

## A REVIEW OF THE RIGHT TO LIBERTY – AS A FUNDAMENTAL RIGHT AND LINCHPIN OF DEMOCRATIC SOCIETIES

By

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### Abstract

*The right to liberty is a fundamental human right, legally recognized by constitutions, declarations, and international treaties, including the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Universal Declaration of Human Rights (UDHR), African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPR), International Covenant on Civil and Political Rights (ICCPR), as well as implied references in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Liberty is one of the most essential guiding principles of democratic societies – which is centered on the rights, autonomy, and agency of the free and independent man, to practice or participate in legitimate endeavors, without unjustified or prohibitory interventions by state authorities, especially through arrests, detentions, or other forms of confinement. Consequently, violations of the right to liberty are centered on unjustified interferences, with the rights and fundamental freedoms of the individual through detentions or incarcerations that are not qualified on the basis of legitimate objectives. Thus, authoritarian or corrupt regimes can suppress political opinion, activism, civil or economic rights through the force of military or law enforcement agencies that act contrary to constitutional or statutorily defined procedures, and contrary to human rights law – to use imprisonment or enforced disappearance as a means of confining or neutralizing targets/victims. Hence, verifying the essentiality of a guaranteed right to liberty, as the catalyst for a sustainable culture of democracy, and the exercise of individual autonomy, freewill, and wherewithal for associational and development-oriented activities, as well as activism.*

**Keywords:** Liberty, Rights, Political, Democratic, Economic, Prison

## Introduction

The principle of freedom and independence of man, is encapsulated in the right to liberty. The UDHR obliges states to ensure universal respect for and observance of human rights and fundamental freedoms; and that the equal and inalienable rights of all members of the human family is the foundation of freedom (Preamble, UDHR). States are entrusted with the duty to “promote better standards of life in larger freedom”; and the declaration further emphasizes that freedom is of the greatest importance: for the full realization of rights (Preamble, UDHR); all persons are entitled to all human rights and freedoms (Article 2, UDHR); and the declaration places emphasis on the essentiality of establishing a social and international order for human rights and fundamental freedoms (Article 28, UDHR). The ICESCR states that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights” (Preamble). The ICCPR, places an obligation on States to ensure that in cases where rights or freedoms as herein recognized are violated – victims shall have an effective remedy (Article 2(3) (a)). The ICCPR also provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law” (Article 9(1.)). However, in the context of duties to the community, the UDHR provides that:

(1.) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2.) 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 (Article 29).

Consequently, it is recognized that there are exceptions to the right to liberty. However, the regulation of the right to liberty, can only be justified on the basis of legitimate objectives. A quintessential level of inviolability has been placed on the right to liberty, judging from the views of John Rawls for instance –

Rawls’s account of the relationship between justice and liberty, and in particular with his conception that justice requires that liberty may only be limited for the sake of liberty and not for the sake of other social and economic advantages (Hart, 1973, p.534)

On that account, by placing the right to liberty on a scale of balance, it has been submitted that

In the general conception of justice there is no such priority rule and no requirement that liberty must be as extensive as possible, though it is to be equally distributed unless an unequal distribution of it is justified as being to everyone’s advantage (Hart, 1973, p.537).

Thus, using the prison system for instance, the liberty of a convict can be justifiably restrained in a penitentiary system, designed for regulating the conduct of deviants to achieve the goal of crime prevention which is a justified public order objective. On the other hand, the prison system can be designed to operate as a reformative/rehabilitative institution, with educational and skill acquisition opportunities, provided to improve the life of the convict, and to create potential opportunities for legitimate sources of livelihood and more prudent utilization of the fundamental freedoms and liberties of the ex-convict when reintegrated to civil society. Another example is the confinement of a suicidal individual, provided for in section 327 of the Criminal Code Act (Cap C38 LFN), in the light of the superior objective of protecting the fundamental right to life, in the sense that life is essential to liberty. On that account, there appears to be a utilitarian dimension of regulating liberty, as a precursor to achieving the progressive actualization of greater forms of liberty.

The special conception is to govern societies which have developed to the point when, as Rawls says, “the basic wants of individuals can be fulfilled” and social conditions allow “the effective establishment of fundamental rights.” If these favourable conditions do not obtain, equal liberty may be denied, if this is required to “raise the level of civilization so that in due course these freedoms can be enjoyed” (Hart, 1973, p.537).

However, conditions which might justify the regulation of liberty, must be carefully assessed, strictly in the context of efficiency considerations, public order concerns, the interests of the citizenry, and the protection of inviolable human rights, which is the basis of the view that “freedom begins where politics ends” (Pitkin, 1988, p.526).

### **The Role of Liberty in Modern Democratic Societies**

As a human right, liberty entails freedom from arbitrary confinement. The liberty of an accused person, is very consequential to the right to presumption of innocence, and the individual right to autonomy. Consequently, the right to liberty, must not be undermined for the purpose of executing “inappropriate, unjust, unpredictable, unreasonable, unnecessary, or disproportional” objectives (author of “The Right to Liberty” 2). On that account, the deprivation of the right to liberty occurs when there is no legal justification, or legitimate objective, verifying the right of executives or law enforcement agents to detain or imprison a person. In Nigeria, there are reported cases of persons detained without regard for time limitations stipulated as punishment for the alleged offence, as well as persons kept in custody for periods exceeding the time limit of their official sentences (Olomjobi, 2022, p.47).

The right to liberty has also been addressed in the context of “equality and freedom” (Olomjobi, 2022, p.48). Hence, verifying its imperativeness, as one of the core values of democratic societies, where the rights and liberties of all persons must be respected; and a fair balance must be achieved

in regard to executing investigations and law enforcement activities, in a way that as much as practicable, does not interfere with the rights and liberties of accused persons. Lord Atkin, in the case of *Liversidge v. Anderson*, [1942] notes that: “[I]n English law every imprisonment is prima facie unlawful and [...] it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge” (A.C. p.206, 245).

The existence of a legitimate objective for the deprivation of liberty must be proved by prosecuting authorities, that is the basis of the legal obligation placed on law enforcement officers to inform an accused person of the reason for arrest, and the charges against him; to be promptly presented before a court of competent jurisdiction as soon as practicable to prevent extended periods of detention; to grant bail or conditional release pending the conclusion of trial; and the right to compensation in cases of unlawful arrest or detention (Article 9(2),(3) and (5) of the ICCPR).

Liberty appears to be a sine qua non for democracy, based on the guaranteed exercise of all rights of the free and independent man, constitutionally entitled to a dignified state of existence, private and family life, freedom of expression, press, fair hearing, assembly and association, movement, non-discrimination, an adequate source of livelihood and the right to partake in economic endeavors, freedom of religion, thought, conscience, and opinion without repressive and arbitrary actions by an unjustifiably or corruptly intrusive regime (Chapter II and IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); Since democracy verifies the right of citizens to “choose political representatives and to hold dissenting views against an elected government” (Olomojobi, 2022, p.49).

For instance, the case of *Aminu v. Nigeria* (2000), involved the arrest, detention, and torture of Mr. Ayodele Ameen, who was a political figure that was “being sought after by the Nigerian security agents as a result of his political inclination[s]” (Olomojobi, 2022, p.54). Due to the political nature of his persecution, all attempts to seek remedy through national courts were futile. Consequently, a complaint was made to the African Commission on Human and Peoples Rights, which held that – Mr Ameen’s arrest and multiple detentions were executed without legitimate justification, nor valid explanations by law enforcement officers, thereby constituting a violation of the African Charter on Human and Peoples’ Rights (ACHPR), specifically in the context of Articles 3(2), 4, 6, and 10(1) of the ACHPR, which were grossly violated by virtue of the arbitrary actions of the state (Olomojobi, 2022, p.54).

### Cases on the Right to Liberty

The case of *Mussa Ali Mussa Benali v Libya* (2008), involved a Libyan citizens, who was formerly employed in the state-owned Darnah furniture factory. Benali was arrested by officers of the Internal Security Agency (ISA), on the 9<sup>th</sup> of August, 1995. Prior to his arrest he was under the Agency’s surveillance, and was mandated to report daily to the ISA headquarters, at Darnah.

“Since July 1995, he had reported in person to the internal security agents every morning and had been systematically held at the ISA until the evening” (para 2.2). Subsequently, he was arrested on the 9<sup>th</sup> of August, 1995, and was subjected to “secret detention for more than five years in the Abu Slim prison. He spent his first two years there in an underground cell which he was never allowed to leave” (para 2.3).

In 2000, when allowed to contact his family, he informed them of his experience in detention, stating that he had been tortured, starved, kept in custody without a charge, and had never been brought before a judge (para 2.4). He was eventually released on 15 October 2002, “after various governmental institutions – namely the ISA, the People’s Social Command in Darnah and the Gaddafi International Charity and Development Foundation – expressly approved his return to his professional life in letters that provided corroborating evidence of his prior detention” (para 2.5). However, he was still subjected to further harassment and intimidation by ISA, until 16 February 2005, when he went to the British embassy in order to request a travel visa to the United Kingdom and Northern Ireland. That same day, he was once again arrested by security agents. Although, while in custody, monthly visits were allowed initially, at the beginning of October 2006, after riots in the Abu Slim prison, all visits were forbidden. The prospects of receiving judicial remedy in the Libyan administration of justice system was very bleak, due to the systemic repression/capture of the judiciary by the executive arm of government.

The author submitted that fear of reprisals from the Government prevented him from complaining to judicial authorities or resorting to other remedies provided for in domestic law. The regime in Libya had notoriously engaged in merciless repression with the aim of putting down any kind of political opposition. The mere fact of inquiring about the situation of a relative may result in detention, torture or death at the hands of the security forces. The author said that, despite the extremely poor human rights record of the State party, complaints for such violations before national courts were virtually non-existent (para 2.11).

Abdeladim Ali Mussa Benalis, was subjected to unacknowledged and incommunicado detention, which escalated to the level of an enforced disappearance. Consequently, his right to liberty was grossly violated. The author claimed that his arrest was executed without regard for established procedures, he was not informed of the reason of arrest, nor brought before a court of competent jurisdiction, he was denied access to legal counsel, deprived of access to his family, and “no criminal prosecution has ever been initiated against him” (para 3.4). So, Abdeladim Ali Mussa Benali, was a political prisoner, who lost his freedom for several years, solely for political reasons, without access to judicial remedy.

The case of *Malika Bendjael and Merouane Bendjael v Algeria* (2016), involved Mourad Bendjael and A.B. who were arrested in Algiers by agents of the Intelligence and Security Department, on

4 May 1994, at around 11 a.m. These agents were dressed in civilian clothing, were hooded and armed, and arrived in a pickup truck. They forced the two young men into their vehicle at gunpoint, without producing any official document or arrest warrant or explaining the reasons for their actions (para 2.1). At 2.am, on the 6<sup>th</sup> of May, 1994, armed Intelligence and Security Department agents were deployed to the Alger Centre neighbourhood, in search of Mourad Bendjael, regardless of his prior arrest, which was executed few days earlier. Without a search warrant or any other proof of authorization, Malika Bendjael's other two sons, Karim and Merouane, were arrested by the security officers. At the Châteauneuf barracks, Merouane Bendjael was tortured for four days.

On arrival he caught sight of his brother Mourad Bendjael, lying on the ground and tied to a pipe in the recess of a corridor. He was very weak and covered in bruises, having evidently been tortured. During the four days of his detention at the barracks, Merouane saw his brother Mourad every time the agents took him along the corridor to the torture room. Mourad Bendjael was always in the same place and in the same state. He was never able to talk to his brother (para 2.3).

Merouane was brought before the public prosecutor of Sidi M'Hamed Court in Algiers, on the 12<sup>th</sup> of June 1994, where he was remanded, and transferred to Serkadji prison. Although, his third brother Karim was freed on 12 June 1994 without even being brought before a court.

However, at the end of 2011, Mourad Bendjael's sister discovered her brother's name in the records of the El Alia cemetery in Algiers. The records stated that Mourad was 19 years old at the time of death, whereas in fact he was 27 years old on the day of his arrest, that he had been shot dead by armed groups in Kouba and that he was buried in a grave set aside for terrorists (para 2.7).

An employee of the Saint Eugène morgue in Algiers, confirmed that "Mourad's body had been taken to the morgue on 7 June 1994 by police from the anti-banditry squad and buried on 15 August 1994 in the El Alia cemetery" (para 2.7). While searching for her brother, Malika Bendjael states that she has severally been arrested and assaulted by law enforcement authorities, who intended to suppress the case of her brother's disappearance; and regardless of her efforts, no investigation was executed to "examine the significant contradictions between the information contained in official records, the authorities statements and the observations of witnesses" (paras 2.7, 2.10, 2.11).

The author, further explained that the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, made it legally impossible for them to have recourse to judicial proceedings. Consequently, "domestic remedies, which had in any case proved useless and ineffective, are thus now totally unavailable"; So the Human Rights



Committee, found the state guilty of violating articles 2(3), 6, 7, 9, 14 and 16 of ICCPR (paras 2.11, 2.12, 2.13, and 9).

The case of *Khaled II Khwildy v Libya*, (2008) involved Khaled II Khwildy, a Libyan national, who migrated to Switzerland. He submitted the communication on behalf of himself and his brother. The author gained political asylum in Switzerland after fleeing Libya in 1996. His elder brother was summarily and publicly executed in Benghazi. After which, his family home was forcefully invaded, and all the men, including children were arrested by the Internal Security Agency. They were detained in Benghazi prison, until the authors brother admitted after a period of one month, to have aided the author in the course of fleeing the country (para 2.2).

They were severely tortured, maltreated, and detained without judicial affirmation. The decision to keep Abdussalam II Khwildy in detention was made by members of the security forces, with no judicial control. He was told by a police official: "I know you have done nothing, but you are going to stay here for five years" (para 2.2). The security forces reportedly executed another of his family member while his brother "Abdussalam II Khwildy was held in secret detention. In January 1999 he was transferred to Abou Salim prison in Tripoli", where he was detained until 2003, with no recourse to courts, and no communication with family or legal counsel (para 2.3).

After his released in 2003, Abdussalam II Khwildy was again arrested in 2004. "After an unfair trial, conducted in complete disregard of his rights," on the 7<sup>th</sup> of August 2006, he was sentenced to two years imprisonment for having aided Khaled II Khwildy in fleeing the country (para 2.4). At the end of his two year sentence, the Libyan authorities refused to release him. He was subjected to enforced disappearance, since his family had no information of his whereabouts, due to the failure of Libyan authorities, to respond to the enquiries of the victim's family, until the Secretary of Prisons eventually confirmed that his current location is unknown (para 2.5).

The security services blatantly denied his detention, and gave no information concerning any previous authorization of his release. In the light of the family's previous experiences with the security services they had every reason to fear for his life and physical and psychological integrity. Eventually, Abdussalam II Khwildy was permitted to contact his family in May 2008. Hence, he informed them that he was in Abou Salim prison (para 2.5).

No news had been heard from him before that date as the Libyan authorities had sealed off outside contact with Abou Salim prison following an incident in 2006 where three prisoners died of starvation. Abdussalam II Khwildy remained in detention until he was released on 22 August 2011. The Human Rights Committee, found the state guilty of violating articles 2(3); 6; 7; 9, paragraphs 1-4; 10 (1); 14, paragraphs 1 and 3 (b) and (c); and article 16 of the ICCPR. (paras 2.6 and 8).

As presented in the aforementioned cases, the right to liberty of citizens has been violated severally by agents of the state, and in extreme cases has resulted in enforced disappearances without charges, or recourse to courts.

### **The dynamics of negative and positive liberty**

Hillel, in his article on liberty, made reference to two typologies, viz. negative liberty, and positive liberty (Hillel, 1976, p.147). Hence, portraying negative liberty as centered on legalistic and regulatory frameworks; while positive liberty connotes the individualized dimension of liberty, as opposed to the societal dimension – which according to Hillel, is the basis of negative liberty (Hillel, 1976, p.147).

#### **Negative Liberty**

Negative libertarians evaluate liberty from an institutionalized, or systemic point of view, which is largely based on the public policy dimension, evaluated by Hillel in terms of the regulation or limitation of liberty, with the aim of maintaining law and order; as opposed to the laissez faire quality of positive liberty (Hillel, 1976, p.147). So negative libertarians view the law as a necessary tool for curbing the abuse of fundamental freedoms/liberties. Thus, negating the abusive exercise of human freedoms through law – in the sense that the social contract of protecting life and property, is executed via preventing people from acting contrary to public interest, that being the core ideology of negative libertarians (David, 1891, 656). Thus, the negative theory of liberty appears to be antithetical to, and paradoxically opposed to the freewill that is popularly recognized as the principal feature of liberty.

Nonetheless, negative libertarians justify their point of view based on the claim that – liberty is enhanced via preventing people from acting contrary to their own interest; and on the other hand, it serves as a regulatory framework for ensuring accountability and responsibility for individual choices (Hillel, 1976, p.147). For example, in the context of section 301 of the Criminal Code Act, which compels action, by imposing a legal obligation on heads of families who choose to have children, to provide all the necessities that are essential for the survival of their dependants. Therefore, while negative liberty possesses more of a utilitarian and societal dimension; positive liberty is centered on individualism and autonomy.

#### **Positive Liberty**

Positive libertarians are focused more on individual rights and fundamental freedoms, which is more capitalistic from an economic point of view (Friedman, 1962, 2), and religious or philosophical from an ethical point of view. Considering the role of the individual as an economic; as well as a moral agent, endowed with the capacity and wherewithal to abstain from what is morally wrong (Hillel, 1976, p.147); and to make prudent livelihood and socio-economic choices.



Thus, in terms of positive liberty – in the most efficient sense, the state is not meant to function as an intrusive institution, but its principal role is to create a safe and enabling environment for the exercise of human rights and fundamental freedoms.

### The Paradox of Liberty

In the context of law, liberty is a paradoxical concept, because law is simultaneously applied as a tool for protecting liberty; and for limiting or regulating the exercise of liberty/fundamental freedoms. However, for the determination of the most efficacious approach to the right to liberty, it is a prudent choice to adopt the position of Burns Weston, who focuses on creating a fair balance, based on the rationale that human rights “imply claims against persons and institutions who impede realization and standards for judging the legitimacy of law and traditions,” so “human rights limit state power” (Weston, 1984, p.263).

### Conclusion

Article 29 of the UDHR, Article 8 of the ICESCR, Article 12, 19, and 22 of the ICCPR, Article 10, 13 and 15 of the Convention on the Rights of the Child, among others, all recognize the aim of upholding the law and maintaining public order, as legitimate limitations for regulating the exercise of human rights and fundamental freedoms. However, it is a problematic trend when the right to liberty is undermined for the purpose of – (a.) actualizing political and systemically unethical objectives; (b.) executing aims which are contrary to the tenets of democracy, and respect for rights and freedoms of citizens; or (c.) practices that are antithetical to the supremacy or the rule of law, public order, and constitutionalism – considering that the right to liberty is a constitutional right, which the state is obliged to respect and protect. Consequently, it is the duty of the state to create effective checks and balances, and efficacious procedural principles to curtail the abuse of public authority, in order to ensure that citizens are not arbitrarily deprived of liberty, for unethical, abusive, intrusive, and subversive reasons.

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International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948