two-thirds majority of the Senate praying that they be so removed for their inability to discharge the functions of their office, whether arising from infirmity of mind or body or any other cause or misconduct.⁹²

The constitutional provision stipulating qualification as a member of the House of Representatives for eligibility for appointment as a member of the Code of Conduct Bureau needs a rethink. This is because membership of and sponsorship by a political party are some of the qualifications for election into the House of Representatives. This seems to suggest that only card-carrying members of political parties can become members of the Bureau. Considering the sensitive nature of the Bureau, it has been suggested elsewhere that the qualification as to the membership of and sponsorship by a political party be deleted from the qualifications of appointment into the Code of Conduct Bureau.⁹³ Other qualifications can still be retained. This is because partisan people are the least qualified for such appointment in order to give the Bureau some credibility and avoid political meanings being read into its actions.

Paragraph 3(c) of the Third Schedule to the 1999 Nigerian Constitution, to the effect that the Code of Conduct Bureau shall make asset declarations available for inspection on such 'terms and conditions as the National Assembly may prescribe', is about the most controversial provision on asset declaration in Nigeria. It is one of the main reasons for writing this article. This is because, despite the fact that Nigerians are desirous of knowing the content of asset declarations of public officers, especially the political office holders, the National Assembly has never deemed it fit to prescribe 'such terms and conditions' on which the Code of Conduct Bureau will make an asset declaration available for inspection by members of the public since the enactment

⁸⁸ Para 3(f) Third Schedule to the 1999 Nigerian Constitution.

⁸⁹ Para 3(g) Third Schedule to the 1999 Nigerian Constitution.

⁹⁰ See sec 84(4) of the 1999 Nigerian Constitution. According to Akintayo (n 34 above), the consolidated revenue fund relates to accounts maintained for the benefit of the Federal Government.

⁹¹ See sec 158(1) of the 1999 Nigerian Constitution.

⁹² See sec 157(1) of the 1999 Nigerian Constitution.

⁹³ Lawal (n 43 above) 114.

of the Constitution. This reluctance might not be unconnected to the fact that members of the National Assembly are also among the public officers whose asset declarations Nigerians would want to be made available for inspection. Therefore, the controversial provision should be reviewed or totally expunged from the Nigerian Constitution that asset declaration forms be treated as public documents within the meaning of section 109 of the Evidence Act⁹⁴ and upon the fulfilment of the conditions stipulated in section 111 thereof, every person should be entitled to inspect them. Furthermore, asset declarations of top government functionaries should be posted on the website of the Code of Conduct for easy access by members of the public.⁹⁵ Breaches of the Code of Conduct are tried by the Code of Conduct Tribunal.

2.3 The Code of Conduct Tribunal

The Code of Conduct Tribunal is established under paragraph 15 of Part 1 of the Fifth Schedule to the 1999 Nigerian Constitution. It consists of a Chairperson and two other persons.⁹⁶ The Chairperson must have held office or be qualified to hold office as judge of a superior court of record in Nigeria.⁹⁷ Like members of the judiciary, the members of Code of Conduct Tribunal are appointed by the President on the recommendation of the National Judicial Council.⁹⁸ However, unlike the judiciary, the Code of Conduct Tribunal is not classified under Judicature in chapter VII of the 1999 Nigerian Constitution.⁹⁹ The Chairperson and members of the Tribunal, like a judge of the Court of Appeal or Supreme Court, enjoy practically the same security of tenure with regard to their employment, discipline and retirement.¹⁰⁰

The retirement age of the Chairperson and members of the Tribunal is 70 years.¹⁰¹ Their remunerations and salaries are a charge upon the Consolidated Revenue Fund of the Federation and the Chairperson or any member of the Tribunal who has held office for a minimum of ten years shall, if he retires at the age of 70 years, be entitled to pension for life at a rate equivalent to his last annual salary in addition to other retirement benefits to which he may be entitled.¹⁰² Furthermore, the Chairperson or member of the Tribunal shall not be removed from

⁹⁴ Cap E 14 Laws of Federation of Nigerian, 2004. See also sec 7 of the Ugandan Leadership Code Act, 2002.

⁹⁵ B Owasanoye 'Transparency, accountability and good government under the 1999 Constitution' in IA Ayua *et al* (eds) *Nigeria: Issues in the 1999 Constitution* (2000) 234-238.

⁹⁶ Para 15(1) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁷ Para 15(2) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁸ Para 15(3) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁹ A Emiola *Public servants and the law* (2001) 31.

¹⁰⁰ As above.

¹⁰¹ Para 17(1) Part I Fifth Schedule to the 1999 Nigerian Constitution.

¹⁰² Para 17(2) Part I Fifth Schedule to the 1999 Nigerian Constitution.

office on appointment by the President except upon an address supported by a two-thirds majority of each House of the National Assembly praying that he be so removed for inability to discharge the functions of his office (whether arising from infirmity of mind or body) or for contravention of the Code of Conduct.¹⁰³ According to Nwabueze, this provision does not seek to prescribe an exclusive method of removal, as in the case of judges, but merely to limit the President's removal power.¹⁰⁴

The removal of the Chairperson or member of the Code of Conduct Tribunal for breach of the Code of Conduct admits no argument. As for their inability to perform their duty, this could be either physical or mental.¹⁰⁵ For instance, a judge called John Pickering of the United States was insane for three years and was an incurable drunkard. He was impeached for presiding while drunk and delivering opinions contrary to law.¹⁰⁶ In either case, before the removal of a member of the tribunal is effected, it is proposed that the person concerned should be informed of the allegation against him and be given a chance to reply to it in such a way as appropriate, albeit not necessarily by an oral hearing.¹⁰⁷

Unlike the Code of Conduct Bureau, no power is directly conferred on the Code of Conduct Tribunal, but it is implied by paragraphs 18(1) and (2) of Part I of the Fifth Schedule stating the punishment that the Tribunal can impose. Moreover, the National Assembly may by law confer on the Tribunal such additional powers as may appear to it to effectively discharge the functions conferred on it.¹⁰⁸ In *Nwankwo v Nwankwo*,¹⁰⁹ the Nigerian Supreme Court held that the Code of Conduct Tribunal is the only body vested with jurisdiction to handle breaches of the Code of Conduct.¹¹⁰ However, different decisions were reached by Nigerian courts in *Ebiesuwa v Commissioner of Police*¹¹¹ and *Akinkunmi v Spiff*.¹¹²

The punishment which the Code of Conduct Tribunal may impose for breaching any provision of the Code includes vacation of office or seat in any legislative house,¹¹³ disqualification from membership

¹⁰³ Para 17(3) Part I Fifth Schedule to the 1999 Nigerian Constitution.

¹⁰⁴ BO Nwabueze *Nigerian presidential Constitution (1979-8)* (1985) 297.

¹⁰⁵ JO Sokefun 'Independence of the judiciary' in JO Sokefun (ed) *Issues in constitutional law and practice in Nigeria* (2002) 199.

¹⁰⁶ B Raoul *Impeachment: The constitutional problems* (1974) 183–184.

¹⁰⁷ *Rees v Crane* (1994) 2 AC 173.

¹⁰⁸ Para 15(4) Part I Fifth Schedule to the 1999 Constitution.

¹⁰⁹ (1995) 30 LRCN 24.

¹¹⁰ See also *Oguagbu v Oguagbu* 1981 2NCLR 600; *Oloyo v Alegbe* (1982) 3 NCLR 346.

¹¹¹ (1982) 3 NCLR 339 341.

¹¹² (1982) 3 NCLR 342 345. Since the Supreme Court's decision in *Nwankwo v Nwankwo* is the later in time, these cases seem to have been wrongly decided.

¹¹³ Para 18(2)(a) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

of a legislative house and from holding any public office for a period not exceeding ten years,¹¹⁴ and forfeiture to the state of any property acquired in abuse or corruption of office.¹¹⁵ These sanctions are without prejudice to the penalties that may be imposed where the conduct is also a criminal offence.¹¹⁶ This raises the question of whether the Code of Conduct does not offend the rule against double jeopardy. Commenting on a similar provision of the Code of Conduct in the 1979 Nigerian Constitution and the lackadaisical attitude of government towards its implementation, Nwabueze is of the view that:¹¹⁷

Given the necessity for penal sanctions which is implied in the prohibitory character of the provision as well as in the reference to penalties that may be imposed by any law, a duty clearly arises on the part of the government to enact penal sanctions to back up the disciplinary ones. And it seems right and proper that it should have been left to the government to enact the necessary penal sanctions, since it should not really be the place of the Constitution to create offences and to prescribe penalties for them. This is the function of government by ordinary legislation.

He states further that the duty thus imposed was utterly neglected by the government of the Second Republic. He therefore expresses no surprise that a government which neglected willfully to appoint members of the body established by the Code for the implementation and enforcement of its provision would ever want to enact penal sanctions for its breach.¹¹⁸ The shortcomings highlighted by Nwabueze seem to have been rectified by the enactment of the Code of Conduct Bureau and Tribunal Act,¹¹⁹ the Corrupt Practices and Other Related Offences Act¹²⁰ and other anticorruption legislation as well as the Constitution and the empowerment of bodies to implement all these legislations.

3 Public declaration of assets and the right to privacy

The concept of right is filled with difficulty, but the difficulty is indefinitely greater in relation to human rights. The particular difficulty with the concept of human rights springs from their very nature.¹²¹ Human rights are the conceptual products of the seventeenth and eighteenth centuries' philosophies of John Locke and Rousseau, in the context of the national state, so that in the final analysis they became rights of

¹¹⁴ Para 18(2)(b) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁵ Para 18(2)(c) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁶ Para 18(3) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁷ BO Nwabueze *Military rule and constitutionalism* (1992), cited in Akinseye-George (n 52 above) 108.

¹¹⁸ As above.

¹¹⁹ Cap C 15 Laws Federation of Nigeria, 2004.

¹²⁰ Cap C 31 Laws of Federation of Nigeria, 2004.

¹²¹ BO Nwabueze *Constitutional democracy in Africa* (2003) 305.

citizens. In the context of Africa, the association between human rights and the state is strong primarily because of the fact that the significant abuse of human rights is perpetrated by the state so that their affirmation is a self-assertion by the citizenry against the state.¹²² According to Lien, human rights are:¹²³

universal rights or enabling qualities of human beings as human beings or as individuals of the human race, attaching to the human being wherever he appears without regard to time, place, colour, sex, parentage or environment.

The respect and primacy accorded to human rights are because, in the words of the Preamble of the two international covenants,¹²⁴ 'they derive from the inherent dignity of the human person'. According to Nwabueze, to say human rights derive from the inherent dignity of the human person seems to imply that the two (human rights and human dignity) are equivalent or synonymous. He asserts that human rights are not a spiritual or physical attribute of the human being but a concept invented by philosophers for the realisation of the inherent dignity of the human being; man is not born with human rights. Being innate in man, human dignity is coeval with him; he is born with it; not so with the concept of human rights.¹²⁵ An appreciation of the development of human rights in different societies calls for the study of history and sociology. To explain the extent of the inculcation of human rights in the political philosophy of people, it is necessary to have recourse to their culture, tradition and religion.¹²⁶

Human rights have been classified generally into civil and political rights, and economic, social and cultural rights. Civil and political rights impose limitations on the activities of government and are called negative rights. They are generally justiciable.¹²⁷ Economic, social and cultural rights, on the other hand, are called positive rights in that they enhance the power of the government to do something for the people to enable them to act in some way. They are generally non-justiciable; they require affirmative action by governments for their implementa-

¹²² FW Jjuuko 'The state and constitutionalism in Africa' (1995) 2 *East African Journal of Peace and Human Rights* 20.

¹²³ A Lien *A fragment of thought concerning the nature and fulfillment of human rights* (1973) 24.

¹²⁴ These are the International Covenant on Civil and Political Rights GA Res 2200 A (xxi), UN GAOR 21st session Supp No 1652 UN Doc A/6316 (1966) and the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (xxi) UN GAOR 21st session Supp No 16 49 UN Doc A/6316 (1966).

¹²⁵ Nwabueze (n 121 above) 305.

¹²⁶ UO Umozurike *The African Charter on Human and Peoples Rights* (1997) 1.

¹²⁷ See eg Universal Declaration of Human Rights arts 1-21, GA Res 217A (iii) UN GAOR, 3rd session UN Doc A/RES/810 1948, International Covenant on Civil and Political Rights and ch IV of the 1999 Nigerian Constitution, secs 33-44.

tion.¹²⁸ According to Schmidt, civil and political rights are at the centre of upholding human dignity and their importance has gained recognition because of conflict over their violation and the development of legitimate claims for their protection. There is much to learn from the process in which civil and political claims gain legitimacy and are applied to the benefits of the world community.¹²⁹ He cautions that any assertion that civil and political rights are more important ignores the processual understanding of how rights arise out of claims and come to be legitimated.¹³⁰ The right to privacy belongs to civil and political rights.

The right to privacy is easily and often conflated with the right to (private) property and the right to liberty (of one's private affairs). In fact, the word 'private' figures in such an array of moral considerations that it is tempting to erroneously conclude that privacy is not a particular right at all, but a way of talking about a cluster of several rights that grant individuals sovereignty over various domains.¹³¹ Most of the theories on the right to privacy can be fairly characterised as claiming that the right to privacy is the right to restrict access to a personal domain. Many differences among privacy theories turn on different definitions of this domain. In some theories the right to privacy is the right to restrict access to the person himself or herself, in other theories the right to restrict access to personal information.¹³² The latter is of greater relevance to the theme of this paper.

The right to privacy is guaranteed by virtually all international and regional instruments on human rights. Article 12 of the Universal Declaration on Human Rights (Universal Declaration)¹³³ provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

According to Lillich, while commonly thought to protect the right to privacy, article 12 actually protects a number of somewhat 'disparate' rights.¹³⁴ The International Covenant on Civil and Political Rights (CCPR) in article 7 inserts the words 'or unlawful' before 'interference' and 'unlawful' before 'attacks' in the first sentence and upgrades the

¹²⁸ See International Covenant on Economic, Social and Cultural Rights and ch II of the 1999 Nigerian Constitution secs 13–24.

¹²⁹ PR Schmidt 'African configuration in the right to a cultural heritage' (1995) 2 *East African Journal for Peace and Human Rights* 41.

¹³⁰ As above.

¹³¹ http://goliath.ecnext.Com/coms2/summary_0199-2719260199-2719246_ITM (accessed 31 January 2009).

¹³² As above.

¹³³ GA Res 217A (iii) UN GAOR, 3rd session UN Doc A/RES/810 (1948).

¹³⁴ RB Lillich 'Global protection of human rights' in T Meron (ed) *Human rights in international law: Legal and policy issues* (1989) 147.

second sentence into a separate paragraph, but otherwise it follows article 12 of the Universal Declaration *in haec verba*.¹³⁵ While article 8 of the European Convention¹³⁶ and article 11 of the American Convention¹³⁷ substitute 'private life' in place of 'privacy', they both, especially the latter, reaffirm the general norms found in the Universal Declaration and CCPR.¹³⁸

The African Charter on Human and People's Rights (African Charter)¹³⁹ makes elaborate provision for the rights to life and integrity of the person,¹⁴⁰ respect for human dignity¹⁴¹ as well as liberty and security.¹⁴² There is unfortunately no mention of the right to privacy.

Section 37 of the 1999 Nigerian Constitution provides for the right to privacy as follows: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'

The right is not absolute. Like what obtains under the European Convention, section 45(1) of the Constitution allows derogation in certain circumstances. The section provides:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society —

- (a) in the interest of defence, public safety, public order, public morality, or public health, or
- (b) for the purpose of protecting the rights and freedoms of other persons.

While many believe that the right to privacy should be given expansive interpretation, others insist on a restrictive interpretation. According to Malherbe, factors usually taken into consideration to restrict the right to privacy include the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relations between the limitation and its purpose as well as the possibility of less restrictive means of achieving the purpose.¹⁴³ Commenting on a derogation from the right to privacy under the Nigerian Constitution, Obilade is of the view that a limitation with respect to public morality is significant and that the idea of using legislative measures as instruments of social

¹³⁵ As above.

¹³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 136 140.

¹³⁷ American Convention on Human Rights (1969) 1144 UNTS 123, OASTS No 36; 124.

¹³⁸ Lillich (n 134 above).

¹³⁹ African Charter on Human and Peoples Rights (Banjul Charter) 1981 OAU Doc CAB/LEG/67/3Rev 5, 21 *International Legal Materials* 58.

¹⁴⁰ Art 4 African Charter.

¹⁴¹ Art 5 African Charter.

¹⁴² Art 6 African Charter.

¹⁴³ K Malherbe 'Stretching solidarity too far: The impact of fraud and corruption on social security in South Africa' 2000 5 *Law, Democracy and Development* 121.

progress is modern;¹⁴⁴ classical utilitarianism advocates the use of law as an instrument of social reform. According to Bentham's utilitarian principle, governmental and individual actions should aim at achieving 'the greatest happiness of the greatest number'.¹⁴⁵ In Bentham's view, law should promote the greatest possible happiness of all members of the community.¹⁴⁶ To him, the public good ought to be the object of the legislator, general utility ought to be the foundation of his reasoning. This is to be done by balancing the interests of the individual and that of the community.¹⁴⁷ Obilade is of the view that one means of balancing the interest of the individual in acquiring property and the interest of the community is enacting a law on corruption. The Code of conduct is undoubtedly one such law. Is a public declaration of assets now being proposed by Nigerians not a violation of public officers' right to privacy?

Prima facie, a public declaration of assets, especially when not a requirement of Nigerian law at present, seems to be a violation of this right. It has, however, been argued that public officers cannot lay claim to absolute privacy, especially in accounting for public funds entrusted to them.¹⁴⁸ It is further contended that there is an overriding public interest in the disclosure of information on the assets of public officers who obviously are trustees of the nation's wealth. There is, therefore, nothing inherently private in the affairs of such public officers.¹⁴⁹ The view has also been expressed that in declaring assets as required by the provisions of the Code of Conduct, public officers should be categorised and not lumped together; those public officers, such as the President, Vice-President, governors, deputy-governors, ministers, commissioners, legislators, advisers and other political office holders, rather than normal career officers, should declare their assets publicly.¹⁵⁰ According to Idowu, these people are in advantaged positions which could be easily abused because they have access to the wealth and opportunities of the nation. It is argued that, since they have decided to accept those responsible positions, there should be nothing secret in their assets.¹⁵¹ It is further argued that:¹⁵²

¹⁴⁴ AO Obilade 'The Corrupt Practices and Other Related Offences Act and the right to privacy' in AO Obilade *et al* (eds) *Contemporary issues in the administration of justice: Essays in honour of Justice Atinuke Ige* (2001) 126.

¹⁴⁵ J Bentham *An introduction to the principles of morals and legislation*, cited in Obilade (n 144 above) 126.

¹⁴⁶ As above.

¹⁴⁷ As above.

¹⁴⁸ T Osipitan *et al* 'Structuring measures against corruption for sustainable development' in *NALT Proceedings of the 38 Annual Conference Faculty of Law LASU* (2002) 334.

¹⁴⁹ As above.

¹⁵⁰ As above.

¹⁵¹ As above.

¹⁵² As above.

Many of them (political office holders) are catered for by the public, the public should know their worth. If their assets are publicly declared, it will be easy for the public to point out their assets after coming into office. Nigerians have been known to become millionaires having large properties after about a year in political office, even when there has been evidence that they found it difficult to make ends meet before appointment. The present practice of secret declaration should be limited to public officers in public career appointment.

I am in total agreement with this view.

4 Public declaration of assets and freedom of information

Freedom of information and the press is one of the indices to measure how democratic a given state is. This is underscored by the fact that regular access to information will not only lead to the empowerment of the people but will also prevent them from living on rumours and half truths.

Freedom of information is accorded pride of place among all freedoms. It is, as the General Assembly said at its first session, the touchstone of all the freedoms to which the UN is consecrated.¹⁵³ According to Humphrey, freedom of information is a somewhat, although not exclusively, political right.¹⁵⁴ It is a political right of a very special kind; for among other things, its exercise makes possible the criticism of government and exchange of information without which there can be no democracy.¹⁵⁵ A free press and other information media are instruments for the realisation of other rights because, in a country where there is freedom of information and where other information media is free, there is a great likelihood that other rights and freedoms will be respected.¹⁵⁶

Broadly speaking, freedom of information includes the right to access information and the right to free expression of opinion, that is, the right to freedom of speech and freedom to publish.¹⁵⁷ It subsumes the right to access information held by public institutions, that is, official information.¹⁵⁸ The practice has been recognised in Sweden since 1976. In the last few years, the doctrine of the right to information has

¹⁵³ GA Res 59 UN Doc A/64/Add. 1 a 95 (1946).

¹⁵⁴ JP Humphrey 'Political and related rights' in Meron (n 134 above) 182.

¹⁵⁵ As above.

¹⁵⁶ As above.

¹⁵⁷ S Hameso 'Politics of freedom of information in Africa' (1995) 26 *Focus on International and Comparative Librarianship* 156.

¹⁵⁸ V Ogwezzy 'Freedom of information as the fountain of all constitutional freedoms' unpublished LLB thesis, University of Ibadan, 2008 3.

gained widespread recognition in all regions of the world.¹⁵⁹ According to Mendel:¹⁶⁰

There has been a veritable revolution in last ten years in terms of the right to information, commonly understood as the right to access information held by public bodies. Whereas in 1990 only 13 countries had adopted national right to information laws, upwards of 70 of such laws have now been adopted globally, and they are under active consideration in another 20 to 30 countries. In 1990, no inter-governmental organisation had recognised the right to information; now all of the multilateral development banks and a number of other international financial institutions have adopted information disclosure policies. In 1990, the right to information was seen predominantly as an administrative governance reform whereas today it is increasingly being seen as a fundamental human right.¹⁶¹

This probably explains why the right to freedom of information is guaranteed by virtually all international and regional instruments on human rights. This right is contained in article 19 of the Universal Declaration thus:¹⁶²

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

According to Humphrey,¹⁶³ this right includes more than is indicated in the specific provisions of the second part of the article. The word 'seek' is used in the corresponding provisions of article 19 of CCPR¹⁶⁴ and in article 13 of the American Convention,¹⁶⁵ but not in the corresponding article 10 of the European Convention.¹⁶⁶ This seems to make the latter provision less expansive.

Article 29(2) of the Universal Declaration sets forth the circumstances under which the right to information may be restricted. It states:¹⁶⁷

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

¹⁵⁹ As above.

¹⁶⁰ T Mendel *Freedom of information: A comparative legal survey* (2008) 3.

¹⁶¹ As above.

¹⁶² Universal Declaration (n 127 above).

¹⁶³ Humphrey (n 154 above) 182.

¹⁶⁴ CCPR (n 124 above).

¹⁶⁵ American Convention (n 137 above).

¹⁶⁶ European Convention (n 136 above).

¹⁶⁷ See also arts 19(3)(a) & (b) CCPR; art 13(2)(a)(b) American Convention; art 10(2) European Convention.

The guarantee of the right to information in the African Charter¹⁶⁸ is not as elaborate as those of the Universal Declaration, CCPR and the European Convention. The word 'seek' is also omitted. The African Charter tersely provides for the freedom of information as follows:

- 1 Every individual shall have the right to receive information.
- 2 Every individual shall have the right to express and disseminate his opinions within the law.

Derogation from this right is also less restrictive as the only limitation is that the right should be exercised 'within the law'.

Section 39 of the 1999 Nigerian Constitution guarantees freedom of information and expression as follows: 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.' Sub-section (3) thereof states the circumstances under which this freedom may be restricted. It declares:

Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society —

- (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or exhibition of cinematograph films; or
- (b) imposing restrictions upon persons holding office under the government of the federation or of a state, members of the armed forces of the federation or members of the Nigeria police force or other government security services or agencies established by law.

The right to receive information is not simply the converse of the right to impart information but can be said to be an independent right. While freedom of information deals with the right to receive information, freedom of expression relates to the liberty of open discussion without fear of restriction or restraint.¹⁶⁹

It is interesting to note that, while the marginal note of section 39 of the 1999 Nigerian Constitution reads 'right to freedom of expression and the press', there is no mention of the word 'press' in the substantive provision. The question that has agitated the minds of many Nigerians is, if Nigeria has indeed adopted the American constitutional model, why has it stopped short of the American provision in this regard?¹⁷⁰

Nigerian courts have had cause to pronounce on constitutional provisions relating to freedom of information and expression. In *Tony Momoh v the Senate*,¹⁷¹ it was held that asking a new newspaper editor to disclose his source of information is a breach of his freedom of expres-

¹⁶⁸ African Charter (n 139 above).

¹⁶⁹ JA Yakubu *Press law in Nigeria* (1999) 10.

¹⁷⁰ A Ibidapo-Obe *Essays on human rights law in Nigeria* (2005) 120. The First Amendment to the American Constitution provides that 'Congress shall make no law ... abridging the freedom of speech, or of the press.'

¹⁷¹ *Tony Momoh v The Senate* (1981) 1 NCLR 105.

sion. A similar decision was also reached in *Oyegbemi and Others v AG of the Federation and Others*.¹⁷² However, in *The Queen v Amalgamated Press of Nigeria Ltd and Another*,¹⁷³ it was held that the Constitution could not be used to spread false news likely to cause false alarm to the public. Similarly, in *DPP v Chike Obi*,¹⁷⁴ the accused person was convicted of sedition, while in *Nwankwo v The State*,¹⁷⁵ the Nigerian Court of Appeal held that the offence of sedition was unconstitutional.

Apart from being formally prosecuted by the government in the course of their duties, journalists have also been dealt with ruthlessly through extra-judicial means, especially during military governments.¹⁷⁶ In order to reduce the risk faced by journalists in the course of their duties, and in order to promote transparency in governance through unhindered access to public information, many countries of the world have enacted freedom of information acts in addition to the constitutional provision on this right.

Over 70 countries worldwide have enacted freedom of information acts implementing one variant or the other of freedom of information legislation.¹⁷⁷ It is instructive to note that the countries with existing freedom of information legislation cut across developmental and ideological boundaries. As of 2006, 20 countries in Central and Eastern Europe have adopted freedom of information legislation, guaranteeing public access to government-held information, establishing procedures, the organisation and dissemination of such information, and providing for narrow exceptions.¹⁷⁸ On the African continent, only four countries have freedom of information legislation as at the time of writing this paper.¹⁷⁹ Being the first on the continent, the South African Act deserves some mention.

The Promotion of Access to Information Act (PAIA)¹⁸⁰ was approved by the South African Parliament in 2000 and came into effect in 2001. The objects of the Act, among other things, include giving effect to the

¹⁷² (1982) 3 NCLR 897.

¹⁷³ (1961) 1 ALL NLR 199.

¹⁷⁴ (1961) 1 ALL NLR 1.

¹⁷⁵ (1985) 6 NCLR 228.

¹⁷⁶ See, eg, *Amakiri v Iworari* (1974) 1 RSLR 5.

¹⁷⁷ Ogwezy (n 158 above) 2.

¹⁷⁸ The countries are Albania (1999); Armenia (2003); Bosnia and Herzegovina (2000); Bulgaria (2000); Croatia (2003); Czech Republic (1999); Estonia (2000); Georgia (1999); Hungary (1992); Latvia (1998); Lithuania (2000); Macedonia (2006); Moldova (2000); Montenegro (2005); Poland (2001); Romania (2001); Serbia and Montenegro (2004); Slovakia (2000); Slovenia (2003); Ukraine (1992); and Kosova (2003). These are as listed in JA Goldstone 'Public interest litigation in Central and Eastern Europe: Roots, prospects and challenges' (2006) 28 *Human Rights Quarterly* 520–521.

¹⁷⁹ These are South Africa (2001); Zimbabwe (2002); Angola (2005); and Uganda (2005).

¹⁸⁰ South Africa Promotion of Access to Information Act <http://www.info.gov.za> Vol 466 No 20852 — Cape Town 3 February 2000.

constitutional right of access to any information held by the state or by another person and that is required for the exercise or protection of any right;¹⁸¹ to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner that enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible¹⁸² and to promote transparency, accountability and effective governance of all public and private bodies.¹⁸³

The Act allows any person to demand records from government bodies without showing a reason.¹⁸⁴ The Act also has a unique provision that allows individuals and government bodies to access information from private bodies.¹⁸⁵ Both public and private bodies must respond to a request for information within 30 days.¹⁸⁶ The Act does not, however, apply to the records of cabinet and its committees,¹⁸⁷ judicial functions of courts and tribunals,¹⁸⁸ judicial officers of such a court or tribunal¹⁸⁹ and individual members of parliament or a provincial legislature in that capacity.¹⁹⁰ The South African Human Rights Commission has been designated to oversee the functioning of the Act.¹⁹¹

The story of freedom of information legislation in Nigeria is in sharp contrast to what obtains in South Africa. The Freedom of Information Bill was first submitted to the Nigerian House of Representatives in 1999 as a private member bill. It was published in the federal government's official Gazette on 8 December 1999. It underwent a first reading on 22 February 2000. The second reading was on 13 March 2000. After much delays and hiccups, the Bill was eventually passed by the House of Representatives on 5 August 2004 and sent to the Senate in September 2004.

The first reading of the Bill was held at the Senate on 23 November 2004, while the second reading was on 22 February 2005. The Bill was then referred to the Senate Committee on Information. Since then many attempts have been made to frustrate the passage of the Bill, which explains why it has not yet been passed at the time of writing this paper.¹⁹²

¹⁸¹ Secs 9(a)(i) & (ii) of the Act.

¹⁸² Sec 9(d) of the Act.

¹⁸³ Sec 9(e) of the Act.

¹⁸⁴ Sec 11(e) of the Act.

¹⁸⁵ Sec 50 of the Act.

¹⁸⁶ See secs 25(1) & 56 of the Act respectively.

¹⁸⁷ See sec 12(a) of the Act.

¹⁸⁸ Secs 12(b) (i) & (ii) of the Act.

¹⁸⁹ Sec 12(b)(iii) of the Act.

¹⁹⁰ Secs 12(b) & (c) of the Act.

¹⁹¹ For a critique of the provisions of the Act, see J de Waal *et al* *The Bill of Rights handbook* (2001) 525–553.

¹⁹² For a detailed discussion of the Freedom of Information Bill in Nigeria, see Oguezzy (n 158 above) 5–10.

The symbiotic relationship between unhindered access to information and a public declaration of assets is self-evident. This is because access to information, especially that held by government, can promote transparency, accountability and effective governance. This in the long run will reduce corruptive tendencies, which is the aim of a public declaration of assets. If a Freedom of Information Act has been enacted in Nigeria, as was done in South Africa, Nigerians will be able to have access to the content of assets declared by public officers without any recourse to the 'terms and conditions as the National Assembly may prescribe'.¹⁹³ Therefore, it is suggested that the Nigerian judiciary should give a liberal interpretation to freedom of information under the Constitution while the National Assembly should speed up the passage of the Freedom of Information Bill in order to promote virtues of accountable and democratic governance.

5 Public declaration of assets and the right to democratic governance

The term 'democracy' is not amenable to an easy definition. However, it is generally believed to be a system of government whereby the people are ruled by their elected representatives through free and fair elections.

According to Diamond, governments chosen through free and fair competitive elections are generally better than those that are not.¹⁹⁴ They offer the best prospect for accountable, responsive, peaceful, predictable, good governance.¹⁹⁵ In the past decade, the theory of democracy has been dominated by two very different approaches. These are the deliberative democracy and social choice theories.¹⁹⁶

For deliberative democrats, the essence of democratic legitimacy is the capacity of those affected by a collective decision to deliberate in the production of that decision.¹⁹⁷ Deliberation involves discussion in which individuals are amenable to scrutinising and changing their preferences in the light of persuasion (but not manipulation, deception or coercion) from other participants. Claims for and against courses of action must be justified to others in terms that they can accept.¹⁹⁸

On the other hand, the social choice theory, whose proponents generally deduce far less optimistic results, believes that democratic

¹⁹³ Para 3(c) Part 1 Third Schedule to the 1999 Nigerian Constitution.

¹⁹⁴ L Diamond *Developing democracy* (1999) 3.

¹⁹⁵ As above.

¹⁹⁶ See generally JS Dryzek & C List 'Social theory and deliberative democracy: A reconciliation' (2003) 33 *British Journal of Political Science* 1.

¹⁹⁷ As above.

¹⁹⁸ J Rawls 'The idea of public reason revisited' (1997) 64 *University of Chicago Law Review* 771-772.

problems involve an aggregation of views, interests or preferences across individuals, not deliberation over their content.¹⁹⁹ According to Arrow, such aggregation is bedevilled by impossibility, instability and arbitrariness.²⁰⁰ The two theories are, however, not irreconcilable. According to Dryzek and List, although social theory practitioners may be unaware of it, their theory points to the functions deliberation can perform in making collective decisions both tractable and meaningful, thus providing a crucial service to deliberative democracy.²⁰¹

Irrespective of the theory to which one subscribes, democracy promotes freedom as no other feasible alternative can. According to Dahl, democracy is instrumental to freedom in three ways.²⁰² First, free and fair elections inherently require certain political rights of 'expression, organisation and opposition' and these fundamental political rights are unlikely to exist in isolation from broader civil liberties.²⁰³ Democracy also maximises the opportunities for self-determination and facilitates moral autonomy.²⁰⁴ Consequently, the democratic process promotes human development (the growth of personal responsibility and intelligence) while also providing the best means for people to protect and advance their shared interest.²⁰⁵

Upon a point consistent with the principles of constitutionalism and representative democracy, government is better when it is more democratic.²⁰⁶ However, a constitutional government is not the same thing and need not be a democratic government.²⁰⁷ Constitutional democracy combines the notions of a constitutional government and a democratic one, that is to say, it is a democratic government regulated and limited by a constitution.²⁰⁸

Democracy is also distinguishable from democratisation. According to Beetham, democracy should properly be conceptualised as 'lying at one end of a spectrum', the other end of which is a system of rule where the people are totally excluded from the decision-making process and any control over it.²⁰⁹ Beetham goes on to say that:²¹⁰

¹⁹⁹ Dryzek & List (n 196 above) 2.

²⁰⁰ K Arrow *Social choice and individual values* (1963), cited in Dryzek & List (n 196 above) 2.

²⁰¹ As above.

²⁰² R Dahl *Democracy and its critics* (1989) 88–89.

²⁰³ As above.

²⁰⁴ n 202 above, 88–89.

²⁰⁵ Diamond (n 194 above) 3.

²⁰⁶ As above.

²⁰⁷ Nwabueze (n 36 above) 4.

²⁰⁸ n 207 above, 5.

²⁰⁹ D Beetham 'Liberal democracy and limits of democratisation' in D Held (ed) *Prospects for democracy* (1999) 55, cited in Nwabueze (n 121 above) 8.

²¹⁰ As above.

The concept of democratisation expresses both a clear direction of change along the spectrum, and a political movement or process of change, which can apply to any given system, not only change from authoritarian forms of rule.

Beetham's conception of democratisation seems to suffer from a certain vagueness in failing to indicate at what point in the movement toward direction of change, after its initial commencement, that democratisation can be said to be taking or to have taken place.²¹¹

In externally-induced democratisation processes, the role of internal agents of democratisation determines the level of implementation.²¹² There seems to be many terms for defining various mechanisms of democratisation where international factors play a role, depending on whether they are actor or policy-oriented, major or minor processes, or whether they simply overlap.²¹³ Keeping in mind the fact that international factors play only a supportive role in democratisation efforts, Kubicek identifies four broad categories — control, contagion, convergence and conditionality.²¹⁴ The foregoing analysis has serious implications for democratic governance.

Governance, in contradistinction to democracy, is the process whereby public institutions conduct public affairs, manage public resources, and guarantee the realisation of human rights.²¹⁵ It is the structure of rules and processes that affect the exercise of power, particularly with regard to participation accountability, effectiveness and coherence.²¹⁶ Good government is the key to economic development and, therefore, must be participatory, transparent and accountable.²¹⁷ It must be effective and equitable in order to promote the rule of law.²¹⁸

The right to democratic governance has been defined as:²¹⁹

the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of politi-

²¹¹ Beetham (n 209 above) 9.

²¹² F Turkmen 'The European Union and democratisation in Turkey: The role of the elites' (2008) 30 *Human Rights Quarterly* 146.

²¹³ n 212 above, 8.

²¹⁴ PJ Kubicek 'International norms, European Union and democratisation: Tentative theory and evidence' in PJ Kubicek (ed) *The European Union and democratisation* (2003) 4–21, cited in Turkmen (n 212 above).

²¹⁵ NJ Udombana *Human rights and contemporary issues in Africa* (2003) 53.

²¹⁶ As above.

²¹⁷ N Woods (1999) 5 *Global Governance* 43.

²¹⁸ UN Development Programme, 'Governance for sustainable human development, UNDP Policy Document' <http://magnet.undp.org/policy/default.html> (accessed 31 January 2009).

²¹⁹ 'Promotion and consolidation of democracy' in UN ESCOR 53 session paragraph 81 UN Doc E/CN.4/Sub.2/2001/32.17 (2001).

cal parties, full respect for the exercise of freedom of expression, the press and association and the effective enjoyment of human rights.

One of the leading proponents of the right to democratic governance is Franck.²²⁰ He argues that democratic entitlement is a recognised and recognisable right. He bases his theory on two notions: the idea that governments derive their just powers from the consent of the governed and the idea that the international legitimacy of a state requires acknowledgment by mankind.²²¹ He further contends that a community expectation has emerged, to the intent that 'those who seek the validation of their empowerment patently govern with the consent of the governed'. Democracy, Franck insists, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.²²² The 'democratic entitlement', he maintains, is gradually being transformed 'from moral prescription to international legal obligation',²²³ largely because such entitlement results from 'the craving of governments for validation'.²²⁴

Apart from international jurists and scholars, there are also international and regional human rights instruments on the right to democratic governance. For example, in 1999, the UN Human Rights Commission adopted a resolution on the Promotion of the Right to Democracy.²²⁵ This was the first text approved in the UN recognising the existence of this right.²²⁶ Others having a bearing on democratic governance include the UN Charter,²²⁷ Universal Declaration,²²⁸ CCPR,²²⁹ which guarantees the right to self-determination, the International Convention on Elimination of All Forms of Racial Discrimination (CERD)²³⁰ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²³¹

The African region is not left out in the fight for democratic governance. In addition to adopting and ratifying some of the international

²²⁰ TM Franck 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 46.

²²¹ As above.

²²² As above.

²²³ As above.

²²⁴ As above.

²²⁵ See 'Promotion of the right to democracy' Commission on Human Rights Res 1999/57, UN Doc E/CN.4/RES/1999/57 (1999).

²²⁶ Udombana (n 215 above) 157.

²²⁷ Art 1(2) of the United Nations Charter proclaims the principle of equal rights and self-determination.

²²⁸ The Universal Declaration provides for democratic governance thus: 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives' (art 21(1)).

²²⁹ Art 1(1) CCPR.

²³⁰ Opened for signature on 21 December 1965, 660 UNTS 85.

²³¹ Opened for signature 1 March 1980, 1249 UNTS 14.

instruments on the right to democratic governance, the region also has its own instruments on the right to democratic governance. One such is the African Charter.²³² Article 13 of the African Charter guarantees to every citizen ‘the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law’.²³³ There are also the Addis Ababa Declaration,²³⁴ the Algiers Declaration,²³⁵ the Lomé Declaration²³⁶ and the Declaration on the Framework for an OAU Response to Unconstitutional Change of Government.²³⁷ Others include the African Union Act,²³⁸ the New Partnership for Africa’s Development²³⁹ and the Declaration on Principles of Democratic Elections in Africa.²⁴⁰

The 1999 Constitution of Nigeria is also replete with provisions relating to democratic governance. For example, section 1(2) of the Constitution expresses its displeasure with undemocratic government when it states that:

The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

According to Akande, this subsection is a reassertion of the illegality of revolutions or *coups d’état* as a means of changing governments.²⁴¹ It cannot, however, by itself, prevent the actual occurrence of a *coup d’état*. It is also doubtful whether the legality of any *coup* can be chal-

²³² African Charter (n 139 above).

²³³ Art 13 African Charter.

²³⁴ See OAU Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, adopted in Addis Ababa, Ethiopia, on 11 July 1990.

²³⁵ Algiers Declaration, OAU Assembly of Heads of State and Government 35th ordinary session Res AHG/Dec 1 (xxxv), OAU Doc DOC/OS/(XXVI) INE 17a (1999).

²³⁶ Lomé Declaration, OAU Doc AHG/Dec/.2 (XXXVI) 12 July 2000.

²³⁷ Declaration on the Framework for an OAU Response to Unconstitutional Change of Government, OAU Doc AHG/Dec/5 (XXXVI) (2000). This might be responsible for the random condemnation of the military *coup* of 24 December 2008 in Guinea by both the ECOWAS and the AU. The *coup* was led by Moussa Dadis Camara, an army captain.

²³⁸ African leaders adopted the AU on 11 July 2000, to replace the OAU Charter. See Constitutive Act of the AU (2000) 8 *African Yearbook of International Law* 479, art 33(1) 494.

²³⁹ See OAU The New Partnership for Africa’s Development (October 2001) http://www.iss.co.za/African_facts/RegOrganisations/unity_to_union/pdfs/oau/keydocs/NEPAD-PDF (accessed 31 January 2009).

²⁴⁰ See OAU/AU Declaration on the Principles Governing Democratic Election in Africa, OAU Assembly of Heads of State and Government, 38th ordinary session, Durban, South Africa, 8 July 2002 AHG/Decl 1 (XXXVIII).

²⁴¹ J O Akande *Introduction to 1979 Nigerian Constitution* (1982) 2.

lenged successfully through this provision.²⁴² To Nwabueze,²⁴³ one of the major reasons why the Constitution of the state in Africa lacks legitimacy in the eyes of the people, rulers and the ruled alike, is the frequent overthrow of the Constitution in a military *coup d'état* followed by a prolonged rule under a military absolutism.²⁴⁴

Section 14(1) of the 1999 Nigerian Constitution, under the fundamental objectives and directive principles of state policy, is apposite to the right to democratic governance. It states that the Federal Republic of Nigeria shall be a state based on 'the principles of democratic and social justice'. It further declares that sovereignty belongs to the people of Nigeria from whom government through the Constitution 'derives powers and authority',²⁴⁵ and that the participation by the people in their government 'shall be ensured in accordance with the provisions of this Constitutions'.

Democracy, it has been observed, is imbued with the greatest potential for engendering good governance, especially when bolstered by credible norms, institutions and a virile civil society.²⁴⁶ Social justice, on the other hand, is predicated on the notion that an organised society creates in its members certain reasonable expectations or claims which it would be unfair to disappoint.²⁴⁷

The inclusion of the right to democratic governance in Nigeria under the fundamental objectives and directive principles of state policy deserves some comment. These provisions are enshrined in chapter II of the Nigerian Constitution²⁴⁸ and contain such lofty ideals as the fundamental obligations of the government, the political objectives of the country, social objectives, educational objectives and the obligations of the mass media, among others. The symbolic significance of the provisions is that government is portrayed as a relationship of rights

²⁴² As above. In addition to this provision, the people can revolt against military adventurists through civil unrest and armed resistance. This has been effectively employed in Uganda, Somalia, Ethiopia, Mali and Liberia. In Nigeria, the former military leader, Ibrahim Babangida, was forced to 'step aside' due to intense civil unrest by pro-democracy groups and human rights activists after the annulment of the June 1993 elections, generally believed to have been won by Chief MKO Abiola.

²⁴³ Nwabueze (n 121 above) 37.

²⁴⁴ The last of such military takeover as at the time of writing this paper was in Guinea on 24 December 2008. The *coup* was led by Moussa Dadis Camera, an army captain who is thought to be in his mid-40s, and used to be in charge of fuel supplies. See *International Herald Tribune* 25 December 2008 1, and, for mixed reactions of African leaders, see *All Gambia.net* Editorial 12 January 2009 1.

²⁴⁵ Sec 14(2)(a) 1999 Nigerian Constitution.

²⁴⁶ FC Nwoke *et al* 'The rule of law as a cornerstone of democracy and good governance' in *39th Proceedings of Nigerian Annual Law Teachers Conference* (2003) 85.

²⁴⁷ Nwabueze (n 207 above) 140.

²⁴⁸ Secs 13-24 1999 Nigerian Constitution.

and duties, a social contract.²⁴⁹ While consent to political domination may precede an appraisal of the performance of the state or regime, legitimacy is conferred on the basis of the performance of the state or regime.²⁵⁰ According to Nwabueze, the affirmation or declaration of common beliefs and objectives has more than a symbolic value, it is part of the process of creating a national acceptance of and attachment to those beliefs and objectives with a view to an eventual growth of habits and a tradition of respect for them.²⁵¹

While section 13 of the 1999 Nigerian Constitution obligates all organs of government, and all authorities and persons exercising legislative, executive or judicial powers, to conform to observe and apply the provisions of the fundamental objectives and directive principles of state policy, section 6(6)(c) of the same Constitution reads that, except as otherwise provided by the Constitution, the judicial powers shall not extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the fundamental objective and directive principles of state policy. According to Okere,²⁵² this apparent contradiction could only mean that the spirit of the objectives and directive principles should inspire and inform judicial interpretations, while actions to enforce the fundamental objective and directive principles *per se* are not maintainable. In order to make the right to democratic governance and other rights included in the fundamental objectives and directive principles justiciable, it is suggested that these rights be transferred to the justiciable part of the Constitution.²⁵³ In the alternative, the judiciary is advised to give liberal and pragmatic interpretations to these provisions as the enjoyment of socio-economic rights will make the enjoyment of fundamental rights more meaningful.²⁵⁴

Lastly, the Nigerian Constitution, like what obtains in many international instruments on human rights, uses the principle of democratic governance as a yardstick for the justification of the derogation from fundamental human rights. For instance, section 45(1) of the 1999 Nigerian Constitution determines that nothing in section 37 (right to a fair hearing), section 38 (right to freedom of thought, conscience and religion), section 39 (right to freedom from discrimination), section 40 (right to peaceful assembly and association) and section 41 (right

²⁴⁹ EEO Alemika 'Fundamental objectives and directive principles of state policy within the framework of a liberal economy' in IA Ayua et al (eds) *Issues in 1999 Nigerian Constitution* (2000) 199.

²⁵⁰ n 250 above, 156.

²⁵¹ Nwabueze (n 207 above) 260.

²⁵² BO Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214.

²⁵³ See IB Lawal 'The role of the judiciary in the promotion of human rights and sustenance of democracy' (2008) 2 *Igbinedion University Law Journal* 53.

²⁵⁴ As above.

to freedom of movement) shall invalidate any law that is ‘reasonably justifiable in a democratic society’, in the interest of defence, public safety, public morality or public health;²⁵⁵ or for the purpose of protecting the rights and freedoms of other persons.²⁵⁶

The above provisions underscore the importance attached to the right to democratic governance not only in Nigeria but also under international law. Since democracy promotes human rights and the rule of law, the recognition of the right to democratic governance as a justiciable right all over the world is a fight that calls for the involvement of everyone.

Next to be considered is the effect of a public declaration of assets on the right to democratic governance. A public declaration of assets is meant to promote transparency, accountability and reduce corruption, among others. Democratic governance, as already discussed, also promotes these virtues. The tendency for democracy to heighten corruption in certain instances makes the relationship between democratic governance and a public declaration of assets very intriguing.

Can democratisation itself trigger an increase in corruption, as opposed to merely promoting more vigilant reporting of corruption? According to Weyland,²⁵⁷ the dispersal of power that a transition from authoritarian to democratic rule extends a range of actors who need to consent to decisions over public resource-allocation. Using Brazil and many countries in Latin America as examples, Weyland further contends that the dependence of entrepreneurs on favourable political decisions and their capacity to pass on the cost of corruption to consumers through higher prices or to workers through lower wages facilitate the increase in bribery.²⁵⁸ He is, however, quick to admit that, while democratisation can extend the range of actors who have the power to demand bribes, it may also enhance overall accountability and thus prevent newly-empowered actors — as well as old power holders — from misusing their clout for illicit enrichment.²⁵⁹ According to Montinola and Jackman,²⁶⁰ political competition affects all levels of corruption, but the effect is non-linear. Corruption is typically lower in dictatorships than in countries that have democratized partially. But once past the threshold, democratic practices inhibit corruption.²⁶¹

The above analyses of the tendency of democracy to increase the levels of corruption are very true of Nigeria where there have been

²⁵⁵ Sec 45(1)(a) 1999 Nigerian Constitution.

²⁵⁶ Sec 45(1)(b) 1999 Nigerian Constitution.

²⁵⁷ K Weyland ‘The politics of corruption in Latin America’ (1998) 9 *Journal of Democracy* 112.

²⁵⁸ Weyland (n 257 above) 112.

²⁵⁹ Weyland (n 257 above) 113.

²⁶⁰ GR Montinola & RW Jackman ‘Sources of corruption: A cross-country study’ (2003) 32 *British Journal of Political Science* 147.

²⁶¹ As above.

many cases of allegations of corruption against many members of all arms of government and many are currently being tried and others already convicted.²⁶² In order to ensure that the current democratic experiment in Nigeria engenders transparency and accountability, rather than greed and corruption, a public declaration of assets by all political office holders is a *sine qua non*.

6 Declaration of assets in other jurisdictions

The declaration of assets by public officers is not limited to Nigeria. Some other African countries require their public officers to declare their assets and liabilities as well as those of their spouses, children and dependants within a prescribed period. There is, however, a high degree of variation in the mode of declaration and its frequency.

For example, by the provisions of the Public Officers' Ethics Act,²⁶³ public officers in Kenya are required to declare their assets and liabilities as well as those of their spouses and children under 18 years within 30 days of becoming a public officer.²⁶⁴ Thereafter an annual declaration of such assets will be made.²⁶⁵ The content of the declaration is confidential.²⁶⁶ However, unlike what obtains in Nigeria and Ghana, information on the asset declaration may be disclosed to authorised staff of the anti-corruption commission,²⁶⁷ the police and law enforcement agents,²⁶⁸ a person authorised by an order of court,²⁶⁹ and the person who provided the information or his representative.²⁷⁰ Unlike under Nigerian law, where no specific time is stipulated for public officers to declare their assets upon their vacation of office, the Kenyan Public Officers' Ethics Act obligates a public officer to declare his assets within 30 days of vacation of office.²⁷¹

The statutory provisions on asset declaration by public officers in Uganda appear to be fairly stringent. Public officers, called 'leaders' under the Leadership Code Act 2002, are required to declare their assets within three months of assumption of office²⁷² and thereafter

²⁶² IB Lawal 'Is executive immunity coterminous with executive corruption? (2006) 1 *International Journal of Law and Contemporary Studies* 325–346.

²⁶³ 4 of 2003.

²⁶⁴ Sec 25(1) Public Officers' Ethics Act 2003.

²⁶⁵ Sec 26(1) Public Officers' Ethics Act 2003.

²⁶⁶ Sec 29 Public Officers' Ethics Act 2003.

²⁶⁷ Sec 29(4)(a) Public Officers' Ethics Act 2003.

²⁶⁸ Sec 29(4)(b) Public Officers' Ethics Act 2003.

²⁶⁹ Sec 29(4)(b) Public Officers' Ethics Act 2003.

²⁷⁰ Sec 29(4)(c) Public Officers' Ethics Act 2003.

²⁷¹ Sec 27(5) Public Officers' Ethics Act 2003.

²⁷² Sec 4(a) Leadership Code Act 2002.

every two years.²⁷³ Furthermore, public officers are obligated to declare their assets before the expiration of their term of office if their term of office expires six months after their last declaration.²⁷⁴ Contrary to the situation in Nigeria, the contents of a declaration under the Leadership Code Act are treated as 'public information' and 'shall be accessible to members of the public upon application to the Inspector-General' in the form prescribed under the Code.²⁷⁵ As obtains under the provisions of other asset declaration laws discussed earlier, asset declarations in Uganda are subject to verification and penalties are stipulated for breach.²⁷⁶

The asset declaration regime in Ghana²⁷⁷ is governed by the Public Office Holders (Declaration of Assets and Disqualification) Act of 1998.²⁷⁸ The Act requires public officers to declare their assets on assumption of office and thereafter at intervals of four years.²⁷⁹ They are also required to declare their assets on vacation of office.²⁸⁰ Members of the armed forces are, however, exempted from declaration of assets.²⁸¹ Unlike what obtains in Kenya, Uganda and Nigeria, asset declarations in Ghana are not cross-checked or verified.²⁸² The right to privacy seems to have been taken to the extreme under the Ghana's asset declaration laws as completed asset declaration forms are submitted to the Auditor-General in sealed envelopes. The Auditor-General, who is the authorised custodian of these declarations, has no authority to open the envelopes. Only a court of law can order them to be opened.²⁸³ Access to asset declarations in Ghana is, therefore, the most restrictive of all the countries considered.

7 Conclusion

Corruption is the bane of Nigeria's socio-political and economic development. One of the ways by which the Nigerian Constitution tries to

²⁷³ Sec 4(b) Leadership Code Act 2002.

²⁷⁴ Sec 4(3) Leadership Code Act 2002.

²⁷⁵ Sec 7 Leadership Code Act 2002.

²⁷⁶ Sec 35 Leadership Code Act 2002.

²⁷⁷ This section is substantially based on Global Integrity 2006 Country Report on Ghana; available at <http://www.globaintegrity.org/reports/2006/Ghana/index.cfm>, and 'Money laundering in relation to anticorruption commitments' http://www.iss.co.za/pubs/other/ahsi/Goredema_Botha/pt1chap_4.pdf (accessed 31 January 2009).

²⁷⁸ Act 550.

²⁷⁹ Sec 4 of the Public Office Holders (Declaration of Assets and Disqualification) Act 1998; art 286 of the 1992 Constitution of Ghana.

²⁸⁰ As above.

²⁸¹ See 'Money laundering' (n 277 above) 39.

²⁸² n 278 above.

²⁸³ As above.

curb corruption is the entrenchment of a Code of Conduct for public officers. Among the numerous provisions of the Code are those that oblige public officers to declare their assets on assumption of office and cessation of same. The legal requirement is that public officers declare their assets before a High Court judge and submit the asset declaration to the Code of Conduct Bureau. The Bureau would retain the custody of such declarations and make them available for inspection by any Nigerian on 'such terms and conditions as the National Assembly may prescribe', which conditions the National Assembly is yet to prescribe. While many public officers are reluctant to declare their assets at the risk of penal sanction, others have promptly fulfilled their constitutional obligation. Some public officers, especially political office holders, have gone a step further to make their asset declarations public with the President, Shehu Musa Yar'adua, taking the lead.

This has taken the fancy of many Nigerians who now mount pressure not only on public officers who are yet to declare their assets, but also on those who have done so to make their declarations public. This is partly due to the reluctance of the National Assembly to prescribe the terms and conditions under which the Code of Conduct Bureau should make asset declarations available for inspection by members of the public, and partly to the belief that Nigerians have a right to know the worth of their leaders. In the eyes of most Nigerians, therefore, any political office holder who has not made his asset declaration public is a villain. This might not be totally true but all the same it is a moral judgment. According to Westermack, moral judgments are passed on conduct and character because such judgments spring from moral emotions, because moral emotions are retributive emotions, because a retributive emotion is a reactive attitude of mind, either kindly or hostile toward a living being (or something looked upon in the light of a living being), regarded as a true cause of pleasure or pain only in so far as it is assumed to be caused by his will.²⁸⁴

This has also brought to the fore the jurisprudential question of how far the law should go in upholding morality. While a public declaration of assets seems to violate the right to privacy under the Nigerian Constitution and some other international human rights instruments to which Nigeria is a signatory, it has been argued that there is nothing inherently private in the affairs of public officers in accounting for public funds entrusted to them, and that there is an overriding public interest in the disclosure of information on the assets of public officers as trustees of the nation's wealth. Therefore, legislative interventions aimed at making the assets of public officers accessible to the public can be justified on the basis of utilitarianism. It has also been demonstrated that such a move would be 'reasonably justifiable in a democratic society'. The National Assembly should as a matter of urgency prescribe the

²⁸⁴ E Westermack *The origin and development of moral ideas* (1971) 314.

terms and conditions under which asset declarations would be made available for inspection by the people, while the Nigerian Constitution should be amended to make it mandatory for political office holders to declare their assets publicly.

The failure of the Code of Conduct to indicate the time-frame within which public officers should declare their assets on vacation of office has left the affected officers with the discretion of choosing a time convenient to them. This approach does not afford the Code of Conduct Bureau the opportunity to verify the assets of public officers immediately upon cessation of their term of office and the whole essence of asset declarations is thereby thwarted. It is recommended that the provisions of the Code be amended to indicate the time-frame within which public officers must declare their assets at the end of their terms of office. A period of one month after leaving office has been suggested.²⁸⁵ Furthermore, asset declarations of top government functionaries should be posted on the website of the Code of Conduct Bureau. The frequency of asset declarations should also be reduced from four to two years, as is done in Uganda.

The Code of Conduct Bureau should take the verification of assets more seriously for early detection of foul play. The non-inclusion of local government Chairpersons among public officers prohibited from having foreign accounts is also a serious *lacuna* to be redressed, since financial allocations to local governments in recent times have increased tremendously and cases of diversion and misappropriation of local government funds are now a regular occurrence. The inclusion of eligibility to contest as a member of the House of Representatives as one of the conditions for appointment as a member of the Code of Conduct Bureau is another issue that can cast a pall on the image of the Bureau. This is because membership of, and sponsorship by a political party are conditions precedent to contesting as a member of the House of Representatives. This part of the qualification should be expunged while the others may be retained to give some modicum of credibility to the Bureau.

The concession given to public officers to engage in farming can be used to disguise ill-acquired wealth. So also should there be a review of the decision in *Nwankwo v Nwankwo*²⁸⁶ to the effect that public officers can acquire an interest in private business-like partnerships without holding a managerial post, in order not to provide a justification for incomes not fairly attributable to legitimate emoluments. There is also a need for a code of conduct for private persons so that they do not render nugatory probity and transparency being fostered among public officers. Besides that, many private individuals have also been found

²⁸⁵ AOO Ekpú 'Curbing corruption in Nigeria: The role of the Code of Conduct Bureau' (2004) 20 *Benin Journal of Public Law* 68-69. See also sec 27(5) of Kenyan's Public Officers' Ethics Act 2003.

²⁸⁶ (1995) 30 LRC 24 33.

guilty, either as principal offenders or accomplices, of corrupt practices and allied offences. There should be a positive change in our values and orientation. A situation in which corrupt persons and people of doubtful character are honoured with awards and chieftaincy titles should be deprecated.²⁸⁷ So also can the war against corruption and abuse of office never be successfully fought when pressures are mounted by sponsored kinsmen and associates to secure the release of corruption suspects without following due process, nor when a heroic welcome is given to corruption ex-convicts on completion of their terms.²⁸⁸ The war against corruption should never be tribalised or trivialised. The prosecution and trial of corruption cases should be handled with sincerity and dispatch. There should be a uniform application of the rules and selective prosecution and individualisation of justice should be avoided as much as possible. Sentences on conviction should always reflect the gravity of the offence in order to serve as a deterrent to others.

For us to make any meaningful headway in the fight against graft and greed, Nigerians must have access to information about the activities of government. An accelerated passage of the Freedom of Information Bill (as done in South Africa, Zimbabwe and Uganda) is, therefore, another means of ensuring probity and transparency in our public life. The fear is that the National Assembly may vacillate on the passage of the Bill, since its members are to be affected, the same way they have not been able to prescribe the terms and conditions under which asset declarations should be made available to the public. This view is buttressed by the fact that most political holders, including the members of the National Assembly, are generally reluctant to make their asset declarations public.²⁸⁹

As the only authoritative interpreter of the provisions of the Constitution and statutes, the judiciary should use the earliest opportunity to declare the asset declaration a public document within the meaning of section 109 of the Evidence Act²⁹⁰ to ensure easy access by members of the public. If the Freedom of Information Bill is eventually passed

²⁸⁷ Eg, President Olusegun Obasanjo allegedly nullified the nation awards conferred on some Nigerians by General Abdusalami Abubakar in 1998 because some murder suspects were included on the list.

²⁸⁸ Diepreye Solomon Peter Alamiyeseigha, the impeached Governor of Bayelsa State, was convicted and sentenced to 12 years' imprisonment for corruption and money laundering offences in 2007. The sentences ran concurrently from the day he was incarcerated in December 2005. On his release from prison, he was accorded a heroic welcome, a motorcade of four kilometres reportedly heralded his entry into Yenagoa, the state capital. A sitting government also joined the welcome team. For an incisive comment on this action, see 'Alams the hero' *The Vanguard Editorial* 6 September 2007 18.

²⁸⁹ As at the time of writing this paper, apart from the President, the Vice-President and the Secretary to the Government of the Federation, only three ministers had declared their assets publicly out of 39, four state governors out of 36 and one member of the National Assembly out of 469.

²⁹⁰ Cap E 14 Laws of Federation of Nigeria 2004.

into an Act, it is not unlikely that corrupt public officers will contest its constitutionality as they did to the Corrupt Practices and Other Related Offences Act²⁹¹ in *Attorney-General of Ondo State v Attorney-General of the Federation*.²⁹² It behoves the judiciary to rise in defence of probity and transparency by declaring the Act constitutional. This is the only way to engender a synergy, as opposed to conflict, between the *lex lata* and *lex feranda* on asset declaration in Nigeria.

²⁹¹ Cap C 31 Laws of Federation of Nigeria 2004.

²⁹² (2002) 27 WRN 1 SC. The constitutionality of the Corrupt Practices and Other Related Offences Act was challenged in this case. The Nigerian Supreme Court applied the blue pencil rule when all seven justices held that the plaintiff's action succeeded in part by holding that the Act is generally constitutional, while voiding secs 26(3) and 35 of the Act.