Is the Common Law Human Rights System Still Relevant with the Coming into effect of the Fundamental Rights Provisions of the Constitution of the Federal Republic of Nigeria 1999?*

Abstract

Is the common law human rights system still relevant with the coming into effect of the fundamental rights provisions of the Constitution of the Federal Republic of Nigeria 1999 (CFRN)? This is the central question of this article. The article utilises the doctrinal method by analysing some provisions of the current and the old Nigerian constitutions and the nature of the common law system and the common law human rights system. The article argues that the common law human rights system still retains its relevance despite the promulgation of the fundamental rights provisions of the CFRN.

Key Words: Common Law, Common Law Rights, Human Rights, Nigeria, Nigerian Common Law, Fundamental Human Rights

1. Introduction

The central question of this paper is whether the common law human rights system is still relevant with the coming into effect of the fundamental rights provisions of the Constitution of the Federal Republic of Nigeria 1999 (CFRN). The paper answers the question by reflecting on the nature and the state of the common law human rights system and the rights in the fundamental rights provisions of the CFRN. The paper argues that the common law human rights system still retains its relevance despite the promulgation of the fundamental rights provisions of the CFRN.

This study is relevant because certain aspects of the common law – for example: the tort law, which protects some common law human rights – are still taught in law faculties in Nigeria. Are the law faculties engaging in an enterprise that has been overtaken by the CFRN? Also, the common law system is still statutorily protected by many legislations in Nigeria. Are these legislations, to the extent that they protect common law human rights, still relevant since the CFRN supremely does what the common law human rights system was originally intended to do?

This introduction will be followed by section 2 which is on the constitutional protection of human rights in Nigeria. Section 3 dwells on the common law system. Section 4 reflects on the common law human rights. This is followed by section 5 which discusses the edge of the rights in the fundamental rights provisions of the CFRN over the common law human rights. Section 6, which dwells on the perennial relevance of the common law human rights system, is followed by the concluding section 7.

2. The Constitutional Protection of Human Rights in Nigeria.

The Colony and the Protectorate of Lagos, the Northern Protectorate of Nigeria and the Southern Protectorate of Nigeria were amalgamated in 1914. The constitutional instrument that gave birth to the 1914 amalgamation was mute on human rights. Following the appointment of Sir Hugh Clifford as the second governor general in 1921, the Clifford Constitution came into effect in 1922 following pressure from nationalist movements in Southern Nigeria. The 1922

* **Somadina IBE-OJILUDU,** Lecturer, Faculty of Law, Godfrey Okoye University, Thinkers' Corner, Enugu State, Nigeria. Email: somadina.ibe-ojiludu@city.au.uk

Clifford Constitution established a legislative council which had only 4 elected members (three representing Lagos and one representing Calabar). The council made laws for the Southern part of Nigeria. The Governor-General retained the power to make laws for the Northern part of Nigeria through proclamation. The 1922 Constitution had no human rights provisions. The Richard Constitution came into effect in 1946. The Richard Constitution organised Nigeria into regions: the Eastern Region (the Southern Cameroon was part of the region), the Northern Region and the Western Region. This constitution which was equally deficient in the protection of human rights was replaced by the Macpherson Constitution of 1951 which increased regional autonomy. The Macpherson Constitution had no protection for human rights. The 1954 Lyttleton Constitution, which introduced a federal system of Government composed of three regions with Southern Cameron (which was not declared a region but a quasi-federal territory), did not have any protection for human rights.

To address the fears of the minorities, the Willink Commission, named after Harry Willink who headed the commission, was set up in 1957.[1] Minorities in the constitutionally-recognised regions had become by 1958 vociferous, determined and united in their demands for separate states from the existing regions.[2] At the London Conference of 1958 where the Willink Commission report was debated, 'the issue of state creation was contentious'.[3] The Willink Commission, wrote that 'in each of the three Regions of Nigeria we found either a minority or a group of minorities who described fears and grievances which they felt could become intense when the present restraints were removed and who suggested as a remedy a separate State or States'.[4]

Since the Commission was instructed to 'recommend safeguard in the Constitution' or 'to make recommendations for the creation of new States "if but only if, no other solution seems to meet the case",[5] it settled for safeguard in the Constitution by way of fundamental human rights. It is curious why the Commission would settle only for the insertion of the fundamental rights provisions in the Constitution even after it concluded that 'provisions of this kind in the Constitution are difficult to enforce and sometimes difficult to interpret'[6]. The Commission opted for the codification of the fundamental rights in the Constitution even after expressing that 'this would certainly not satisfy the minorities who appeared before us; in each Regions, it was the case for a new State that they wished to argue'[7].

The Commission recommended that 'provision should be made in the Constitution for the following rights'[8]: the right to life, freedom from inhuman treatment, freedom from slavery or forced labour, right to liberty, right to private and family life, right to be presumed innocent until proven guilty according to law, freedom of expression, freedom of peaceful assembly,

[1] Timothy Onimisi, 'The Politics of State Creation in Nigeria and the Economic Viability of Existing 36 States' (2014) 1(2) *International Journal of Social Sciences and Management* 64, 65 and Victor Ita, Itoro Ebong and Tonye Inimo-Etele, 'Restructuring Nigerian Federalism: A Prognosis for Nation-Building and Socio-Political Stability' (2019) 5 (1) *Journal of Political Science and Leadership Research* 1, 7.

[2] Timothy Onimisi, 'The Politics of State Creation in Nigeria and the Economic Viability of Existing 36 States' (2014) 1(2) *International Journal of Social Sciences and Management* 64, 65.

[3] Lexington Izuagie, 'The Willink Minority Commission and the Minority Rights in Nigeria' (2015) 5(12) *Ekpoma Journal of Theatre and Media Arts* 206, 212.

[4] *Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying Them* (Her Majesty's Stationery Office 1958) Chapter 14, section 1.

[5] ibid.

[6] ibid section 32.

[7] ibid section 1.

[8] ibid section 39.

freedom of movement, right to marry, freedom of religion, right to religious education, right to enjoy fundamental rights without discrimination. These rights would later form part of the 'fundamental rights' in chapter III of the Constitution of the Federation of Nigeria 1960.[9] Nigerian constitutions since 1960 have always reflected the 'fundamental rights' provisions.[10] The fundamental rights provisions in the CFRN, which was promulgated in 1999, are contained in Chapter IV of the Constitution.

3.a The Common Law

The common law was originally specific to England. Thus, the appellation, 'The English Common Law'[11] or 'The Common Law of England'. When he ascended the throne in 1066 AD, William the Conqueror had the practice of sending his representatives (itinerant judges) to the countryside to settle disputes based on the local law. When these representatives returned to Westminster, they would discuss their experiences at the country side and agreed on the best of the principles of law (generated by local laws) upon which they based their decisions. These agreements became the standard upon which similar cases would be adjudicated. Thus, the principle of *stare decisis* was born.

In the Common law system, whenever a problem of law is decided, the decision forms a rule such that similar cases which arise in future follow the formed rule.[12] This is called the principle of *stare decisis*. The principle of *stare decisis* also entails that lower courts must follow the legal decisions of higher courts with regard to cases that are similar. This obligation is known as case law[13] or precedent[14]. In fact, 'case law … is … often known as common law'.[15]

Stare decisis is a Latin expression which simply means 'let the decision stand'. The expression is an abbreviation of the maxim, '*stare decisis et non quieta movere'*.[16] '*Stare decisis et non quieta movere'* means 'Let the decision stand and do not unsettle or disturb matters that are settled'.[17] The principle of *stare decisis* is fundamental to the common law system.[18] By 1268 AD, the formation of the common law system had been completed. This is because by that time the famous *Treatise on the Laws and Customs of England* authored by Henry de Bracton had been written. Henry de Bracton died in 1268 AD.

As Britain spread her influence to different parts of the world through colonialism, she disseminated the common law system. The system became the legal arrangement of countries that were under the British rule. Thus, the common law system is practised in the United States of America, India, Australia, Nigeria and other commonwealth countries.

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[9] Constitution of the Federation of Nigeria 1960, Ss. 17 – 32.
[10] See, for instance, the following: Constitution of the Federal Republic of Nigeria 1979, Chapter IV (ss. 30 – 42).
[11] Catherine Elliott and Frances Quinn, *English Legal System* 15th edn (England, Pearson 2014) 10.
[12] ibid.
[13] ibid.
[14] Nicola Gennaiooli and Andriel Shleifer, 'The Evolution of Common Law' (2007) 15 *Journal of Political Economy* 43, 44
[15] Catherine Elliott and Frances Quinn, *English Legal System* 15th edn (England, Pearson 2014) 10.
[16] B A Garner (ed.), *Black's Law Dictionary* 9th edn,(USA, West Publishing Co 2009) 1874.
[17] A literal translation of the expression actually means, 'Let the decision stand and do not move or stir what is quiet or sleeping'. This literal translation is a product of this writer's elementary knowledge of Latin aided by D. P. Simpson, *Cassell's Latin Dictionary* (Houghton Mifflin Harcourt 1968).
[18] Catherine Elliot and Frances Quinn, (n.16).

The following were introduced into the Nigerian legal system by many colonial and post-colonial statutes: the common law of England, the doctrine of equity and the statutes of general application (SOGA) in force in England on 1st January 1900.[19] The States of the former Western Region of Nigeria which made SOGA[20] non-applicable within their territories still made provisions for the accommodation of the common law of England and the doctrine of equity.[21]

One advantage of the common law system is its predictability. This is because whenever a problem arises, the principle upon which the problem is resolved becomes a rule to be applied in future similar cases. This makes the law, not only predictable, but also certain.

One problem with the common law is that once it evolves a law, it is difficult to change it even when such a law is not favourable. This is because of the doctrine of precedent. Speaking about the absolute binding nature of the decision of the Supreme Court of Nigeria on the Court of Appeal, Nweke JCA would opine thus, 'We find it curious that the learned counsel for the appellant could invite us to jettison the position of the Supreme Court of Nigeria …wonder shall never end. …suffice it to note that, like the Centurion at Capernaum in the Christian Bible, this court is under authority – under and subordinate; indeed, submissive to – the authority of the Supreme Court'.[22] Kayode Eso JSC would similarly reason, 'I hope it will never happen again where the Court of Appeal in this country or any lower court for that matter would deliberately go against the decision of this court …. This is the discipline of law. This is what makes the law certain and prevents it from being an ass'.[23] Although, the Supreme Court can decide not to bind itself to its past decision and thus overrule itself, this is rarely done. The Supreme Court once held that, 'The Supreme Court as the apex court would be wary to overrule itself or depart from its previous decision'.[24]

The above shows that the doctrine of precedent can retard development (socio-political, economic or human) when precedence demands that the society be stuck to a principle that is outdated, unpopular and less progressive. This deprives law of playing its expected developmental role.[25]

3.b. Common Law Human Rights

Common law rights are different from common law human rights. Whereas every common law human right is a common law right, not every common law right is a common law human right. Thus, Oputa JSC would similarly opine that 'not every civil or legal right is fundamental right'; fundamental rights refer to the inalienable rights of the human person; 'emergent nations with written constitutions have enshrined in such constitution some…basic human rights' which

[19] See for instance the following federal law and state laws: Interpretation Act cap 192 LFN, 1990, section 32 and High Court of Lagos State Law 2003, sections 13, 15 and 19(2).

[20] An Act of the UK Parliament which applied to all criminal and civil courts and to all classes of community in England would likely constitute a stature of general application (*Attorney General v John Holt and Co* (1910) 2 NLR 1).

[21] Law of England (Application) Law Cap 60 Laws of Western Region 1959, section 3.

[22] *Ojora v Agip (Nig) Plc* (2014) 1 NWLR (pt 1387) 150.

[23] *Okoniji v Mudiaga Odge* (1985) 10 S. C 267 at 268 – 269.

[24] *Akintokun v L. P. D. C* (2014) 13 NWLR (pt 1423) 1 at 36. [Emphasis is the author's]

[25] On the developmental role of law, see the following: Somadina Ibe-Ojiludu, 'The Failure of Nigeria's Economic and Financial Crimes Commission (establishment etc.) Act 2004 as a Development Act' (2018) 11(1) *Law and Development Review* 127, 137 – 140 and 155 – 160; Somadina Ibe-Ojiludu, 'Koskenniemi on Sovereignty and Global Governance' (2019) 5(1) *International Journal of Law* 41, 46.

they consider fundamental to human beings; in Nigeria, those rights which the constitution considers fundamental to the human person are contained in chapter IV of the CFRN.[26]

On the other hand, common law rights which are not common law human rights include such rights like contractual rights and proprietary rights which one is not born with but which one rather acquires as a result of a transaction. One may call them, therefore, transactional rights. Thus, there is a difference between mere rights and fundamental/human rights. It is for this reason, for instance, that a distinction is sometimes made even in development discourse between human rights-based development and rights-based development.[27]

One common law human right that is easily discernible from the law of evidence is freedom from torture. The common law prohibits admitting evidence that emanates from torture. Thus, Lord Bingham would assert that 'the English common law has regarded torture and its fruits with abhorrence for over 500 years'.[28] Similarly Lord Hoffmann would note that 'the law has moved on. English law has developed a principle …that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceeding were to be entertained or the evidence admitted'.[29] Thus in Nigeria, 'where the prosecution proposes to give in evidence a confession made by a defendant' which was or may have been obtained 'by oppression of the person who made it', such an evidence is not admissible.[30] The Evidence Act 2011's description of 'oppression' would include 'torture, inhuman or degrading treatment, and the use of threat or violence whether or not amounting to torture'.[31] The common law's prohibition of torture and rejection of any evidence arising from it, is protected in the CFRN[32] and the International Covenant on Civil and Political Rights[33].

Other common law human rights are alluded to in the English *Metric Martyrs*[34] case. The mentioned rights include right of access to courts, right to enjoy confidential communication with a solicitor, right of a prisoner to communicate with a journalist about her/his conviction, right not to be sued by a public authority for libel (this is because a public interest for an authority to do so is lacking), freedom of speech, etc.[35]

It is also important to also point out that the common law's law of tort is a bundle of doctrines that protect many of today's human rights recognised in municipal and international

[26] *Kuti and others v. AG Federation*. [1985] 8 NWLR (pt 6) 211.
[27] See, for instance, Dan Banik, 'Implementing Human Rights-Based Development: Preliminary Evidence from Malawi' (Expert Seminary: Extreme Poverty and Human Rights, Geneva, 23 – 24 February 2007) 2, quoting A. Eide, 'Human Rights-Based Development in the Age of Globalization: Background and Prospects' in B. A. Andreassen and S Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press) 250.
[28] *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.
[29] ibid.
[30] *Evidence Act* 2011, S. 29 (2) (a).
[31] ibid, s. 29 (5).
[32] Constitution of the Federal Republic of Nigeria 1999, s. 34 (1) (a).
[33] International Covenant on Civil and Political Rights 1966, art. 7.
[34] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) 186 [62] (Lord Justice Law).
[35] ibid, quoting the following: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131: *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 591 and 603; *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, 201; *R v Lord Chancellor, Ex p Witham* [1998] QB 575, 585 and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551.

instruments. The tort of trespass to the person protects the right to life and the right to liberty and security. The aim of the torts of battery and assault, which essentially preserve a person's life, coincides with the right to life which is protected by some municipal laws like the Nigerian constitution[36] and some international human rights treaties[37]. The tort of false imprisonment protects the right to personal liberty which is equally provided for in both the Nigerian constitution[38] and the International Covenant on Civil and Political Rights (ICCPR).[39]

4. The Edge of the Fundamental Rights Provisions of the Constitution of the Federal Republic of Nigeria 1999 over the Common Law Human Rights.

The common law in Nigeria can be overridden/reversed by a statute. Thus, the Interpretation Act, for instance, would provide that the common law and other imperial laws shall be in force in Nigeria 'subject to any federal law'.[40] The implication of this is that the common law human rights can be 'annulled' by a mere statute emanating from any legislative body in Nigeria. This is quite unlike the fundamental rights provisions of the CFRN. The fundamental rights provisions cannot be annulled by the parliament with an ordinary legislation by virtue of the supremacy clause of the CFRN. The clause declares the constitution supreme and binding on all persons and authorities in Nigeria; it further affirms that 'if any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.[41]

Another edge that the fundamental rights provisions of the CFRN have over common law human rights stems from the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules). FREP Rules, which was issued by the Chief Justice of Nigeria pursuant to section 46 (3) of the CFRN, specifically provides that it protects fundamental rights enshrined in the CFRN and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPR).[42] The advantages of FREP Rules are that they enable courts to 'pursue the speedy and efficient enforcement and realisation of human rights' and they give priority to human rights suits.[43] These advantages are accruable to only those fundamental rights in the CFRN and the ACHPR by virtue of section 46 (3) of the CFRN[44] and Order II (I)[45] of the FREP Rules. Thus, human rights actions founded on only common law-generated rights would not benefit from the above-stated advantages of the FREP Rules. This is an edge that the fundamental rights provisions of the CFRN have over the common law human rights.

Also, the common law human rights remedies are deficient against the state or its agents. Historically the British monarch was the first common law judge. The monarch was such because, as pointed out earlier, before the crystallisation of the common law system s/he sent

[36]Constitution of the Federal Republic of Nigeria 1999, s. 33.
[37] See, for instance, International Covenant on Civil and Political Rights 1966, art. 6.
[38] Constitution of the Federal Republic of Nigeria 1999, s. 35.
[39] International Covenant on Civil and Political Rights 1966, art. 9.
[40] Interpretation Act, Cap 123 LFN, 2004, s. 32 (2).
[41] Constitution of the Federal Republic of Nigeria 1999, s. 1 (1) and (3).
[42] Fundamental Rights (Enforcement Procedure) Rules 2009 Order II (I).
[43] ibid, preamble 3 (f) and (g).
[44] The section empowers the Chief Justice of Nigeria to 'make rules with respect to the practice and procedure of a High Court for the purposes' of fundamental rights provisions in chapter iv of the Constitution of the Federal Republic of Nigeria 1999.
[45] 'Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled, has been m is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress' (Fundamental Rights (Enforcement Procedure) Rules, 2009, Order II, rule 1).

judges (who were the first common law judges) as his representative to adjudicate in local disputes based on local law and thus formulate 'the common law'.[46] Because the British monarch was considered the first common law judge (represented by common law judges in courts!), one could not bring an action against the king/queen in common law. Consequently, tort's law of negligence could not evolve a duty of care with regard to the state or any of its institution/agent. The implication of the above is that one cannot, as a matter of right, invoke a common law human right remedy against the State or its agent. Such is foreclosed.[47] This is quite unlike the remedies attached to the fundamental rights provisions of the CFRN. Such remedies can be invoked against the state via the judiciary.[48] In fact, many sections of chapter IV of the CFRN, which houses the fundamental rights provisions, specifically give citizens power to bring actions against any government or authority in order to protect their fundamental human rights.[49]

5. The Enduring Relevance of the Common Law Human Rights

From the above, the following conclusions are discernible. Firstly, the common law human rights system is deficient against the state and its agents. Secondly, most of the common law human rights coincide with the human rights in the CFRN. Thirdly, the FREP Rules gives the fundamental rights provisions in the CFRN some edge over common law human rights. Fourthly, the supremacy clause in the CFRN prevents a possible future annulment of the fundamental rights in the constitution via an ordinary legislative statue (a privilege that is not enjoyed by the common law human rights). With the above conclusions, are the common law human rights still relevant?

For a claim in negligence to succeed, the existence of a duty of care is primary. According to Lord Macmillan in the celebrated '*Snail in the bottle*' case[50], with regard to liability in negligence, 'the cardinal principle of liability is that the party complained of should owe the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty'. In this case where Lord Atkin spoke about the 'neighbourhood' or 'neighbour' principle, the concept of duty of care was well-expounded. Lord Atkin reasoned that 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour' and one's neighbour refers to 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my

[46]Catherine Elliott and Frances Quinn, *English Legal System* (15th Edition Pearson 2014) 10.

[47] It is true that based on the Petitions of Right Act 1860, which was part of the received English Law in Nigeria, a citizen could bring an action against the state or its agent but if and only if the state consented to such an action. Thus in *Dr (Mrs) Olufunmilayo Ransome-Kuti & Ors v Attorney General of the Federation & 8 Ors*, Eso JSC would reason that based on the 'old and almost anachronistic legal phraseology that the king can do no wrong', the state has some immunity at common law against being sued; 'I have checked all our constitutions prior to 1979 and regrettably I am not able to find any provision which one cold apply, even remotely but rightly in annulment of this doctrine'. It is however clear from the tenor of the above that the Petitions of Right Act 1860 has been rendered impotent/annulled by the 1979 Nigerian constitution and other post-1979 Nigerian constitutions (see, for instance, the following sections of the Constitution of the Federal Republic of Nigeria 1999: sections 35 (6) and 36 (1).

[48] See, for instance, section 6 of the Constitution of the Federal Republic of Nigeria 1999 which provides that judicial powers vested in the judiciary by the constitution extends to 'all matters between person or between government or authority and to any person in Nigeria, and to all actions and proceedings in relation thereto, for the determination of any question as to the civil rights and obligations of that person'.

[49] See, for instance, sections 35(6) and 36 (1) of the Constitution of the Federal Republic of Nigeria 1999

[50] *Donoghue v Stevenson* [1932] AC 562.

mind to the acts or omissions which are called in question'.[51] Thus, proximity/neighbourhood and foreseeability of damage are key in determining the existence of a duty of care. Lord Atkin however shows that in determining this breach, attention must be paid to the extent that the defendant took 'reasonable care to avoid' the suffered injury or damage

In the modern era, Lord Bridge of Harwich[52] added an additional requirement in determining the existence of duty of care. According to him, the court must also consider whether it is fair, just and reasonable that a duty should be imposed on a party for the other's benefit.[53]

Since, to use the words of Lord Macmillan in *Donoghue v Stevenson*, 'the categories of negligence are never closed', and different categories of duty care have arisen in the common law. Thus, a banker has a duty of care to his customers[54], an accountant/auditor has a duty of care towards those that would rely on his/her account report[55], a medical practitioner has a duty of care to his patients[56], a legal practitioner has a duty to advice his client properly and diligently[57] etc. Prior to *Caparo Industries plc v Dickman*, the court would impose a duty of care solely by invoking previous cases having similar facts (where the existence of a duty was affirmed) to a situation under consideration. There were however situations where the court clearly did not impose any duty of care. The 'fair, just and reasonable' principle of *Caparo v Dickman* becomes very handy in situations where facts do not fall in either of these situations: previous court-decided situations giving rise to duty of care or situations where court refused to impose any duty.

Courts commonly invoke these fairness, justice and reasonableness considerations where it is reasoned that imposing duty solely on the ground of reasonable foreseeability of damage would not be desirable.[58] The *Caparo v Dickman*'s 'fair, just and reasonable' appears like a crack in the wall of the law of negligence through which judges can let in public policy considerations in the formulation of a duty of care. This aligns with the nature of the common law system. In the common law, rights are developed incrementally via judicial decisions.[59] Lord Justice Laws would describe such public policy considerations in the evolution of common law rights as a maturity process in common law's recognition of fundamental or constitutional rights[60]. This is quite unlike the constitutional bill of rights which 'fossilises' human rights in a document. The effect of the above is that whereas the common law's incremental approach opens some possibility for future development of new common law human rights which are not part of today's recognised rights, the fundamental rights provisions in the CFRN and other fundamental rights protected by statutes are so stable that they foreclose the generation of rights outside the wordings of the human rights instruments. The above, thus, brings out the relevance of the common law rights: their incremental nature makes it possible to easily multiply or reform them to take care of hitherto unforeseen or unrecognised rights or a dimension previously unknown.

[51] ibid. Lord Buckmaster dissented. He reasoned that the only duty that a person would owe another was a duty 'implied by contract or imposed by statute'
[52] In *Caparo Industries plc v Dickman* [1990] 2 AC 605.
[53] ibid.
[54] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465.
[55] *J. E. B Fastners Ltd v Marks* (1983) 1 All ER 583.
[56] *R v Bateman* (1925) All ER 45.
[57] *Lawson v Siffre* (1932) II NLR 113.
[58] Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* 5th edn (London, Oxford Press 2013) 141.
[59] Bevereley McLachlin, 'Bill of Rights in Common Law Countries' (2002) 51 *The International and Comparative Law Quartely* 197, 197.
[60] *Thoburn v Sunderland City Council* (Metric Martyrs case) [2002] EWHC 195 (Admin) 151 [62].

Also, the common law human rights safeguard the principle of legality, a common law jurisprudential presumption that protects the assumptions of the rule of law and human rights. According to this principle, the court is expected to defend good governance issues like the principles of human rights and the rule of law unless a legislation forecloses it from doing so.[61] This also entails that every legislation must be compatibly understood with human rights unless a contrary intention is specified by the legislature.[62] The principle of legality was the basis for the judicial affirmation of the right to freedom from slavery in the 16th Century AD.[63] Thus, the principle of legality aligns with the earlier-discussed incremental approach of the common law jurisprudence. The jurisprudence can evolve a human right which is unrecognised by the fundamental rights provisions of the CFRN.

6. Conclusion

Common law rights are those rights generated and recognised by the common law system. There are two types of common law rights: common law human rights (which are inalienable rights of the human person) and transactional rights which often arise from contract.

Not minding the deficiencies of the common law human rights vis-a vis the fundamental rights provisions of the CFRN 1999, the common law human rights system is still relevant with the coming into effect of the fundamental rights provision of the CFRN. This is because of the expansive nature of the common law human rights jurisprudence: it is capable of evolving new rights, modifying existing ones and doing away with misconstrued rights. The rigidity of the fundamental rights provisions of the CFRN precludes constitutionally recognised rights from easily enjoying this expansive character typical of the common law human rights system.

[61] Australian Human Rights Commission, 'Common Law Rights, Human Rights Scrutiny and the Rule of Law' < https://www.humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law> accessed 5 February 2022.

[62] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 451.

[63] *Somerset v Stewart* (1772) Lofft 1: 98 ER 499, as quoted by ibid, 452.