

PROCEEDINGS OF THE



FACULTY OF LAW
INTERNATIONAL CONFERENCE

ABULC 2024

THEME

*Law and Contemporary
Societal Issues*

7th - 9th August, 2024

PUBLISHED BY

FACULTY OF LAW

Ahmadu Bello University, Zaria
NIGERIA

PROCEEDINGS OF THE FACULTY OF LAW INTERNATIONAL CONFERENCE (ABULC 2024)

DOI: <https://doi.org/10.67203/sp.ABULC.2024>

Editors:

Magashi S B
Kera F A
Onuh P I
Idris D A
Bebeji U S

Published by:

Faculty of Law,
Ahmadu Bello University,
Zaria, Kaduna State, Nigeria.

Prepared by:

Saypeace Solutions Ltd
www.saypeace.ng

August, 2024

Copyright

All rights reserved.

No part of this publication may be reproduced in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior permission of the Dean, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria.

Disclaimer: The authors of individual papers are responsible for technical, content, and linguistic correctness.

OPENING REMARKS BY THE VICE CHANCELLOR

Protocols,

The Royal Father, HRH Mal Ahmed Nuhu Bamalli (The Emir of Zazzau)

The Chairman of the Occasion, Dr. Hassan Liman SAN, (Wakilin Lafiya)

The Keynote Speaker, Dr. Musa Adamu Aliyu, SAN, Chairman ICPC

Prof. Kassim Balarabe, The Lead Paper Presenter

DVC's and other Principal Officers of the University,

Deans, Directors and HoDs (present)

My Lords Justices (present)

Members of the Legal Profession

Senior Officers (Present)

Distinguished Participants,

My Dear Students,

Gentlemen of the Press

Ladies and Gentlemen

It is with great pleasure that I welcome you to Ahmadu Bello University, Zaria, for the Faculty of Law 2024 International Conference. The theme, "Law and Contemporary Societal Issues," is both timely and apt, reflecting the critical intersections between law and the pressing challenges facing our society today.

As we gather here, we are reminded that law is not static; it is a dynamic and evolving discipline that must respond to changes in our society. Law cuts across virtually every field of human endeavour including crimes, family, intellectual property, education, health, the environment, property, technology, governance, human rights and emerging issues such as artificial intelligence and GMOs. Therefore it plays a pivotal role in shaping and guiding our collective future.

Currently, the nation is facing the end bad governance protests to challenge hunger and poor governance. This situation necessitated the organizers of this conference to settle for a virtual conference as opposed to giving our participants the opportunity to visit and enjoy the beautiful ABU Zaria scenery and landscape. We hope that in the nearest future, another opportunity will be provided to you to visit our beautiful campus.

It is worth mentioning that the protests have similarly raised important concerns about the interface between law and our societal issues. I implore participants to therefore explore some of these relationships and concerns to enable us find lasting solutions and to ensure an egalitarian society for us all.

Moreover, this conference serves as a vital platform for the exchange of ideas, rigorous debate, and collaborative problem-solving. We are privileged to have a distinguished gathering of scholars, practitioners, policymakers, and students with wealth of knowledge and diverse perspectives. Your contributions will undoubtedly enrich the discussions and inspire fresh approaches to addressing the contemporary issues we face generally.

I extend my deepest gratitude to the organizing committee for their dedication and meticulous planning in bringing this conference to fruition. I also thank our Chairman, Keynote Speaker, Lead Paper Presenter, Distinguished Invited Guests, and Participants for their time and commitment to this conference. In the same vein, we thank those that have supported this conference in different ways.

As we embark on this journey of intellectual exploration and discourse, I encourage each of you to engage actively and make the best out of the conference. Let this conference be a beacon of innovation and an avenue to use law as a tool for positive societal transformation.

On this note, I now declare the Faculty of Law, Ahmadu Bello University, Zaria International Conference 2024 officially open. I wish you all fruitful deliberations.

Thank you, and welcome.

Prof. Kabiru Bala
Vice Chancellor
Ahmadu Bello University, Zaria
8th August, 2024.

OPENING ADDRESS BY THE LOC CHAIRMAN

It is with great pleasure and immense honor that I welcome you to the Ahmadu Bello University (ABU) Faculty of Law International Conference. Our theme for this year's conference, "Law and Contemporary Societal Issues," is both timely and critical, reflecting the dynamic interplay between legal frameworks and the evolving challenges faced by societies around the world.

2. In today's rapidly changing world, we are confronted with a myriad of societal issues that demand our attention and action. From climate change and digital privacy to human rights and economic inequality, contemporary challenges are complex and multifaceted. Law, as a cornerstone of civilization, plays a crucial role in addressing these issues, shaping policies, and guiding societies towards justice and equity.

3. Our conference theme underscores the importance of understanding how legal principles can be applied to contemporary societal problems. It encourages us to explore innovative solutions, share diverse perspectives, and foster interdisciplinary collaborations that will contribute to the development of more robust legal frameworks.

4. Academia and legal scholarship are instrumental in driving societal progress. As scholars, researchers, and practitioners, we have a responsibility to engage with pressing issues, question established norms, and propose forward-thinking solutions. This conference provides a platform for us to do just that.

5. Our Faculty of Law has a proud tradition of academic excellence and a commitment to addressing societal challenges through rigorous research and impactful discourse. This conference is a testament to our dedication to fostering intellectual growth and contributing to the betterment of society.

6. We are honored to have a distinguished array of participants joining us for this conference. We received a total of 96 abstracts on myriad topical and contemporary issues. We remain proud of this submissions and are honoured to have you as part of this august occasion. Your presence reflects the importance of our collective endeavor to address contemporary societal

issues through the lens of law. We are however sad that we could not meet physically to enjoy the other memorable activities that come with conferences. Nevertheless, we will live to cherish the academic engagements that we shall share together virtually.

7. I extend my heartfelt gratitude to our Chairman, Dr. Hassan Liman SAN (Wakilin Lafia), Keynote Speaker, Dr. Musa Adamu Aliyu SAN, Lead Paper Presenter, Prof. Kassim Balarabe. We acknowledge your extremely busy schedules and are immensely grateful for finding time to be with us today. Words cannot express how appreciative we are of this memorable gesture. We equally appreciate all our invited special guests and presenters for your presence and for sharing your insights and expertise.

8. Your contributions will undoubtedly enrich our discussions and provide valuable perspectives that will help shape the future of legal scholarship and practice.

9. One of the key objectives of this conference is to foster dialogue and collaboration among scholars, practitioners, and policymakers. By bringing together diverse voices and expertise, we can gain a deeper understanding of the complexities of contemporary issues and develop holistic approaches to address them.

10. I encourage all participants to actively engage in discussions, ask probing questions, and seek out opportunities for collaboration. Let us leverage this conference as a platform for meaningful exchange and the creation of lasting partnerships that will drive positive change in our societies.

11. As we embark on this intellectual journey today, let us remain mindful of the broader impact of our work. The insights and solutions generated from this conference have the potential to influence policy, guide legal reform, and ultimately contribute to the betterment of our societies.

12. In closing, I would like to express my sincere appreciation to the Vice Chancellor, Ahmadu Bello University, Zaria. Prof. Kabiru Bala, organizing committee, sponsors, staff and students of our great Faculty, and all those who have worked tirelessly to make this conference a reality. Your dedication and efforts are commendable and have set the stage for what

promises to be an enlightening and impactful event.

13. Once again, welcome to the ABU Faculty of Law International Conference. I look forward to the engaging discussions, innovative ideas, and collaborative spirit that will define our time together. Let us seize this opportunity to advance our understanding of the intricate relationship between law and contemporary societal issues and work towards creating a more just and equitable world.

Thank you.

Prof. Salim Bashir Magashi
Dean of Law/Chairman LOC
8th August, 2024

FOREWORD

It is with great pleasure that I present the Proceedings of the Faculty of Law International Conference (ABULC 2024), organized by the Faculty of Law, Ahmadu Bello University, Zaria, from 7th to 9th August 2024 under the theme: “Law and Contemporary Societal Issues.”

The conference brought together scholars, legal practitioners, researchers, policymakers, and other stakeholders from diverse fields to examine contemporary legal challenges and emerging societal realities confronting Nigeria and the global community. The papers presented reflect rigorous scholarly engagement with pressing issues ranging from artificial intelligence, cyber security, environmental governance, human rights, constitutionalism, digital economy regulation, criminal justice reform, Islamic law, corporate governance, and access to justice, among others.

This volume is therefore a rich compilation of intellectual contributions aimed at advancing legal scholarship, informing policy development, and promoting meaningful discourse on the role of law in addressing modern societal concerns. The diversity and quality of the papers underscore the commitment of the Faculty to research excellence and its continued contribution to national and global legal development.

I wish to sincerely appreciate all the authors, reviewers, conference participants, members of the organizing committee, and partners whose efforts contributed to the success of the conference and the publication of this proceedings. Special recognition is due to the members of the Conference Organising Committee for their dedication and tireless service throughout the planning and execution of the conference.

It is my hope that this publication will serve as a valuable resource to academics, students, researchers, legal practitioners, policymakers, and all those interested in contemporary legal discourse.

Prof. S. B. Magashi
Chairman, Conference Organising Committee
Faculty of Law
Ahmadu Bello University, Zaria

COMMUNIQUE

1.1 Introduction

In line with the Faculty's teaching, research, and community service mandates, this multi-disciplinary international conference is organized to bring researchers, practitioners, and experts together to discuss how the law can serve as an instrument in addressing some challenges confronting our society. After robust and engaging sessions, the conference reached specific conclusions. We hope that the findings and recommendations put forward will provide guide for legal reforms and policy formulations to address societal issues.

In his welcome address to the participants, the Dean Faculty of Law, Ahmadu Bello University, Zaria, Professor Salim Bashir Magashi noted that the conference theme underscores the importance of understanding how legal principles can be applied to contemporary societal problems. It encourages us to explore innovative solutions, share diverse perspectives, and foster interdisciplinary collaborations that will contribute to the development of a more robust legal framework. As scholars, researchers, and practitioners, we have a responsibility to engage with pressing issues, question established norms, and propose forward-thinking solutions. This conference provides a platform for us to do just that.

In a similar vein, the Chief Host, the Vice Chancellor, Ahmadu Bello University, Zaria, Professor Kabir Bala, reminded the scholars that law is not static but a dynamic and evolving discipline that must respond to changes in our society. The law cuts across virtually every field of human endeavour, including crimes, family, intellectual property, education, health, the environment, property, technology, governance, human rights, and emerging issues such as artificial intelligence and GMOs. Therefore, it plays a pivotal role in shaping and guiding our collective future. He, therefore, wished the scholars fruitful deliberation.

The Keynote Speaker, Dr. Musa Adamu Aliyu, SAN, Chairman of the Independent Corrupt Practices and Other Related Offences Commission (ICPC), addressed the Conference on four key contemporary issues, which are: Corruption, Human Rights and Social Justice, Digital Transformation and Cybersecurity, and Environmental Sustainability.

He dwelled on the effects of corruption and submitted that corruption remains one of the most significant impediments to Nigeria's development. It erodes trust in public institutions, undermines the rule of law, and stifles economic growth. Alarming, a report found that 34% of citizens in contact with public officials paid a bribe or were asked to pay a bribe but refused. In 2023, an estimated 87 million bribes were paid, amounting to more than NGN 700 billion. The frequency of bribery is higher in rural areas than in urban areas, with bribe-payers in rural areas paying an average of 5.8 bribes compared to 4.5 bribes in urban areas.

He concluded that tackling corruption, human rights, digital threats, and environmental issues presents major challenges and exciting opportunities. By uniting efforts, embracing innovative technologies, and championing justice, these hurdles can be overcome to drive meaningful change. He implored the conference to seize the moment to form collaborations to build a future that's fair, transparent, and sustainable, and wished the participants fruitful deliberations.

1.2 Observations

After extensive deliberations, the participants noted the following:

1. Tagging non-interest banking to religion affects the patronage of Islamic banking products.
2. There is still serious abuse of contracts of employment in Nigeria by the employers of labour. The plight of contract employees can be likened to that of slaves.
3. That the e-naira introduced by the Central Bank of Nigeria to improve access to financial services, especially in rural areas, has so far failed to thrive because of inadequacies of the necessary understanding of its operations and infrastructure associated with the banking system.
4. Many law faculties are yet to adopt the Clinical Legal Education (CLE) pedagogy, having become comfortable with the predominantly theory-based learning culture. Low participation and absenteeism have been observed, as law teachers also find it difficult to adjust to the practical and less strict approach required. Furthermore, the compressed nature of the course makes assessment difficult,

considering the lopsided teacher-student ratio.

5. The Child Rights Act (CRA) 2003 fails to define ‘necessaries’ regarding children’s contract capacity. This created uncertainty in the contractual rights and capacity of the child in Nigeria. More so, section 18 of CRA seems to be oblivious to the best interest of the child, which is the philosophy that underpins the CRA 2003.
6. Despite the myriad anti-corruption measures being taken, corruption persists in Nigeria, due to weak enforcement mechanisms, political interference, and societal tolerance of corrupt practices.
7. Reliance of the courts on a lone juristic view under Islamic Law is inimical to the positive development of the lives of women, children, and society at large. Aside from Bauchi state, no state in the North enacted the women’s right of *khul’I* (redemption) law.
8. *Waqf* (endowment) is one of the workable tools for eliminating or, at least, reducing poverty to the barest minimum in a Muslim society. Similarly, it is a well-designed scheme for the sustainability and independence of religious institutions.
9. The methods of identifying *illah* (effective cause) in *qiyas* (analogical deduction) in Islamic law are more definite, certain, and diverse than the methods of determining the *ratio* in the common law.
10. The lack of harmonisation and consistency in antitrust approaches across the African continent hinders the effective promotion of competition, innovation, and consumer welfare, leading to high prices and low-quality products and services, inadequate protection of consumer rights, and insufficient cooperation and information sharing among competition authorities, thereby generally undermining the potential benefits of economic integration, as well as hindering the development of a vibrant and competitive African market.
11. Section 5 of the Nigerian Oil and Gas Industry Content Development Act, 2010 contains the parameters for measuring and determining the Nigerian content (personnel and materials) in each programme. However, although rigid and specific targets, expressed in percentages, are set in the Schedule to the Act, no metrics exist for the measurement of Nigerian content. This is because the Act fails to propose the indices for ascertaining the percentages expressed in the

Schedule to the Act. Due to the absence of a standard metric system, the Board is left with developing and measuring local content on a subjective basis.

12. The provisions of the Administration of Criminal Justice Law cannot be fully realised unless the State decides to fund the law Enforcement Agencies, the Ministries of Justice, and the Judiciary. For instance, video recording of the statement of witnesses involves funding and logistics.

1.3 Resolutions

Consequently, and in the light of the above, the following recommendations are put forward:

1. There is a need for a proper public enlightenment program on the essence and operation of Islamic finance to allay fears that it is meant to Islamise the country.
2. There is also the need to revisit the nation's legal framework on contract employment by stating clearly the rights and obligations of both the employers and the employees.
3. Government should create more awareness of the e-naira, establish confidence and guarantee the efficient utilisation of the e-naira through reliable internet services, ensuring safety and security measures to improve the adoption of the e-naira towards financial inclusion.
4. The curriculum for legal education should be reviewed to align with the standards set by this new clinical approach. Incorporating CLE pedagogy into all law courses; mandatory use of formative assessment methodologies and extending its coverage beyond the current level will go a long way.
5. Section 18 of the CRA 2003 and similar laws should be amended to adopt the common law definition of what constitutes 'necessaries'. In addition, the contract of non-necessaries entered into by the child should not be treated as *void ab initio*. Rather, they should be construed as void against the child but binding on the adult to protect the best interest of the child.
6. Religious and ethical teachings must be integrated into Nigeria's legal framework, to promote moral responsibility and accountability. This can

be done using educational reforms to inculcate religious ethics, providing for stricter penalties as inspired by religious principles, and enhanced collaboration between religious leaders, legal experts, and anti-corruption agencies. Nigeria can thus develop a comprehensive and culturally resonant strategy to combat corruption by aligning legal reforms with Islamic ethical mandates.

7. Sharia Courts in Northern Nigeria should embrace more expansive juristic views under Islamic Law in their interpretation of women's right to the right of redemption under Islamic Law. Sharia Courts in northern Nigeria should adopt an out-sourcing technique in their interpretation of the right of *khul'i* (self-redemption) of redemption for greater protection for women, children, and society.
8. The current endowment system in Nigeria, the enabling laws in the country, and the prospective dispute resolution forum should be reviewed to create viable modalities that will conform to the general principles and philosophy of Islamic law, in the struggle to go back to the practices of our predecessors and for universal social and economic benefit to be easily attained.
9. That jurists of common law should consider developing clear, rational guidelines for determining *ratio decidendi*, that closely mirror the methods of the jurists of Islamic law but that are tailored specifically to the common law system.
10. the competition and intellectual property laws should be understudied for a purposive symmetric application to advance innovation. A framework should then be proposed for balancing cooperative economic models with robust antitrust enforcement for African nations.
11. Technology Measurement Experts within and outside Nigeria should be contracted to successfully carry out a new and acceptable metric system that will be nationally and universally meaningful and acceptable as contemplated by the provisions of Section 5 of the Nigerian Oil and Gas Industry Content Development Act, 2010.

12. Law enforcement agencies must be adequately funded to enable them apply technology and innovation in the investigation of crimes. Suspects and criminal activities have become sophisticated and only highly knowledgeable investigators are required in this area.

Communiqué Drafting Committee

Dr. Dalhat A. Idris	-	Chairman
Dr. M. T. Jibril	-	Member
Dr. Hassan Bala	-	Member
Dr. A. M. Bokani	-	Member
Dr. Hannatu Adamu	-	Member
Nasiru Bala, Esq.	-	Member
Imam-Muslim Farra'u Esq.	-	Member
Dr. Aliyu Abdullahi	-	Secretary

Dignitaries

Chairman of the Occasion

Dr. Hassan Liman SAN,
Wakilin Lafiya

Keynote Speaker

Dr. Musa Adamu Aliyu, SAN
Chairman, ICPC

Lead Paper Presenter

Prof. Kassim Balarabe,
National Law University, New Delhi

Conference Organising Committee

1	Prof. S. B. Magashi	Chairman
2	Dr. U. S. Bebeji	Secretary
3	Prof. Y. Y. Bambale	Member
4	Prof. M. B. Uthman	Member
5	Prof. B. Y. Ibrahim	Member
6	Prof. N. M. Jamo	Member
7	Prof. B. Babaji	Member
8	Prof. A. I. Bappah	Member
9	Prof. A. M. Madaki	Member
10	Prof. I. F. Akande	Member
11	Prof. A. A. Akume	Member
12	Prof. S. A. Apinega	Member
13	Prof. Ibrahim Abdulkarim	Member
14	Prof. Ibrahim Shehu	Member
15	Prof. P. I. Onuh	Member
16	Dr. D. A. Idris	Member
17	Dr. Sani Abdullahi	Member
18	Dr. D. M. Sani	Member
19	Dr. F. A. Kera	Member
20	Dr. Hassan Bala	Member
21	Dr. M. T. Jibril	Member
22	Dr. M. I. Abdullahi	Member
23	Dr. H. Adamu	Member
24	Dr. L. A. Bello	Member
25	Dr. A. M. Bokani	Member
26	Dr. Aliyu Abdullahi	Member
27	Zainab Haruna Esq.	Member
28	Nasiru Bala Esq.	Member
29	M. K. Abdullahi Esq.	Member
30	Eunice O. Duchi	Member
31	Halima M. Datti	Member
32	Ramatu Ado	Member
33	Ismail Yahaya	Member
34	Umar Danburam	Member
35	Abubakar Umar	Member
36	Nura Garba	Member
37	Nasiru Tanko	Member

Table of Contents

1	LEGAL AND INSTITUTIONAL FRAMEWORK FOR ELECTRONIC GOVERNMENT LAW AND PRACTICE IN INDIA: LESSONS FOR NIGERIA <i>Maryam Ahmad Bornoma</i>	1
2	LAW AND ARTIFICIAL INTELLIGENCE <i>Mohammed Bashir Badr</i>	26
3	DIRECTORS AND DIRECTING UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020: WHY SOME OF THE RULES MUST CHANGE <i>Hannatu Adamu</i>	48
4	LEGAL CHALLENGES AND FRAMEWORKS AGAINST INFORMAL ECONOMY WORKERS IN NIGERIA: A PATH TO PROGRESS <i>Lawal Gambo Saulawa, Masoud Saidu Garba, Danjuma Abdullahi</i>	71
5	JUSTICE BEYOND BARS: BARRIERS AND RECOMMENDATIONS TO QUALITY LEGAL REPRESENTATION FOR PRE-TRIAL DETAINEES IN NIGERIA <i>Linda Daze, Muhammad Sani Kassim</i>	91
6	HUMANITARIAN IMPACTS OF TRADE DISRUPTIONS IN ECOWAS: A FOCUS ON ESSENTIAL GOODS AND SERVICES <i>Suleiman Hassan Gimba</i>	133
7	REGULATORY CHALLENGES AND INNOVATIONS IN THE DIGITAL TOURISM ECONOMY: IMPLICATIONS FOR CONSUMER PROTECTION AND BUSINESS SUSTAINABILITY IN NIGERIA <i>Lateefat Adeola Bello, Jemila Shuaibu</i>	152
8	BALANCING COPYRIGHT PROTECTION AND ACADEMIC LIBRARY OPERATIONS IN NIGERIA: A LEGAL ANALYSIS OF THE COPYRIGHT ACT 2022 <i>Raphael Gabriel Okplogidi and Aishatu Eleojo Adaji</i>	167
9	PUBLIC INTEREST LITIGATION-CONSIDERATION AS PANACEA FOR SOUTH AFRICAN UNFAIR TRADE PRACTICE; LESSONS FOR NIGERIA <i>Iya Muhammad Alhaji, Sani Ibrahim Koki</i>	189
10	HARNESSING CUSTOMARY LAND TENURE FOR SUSTAINABLE LAND RESOURCE MANAGEMENT IN RURAL NIGERIA	211

Busari Morufu Salawu

11	AN ANALYSIS OF THE DEVELOPMENT OF ELECTRONIC BANKING UNDER NIGERIAN LAW <i>Sani Abdulkadir, Iya Mohammed Alhaji</i>	231
12	ADJUDICATION OF ISLAMIC BANKING AND FINANCE DISPUTES IN NIGERIA: ISSUES AND CONSTRAINTS <i>Sani Abdul-Aziz</i>	251
13	ADVOCATING FOR LEGAL FRAMEWORK FOR COMMERCIAL RECOVERY AND DEVELOPMENT OF SPACE RESOURCES IN NIGERIA <i>Paul Sule Hakuri</i>	274
14	APPRAISING STATE GOVERNANCE OF ELECTRICITY IN NIGERIA <i>Alfred M. Tijah</i>	304
15	COMMUNITY ATTITUDE TOWARD CHILD SEXUAL ABUSE AMONG RESIDENCE IN KADUNA METROPOLIS <i>Farida Mohammed, Patrick Joseph Matthias, Nuhu Marshal Yakusak</i>	324
16	AN OVERVIEW OF KATSINA STATE COMMUNITY WATCH CORPS LAW <i>Shafiu Umar</i>	346
17	AN ASSESSMENT OF THE HEALTH CARE STATUS AND INDICES IN NIGERIA; A PEEP AT THE PROBLEMS AND PROSPECTS <i>Agbo Friday Ojonugwa, Mary Arthur Jolasinmi, Grace Perpetual Dafiel</i>	358
18	CYBER CRIME AND CASHLESS POLICY: PROPHETIC STRATEGY IN CURBING RISING CASES OF GISHU (E-FRAUD) IN NIGERIA <i>Akanbi Mukaila Akolade</i>	371
19	ILLEGAL MINING AND ENVIRONMENTAL DEGRADATION IN NIGERIA: CHALLENGES AND PROSPECTS OF DECENTRALIZATION <i>Ebunoluwa O. Popoola, Wadzi V. Aboki, Clementina C. Okeke</i>	389
20	ADDRESSING PRISON DECONGESTION IN NIGERIA THROUGH RESTORATIVE JUSTICE AND NON-CUSTODIAL MEASURES <i>James Hope</i>	414
21	LEGAL EMPOWERMENT OF THE POOR AND MARGINALIZED IN NIGERIA: STRATEGIES FOR INCLUSIVE NATIONAL DEVELOPMENT IN NIGERIA <i>Yewande Fatoki, Michael Bolarinwa Gomez</i>	426

22	AN EXAMINATION OF THE LEGAL PROTECTION OF MARINE ENVIRONMENT FROM SHIP-SOURCE POLLUTION IN NIGERIA <i>Haruna Hassan</i>	445
23	THEORETICAL JUSTIFICATIONS FOR COPYRIGHTS UNDER ISLAMIC LAW <i>Asma'u Aminu Sani</i>	482
24	APPRAISAL OF HUMAN RIGHTS VIOLATIONS IN THE ENFORCEMENT OF THE LEGAL REGIME ON THE CONTROL OF INFECTIOUS DISEASES IN NIGERIA <i>Abdullahi Atika Idris, Abdullahi Sani</i>	500
25	AN EXAMINATION OF FUNCTIONS OF THE NIGERIAN UPSTREAM PETROLEUM REGULATORY COMMISSION AND ITS REGULATIONS UNDER PETROLEUM INDUSTRY ACT (PIA) 2021 <i>O. Aninye-Iloba, Cynthia Ogochukwuka Juwah, Rainat Fadeke Abimbola</i>	513
26	PUBLIC PARTICIPATION AND COMMUNITY RIGHTS TO SHARING OF MINERAL RESOURCE REVENUE IN NIGERIA <i>Aisha Ahmed Rufa'i</i>	532
27	CLINICAL LEGAL EDUCATION: AN AVENUE FOR EXPLORING LEGAL ACUMEN AND ACQUIRING LEGAL SKILLS IN NIGERIA <i>Abubakar Suleiman, Musa Yahaya</i>	547
28	LAW, RELIGION AND THE FAMILY: (KHUL'I) WOMEN'S RIGHT OF REDEMPTION UNDER ISLAMIC FAMILY LAW AS A TOOL FOR THE PROTECTION OF HUMAN DIGNITY <i>Muhammad Kamal Jibrin, Habila Isa Barau, Kabiru Idris Zakariya</i>	560
29	EFFECTS OF CLAIMANTS AWARENESS AND INVOLVEMENT IN COMPULSORY ACQUISITION AND COMPENSATION ON THEIR SATISFACTION WITH THE COMPENSATION PROCESS: A CASE STUDY OF BAUCHI STATE, NIGERIA <i>Ibrahim Samirah Jibril, Muhammad Usman Adekunle, Aishatu Adamu Mazadu</i>	578
30	CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT IN NIGERIA: POLICY IMPLICATIONS AND FUTURE DIRECTIONS <i>Hadiya Aliyu</i>	585
31	EXAMINATION OF HUMAN RIGHT AND HUMANITARIAN VIOLATION IN NIGERIA	604

*Dije Mohammed, Abdulsalam Muhammad Aminu, Sulaiman Onilude
Boluwatife*

32	IN SEARCH OF THE REASONING OF A CASE: A PHILOSOPHICAL EXPLORATION OF THE METHODOLOGY OF DERIVING ILLAH AND RATIO DECIDENDI IN ISLAMIC AND ENGLISH JURISPRUDENCE <i>Abdulazeez Adavize Sadeeq</i>	623
33	INTERROGATING FIFA'S NON-INTERFERENCE POLICY BY NATIONAL GOVERNMENT'S IN THE ADMINISTRATION OF FOOTBALL FEDERATIONS <i>Antom Vanen Lawrence, Agbakor Zugwem Emmanuel</i>	644
34	HARMONIZING COOPERATIVE INDUSTRIES IN AFRICA THROUGH A COMPARATIVE STUDY OF ANTITRUST APPROACHES <i>Umar Ahmadu Gwamna</i>	661
35	RESURGENCE OF COUPS AND THE LEGAL CHALLENGE FOR ECOWAS INTERVENTION IN WEST AFRICA <i>Taiwo Abbas Ayodele, Abubakar Sani Tambai, Yusuf Barau Abdulrahman</i>	684
36	IMPACT OF CORPORATE SOCIAL RESPONSIBILITY ON SURVIVAL OF QUOTED MANUFACTURING COMPANIES IN ABUJA <i>Halima Shuaibu</i>	700
37	LEGAL REGIME OF PRIVACY AND DATA PROTECTION OF E- COMMERCE CONSUMERS IN NIGERIA <i>Muhammad Nuruddeen</i>	720
38	HARNESSING INTELLECTUAL PROPERTY IN TECHNOLOGY TRANSFER: EMPOWERING INNOVATION-DRIVEN ENTERPRISES <i>Muhammad Umar</i>	752
39	EFFECTS OF GLOBALISATION ON INTERNATIONAL LAW <i>Muhammad Munir Sani</i>	762
40	AN ANALYSIS OF CORPORATE INCOME TAXATION IN 21ST CENTURY NIGERIA <i>Magashi Hajara Garba</i>	773
41	APPRAISING THE INHIBITORY FACTORS TO ACCESS INFORMATION AND COURT UNDER THE NIGERIAN COMMUNICATIONS ACT IN NIGERIA <i>Yakubu Moses Ede</i>	797

42	CONSTITUTIONALITY OF EXECUTIVE ORDER IN NIGERIA: EFFICACY AND CHALLENGES <i>Nafagha Okiefete Bernard</i>	820
43	TELEMEDICINE IN NIGERIA: NAVIGATING THE LEGAL AND ETHICAL FRAMEWORKS IN HEALTHCARE DELIVERY <i>Razaq Justice Adebimpe</i>	844
44	REASSESSING THE CRIME CONTROL SYSTEM OF NIGERIAN POLICE FORCE: TOWARDS ENSURING EQUITY AND JUSTICE <i>Mercy Bolade Adewusi-Bakare</i>	861
45	ANALYSIS OF SOME DEFECTS IN THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999: GOVERNANCE AND DEMOCRATIC EXPERIENCE <i>Suleiman Musa Abdullahi, Ibrahim Mohammed, Najahatu Abdullahi Ra'is</i>	871
46	ENDOWMENT (WAQF) AND THE SUSTAINABILITY OF RELIGIOUS INSTITUTIONS <i>Sa'ad Musa Abubakar</i>	896
47	A CRITICAL REVIEW OF RESTITUTION UNDER THE NIGERIAN ARMED FORCES ACT: TOWARDS A BROADER AND MORE EFFECTIVE FRAMEWORK <i>Al-Ameen Abubakar</i>	918
48	AN APPRAISAL OF THE ADMINISTRATION OF CRIMINAL JUSTICE LAW OF KADUNA STATE, 2017 AND ITS IMPACT ON THE NIGERIA'S CRIMINAL JURISPRUDENCE <i>Dalhat A. Idris, Abubakar Ishaq</i>	931
49	PERCEPTIONS OF EASE OF USE AND USEFULNESS OF ARTIFICIAL INTELLIGENT CHATGPT AMONG UNDERGRADUATE LAW STUDENTS OF AHMADU BELLO UNIVERSITY, ZARIA <i>Sadiq Buhari Bello, Zubairu A. Suleiman, Muhammad Sani Abdurrahman, Abubakar Bashir Jamilu Argungu Ibrahim</i>	951
50	MARITIME GOVERNANCE LAWS AND FINANCING OF BLUE ECONOMIES: EVIDENCE FROM NIGERIA <i>Andrew Aondohemba Chenge</i>	964
51	EXPOSITORY ANALYSIS OF ACCESS TO MEDICAL TREATMENT UNDER THE COMPULSORY TREATMENT AND CARE FOR VICTIMS OF GUNSHOTS ACT, 2017 <i>F.A. Kera, Paul Abraham</i>	993

52	AN APPRAISAL OF THE CONSTITUTIONAL ABROGATION OF ISLAMIC CRIMINAL JUSTICE SYSTEM <i>Usman Abdulrahman Aboki</i>	1014
53	CRITICAL ANALYSIS OF LEGAL PROTECTION OF GIRLS AND WOMEN FROM HARMFUL PRACTICES AND PROCEDURES OF FEMALE GENITAL MUTILATION IN NIGERIA <i>Ifepe Nnennia Adaku</i>	1028
54	AN EXAMINATION OF THE SCHEDULE TO THE NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT, 2010 <i>Iloba-Aninye Okechukwu</i>	1046
55	NIGERIAN LEGAL SYSTEM IN THE AGE OF AI: UNDERSTANDING A UNIQUE FORM OF DIGITAL EXCLUSION AND ITS IMPACT ON HUMAN RIGHTS AND AFRO-COMMUNITARIAN IDEALS <i>Bambale Zubairu Lawal</i>	1067
56	LEGAL REGIME ON TRADE UNIONISM AND COLLECTIVE BARGAIN: AN APPRAISAL OF THE DETERMINATION OF MINIMUM WAGE IN NIGERIA <i>Ado Mallam Bello</i>	1078
57	EXAMINATION OF THE LAWS OF KIDNAPPING IN NORTH-WEST NIGERIA <i>Faiza Abdullahi Miko</i>	1091
58	A REVIEW OF THE LEGAL FRAMEWORK FOR THE INSTITUTION OF Waqf (Endowment) Under Islamic Law in Nigeria <i>Garba Ibrahim Malumfashi, Ibrahim Barkindo, Dayyabu Ibrahim Sulaiman, Hafsatul Sulaiman</i>	1112
59	LEGAL REVIEW OF THE SCOPE OF THE OVERSIGHT POWERS OF THE NATIONAL ASSEMBLY WITH RESPECT TO BANKS AND OTHER PRIVATE SECTOR OPERATORS <i>Dimas David Isa, A. Is'haq</i>	1134
60	APPRAISING THE PROTECTION OF THE RIGHTS OF PERSONS HORS DE COMBAT (THOSE WHO ARE NOT, OR NO LONGER, DIRECTLY PARTICIPATING IN HOSTILITIES) IN INTERNATIONAL LAW <i>Dahiru Ahmad Modibbo</i>	1147
61	DECENTRALISING TRIAL OF DRUG OFFENCES AND LEGISLATION IN NIGERIA: A COMPARATIVE ANALYSIS AND THE CASE FOR MAGISTRATE COURT JURISDICTION	1163

Al-Ameen Abubakar, Usman Uwaisu Usman

62	THE PRIMACY OF CHILD PROTECTION IN ISLAMIC LAW: AN ANALYSIS OF TEXTUAL PROVISIONS ON THE RIGHT TO SURVIVAL OF THE CHILD	1187
	<i>Abdulazeez Adavize Sadeeq, Yunusa Yahaya Bambale</i>	



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LEGAL AND INSTITUTIONAL FRAMEWORK FOR ELECTRONIC GOVERNMENT
LAW AND PRACTICE IN INDIA: LESSONS FOR NIGERIA

Maryam Ahmad Bornoma

North-Eastern University, Gombe Nigeria

Email: mabornoma@gmail.com Phone: 07068986038

Abstract

A framework is the backbone of governance and a major contributor to its quality. Such a framework is particularly required in the areas where public governance seeks technological support, as is the case for Electronic Governance (e-Governance). This paper explains the comprehensive set of policies, and presents a model initiative and interventions for e-Governance practice and development in India going through the definition of e-governance, its structure, evolution, stages, various e-governance initiatives and institutions in place launched by the Indian government at different states. The provision of the information technology Act 2000 which gives room for the operation e-government and e-administration of governmental policies in India, questions as to the nature, laws as well as government institutions involved in achieving the e-governance plan is answered by this paper. The paper further sets the merits of e-governance, challenges of implementation involving technical, economic and social issues. It goes further to equally proffer lessons that Nigeria could adopt in its e-governance policies, institutions and initiative as practiced by the Indian government. The methodology adopted for this research is the doctrinal legal research method. The paper also recommend suggestive ways to do away or lessen the challenges of e-government practice in India by recommending a more sound and organized legal framework with working policies, which if implemented could target and establish a hitch free implementation of e-government policies in India, thereby ensuring effective and efficient implementation towards achieving the objective of the e-government practice of the Indian government.

Keywords: e-governance, India, framework, legal, institutional, Nigeria.

INTRODUCTION

Information and communication technology or information technology has become an integral part of life of people today, India is not left out in this. It is important that this be utilized to ensure an effective administration of governmental policies, which would also bring about a revolution in the quality of services rendered to its citizens. E-government is not just an "electronic" government. It is a "government" that offers a variety of excellent programs and services. E-government is about people: a new set of skills, a way of thinking and a leadership approach. It will change the way public servants work, interact, do business, and engage citizens and others. EG is a process that requires an ongoing commitment to the political will, resources and involvement of government, the private and public sectors, e-governance deals with the process of transformation and administration of government policies and relationship management between the government and its citizens, organs of the government, businesses and other parastatals. It aims at transparency, good governance, accountability, direct participation in governance and services to citizens. It makes available to citizens government activities in a less cumbersome path. e-Governance means rendering of government services and information to the public using electronic means. This new paradigm has brought about a revolution in the quality of service delivered to the citizens. The most common interactions in e-governance, which are: the Government-to-Citizen (G2C), Government-to-Business (G2B) and Government-to-Government (G2G). The objective of e-governance is to support and simplify governance for all. This however, does not happen without challenges, issues and hindrances, ranging from social, economic and environmental, it is in this vein that the need arises for a revival in the electronic government law in India to cater for these issues and challenges towards effective and efficient governance and service delivery to its citizenry especially as e-governance is not uniformly practiced in India as the law still recognizes the manual method of filing. It is in the light of this, that Nigeria can adopt and learn from the e-government law (IT LAW OF INDIA) and put it into practice with amendments where needed from the India angle to enable Nigerian citizens benefit also from initiative and projects just like those operating in India with the view of improving good governance, efficient, and effective service delivery to the populace. The objective

of this paper is to profer solutions to the existing,issues of electronic government law and practice of India including the legal and institutional challenges, and to also draw lessons for the Nigerian government towards adopting its own electronic government laws, practice and initiative. This paper adopts the doctrinal legal research methodology which is a library oriented approach towards arriving at relevant resource materials with a view to contributing to the existing wealth of knowledge on electronic government.

CONCEPTUAL CLARIFICATION OF KEY TERMS

INDIA

A Country located in the continent of Asia. India covers 2,973,193 square kilometers of land and 314,070 square kilometers of water, making it the 7th largest nation in the world with total area of 3,287,263 square kilometers. Surrounded by Bhutan, Nepal, and Bangladesh to the north East, China to the North, Pakistan to the North West and Sri Lanka of the South East coast.¹

India is an island of ancient civilizations. India's social, economic, and cultural configurations are the products of a long process of regional expansion. Indian history begins with the birth of the Indus Valley civilization and the coming of the Aryans. These two phases are usually described as the Vedic and Vedic age.²

LEGAL

Of or relating to law ;established, required, or permitted by law; or founded upon by the law or official or accepted rules.³ In this context it may refer to the accepted or approved laws in place in a state or country.

INSTITUTIONAL

Black's law Dictionary defined an institution an established organization especially one of a public character, such as a facility for the treatment of mentally disabled persons.⁴

¹ India available at <http://www.memphistours.com/india/india-travel-guide/india-cul> last visited on the 20th July 2021 at 4:00pm

² Ibid

³ Bryan A.Garner(1999)Black's law Dictionary 8th Edition west publishing company

⁴ ibid

It may refer to the various parastatals owned by the government of a particular state or nation put in place for the implementation of its policies.

FRAMEWORK

A real or conceptual structure intended to serve as a support or guide for the building of something that expands the structure into something useful.⁵ In the context of this paper, a framework connotes the manual or guides and structure in place for electronic government in India, of which this paper focuses specifically the legal and institutional framework.

NIGERIA

A Country located on the western coast of Africa that has a diverse geography, with climates ranging from arid to equatorial.⁶ Nigeria's capital is FCT Abuja as the Capital city, with democratic system of governance operating a three tier government at federal, state and local government levels respectively.

E-GOVERNANCE

E-governance is the application of information & communication technologies to transform the efficiency, effectiveness, transparency and accountability of informational & transactional exchanges within government, between government & government agencies of National, State, Municipal & Local levels, citizen & businesses, and to empower citizens through access & use of information.⁷

EVOLUTION OF E-GOVERNANCE IN INDIA

E-governance had its origins in India during the 1970s with a focus on development and deployment of Information Technology (IT) to manage data-intensive functions related to elections, census, tax administration, etc. During the 1980s, the efforts of National Informatics Centre (NIC) to connect all the district headquarters was a significant step. The states followed a three-pillar e-governance structure of State-Wide Area Network

⁵ Framework available at <https://www.techtarget.com> last visited on 17th july, 2024 at 10:35am

⁶ Nigeria available at <https://www.britannica.com> last visited on 17th july, 2024 at 10:00am

⁷ Mrinali Shah (2007) NMIMS University Mumbai India. E-governance in India: Dream or reality? *International Journal of Education and Development using Information and Communication Technology (IJEDICT)* Vol. 3, Issue 2, p. 125-137.

(SWAN), State Data Centre (SDC) and CSC that linked all districts through Information Communication Technology (ICT) networks.⁸

From the late 1990s, the Central and the state governments have been pursuing a policy for the adoption of ICTs, web-based technology and internet. By 1995, the Videsh Sanchar Nigam Limited (VSNL) formally launched internet services for the Indian public to use the World Wide Web (www) network in the public domain and sharing of information extensively. India has been at the forefront of the IT revolution encompassing the areas of rural development, services delivery, local administration, education, training, economy and many others. Digital governance has been legalized in India by the Information Technology Act 2000, which provides legal reorganization for transactions carried out by means of electronic data exchange. This Act was a path-breaking initiative towards administrative reform in India. Furthermore, the political will to employ e-governance and online administration has led to the transformation of a representative democracy into a participatory democracy through the introduction of key milestones for digital empowerment like National e-Governance Plan (NeGP), 2006 comprising twenty-seven mission mode projects at the center, state and grassroots level to enable citizen-centric governance.⁹

THE BASIC STRUCTURE OF E-GOVERNANCE

Layne described a four-stage growth model to develop a fully functional e-government. Based on technical, organizational and managerial feasibilities, the four stages of a growth model for e-governance are:

- Cataloguing (Information)
- Transaction
- Vertical integration (Interactive)
- Horizontal integration (Strategic, interactive) or transformation¹⁰

⁸Sangita Dhal (2020) Situating Digital India Mission in Pursuit of Good Governance: A Study of E-governance Initiatives in the Indian Province of Odisha available at DOI:10.1177/0019556120904034 last visited on 15 July 2021 at 3:00pm

⁹ ibid

¹⁰ ibid

These four stages are arranged in terms of complexity and different levels of integration. This section explains these four stages.

The first stage is “cataloguing” or “Information” because efforts are focused on cataloguing government information and presenting it on the web. The first stage is focused on establishing an on-line presence for the government.¹¹

The second stage “Transaction”, where e-government initiatives are focused on connecting the internal government system to on-line interfaces and allows citizens to transact with government systems to on-line interfaces and electronically, is referred as “transaction-based” e-government. This stage is a link between the live database and the on-line transaction.¹²

However, the critical benefits of implementing e-governance are actually derived from the integration of underlying processes across different level of government. Any citizen can contact one point of government to complete any level of governmental transaction, which can be referred as “one stops shopping” concept. This integration may happen in two ways: vertical and horizontal. Vertical integration refers to local and central administration connected for any functions or services of government, while horizontal integration refers integration across different functions and services.¹³

Vertical or intra- departmental integration is must before implementing the horizontal or inter- departmental integration because of different level of complexities associated. It is expected that vertical integration across different levels of government should happen first, because the gap between the levels of government is much less comparatively than the difference between different functions. Mostly administrators interact more closely with their central or local counterparts than with other departments in the same level of government. The vertically and horizontally integrated e-government represents an ideal situation, in which citizens have on-line access to ubiquitous government services, with a transparent system.¹⁴

¹¹ ibid

¹² ibid

¹³ ibid

¹⁴ ibid

INSTITUTIONAL FRAMEWORK FOR E-GOVERNANCE IN INDIA

Section 9 of the ITA provides for, “any Ministry or Department of the Central Government or the State Government or any authority or body established by or under any law or controlled or funded by the Central or State Government” to go in for the implementation of sections 6, 7 and 8 on an “opt-in” basis. The rationale being that agencies that are not yet ready to go “paperless” are not compelled to do so and over enthused litigants may not flood the courts with public interest litigation(s) praying for implementation of e-governance. However, debate surrounds the aspect as to whether the central government should frame rules for implementation of e-governance within an adequate timeframe and whether the provision merely allows official inaction. Thus, in essence the ITA does not provide justiciable rights to citizens to enforce e-governance.¹⁵

From the above-governance in itself in India is not uniformly applied and cannot be enforced legally as the law presents a loophole which hinders implementation across the whole of India.

Domain ministries at the central and state levels are basically considered owners of the initiatives, who implement and realize the set of outcomes envisioned in the policy that is the e-government policy. Central- level ministries are charged with the coordination of domain-specific initiatives and with the management of funds at the national level. Policy Guidelines and Regulations are left at the discretion of specific domain owners and the overall assistance and support rests with the Central IT Department.¹⁶

The basic approach is to rely on traditional vertical systems to bring in a gradual transformation through e-Government, with federal intervention limited to providing directions related to core technology, such as standards, gateways, security, interoperability, etc. An explicit approach to establish a mandated policy framework for e-Governance as a separate functional domain is missing. This fact can be attributed to the reality of a federal system, and the need to maintain a delicate balance between

¹⁵ Gupta, Apar(2010)The legal framework for electronic governance in India p. 16 available at www.researchgate.net last visited on 17th july,2024 at 10:40pm

¹⁶ Radha Chauhan et al (2009) A Model for Policy Interventions in Support of Electronic Governance *United Nations University –International Institute for Software Technology* Report No.415 available at <https://i.unu.edu> last visited on 17th july,2024 at 10:42pm

vertical government structures and horizontal nature of e-Government, particularly when it is impacting federal boundaries.¹⁷

LEGAL FRAMEWORK FOR E-GOVERNMENT IN INDIA

Indian policy is characterized by its federal multiparty structure and a very strong legacy of legislations, starting with the Constitution that apportions power between federal hierarchies. The whole effort towards e-Governance has an underpinning of this reality and has to be appreciated in this light. The National e-Governance Plan (NeGP) is a policy document on e-Governance that details the charter that India aims to follow. It conveys the vision of the federal government on e- Governance – “to make all Government services accessible to the common man in his locality, through common service delivery outlets, and ensure efficiency, transparency and reliability of such services at affordable costs to realize the basic needs of the citizens. NeGP identifies a set of 27 Mission Mode Projects (MMPs) in key areas of e-Governance, with a stated approach of “centralized initiative and decentralized implementation”. The areas include police, agriculture, panchayats, transport, excise, etc. MMPs are broadly categorized into Integrated, Central, and State Projects: Integrated Projects are implemented by central and state governments; Central Projects are owned by central domain ministries; while State Projects are owned by the states. In the latter case, the central line ministry concerned with the project acts as the coordinating and fund-managing agency, expected to lay down guidelines for implementation by the states. Additionally, core components are defined for the core infrastructure, e.g. wide area networks and electronic data centers across the country¹⁸

With the advent of new technologies, regulatory agencies are increasingly harnessing the power of digital technologies to meet the informational demands of rulemaking and to expand public involvement in policy making. India adopts this method of governance to enhance its citizens life. The launch of National Satellite -Based Computer Network (NICENET) in 1987 and subsequent launch of District Information System of the National Informatics Centre (DISNIC) program to computerize all district offices in the country for which free hardware and software was offered to the state governments

¹⁷ Ibid

¹⁸ ibid

provided the requisite impetus for e-governance. E-governance thereafter developed with the growth of technology. Today, there are a large number of e- governance initiatives, both at Union and state levels. Central and State governments have initiated many strategies to promote ICT in all walks of life. The Central Government announced the IT policy in 1998 to make IT available to all Indians by 2008. The policy aims to make India an IT super-power and make it the generator and exporter of software within the next 10 years. A high-power national task force on IT and software development was set-up in 1998. The policy envisages the creation of a government-wide information infrastructure, which would simplify service delivery, reduce duplication and improve the level and speed of services to the public. This would provide the public with the opportunity to send and receive information through electronic terminals instead of by writing or paper communication. Efforts are taken to increase ICT accessibility through computers and internet to reach wider sections of society with the help of civil society organizations (CSOs). Government processes and procedures would be reengineered to bring about several benefits, such as transparency at work, reduced constraints, increased efficiency and productivity and reduced cost of service delivery. Projects are integrated across departments to provide a single point of electronic delivery of services to citizens. Maximum transparency in government has been ensured through citizen charters available over the internet, for every government department. The government has already passed the Information Act, 2002 within the scope of Article 19 - a fundamental right - in our constitution enabling the citizens to get the information from the government. A number of projects are in operation in different states for promoting electronic governance in India.¹⁹

Information Technology Act enacted on June 9, 2000.

The ITA's purposes are to: (1) recognize the legal

validity of electronic transactions that are used in E-commerce;(2)

promote the growth of E-government, i.e., the acceptance and utilization

¹⁹ Devaiah G Noorera and Keerthiraj (2021) E-governance in India: challenges and strategies available at www.researchgate.net last visited on 15 July,2021 at 10:20am

of documents in electronic form by government departments; and accordingly, (3) to amend the criminal law, evidence law and banking law insofar as they are affected by the legal recognition of electronic Transactions.²⁰

From the above, it can be seen that though the law has accommodated different aspects of electronic government but is still in itself inadequate, this so because electronic government extends beyond electronic transactions- commerce and governmental agencies, issues like implementation and sanctions though captured by the law are yet not clear. This is because without proper clear cut institutional and legal framework, hardly does a government makes progress, and lack of progress here connotes bad leadership which are red flags to the government and would definitely affect its citizens.

In 2006, the National e-Government Plan (NeGP) was formulated by the Department of Electronics and information Technology and Department of Administrative Reforms and Public Grievances that aims at making all government services accessible to the common man, ensure efficiency, transparency, and reliability of such services at affordable costs to realize the basic needs of the common man.²¹ Departments like these when acting under full blown capacities and sound framework would definitely bring greater output by the government.

The legal basis for National e-Government Program is the Information Technology Act 2000 that grants legal recognition to electronic records, and online communications between citizens and government. The Act enables the states to carry out their own policy interventions, as and when required. The key technical issues related to digital signatures and the authority allowed to issue such signatures have been determined by the Act as well. The other key regulation is the Right to Information Act (2005) that mandates and delineates what information should be shared by the government electronically with citizens. In addition, technology issues like the certifying authority

²⁰ Stephen Blithe (2006) A Critique of India's Information Technology Act and Recommendations for Improvement *Syracuse Journal of International Law and Commerce*:vol.34:no.1,Article2 available at: <https://surface.syr.edu/jilc/vol34/iss1/2>

²¹ Ibid(supra)

and its functions are covered by central rules. The NeGP has enabled many e-government initiatives like: Andhra Pradesh: The principal objective of the IT policy in Andhra Pradesh is to extensively use IT in government for enhancing efficiency, transparency, accountability in Government departments and agencies, and providing better services to citizen. AP is one of the few states, which has introduced ICT in a big way to make a good impact on the quality of life of the citizens. Implementation of about 1,500 applications across 160 departments at about 10,000 sites, involving huge financial, technical and managerial resources reflects this trend. The policy document has mentioned, “e-governance is one of the crucial components in realization of the concepts of SMART government and good government”.²²

E-GOVERNMENT INITIATIVES OF THE INDIAN GOVERNMENT

The major e-governance projects in the state are: Andhra Pradesh State Wide Area Network (APSWAN), Computer-aided Administration of Registration Department (CARD), the Andhra Pradesh Development Monitoring System (APDMS), the Fully Automated Services of Transport (FAST) and Secretariat Knowledge and Information Management System (SKIMS) and Twin Cities Network Services (TWINS).²³

The Andhra Pradesh State Wide Area Network (APSWAN) was commissioned in 1999 to provide connectivity between the State Secretariat and each of the twenty-three district collectorates for data.²⁴

Karnataka: The important projects undertaken by the Govt. of Karnataka are Bhoomi, Khajane and Kaveri.²⁵

Bhoomi: Twenty million rural land records belonging to over 6.7 million farmers have been computerized in Karnataka. Citizens can obtain land records with ownership and crop details to obtain loans from banks through 177 government kiosks. This facility has helped farmers to not only secure land records speedily without speed money and

²² ibid

²³ S N Sangita, Bikash Chandra Dash (2005) electronic governance and service delivery in india: theory and practice available at <https://ideas.respec.org> last visited at 2:00pm on 13th August,2023

²⁴ Ibid

²⁵ ibid

middlemen, but also save the time and money earlier spent on visiting government offices where they were harassed by corrupt officials.²⁶

FRIENDS: The fast reliable, instant, efficient network for disbursement of services (FRIENDS) project in Kerala aims at facilitating the provision of services within a corporation or municipality at a single centre. Fourteen centers have been established in all the district headquarters to provide smooth and transparent fast, reliable, instant, efficient services to citizens. It is a “single window scheme” in which the consumer is given the option of paying for common services rendered to him under a single roof. The major feature of the project is that this software is specifically programmed to accept payments due to different agencies by incorporating specific rules and regulations regarding remittances pertaining to each agency.²⁷

Gyandoot

This is a rural intranet network started in 2001 in Dhar, a remote district in MP, to benefit nearly a million people across 311-gram panchayats covering 600 villages. The project provides 15 types of services through a network of 35 information centers. Citizen can avail of various benefits, such as information about crop prices, copies of land records, government applications assistance, obtaining of income, domicile, and caste certificates, redress of grievances, and so on. Trained local people manage it and the gram panchayat meets the entire cost. This project has received worldwide recognition and received the Stockholm Challenge IT award 2000 and the Computer Society of India IT award 2000 for best IT usage in India ([http:// www.gyandoot.nic.in/](http://www.gyandoot.nic.in/)). The local bodies, in collaboration with government officials have started ICT kiosks operated by unemployed youth who were selected and have been trained to run these kiosks. It caters to the ICT requirements of a wide section of rural consumers.²⁸

Maharashtra

In Maharashtra, the “Wired Village” project in Warana, a rural area, gives information in the local language to the people of 70 villages about crop prices, farmer’s payment

²⁶ ibid

²⁷ ibid

²⁸ ibid

dates, employment and educational opportunities through 54 kiosks. It has helped the Warana Group of Cooperatives (WGC) and the farmers who supply sugarcane to the cooperatives to achieve better productivity. Before the implementation of the project, there were communication problems between the farmers and the WGC leading to inefficiency and lower productivity (www.mah.nic.in/warana/).²⁹

Rajasthan

The e-governance projects in the state are: Raj Nidhi, Raj swift, Lok Mitra Electronic service and Vikas Darpan. Raj Nidhi Information Kiosks (Raj Nidhi) is an e-governance project in Rajasthan developed and designed to enable the citizen to access a number of services. A citizen can obtain information relating to investment opportunities, tourism (tourist places, fairs and festivals, forts, sanctuaries), health (family planning and immunization of children), employment, transportation, distance education, and agriculture. Information regarding procedures (forms, rates, places and persons) for obtaining ration cards, licenses, birth/death, and caste certificates, and water and electricity connections. This website also contains electronic versions of State Government publications, statistical data, details of Government departments and PSUs. The kiosk provides an opportunity for the citizen to send complaints and suggestions to the Chief Minister and senior officers directly.³⁰

Gujarat

Computerized Inter-State Check Posts of Gujarat Government (CICP): The prominent e-governance project in Gujarat is the computerized inter-state check post (CICP) system in which all the check posts of Gujarat have been computerized. This helps government officials to check all the heavy vehicles passing through the State to and control the transport of commodities to conform to specified standards to avoid loss to life and property. Besides, the project also protects drivers of transport vehicles from the alleged harassment of officials. The PPP model (Private Public Participation) has been applied to design and run the project. A team comprising an enlightened political executive and a technology-savvy administrator was able to implement an online system

²⁹ *ibid*

³⁰ *ibid*

in which each truck is weighed on an electronic weighbridge. The base data are retrieved from a database, and fines and taxes due to Government are automatically calculated and printed out (www.egov4dev.org).³¹

E-GOVERNANCE INDIA

The Indian e- government portal is <http://nceg.gov.in>. On this portal, one can get comprehensive information regarding National Conference on e-governance and reports on earlier conferences. Additionally the portal provides links to the following important pages:

Digital India

National Portal of India:

It is developed to provide access to information and services being provided by the government

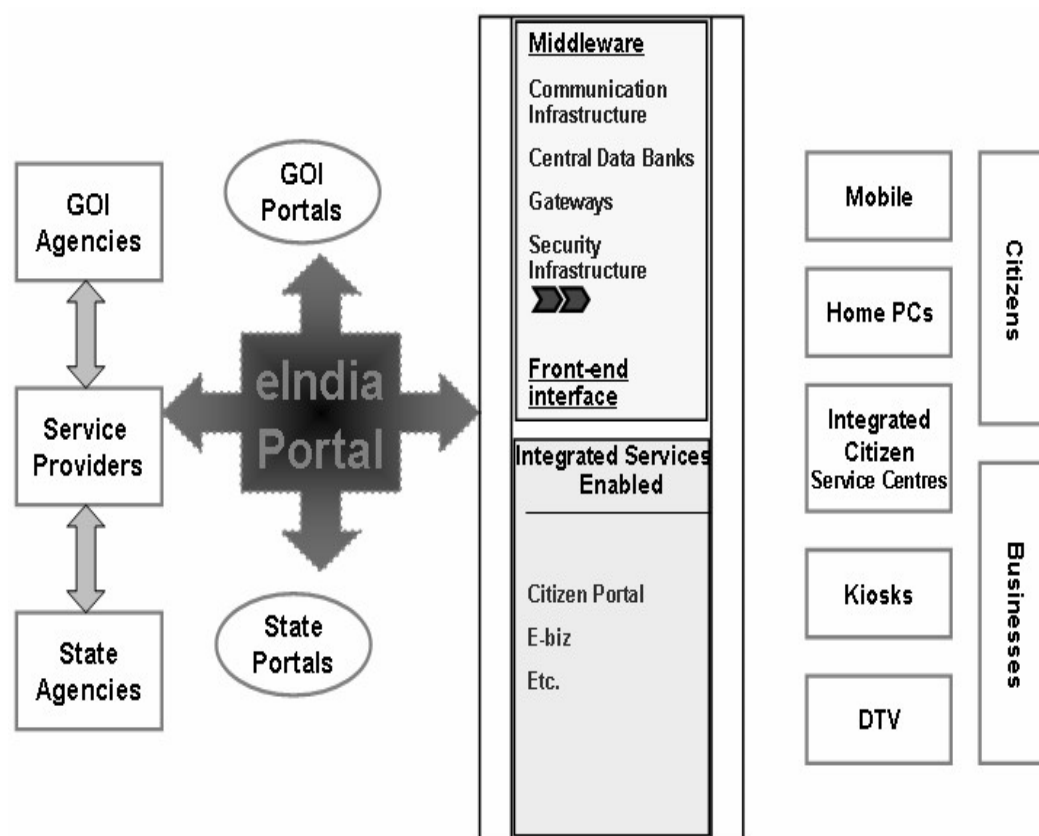
PM India Website: provides information relating to the prime minister's office.

United Nations e-governance website ³²

The overall framework for e-governance in India can be represented in the figure below:

³¹ ibid

³²Ibid (supra)



All the information regarding the Government and its transactions will be available on central portal called “The e-India portal”. This portal will be internally connected to different Government of India portals and different state portals. All the G2G, G2C and G2B transactions will take place through this portal. The connectivity to this portal will be through Internet, LAN, WAN, Intranet for the Government organizations, whereas the connectivity will be through internet, mobile telephone networks, wireless networks, home PCs, Integrated Citizen service centers, kiosks and DTVs for citizens and businesses.³³

E-Governance framework that includes back-ends (databases of different government agencies, service providers, state governments etc.), middleware and front-end delivery channels (home PCs, mobile phones, kiosks, integrated citizen service centers etc.) for citizens and businesses. The middleware comprises of communication and security infrastructure, gateways and integrated services facilitating integration of inter-

³³Anu Paul, Varghese Paul. (2011) The implementation issues of e-governance in India available at www.researchgate.net last visited on 17th July, 2024

departmental services. This Core Infrastructure such as State-Wide Area Networks, Data Centers, Gateways, etc. forms another critical element of the National e-governance plan.³⁴

ADVANTAGES OF E-GOVERNMENT

Provision of information and services: Governance can improve interactions with citizens and provide services at lesser cost and time, and greater convenience. Many government departments provide information about activities and schemes to the public through their websites. They also provide facilities to download information and forms to obtain various services without visiting the concerned offices. Online facilities are also provided to obtain licenses, certificates, reservations, admissions, and allotments, which saves time and cost.³⁵

Multiple services: Governments are also providing multiple services at single points to facilitate speedy delivery of services to citizens to help save their money, effort and time.³⁶

Administrative efficiency for effective communication: E-governance can improve the efficiency of government by streamlining administrative procedures (simplification and transparent) for effective communication within and outside government departments. Rationalization and simplification of the vast number of regulations and procedures through computerization, cut-short delays and enhance the quality of service-delivery. E-governance not only reduces paper work, but also facilitates speedy communication and effective coordination. This ultimately reduces red tape and corruption.³⁷

Transparency, Accountability and Corruption

Dissemination of information provides transparency and empowers citizens to ensure accountability and prevent the administration from indulging in corrupt practices. In many developing countries, including India, regulations are often complex and at times inconsistent. They tend to be numerous and difficult to comprehend not only to the

³⁴ ibid

³⁵ ibid(supra)

³⁶ ibid

³⁷ ibid

public but also to the employees responsible for implementing them. Weak implementation of laws and regulations results in the flouting of rules and corrupt practices. Such violations are more where administrators enjoy vast discretionary powers.³⁸

Transparency and Accountability: Display of information on the internet reduces manipulative capacity as well as prevents officials from misusing resources, and thus enhances peoples' trust in government. Transparency or openness in dealings with the free flow of information to the stakeholders concerned is easy through ICT. Officials are bound to be accountable when they deal with people or people deal with officials electronically because all interactions are open to all concerned. The operations are transparent and known to all the actors involved.³⁹

Accessibility to information regarding land records, land registration, government policies, schemes and procedures, and so on empowers citizens to ensure accountability of administrators. The online complaint registration process, which has been innovatively introduced by an NGO in Mumbai, gives us a good example of how officials are made accountable to the people. If a complaint that is filed is not responded to within the stipulated time, it is automatically passed on to the next higher officer and this goes on till it is addressed. ⁴⁰

Reduction of corruption: Some studies have found that corruption has drastically come down after the introduction of e- governance. E-governance, according to scholars, checks corruption and improves service delivery. ICT promotes transparency and empowers contestability of public functions and ensures responsiveness. It reduces discretionary powers of administrators and transaction costs.⁴¹

Participation: Participation of the stakeholders in policy formulation and implementation is very important for achieving good governance. ICT has significantly

³⁸ ibid

³⁹ ibid

⁴⁰ ibid

⁴¹ ibid

changed the nature and extent of citizen participation, which fundamentally differs from the traditional kind of participation.⁴²

ISSUES AND OR CHALLENGES OF E- GOVERNANCE IN INDIA

ICT have a valuable potential to help meet good governance goals in India. yet such potential remains largely untapped due to the following:

A. Technical Issues

CIT infrastructure is the backbone of e- governance. The technical issues are related to the portability and compatibility of the existing software and hardware platform. Interoperability is the key success factor. The personal data have to be processed and stored, and financial transactions must be executed. So, the legal aspects like security and privacy must be considered.

a) Interoperability

A major issue for integrated service delivery sites is how to capture data in a Web-based form and transfer it to an agency's systems for processing and sharing that information in a common format. The system must be interoperable for the newly developed and existing applications. The interoperation of various state Governments, the various ministries within a state Government is a critical issue. Further how the various islands of automation will be brought together and built into one is another key issue of e-Governance.

b) Privacy

The privacy of the citizen also needs to be ensured. Citizens concern on privacy of their life and confidentiality of the personal data need to be technically supported. Whenever a citizen gets into any transaction with a Government agency, he shells out lot of personal information, which can be misused by the private sector. Thus, the citizen should be ensured that the information flow would pass through reliable channels and seamless network.

c) Authentication

⁴²ibid

Secured ways of transactions for the Government services are another issue of concern. The identity of citizens requesting services needs to be verified before they access or use the services. Thereby the trust and confidence of the citizen can gain. Cyber Security Policy will ensure the secure e-governance transactions in India. The digital signature will play an important role in delivery of such services. But the infrastructure needed to support them is very expensive and requires constant maintenance.⁴³

B. Economic issues

These are mainly concerned with return of investment and protect of the previous ones. Cost of implementation, operational and evolutionary maintenance must be low enough to guarantee a good cost/benefit ratio.

a) Funding

Funding is the main issue in project implementation that are part of e-Governance initiatives. The projects need to be funded either through the Government sector or through the private sector.

b) Management of Change

The Government services are delivered to its stakeholders through the electronic media. These media would necessitate procedural and legal changes in the decision and delivery making processes. This requires fundamental changes in Government decision management. These changes need to be accepted by the Government, citizens and various interests' groups like Employees unions.

c) Delivery of services

Another major issue is the ability of citizens to access these services. The penetration of PCs and Internet is very low in India. So, some framework needs to be there for delivery of the e-Services that would be accessible to the poorest of the poor.

d) Reusability

⁴³ Ibid

e-Governance initiatives must be seen as a nation/state wide plan. Implemented applications, or at least some of their modules, must be reusable by other administrations.⁴⁴

C. Social Issues

This is concerned with the usability by a large variety of people. The interface must be usable by disabled or elderly people, understandable by low literacy or non-native language people.

a) Standardization

One of the main social issues that need to be addressed is defining the standards for the various Government services. The standards for the technologies involved and the issues like naming of websites to creating E-Mail addresses need to be worked out.

a) Technology Issue

This is related to the appropriate hardware platforms and software application packages for cost-effective delivery of public services. Technology Issues/Objectives need to be addressed in e-Governance initiative.

c) Use of local languages

The most comfortable language to the public user is generally the local language. The accessibility of information in local language is another issue in e-Governance initiatives⁴⁵.

LESSONS FOR NIGERIA

Information Technology Act: There should be law in force in Nigeria equivalent to the IT ACT of India for the effective implementation of e-government in Nigeria.

E-government Initiative and Interventions: The government of Nigeria should learn and adopt the initiatives of the Indian government through all levels of government. For example in this era of fuel subsidy removal the government can launch an initiative and

⁴⁴ ibid

⁴⁵ ibid

give it a name to operate at federal, state and local government level to target only eligible Nigerians that require palliatives, this would be in the form of a stop shop registration Centre with a supervisor attached to capture and take adequate information about these citizens so that they reap the fruit of good governance.

Constitutional Recognition and Amendment: Nigeria should make provisions on electronic government projects to target all citizens from the various segments of the country, in its constitution or better still enact new laws to that effect. This even though may be contained in different laws of Nigeria but are not explicit hence inadequate for e governance delivery and dispensation.

FINDINGS

The government of India is aiming at obtaining success in all its e-government plans. To totally and effectively achieve this the government must ensure and safeguard the rights of the citizenry to include and cover all and sundry i.e. all Indians irrespective of age, gender, race, religion, living both in cities and rural areas of the Indian territory. In so doing, the finding of this paper that:

The need arises for a sound policy or regulatory framework.

Lack of peoples' participation, fractured relationships between government agencies and citizens, lack of availability of local resources, limited integration and exogenous social and economic environment are the reasons why ICT has failed to deliver the full range of services in governance matters.

Inadequate funding, lack of updating data collected for official purposes.

Improper management of existing filing systems which include the manual filing since e-governance is not applicable all across India.

Poor or inadequate IT Infrastructure Lack of training on IT by government to officials.

Lack of private and public partnership etc.

RECOMMENDATIONS

The framework of e-governance in India has attained a certain level of success with the number of successful initiatives launched by the Indian government; however it has not reach out to all or has not been at its maximum usage. It is therefore the recommendation of this paper that:

Sound Policy and legal Framework

New regulations and laws are essential with regard to the application of ICT in promoting governance to ensure accountability. Removal of obsolete laws in place to bring in for a new development. For the successful application of electronic governance, a range of legislative regulations is required covering the aspects of electronic signatures, electronic archiving, data matching, freedom of information, data protection, computer crime and intellectual property rights. Already, the Government of India has the IT Act and Convergence Bill. The following policy and legal initiatives have to be taken for strengthening e-governance in India, however the repeal of these laws is necessary for a speedy and effective service delivery by the government to accommodate changes.

Accountability law for making public servants accountable and responsive for non-performance and malfunctioning of their departments especially those saddled with essential services delivery to the public

Law for privacy, ensuring that any information about the citizens is not misused.

Amendments to Consumers Protection Law, Tariffs and Taxation Laws, Intellectual Property Regulations etc., are required in preparing guidelines for Content, technological standards, Electronic payments.

Updating of data in local languages, standardization in all areas like encoding, application logic for common uses, user interfaces, preparing data dictionaries, making appropriate cyber laws, procedural and legal changes in the decision and delivery-making processes as well as in the institutions.

Efforts are needed to incorporate local languages and local content in the internet in a massive way. Accessing the internet using keyboards may limit the use of the internet.

Hence, there is need to develop voice-enabled internet service with Indian languages, and applications should emerge out of the Indian way of life.

Public and private partnership

It is a fact that India needs huge amounts of funds for implementation of e-governance projects. Governments do not have such large amounts of funds. In this regard, encouraging private investment seems to be a possible answer.

Proper Management of existing Manual filling System of the Indian government

There should be a systematic approach to the management of the existing filing system of India to ensure safety and protection of documents filled manually, so that in the event of transfer or need it would be much easier and less time consuming thereby aiding administrative work the government.

Organizing trainings, workshops and programs on IT to government personnel as well as citizens.

Through organization of trainings and programs to enlighten and educate people on e-governance initiatives, which includes training both the personnel involved in the daily affairs and administration of such online platforms for e-governance and the citizenry for whom services are rendered.

The government should ensure accuracy in data collection.

This can be achieved through providing supervisors who can see through or overlook the work of agencies dealing with data collection and processing.

There should adequate IT infrastructure for efficient, less time consuming and effective outcomes.

Cooperation, Support and proper communication should be encouraged by the government to facilitate and ensure the successful and speedy implementation of its initiatives.

CONCLUSION

India as a country with a very large population has attained a certain level of successful initiatives in e-governance. Though its implementation remains an issue due to the challenges faced in the country, the government really needs to make further investment in capacity building; trainings, workshops and awareness programs all need to be in place as well. With the support of the internet, the government process and administration defined by specializations can be made efficient, effective and citizen friendly. The beneficial impact of ICT and e-governance on economy and quality of life would be widely recognized and utilized.

REFERENCES

1. India available at <http://www.memphistours.com/india/india-travel-guide/india-cul> last visited on the 20th July 2021 at 4:00pm
2. Bryan A. Garner (1999) Black's law Dictionary 8th Edition west publishing company
3. Framework available at <https://www.techtarget.com> last visited on 17th July, 2024 at 10:35am
4. Nigeria available at <https://www.britannica.com> last visited on 17th July, 2024 at 10:00am
5. Mrinalli Shah (2007) NMIMS University Mumbai India. E-governance in India: Dream or reality? *International Journal of Education and Development using Information and Communication Technology (IJEDICT)* Vol. 3, Issue 2, p. 125-137.
6. Sangita Dhal (2020) Situating Digital India Mission in Pursuit of Good Governance: A Study of E-governance Initiatives in the Indian Province of Odisha available at DOI:10.1177/0019556120904034 last visited on 15 July 2021 at 3:00pm
7. Gupta, Apar (2010) The legal framework for electronic governance in India p. 16 available at www.researchgate.net last visited on 17th July, 2024 at 10:40pm
8. Radha Chauhan et al (2009) A Model for Policy Interventions in Support of Electronic Governance *United Nations University – International Institute for Software Technology* Report No. 415 available at <https://i.unu.edu> last visited on 17th July, 2024 at 10:42pm

9. Devaiah G Noorera and Keerthiraj (2021) E-governance in India: challenges and strategies available at www.researchgate.net last visited on 15 July, 2021 at 10:20am
10. Stephen Blithe (2006) A Critique of India's Information Technology Act and Recommendations for Improvement *Syracuse Journal of International Law and Commerce*:vol.34:no.1,Article2 available at: <https://surface.syr.edu/jilc/vol34/iss1/2> Ibid(supra)
11. S N Sangita, Bikash Chandra Dash (2005) electronic governance and service delivery in india: theory and practice available at <https://ideas.respec.org> last visited at 2:00pm on 13th August, 2023
12. Anu Paul, Varghese Paul. (2011) The implementation issues of e-governance in India available at www.researchgate.net last visited on 17th July, 2024



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

LAW AND ARTIFICIAL INTELLIGENCE

Mohammed Bashir Badr

Nigeria Police Academy, Wudil – Kano

bashirbadr@polac.edu.ng, +2348134821247

Abstract:

The intersection of law and artificial intelligence (AI) is rapidly evolving, presenting both opportunities and challenges. This paper explores the legal implications of AI technologies, focusing on issues such as accountability, liability, privacy, and ethical considerations. As AI systems become more autonomous, questions arise regarding the allocation of responsibility for decisions made by these systems. It also examines the lawyers' professional responsibility to client with the emergence of AI. The paper examines existing legal frameworks and their adequacy in addressing the unique characteristics of AI, proposing potential regulatory approaches to ensure that AI development and deployment align with societal values and legal standards. Additionally, the ethical dimensions of AI, including bias, transparency, and fairness, are discussed, highlighting the need for interdisciplinary collaboration to create robust and adaptive legal structures. By analyzing current case studies and legal precedents, this paper aims to provide a comprehensive overview of the challenges and potential solutions in the realm of law and AI.

Key words: Accountability, Artificial intelligence, Data protection, Ethics, Legal Frameworks, Liability and Privacy

I. Introduction

The Covid-19 pandemic was a wakeup call to many countries including Nigeria. The pandemic forced many countries to adopt shelter-in-place (quarantines) directives, as well as partial or total lockdown and social distancing orders in order to contain the spread of the virus. As opined by Olubukola and David, Universities around the globe have been profoundly affected by stay-at-home orders, which have required them to close their doors and shift to online education. Courts also gave directives on the use of

virtual hearing (Remote Court Proceedings, RCP) across the globe including Nigeria.⁴⁶ Providing leadership, the remote court proceeding was recommended by the then Chief Justice of Nigeria by way of circular NJC/CIR/HOC/II/656 in April 2020 to mitigate the suspension of courts activities during Covid-19 pandemic.⁴⁷

The reluctance and long-standing skepticism to online teaching and learning compared to active and in-person education was put to test. Online teaching became the main platform for education during the pandemic, creating colossal pedagogical changes. One of the biggest challenges that universities have had to confront due to the unexpected and sudden shift to online education concerns what kind of assessment techniques are appropriate in an online environment.⁴⁸ The intersection of law and artificial intelligence (AI) is rapidly evolving, presenting both opportunities and challenges.

Today, many legal practitioners are increasingly utilizing various types of AI and data analytics tools and smart virtual assistants to enhance their work efficiency, streamline tasks, and improve client services.⁴⁹ These virtual assistants can vary in complexity and functionality; with some being standalone platforms and others integrated into existing legal software or practice management systems. Evidently, the goal of those tools is to assist lawyers in managing their workload more efficiently, improving client services, and enabling them to focus on higher-level legal tasks that require human expertise, resulting in the transformation of legal tasks – from legal research and review, to contract management and the prediction of litigation outcomes.

This paper explores the legal implications of AI technologies, focusing on issues such as accountability, liability, privacy, and ethical considerations. As AI systems become more

⁴⁶ O. Olubukola and A. David (2022) *Remote Court Proceedings in Nigeria: Justice Online or Justice on the Line*. 13(2) International Journal for Court Administration. Available at [www.https://doi.org/10.36745/ijca.448](https://doi.org/10.36745/ijca.448) accessed on 7th July 2024.

⁴⁷ See National Judicial Council Covid – 19 Policy Report: Guidelines For Court Sitting and Related Matters in the Covid-119 Period, National Judicial Council, 2020, Circular No. NJC/CIR/HOC/II/660 [accessed 24 April 2022].

⁴⁸ L. Colonna (2021) *Legal implication of Using AI as an Exam invigilator*. Nordic Yearbook of Law and Informatics 2020-2021. <https://irilaw.org/wp-content/uploads/2022/02/law-in-the-era-of-artificial-intelligence.pdf>

⁴⁹ D. Linna and W. Muchman (2020) *Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI*. The Professional lawyer vol. 27, No.1. available at: https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/

autonomous, questions arise regarding the allocation of responsibility for decisions made by these systems. The paper examines existing legal frameworks and their adequacy in addressing the unique characteristics of AI, proposing potential regulatory approaches to ensure that AI development and deployment align with societal values and legal standards. Additionally, the ethical dimensions of AI, including bias, transparency, and fairness, are discussed, highlighting the need for interdisciplinary collaboration to create robust and adaptive legal structures. The reality of AI has also become more relevant as the African Union (AU) and some African sub-regional groups have started paying attention to AI.⁵⁰ For example, the African Union High-Level Panel on Emerging Technologies (APET) has held consultative expert meetings on AI and recommended developing a continental AI strategy for Africa.⁵¹ This was followed up by a draft of an AU-AI Continental Strategy for Africa is being finalized to be submitted to the AU member states for review and validation, after which a continentally-adopted version will be launched at the beginning of 2024 at the AU Africa Heads of State and Government summit.⁵² Sometimes in 2023, the African Commission on Human and Peoples' Rights (African Commission) commenced a focal point study and expert consultation on the impact of AI, robotics and other new and emerging technologies on African human and peoples' rights.⁵³

According to Daniel and Wendy, in conducting legal research, there are a number of AI tools available to assist lawyers in their research. Examples are e-Discovery, Casetext, ChatGPT, LawGeex, voice dictation and idea generation.⁵⁴ There are others like Gavel, Harvey AI and Blue J L&E.⁵⁵ The authors have noted that these tools can quickly retrieve

⁵⁰ Diplo (2023) *Artificial intelligence in Africa: Continental policies and initiatives*. Diplomacy Education Resources. <https://www.diplomacy.edu/resource/report-stronger-digital-voices-from-africa/ai-africa-continentalpolicies/>

⁵¹ AUDA-NEPAD (2022) *The African Union artificial intelligence continental strategy for Africa*. <https://www.nepad.org/news/african-union-artificial-intelligence-continentalstrategy-africa>.

⁵² AUDA-NEPAD (2023) *Artificial intelligence is at the core of discussions in Rwanda as the AU High-level Panel on Emerging Technologies convenes experts to draft the AU-AI continental strategy*.

29 March 2023 available at: <https://www.nepad.org/news/artificial-intelligence-core-of-discussionsrwanda-au-high-level-panel-emerging/>.

⁵³ African Commission 'Press Release: Inception workshop and experts' consultation on the study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa, 8-9 June 2023. Nairobi, Kenya', <https://achpr.au.int/en/news/press-releases/2023-06-08/inception-workshop-and-experts-consultation-artificialintelligence/>

⁵⁴ Daniel Linna and Wendy Muchman. Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI. *ibid*

⁵⁵ 5 AI Tools Lawyers can Use Today. Available at: <https://gavel.io/resources/5-ai-tools-lawyers-can-use-today/>.

relevant case law, statutes, regulations, and legal articles to support attorneys in building strong legal arguments and staying up to date with legal developments. This role for AI is now quite well established. These can save lawyers from embarrassment especially of incompetence.⁵⁶

The latest developments in the evolution of AI technology suggest the need to reconsider the history of AI in Law. Paliwala discovered that despite the significant changes in the application of information technology to legal work, which is largely due to common information technology processes (processing, storage, retrieval and data management in combination with communication with rich, fast and global information through internet resources). However, so far, in the opportunities when information technology has been applied to deeper legal processes (which involve the very nature of Law), the result has not been very successful — a good example of this concerns to the application of IA systems to Law.⁵⁷ At the 35th Nordic Conference on law and information technology⁵⁸ artificial intelligence is seen as a very useful tool for law and legal science. In AI there is a called “artificial intelligence and law” which aims to apply knowledge in AI to solve or at least facilitate solution of some legal problems. At the same time tools and techniques developed in order to solve specific problems in law are further utilized by AI in general.

II. Legal Frameworks and AI

A. Existing legal frameworks applicable to AI (International laws and regulations)

The European Union General Data Protection Regulation (GDPR) of 2019 was the foremost legislation on AI. Article 22 of GDPR provides for the right not to be subject to a decision based solely on “automated processing, including profiling” with legal or

⁵⁶ *Dangote Cement Plc Vs Peter Ager* (2024) 10 NWLR (Pt.1945) 1

⁵⁷ A. Paliwala (2016) *Rediscovering artificial intelligence and law: an inadequate jurisprudence?* International Review of Law, Computers & Technology, 30(3):107-114. DOI: <https://doi.org/10.1080/13600869.2016.1229651>.

⁵⁸ L. Colonna and S. Greenstein (eds) (2022). *Law in the Era of Artificial Intelligence*. Nordic Yearbook of Law and Informatics 2020-2021. The Swedish Law and Informatics Research Institute. Available at <https://irilaw.org/wp-content/uploads/2022/02/law-in-the-era-of-artificial-intelligence.pdf> assessed on 7th July 2024

significant impact. AI laws also refer to driverless vehicles.⁵⁹ Although, some sources refer to the Council of Europe (CoE) 1981 Convention for the Protection of Individuals with regards to automatic processes of individual Data as the first international legislation on personal data protection which came to force in 1985. However, the convention and its proposed protocol has yet assumed the force of law.⁶⁰ In 2024, the parliament of the European Council adopted the Artificial Intelligence Act in March 2024 and the Council followed with its approval in May 2024.⁶¹ Countries with specific legislation to AI in their respective national laws include: Argentina, Belarus, China, Denmark, Egypt, Estonia, Finland, Greece, Hungary, Iceland, Kazakhstan, Kyrgyzstan, Lithuania, Macau, Mauritius, Norway, Peru, Poland, Portugal, Qatar, the Republic of Ireland, the Russian Federation, Saudi Arabia, Serbia, the Slovak Republic, Spain, Sweden, Taiwan, the United Arab Emirates, the United Kingdom, and Uzbekistan. While legislation referring to AI has been proposed and is at various stages of the legislative process in the following national jurisdictions: Argentina, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Israel, Mexico, Panama, the Philippines, South Korea, and Thailand.⁶²

B. Existing National and Regional Laws

In Nigeria, the National Assembly is still working in the bill on Artificial Intelligence and related subject.⁶³ However, there are some legislation that could be said to contemplate AI operation in Nigeria. In Africa generally, Nigeria was first country in the region to institutionalize a National Centre for AI and Robotics (NCAIR); and the establishment of dedicated government institutions who are fostering a knowledge-

⁵⁹ PV Kadam and AP Kadam (2021) *Legal Framework and Artificial Intelligence: A Macro Review*. Journal of Emerging Technologies and Innovative Research (JETIR). JETIR December 2021, Volume 8, Issue 12

⁶⁰ K. Cantekin (2023) *Regulation of Artificial Intelligence Around the World*. The Law Library of Congress, Global Legal Research Directorate. Available at <https://www.loc.gov/research-centers/law-library-of-congress/about-this-research-center/>

⁶¹ <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>

⁶² K. Cantekin *Regulation of Artificial Intelligence Around the World*, Ibid. p. 2

⁶³ The Guardian Newspaper. 10th NASS to provide legal framework for AI Regulation. Available at <https://guardian.ng/10th-nass-to-provide-legal-framework-for-ai-regulation/> published on 22nd April 2024

based economy and promoting the research and development of AI systems in Nigeria.⁶⁴ AI development and deployment techniques can impact data protection and ethical principles such as transparency, data minimization, purpose limitation, accountability, fairness, and so forth.⁶⁵ Nigeria has passed a number of legislation although not particularly targeting operation of AI. Some of which are Nigeria Data Protection Regulation (NDPR) 2019, Nigeria Data Protection Act (2023), Freedom of Information Act (FOIA) 2011, Cybercrime (Prohibition, Prevention, etc.) Act (CPPA) 2015, National Information Technology Development Agency (NITDA) Act 2007, Consumer Protection Council Act (CPCA) which birthed Consumer Protection Framework which includes, Central Bank Consumer Protection Framework (CBN-PF), National Pension Commission Consumer Protection Framework (NPCCPF). There is also African Union Convention on Cyber Security and Personal Data Protection (AUCC&PDP) which was adopted in 2014 to establish a legal framework for cyber-security and personal data protection entered into force in June 2023.⁶⁶

On Thursday, 20 March 2025, the Nigeria Data protection Commission (NDPC) issued the Nigeria Data Protection Act- General Application and Implementation Directive (NDPA-GAID). The GAID seeks to enhance the understanding, implementation and effectiveness of the NDPA. By virtue of Article 3(3) of the GAID, the Nigeria Data Protection Regulation (NDPR-2019) and consequently the NDPR Implementation Framework (2020) cease to be operational as data protection regulation. By implication,

⁶⁴JO Effoduh (2021) *Towards A Rights-Respecting Artificial Intelligence Policy for Nigeria*. Paradigm Initiative publication. Available at https://link.springer.com/chapter/10.1007/978-3-031-08215-3_5

⁶⁵ E. Salami & I. Nwankwo (2024) *Regulating the privacy aspects of artificial intelligence systems in Nigeria: A primer*. (2024) 1. African Journal on Privacy & Data Protection 220-247 available at <https://research.ulapland.fi/en/publications/regulating-the-privacy-aspects-of-artificial-intelligence-systems>

⁶⁶ See “Status List” at [https://au.int/sites/default/files/treaties/29560-sl-AFRICAN UNION CONVENTION ON CYBER SECURITY AND PERSONAL DATA PROTECTION_0.pdf](https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION_0.pdf).

the primary data protection instruments applicable and effective in Nigeria from 20th March 2025 are the Nigeria Data Protection Act 2023 and the Nigeria Data Protection Act-General Application and Implementation Directive.⁶⁷

The ongoing process of digital transformation⁶⁸ is being accomplished in part with the use of artificial intelligence (AI), an interdisciplinary technology that aims to use large data sets (Big Data), suitable computing power, and specific analytical and decision-making procedures in order to enable computers to accomplish tasks that approximate human abilities and even exceed them in certain respects.⁶⁹ In Nigeria especially, legislation to regulate AI is still inadequate. National Information Technology Development Agency (NITDA) has begun drafting a Code of Practice for AI to regulate AI tools such as ChatGPT.⁷⁰ These legislations could not have been said to be adequate until they become tested at the courts.

III. What is Artificial Intelligence?

In Hizroglu's paper on Artificial Intelligence and Application, Artificial intelligence (AI) is described as "intelligence demonstrated by machines, unlike the natural intelligence displayed by humans and animals, which involves consciousness and emotionality". The distinction between the former and the latter categories is often revealed by the acronym chosen. "Strong AI" is usually labelled as artificial general intelligence (AGI) while attempts to emulate 'natural' intelligence have been called artificial biological intelligence (ABI). Leading AI textbooks define the field as the study of "intelligent agents" 'any device that perceives its environment and takes actions that maximize its

⁶⁷ <https://www.olaniwuajayi.net-introduction-the-nigeria-data-protection-commission/> assessed on 22/3/2025

⁶⁸ T. Cole (2017) *Digitale Transformation*. 2nd edn. Franz Vahlen, München. Available at <https://www.vahlen.de/cole-digitale-transformation/product/17678749>

⁶⁹ S. Russell and P. Norvig (2012) *Künstliche Intelligenz. Ein moderner Ansatz*. 3rd edn. Pearson, Hallbergmoos. available at https://vowi.fsinf.at/images/b/bc/TU_Wien-Einf%C3%BChrung_in_die_K%C3%BCnstliche_Intelligenz_VU_%28Eiter%2C_Tompits%29_-_K%C3%BCnstliche_Intelligenz-_Ein_moderner_Ansatz_%283.%2C_aktualisierte_Auflage%29.pdf

⁷⁰ E. Ojukwu (2019) *NITDA drafting the Nigeria Code of Practice for artificial intelligence tools such as ChatGPT and others*. Available at: <https://www.tekedia.com/nitda-drafting-the-nigeria-code-of-practice-for-artificial-intelligence-tools-such-as-chatgpt-and-others/>.

chance of successfully achieving its goals'. Informally, the term "artificial intelligence" is often used to describe machines that mimic "cognitive" functions that humans associate with the human mind, such as "learning" and "problem solving".⁷¹ Oluwole corroborated that today, AI is playing a critical role in digitalisation in Africa, including in countries that are developing so-called "smart cities".⁷² In general, Scherer says, 'an AI system includes both hardware and software components. It thus may refer to a robot, a program running on a single computer, a program run on networked computers, or any other set of components that hosts an AI'.⁷³ Goldberg and Carson posited that, AI is most often considered as work resulting from creative activity and is, therefore, protected by intellectual property as software through copyright.⁷⁴ Schaal found some impediments to AI under certain conditions, which he said can also be protected by a software patent. Also AI software patents are, however, questionable regarding the level of protection. They might be infringed in a specific manner due to the continuous development and a possibility of being manipulated by a user.⁷⁵ AI systems in a form of software⁷⁶ as well as AI systems inseparably incorporated into physical devices such as robots (cyberphysical systems) are considered as products. In general, every product should meet certain safety and quality standards as well as reasonable expectations of an ordinary customer. If a product is defective, for instance when it does not properly operate or causes damage, its manufacturer can be held liable.

⁷¹ A. Hızıroğlu (2022) *Artificial Intelligence Theory and Application*. İzmir Bakırçay Üniversitesi Available at <https://dergipark.org.tr/en/pub/aita/aim-and-scope> assessed on 7th July 2024

⁷² V. Oluwole (2023) *Africa's smartest cities: Top countries embracing Urbanisation and Technology*. Business Insider Africa. July 28, 2023, <https://africa.businessinsider.com/local/lifestyle/africas-smartest-cities-top-countries-embracing-urbanisation-and-technology/hszfjqk>

⁷³ MU Scherer (2016) *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*. Harvard Journal of Law & Technology. 29(2), pp. 353-400. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/hjlt29&start_page=353&collection=journals&id=365.

⁷⁴ MD Goldberg and DO Carson (1991) *Copyright Protection for Artificial Intelligence Systems*. Journal of the Copyright Society of the U.S.A. 39(1), pp. 57-75. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/jocoso39&start_page=57&collection=journals&id=1.

⁷⁵ EJ Schaal (2004) *Infringing a Fantasy: Future Obstacles Arise for the United States Patent Office and Software Manufacturers Utilizing Artificial Intelligence*. Villanova Sports & Entertainment Law Journal. 11(1), pp. 173-202. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/vse11&start_page=173&collection=journals&id=179

⁷⁶ K. Alhelt (2001) *The Applicability of the EU Product Liability Directive to Software*. Comparative and International Law Journal of Southern Africa. 34(2), pp. 188-209. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/ciminsfri34&start_page=188&collection=journals&i=194.

An injured party can potentially sue for product liability, service liability, malpractice or negligence. A result of each case depends on many factors. Not only manufacturers of AI systems but also their users must take reasonable care to avoid mistakes and causing harm.⁷⁷ Complications in determining a liable person could occur in case of custom-made AI systems combining knowledge of a manufacturer with client's specifications. Moreover, specificities in product liability can be identified in various application domains, such as in automated driving.⁷⁸

Article 22 of GDPR⁷⁹ provides for the right not to be subjected to a decision based solely on "automated processing, including profiling" with legal or significant impact. AI laws also refer to driverless vehicles. This paper will define Artificial intelligence as that area of computer science that mainly focuses on the making of such kind of intelligent machines that work and give reactions same like human beings, faster and more accurate.

IV. Accountability and Liability

According to Sirvastava, all countries welcome AI trends. It is his position that AI is present everywhere, focusing on developed and underdeveloped countries and competing for supremacy in this area. China has ambitions to become a global superpower in the field of AI. China has announced that it will become a leader in AI by 2030, investing 150 billion USD. The goal is perfectly achievable, as it is already a leader because they already lead in research in this area, and the United States is competing fiercely with them. The future of AI in the US has become unclear and declining due to state involvement, funding cuts, increased education costs and strict immigration restrictions for international research experts. The UK is a leader with more than 121 AI companies as the country extensively funds and supports robotics and research in AI.

⁷⁷ GS Cole (1990) *Tort Liability for Artificial Intelligence and Expert Systems*. Computer/Law Journal. 10(2), pp. 127-232. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/jmjcl10&start_page=127&collection=journals&id=131.

⁷⁸ BW Smith (2017) *Automated Driving and Product Liability*. Michigan State Law Review. (1), pp. 1-74. Available: https://www.heinonline.org/HOL/Page?handle=hein.journals/mslr2017&start_page=1&collection=journals&id=3.

⁷⁹ European Union General Data Protection Regulation EU (GDPR) (2019)

Russia invests about \$12.5 million a year in AI. Germany is technically efficient, having the appropriate skills to implement and promote technological innovation and play a leading role in robotics.⁸⁰

However, a very important question often raised about AI is its trustworthiness. It has been asked who will take responsibility for the changes AI brings to the world? The competitive efforts of nations to outshine one another in AI supremacy may make the trustworthiness of AI to be a herculean task. Therefore, in the context of AI, accountability refers to the responsibility and transparency in the development, deployment, and outcomes of AI systems. The responsible AI accounting should involve ensuring that:

1. **Developers and Organizations:** Clearly define who is responsible for the AI system's decisions and actions. This includes developers, companies, and stakeholders involved in the AI lifecycle.
2. **Transparency:** Maintain openness about how AI systems function, including the data they use, the algorithms they employ, and the decision-making processes they follow.
3. **Ethical Standards:** Adhere to ethical guidelines and standards to prevent harm and ensure fairness, bias mitigation, and respect for user privacy and rights.
4. **Oversight and Regulation:** Implement mechanisms for oversight, such as audits, compliance checks, and regulatory frameworks to monitor and enforce accountability.
5. **Responsiveness:** Address and rectify issues or errors in AI systems promptly, including unintended consequences or biases that may arise.
6. **User Awareness:** Inform users about the use of AI, its capabilities, and its limitations to ensure informed consent and understanding.

V. Legal Liability for AI-induced harm

Weng gave an illustration of a scenario in 1981 as narrated by Yueh-Hsaun Weng,⁸¹ would make this question clearly appreciated. "In 1981, a 37-year-old Japanese employee

⁸⁰ S. Sirvastava (2019) *Top 10 Countries Leading the Artificial Intelligence*. Retrieved from <https://www.analytinsight.net/top-10-countries-leading-the-artificial-intelligence-race/>

⁸¹ YH. Weng, et al. (2009) *Toward the Human-Robot Co-Existence Society: On Safety Intelligence for Next Generation Robots*. No.1 International Journal Society, ROBOT 267, 273 (2009). Available at

of a motorcycle factory was killed by an artificial-intelligence robot working near him. The robot erroneously identified the employee as a threat to its mission, and calculated that the most efficient way to eliminate this threat was by pushing him into an adjacent operating machine. Using its very powerful hydraulic arm, the robot smashed the surprised worker into the operating machine, killing him instantly, and then resumed its duties with no one to interfere with its mission. Unfortunately, this is not science fiction, and the legal question is: Who is to be held liable for this cold-blooded, premeditated murder? In the 1964, Isaac Asimov wrote 'The rest of Robots'⁸² where he proposed laws of robot. In the first law, Asimov wrote, 'A robot may not injure a human being, or through inaction, allow a human being to come to harm. The second law says, 'A robot must obey orders given to it by human beings, except where such order would conflict with first order'. Now, where the programming of the AI does not conform to the laws of robot who takes responsibility or what kind of laws or ethics are correct, and who is to decide?⁸³

It becomes necessary to define legal liability. What is legal liability? Greenstein⁸⁴ defined liability as "the state of being legally responsible for something: the state of being liable for something ... something (such as the payment of money) for which a person or business is legally responsible ... someone or something that causes problems."⁸⁵ According to law.com⁸⁶ liability is:

One of the most significant words in the field of law, liability means legal responsibility for one's acts or omissions. Failure of a person or entity to meet

https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.researchgate.net/publication/39730975_Toward_The_Human-Robot_Co-Existence_Society_On_Safety_Intelligence_For_Next_Generation_Robots&ved=2ahUKEwj_gKXVvKeHAxUZU0EAHU7YCccQFnoECBUQAQ&usg=AOvVaw1AuOWaU_R8q3pTDLoqCQgx

⁸² I. Asimov (1963). *The Rest of the Robots*. Available at:

https://www.google.com/search?si=ACC90nzvCy6rkx5htLqWK8ZOeUaRI2vHVIDFhU1_SmRtMI6N2nlsYEE-xUJs1x_BeRzj7ES6yqF0QwJFfYf_oFSz4gWoQ1y6ftXmeTy3RXqskW6uL-eGyxmiyYVvP_zMCeAbrC2ISdW6&hl=en-NG&q=the+rest+of+the+robots+quotes&kgs=cb416b53f549b7b7&shndl=17&source=sh/x/kp/osrp/m5/2

⁸³ H. Gabriel (2010) *The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control*. Akron Intellectual Property Journal: Vol. 4: Iss. 2, Article 1. Available at: <https://ideaexchange.uakron.edu/akronintellectualproperty/vol4/iss2/1>.

⁸⁴ S. Greenstein (2020) *Liability in the Era of Artificial Intelligence*. Article is based on a presentation given at the 35th Nordic Conference on Law and IT, 10-11 November, 2020, which had the general theme of law in the era of Artificial Intelligence (AI).

⁸⁵ Merriam-Webster legal dictionary. <https://www.merriam-webster.com/dictionary/liability#legalDictionary>

⁸⁶ LAW.COM <https://dictionary.law.com/Default.aspx?selected=1151&bold>

that responsibility leaves him/her/it open to a lawsuit for any resulting damages or a court order to perform (as in a breach of contract or violation of statute). In order to win a lawsuit the suing party (plaintiff) must prove the legal liability of the defendant if the plaintiff's allegations are shown to be true. This requires evidence of the duty to act, the failure to fulfill that duty and the connection (proximate cause) of that failure to some injury or harm to the plaintiff. Liability also applies to alleged criminal acts in which the defendant may be responsible for his/her acts which constitute a crime, thus making him/her subject to conviction and punishment.

Therefore the ability to make informed and useful predictions about potential legal outcomes of a case puts understanding liability as one of the primary skills of lawyering.⁸⁷ Because lawyers are routinely called upon to make predictions in a variety of legal settings, a typical scenario may be where a client provides the lawyer with a legal problem involving a complex set of facts and goals.⁸⁸ A lawyer might employ a combination of judgment, experience, and knowledge of the law to make reasoned predictions about the likelihood of outcomes on particular legal issues or on overall issue of liability, often in contexts of considerable legal and factual uncertainty.⁸⁹ On the basis of these predictions and other factors, the lawyer might counsel the client about recommended courses of action.

In the proposal of Surden where he contends that machine learning techniques have often been able to produce “intelligent” results in complex, abstract tasks, often not by engaging directly with the underlying conceptual substance of the information, but indirectly, by detecting proxies and patterns in data that lead to useful results. It becomes useful that adopting these principles, it may be suggested that there are a subset of legal tasks often performed manually today by attorneys, which are

⁸⁷ T. Rostain (1998) *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*. 71 S. CAL. L. REV. 1273, 1281–82.

⁸⁸ P. Brest and LH Krieger. (2010) *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policymakers*. 1st Edition. Oxford University Press 2010. Available at: <https://global.oup.com/academic/product/problem-solving-decision-making-and-professional-judgment-9780195366327?cc=us&lang=en&>.

⁸⁹ E. Malemi. (2017) *The Nigerian Constitutional Law with Fundamental Rights (Enforcement Procedure) – Rules* 2009. Princeton Publishing Company, Lagos, 3rd Edition

potentially-partially automatable given techniques such as machine learning, provided the limitations are understood and accounted for.⁹⁰

It should be emphasized that these tasks may be partially automatable, because often the goal of such automation is not to replace a lawyer, but rather, to act as a complement, for example in filtering likely irrelevant data to help make a lawyer more efficient. Such a dynamic is discussed below in the case of automation in litigation discovery document review. There, the machine learning algorithms are not used to replace (nor are they currently capable of replacing) crucial attorney tasks such as of determining whether certain ambiguous documents are relevant under uncertain law, or will have significant strategic value in litigation.

VI. AI and Human Rights

Human rights are very fundamental rights that every human is entitled to regardless of their colour, nationality, ethnicity, religion, language or any other status. Human rights are universal, inalienable and indivisible so much so that persons cannot live without them. Human rights are what enable a person to continue his humanity.⁹¹ Without human rights, life is meaningless, worthless and a mere shadow.⁹² To wit, human rights are too precious to be infringed upon without sufficient and convincing justification. Human right was succinctly defined by Kayode Eso J.S.C (as he then was) in the case of *Ransome Kuti & ORS v. A.G Federation & ORS*⁹³ as thus:

[Human rights] are rights that have always existed, even before orderliness prescribed rules for the manner they are to be sought. It is a primary condition to a civilized existence which stands above the ordinary laws of the land.

⁹⁰ H. Surden. (2014) *Machine Learning and the Law*. Volume 89 Number 1 Symposium: Artificial Intelligence and the Law. Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss1/>.

⁹¹ Ibid.

⁹² Ibid

⁹³ (1985) 2 NWLR

Since AI cannot be classified as human, where the machine infringes on the rights of humans, how will the law resolve this matter? In Germany, the German Federal Constitutional Court as early as 1983, elaborated a ‘fundamental right to informational self-determination’ in response to the risks to the protection of the right of privacy that were associated with emerging digitalisation.⁹⁴ In 2008 the Court took the innovative step of extending the reach of fundamental rights protection to the ‘fundamental right to the guarantee of the confidentiality and integrity of information technology systems’.⁹⁵ Although owing to the subject matter of the dispute, this decision was directed at online searches of an individual’s personal computer, the Court later held in 2016 that the protection afforded to information technology systems covers more than simply the computers used by individuals but also includes the networking of those computers with other computers, such as in connection with storage of data in the cloud.⁹⁶

VII. Privacy and Data Protection

The right to privacy is an element of various legal traditions that intends to restrain governmental and private actions that threaten the privacy of individuals.⁹⁷ Privacy has been determined to be the right to be left alone; freedom from interruption, intrusion, embarrassment or accountability; control of the disclosure of personal information; protection of the individual’s independence, dignity and integrity; secrecy, anonymity and solitude; the right to protection from intrusion into your personal life.⁹⁸ The right to privacy involves rules governing the collection and handling of personal data, the protection of physical autonomy, the right to limit access to oneself and the right to control one’s identity.

⁹⁴ W. Hoffmann-Riem (2020). *Artificial Intelligence as a Challenge for Law and Regulation*. Bucerius Law School. Available at: Regulating Artificial Intelligence. https://doi.org/10.1007/978-3-030-32361-5_1.

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ Wikipedia, ‘Right to Privacy’ <https://en.wikipedia.org/wiki/Right_to_privacy> accessed 16 July 2024.

⁹⁸ Law Teacher, ‘The Right to Privacy’ <<https://www.lawteacher.net/free-law-essays/human-rights/right-to-privacy.php>> accessed 20 October 2021.

Privacy and data protection have long been leading concerns with eLearning, and when it comes to online proctoring systems the issues only multiply.⁹⁹ A first concern is that of the legality of processing, especially concerning the processing of biometric data like student' faces as well as student's living spaces. The rights of a data subject become significant in discussing data protection and privacy. A data subject is any individual person who can directly or indirectly be identified via an identifier such as a name, an ID number, and location data or via factors specific to the person's physical, psychological, genetic, mental, economic, cultural or social identity.¹⁰⁰ Regional and international instruments such as the African Union Convention on CyberSecurity and Personal Data Protection,¹⁰¹ the Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,¹⁰² and the General Data Protection Regulation (GDPR) of Europe have laid down data rights to rights include the right to access personal information, the right to prevent the processing of personal data, and the right of individuals to be informed of the intended use of their personal data, including in cases of automated data processing where the decision significantly affects the data subject.¹⁰³ Data protection embodies the underlisted principles:

- (i) Lawfulness, fairness and transparency: Processing of personal data should be done lawfully and fairly, and data subjects should be consulted to ensure transparency.
- (ii) Purpose limitation or specification: Personal data must be collected for a specific purpose and a lawful purpose.
- (iii) Storage Limitation: The data must be retained for a period which the purpose serves.

⁹⁹ FF. Kharbat, and AS. Abu Daabes. (2021) *E-proctored Exams During the COVID-19 Pandemic: A Close Understanding, Education and Information Technologies*. Article is based on a presentation given at the 35th Nordic Conference on Law and IT, 10-11 November, 2020, which had the general theme of law in the era of Artificial Intelligence (AI).

¹⁰⁰ <https://www.atinternet.com/en/glossary/data-subject/>.

¹⁰¹ African Union Convention on Cyber Security and Personal Data Protection. Available at: [https://au.int/sites/default/files/treaties/29560-treaty-0048 -
_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf](https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf).

¹⁰² OECD (2013) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. Available at: [https://one.oecd.org/document/C\(2013\)79/en/pdf](https://one.oecd.org/document/C(2013)79/en/pdf).

¹⁰³ General Data Protection Regulation (GDPR). Available at: <https://gdpr-info.eu/>.

- (iv) Data minimisation: Personal data should be processed for a specified purpose and should be relevant, adequate and not excessive.
- (v) Accuracy: All personal data that is collected should be complete, accurate, up-to-date and not misleading.
- (vi) Integrity and confidentiality (security): Security safeguards should be in place for personal data to ensure the integrity and confidentiality of data and to safeguard the data against loss or damage and unlawful access.
- (vii) Accountability: The responsible party should ensure that all measures and conditions in place are complied with to ensure that all principles are given effect.

Therefore, a data collector must ensure strict adherence to the listed principles. Although, concerns have been raised especially with respect to AI's automated programmed system's ability to respect and adhere to these principles.

Canadian government has enacted several laws at the federal and provincial levels that relate to the protection of personal information. The Personal Information Protection and Electronic Documents Act (PIPEDA) is a federal privacy law that is applicable to the private sector.¹⁰⁴ In 2017, the Privacy Commissioner of Canada appearance before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, stated that:

Consent has always been considered a foundational element of PIPEDA. Legally, organizations must obtain consent to collect, use and disclose an individual's personal information, subject to a list of specific exceptions. But obtaining meaningful consent has become increasingly challenging in the age of big data, the Internet of Things, artificial intelligence and robotics.¹⁰⁵

It therefore becomes expedient that the privacy rule in AI should be concerns of legal practitioners.

VIII. Ethical Considerations

¹⁰⁴ Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, as amended, <http://lawslois.justice.gc.ca/eng/acts/P-8.6/FullText.html> archived at <https://perma.cc/KY5R-7YEM>.

¹⁰⁵ Appearance before the Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the Study of the Personal Information Protection and Electronic Documents Act (PIPEDA), OFFICE OF THE PRIVACY COMMISSIONER OF CANADA (Feb. 16, 2017), https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-toparliament/2017/parl_20170216/ archived at <https://perma.cc/6VQX-Y6LW>.

Stahl in his paper, 'Artificial Intelligence for a better future' enumerated about 40 ethical issues.¹⁰⁶ Ethical problems in AI can lead to a variety of consequences with different levels of severity; these consequences include everything from increased inequality to extended litigation processes to resist social uprising. While in most cases one might intuitively accept that the issues can be seen as ethically relevant, no context or reason is provided as to why they are perceived to be ethically problematic. Many of them are not only ethically problematic but also directly linked to regulation and legislation. Being an ethical issue thus clearly does not exclude a given concern from being a legal issue at the same time.

The ethical issues are furthermore highly diverse in their specificity and likelihood of occurrence. Some are certain to come to pass, such as issues around data protection or data accuracy. Others are conceivable and likely, such as misuse or lack of trust. Yet others are somewhat diffuse, such as a negative impact on democracy, or on justice. The question as to who should be interested in AI ethics is answered as everyone. Citizens, businesses, governments, and academia are all users or adopters of AI applications and technologies. They all face, or will face, AI-related ethical challenges that will impact their lives or livelihoods in some way. And they all have a perspective to add to our society's conversation surrounding ethical AI use.

The most frequently raised ethical issues in AI are data protection and privacy. An example of this risk is captured by Jernigan and Mistree¹⁰⁷ when they identified sexual orientation from Facebook friendship. In Australia, concerns relating to maintaining the data privacy of global indigenous peoples in the face of new AI technologies have been raised as well. One example is Maori Principles for Data Sovereignty.¹⁰⁸ There are other AI guiding principles adopted by different organizations and that are fixed in

¹⁰⁶ BC Stahl (2021) *Artificial Intelligence for a Better Future*, Springer Briefs in Research and Innovation Governance. Available at: https://doi.org/10.1007/978-3-030-69978-9_4.

¹⁰⁷ C. Jernigan and BFT Mistree (2009) *Gaydar: Facebook friendships expose sexual orientation*. First Monday 14. <https://firstmonday.org/ojs/index.php/fm/article/download/2611/2302>. Accessed 17 July 2024

¹⁰⁸ Maori Principles of Data Sovereignty. (2016) Available at: <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>.

internationally recognized documents, such as the Montreal Declaration for Responsible AI.¹⁰⁹

IX. Regulatory Approaches

In September 2021, the Secretary-General of the United Nations, António Guterres, released the report *Our Common Agenda*. It made broad proposals for the future of multilateralism, which built on the 2020 Roadmap for Digital Cooperation. It proposed a Global Digital Compact to be agreed at the Summit of the Future, which will be held in 2024. In October 2022, the President of the UN General Assembly appointed the Permanent Representatives of Rwanda and of Sweden as Co-facilitators to lead the intergovernmental process.¹¹⁰

The problem of regulating artificial intelligence or creating a specialized legal framework for it lies in the very nature of AI. There exist a number of definitions of AI but none of them is universally pertinent while being truly unequivocal at the same time. This is mainly due to the ambiguities pertaining to defining the very concept of intelligence. In general, “an AI system includes both hardware and software components. It thus may refer to a robot, a program running on a single computer, a program run on networked computers, or any other set of components that hosts an AI.”¹¹¹

The Secretary-General's 2020 Roadmap for Digital Cooperation recommended action to support global cooperation on AI. The Roadmap set out a vision for AI that is trustworthy, human rights based, safe and sustainable, and that promotes peace.¹¹² To achieve this goal, we strongly believe there is a need to promote research that is independent, interdisciplinary, and international. We propose four principles to guide these efforts, along with four recommendations for the Global Digital Compact.

¹⁰⁹ The Montréal Declaration for Responsible AI Development. (2018) Université de Montréal. https://monoskop.org/images/d/d2/Montreal_Declaration_for_a_Responsible_Development_of_Artificial_Intelligence_2018.pdf.

¹¹⁰ Gray et al. (2023) *Knowledge across boundaries: Promoting global cooperation on AI Regulation*. A Supplementary Report ART-AI submission to the Global Digital Compact. Theme: 6 Available at: <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&/>.

¹¹¹ MU. Scherer. (2016) *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*. Harvard Journal of Law & Technology. 29(2), pp. 353-400. Available at: http://heinonline.org/HOL/Page?handle=hein.journals/hjlt29&start_page=353&collection=journals&id=365

¹¹² Gray et al. *ibid*, p.7

International corporations also play several critical roles in the regulation of artificial intelligence (AI). International corporations often participate in the development of global standards for AI technologies. They contribute to organizations like the International Organization for Standardization (ISO) and the Institute of Electrical and Electronics Engineers (IEEE), which set technical and ethical standards for AI. Corporations ensure that their AI systems comply with international regulations and ethical guidelines. They implement governance frameworks to oversee the development and deployment of AI, ensuring responsible use. International corporations engage with policymakers and regulators to influence the creation of AI regulations.

The corporations advocate for policies that balance innovation with safety and ethical considerations. Corporations collaborate with governments, academic institutions, and other organizations to promote the responsible development and use of AI. These partnerships can help shape regulatory frameworks and ensure they are informed by the latest technological advancements. By promoting transparency in their AI practices, corporations help build trust and accountability. They publish reports on their AI activities, engage in public discourse, and participate in initiatives that promote ethical AI. Corporations invest in AI research and development, which can inform regulatory approaches. Their innovations can highlight new areas where regulation is needed and provide insights into effective regulatory strategies. Corporations often support education and training programs to build a workforce skilled in AI. They also provide resources and training for policymakers and regulators to better understand AI technologies and their implications.

X. Future Directions

The current state of licensing for most open-sourced AI models is dominated by a mix of permissive software licences such as Apache 2.0 or MIT and open data licences such as Creative Commons (CC). While these licences are mainly designed to prioritise rapid development and establish guardrails for ownership of the software or data, users are given minimal usage restrictions. These include the freedom to use, modify, redistribute, and build over current work without substantial emphasis on responsible

use. Permissive licences also do not require developers to adhere to any specific ethical guidelines or principles, which can lead to ethical concerns regarding the use of AI.¹¹³ Responsible AI Licences or RAILs¹¹⁴ are a special type of responsible licence that acts as a contractual agreement between developers and downstream users who want full access to a model. Specifically, these responsible licences contain explicit behavioural-use clauses, which, in contrast to permissive software and data licences, are designed to promote responsible AI practices. They do so by requiring developers to adhere to specific ethical principles and guidelines. Moreover, any downstream derivations, including redistribution and transformation from AI models licensed with RAIL, must also abide by use restrictions clauses. This approach means that any AI-based technology can be developed and deployed in a way that is more aligned with specific values and principles, including those set out in instruments like the OECD Principles or in legislation.

XI. Conclusion

The evolution of AI presents opportunities and challenges for personal data. With increased digitalisations, data subjects may have no option but to surrender data to AI systems in order to access goods and services including from government and financial institutions, and in business and trade. Amidst the challenges and ethical considerations posed, maintaining a balance between innovation and privacy protection is crucial. This balance can be achieved through reinforcing legal and regulatory frameworks, advocating for transparency and accountability, and cultivating education and awareness. Through this approach, it is possible to leverage the advantages of AI while ensuring the protection of the fundamental rights and privacy of individuals. In view of the risks associated with digitalization generally and the use of AI in particular, it is doubtlessly indispensable to have law that is set by state authorities, or in which they at least play a role, and that is furnished with sanctioning options. The verbal acknowledgement of ethical principles must not be used as an alibi for dispensing with

¹¹³ P. Keller and N. Bonato (2023) *Growth of Responsible AI Licensing. Analysis of License Use for ML Models* Published on OpenFuture. Available at: <https://openfuture.pubpub.org/search/>. Assessed on 17th July 2024

¹¹⁴ D. Contractor, et al. (2022) *Behavioral Use Licensing for Responsible AI*. In 2022 ACM Conference on Fairness, Accountability, and Transparency (FAccT '22), June 21–24, 2022, Seoul, Republic of Korea. ACM, New York, NY, USA, 11 pages. <https://doi.org/10.1145/3531146.3533143/>.

legal constraints. As a result of territorial break-downs, which are also typical for the use of AI national efforts, including national legal rules, are often insufficient for solving the problems in this area. What are needed, therefore, are also transnational and globally effective tools that, ideally, are based on corresponding transnational and international agreements, at least where they are intended to take legal form. This includes new concepts, agreements, and institutions of transnational governance¹¹⁵ in which public actors collaborate with the stakeholders concerned, i.e. with associations and companies in the digital economy, but also with NGOs and other entities representing the interests of civil society. In order to have any sustained effect, such transnational agreements require law that is set by state authorities, or in which they at least play a role, and that is coupled with measures for enforcing it.

XII. Summary of key findings

Lawyers today are increasingly utilizing various types of AI and data analytics tools to enhance their work efficiency, streamline tasks, and improve client services. Smart virtual assistant tools based on ML and NLP are proving useful to assist lawyers in legal research and e-discovery, document automation, predictive legal analysis, legal review, case management, legal advice and expertise automation, and information and marketing. On the African level, at least 36 African countries have enacted data protection and privacy laws that regulate the collection and processing of personal data.¹¹⁶ Similarly, the African Union Convention on Cyber Security and Personal Data Protection which was adopted in 2014 to establish a legal framework for cybersecurity and personal data protection entered into force in June 2023.¹¹⁷ Legislation across African states is still deficient in addressing emerging AI challenges. The role of AI in accessing an effective remedy is straightforward. What is not in doubt is that AI has the potential to violate and perpetrate abuse of the rights of human and the data subject.

¹¹⁵ One example is the (not binding) NETmundial Multi-stakeholder Statement of 24 April 2014, which outlines a set of ‘Internet Governance Principles’ and contains a ‘Roadmap for the future evolution of the Internet Governance Ecosystem’. Available at: <https://www.alainet.org/images/NETmundial-Multistakeholder-Document.pdf>.

¹¹⁶ Data Protection Africa, <https://dataprotection.africa/>

¹¹⁷ “Status List” at [https://au.int/sites/default/files/treaties/29560-sl-
AFRICAN UNION CONVENTION ON CYBER SECURITY AND PERSONAL DATA PROTECTION
_0.pdf](https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION_0.pdf)

XIII. Recommendations

1. Policymakers urgently need a stronger interdisciplinary evidence base to understand and formulate effective responses to the challenges AI presents for our societies.
2. AI is inherently interdisciplinary. We must draw on a richer ecology of knowledge to develop, practice, and regulate AI. This requires the creation of new vocabularies¹¹⁸ and plural methodologies.
3. Regulation must be underpinned by inclusive policy processes and research practices. These processes should draw on the insights and leadership of communities likely to be impacted by AI. This must also be supported by a more equitable distribution of research resources, including funding and compute power.
4. AI regulatory policy should be informed by research which is independent¹¹⁹ and conducted according to the highest ethical standards.¹²⁰ Integrity in AI research also includes considerations about labour exploitation,¹²¹ data governance, and climate.

¹¹⁸ Y. S. Benitez(2021) *AI Now, A New Lexicon: Technologies*. Available at:

<https://ainowinstitute.org/publication/a-new-ai-lexicon-technologies/>. Assessed 17th July 2024

¹¹⁹ N. Ahmed et al. (2021) *The growing influence of industry in AI research Industry is gaining control over the technology's future*. Insight. Policy Forum. VOL 379 ISSUE 6635. Available at: https://ide.mit.edu/wp-content/uploads/2023/03/0303PolicyForum_Ai_FF-2.pdf assessed on 17/7/24

¹²⁰ UNESCO (2017) *Recommendation on Science and Scientific Researchers*. Document code SHS/BIO/PI/2017/3 rev. available at: <https://unesco.org/>.

¹²¹ M. Gray and S. Suri (2019) *Ghost work: How to stop Silicon Valley from building a new Global Underclass*.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

DIRECTORS AND DIRECTING UNDER THE COMPANIES AND ALLIED MATTERS
ACT 2020: WHY SOME OF THE RULES MUST CHANGE

Hannatu Adamu

Department of Commercial Law, Faculty of Law
Ahmadu Bello University, Zaria
hannatuadamu@abu.edu.ng

Abstract

Regulating company directors is important in achieving good corporate governance indices. The Companies and Allied Matters Act 2020 (CAMA) was enacted in part to improve accountability and management of companies. Although a significant portion of the earlier 1990 law of the same name was retained, the new law nonetheless made notable changes with respect to many aspects of the law, including those relating to directors and directing, with which this paper is concerned. The Business Facilitation (Miscellaneous Provisions) Act 2022 coming after it, further made significant amendments to the new CAMA. While both laws have not been in force long enough for any significant judicial analysis of their provisions, a superficial reading of some of the portions on directors and directing, raise certain questions which warrant analysis. In particular, this paper is concerned with Section 283(c) CAMA which disqualifies directors removed under Section 288 CAMA, from becoming directors, and Section 305(3) CAMA which expects directors to integrate environmental sustainability considerations into their functions in the company. While employing the medium of doctrinal analysis, involving primary and secondary literature, this paper examined these provisions of the CAMA relating to directors and directing, with the aim of determining their limits and potential, and further providing insights that could inform future improvements to the law. The paper found that the said Section 283(c), in spite of its amendment by the BFA, could still be abused, while Section 305(3) could potentially allow directors avoid liability for the company's environmental pollution occurring away from its immediate area of operations. Both sections, therefore, must be amended.

Keywords: company directors, company, CAMA, disqualification, environmental sustainability, corporate governance

Introduction

The corporation¹²² is doubtless an ingenious institution for the creation of wealth.¹²³ Its influence in terms of affecting mankind in all facets of modern life can certainly not be denied. Consequently, corporate law over the years has sought to tame the corporation in order to reconnect it with the society in which it operates, so that society may reap its benefits while avoiding its detriments. This informs the imperative for corporate regulation.

While the corporation is still largely governed by private ordering,¹²⁴ owing to its liberal foundations, public regulation is still very much required in some important instances. Granted, companies and those who manage and direct them are fundamentally private arrangements, nevertheless, due to the reach of their influence and operations in modern time, there is a markedly *public* interest in the efficient operation of privately controlled companies. It is thus assumed that company law should promote that public interest.¹²⁵

However, there can be no proper regulation of companies without the proper regulation of persons who run them, i.e. directors. Consequently, an important aspect of corporate governance still subject to public regulation, is with respect to the company director—in terms of who occupies the office—as well as directing, that is, in relation to what the occupant is charged to do. The Nigerian company law, the Companies and Allied Matters Act No. 3, 2020 (CAMA),¹²⁶ like many of its counterparts, makes provisions regarding directors in respect of these matters. Probably in a bid to improve on the previous 1990 law of the same name, the relatively new law made notable changes

* Senior Lecturer, Department of Commercial Law, Faculty of Law, Ahmadu Bello University, Zaria. hannatuadau@abu.edu.ng

¹²² Note that ‘Corporation’, ‘company’ and ‘firm’ are used to mean the same thing throughout this paper.

¹²³ Arden, Dbe (2010). Regulating the conduct of directors. *Journal of Corporate Law Studies*, 10(1), 1-15, 14.

¹²⁴ This simply means leaving companies to decide how they wish to be governed. As opposed to public regulation, it refers to allowing private actors, rather than the state, to establish the regulation and policing of their own activity and behavior. Contreras, J.L (2017). From private ordering to public law: the legal frameworks governing standards-essential patents. *Harvard Journal of Law and Technology*, 30(1), 211-231, 213.

¹²⁵ Davies, P. (2020). *Introduction to company law*. Oxford University Press, 332-3.

¹²⁶ Unless otherwise stated, all sections cited refer to this law.

with respect to many aspects of the law, including those relating to directors and directing. In particular, Section 283(c) CAMA, amended by the Business Facilitation (Miscellaneous Provisions) Act 2022 (BFA) coming after it, now disqualifies directors removed under Section 288 CAMA, from becoming directors, while Section 305(3) CAMA expects directors to integrate environmental sustainability considerations into their functions in the company.

Proper codification of the law with respect to directors is crucial to achieving good corporate governance values, as the law then becomes clear and more accessible to directors and their advisers.¹²⁷ While the law in question has not been in force long enough for any chance of significant judicial scrutiny, a superficial reading of the portions on directors and directing identified above, raise certain fundamental queries which pertain to the efficacy of the said provisions. This paper, adopting a doctrinal methodology, thus embarks on a theoretical analysis of the provisions identified, with the aim of determining their limits and potential, and further providing insights that could inform future improvements to the law. This is especially important because, unlike other Commonwealth countries with substantial case law on directors, such as the United Kingdom, Canada and Australia, Nigeria has so far been grossly deficient in that area,¹²⁸ so that the bulk of the guidance, when one seeks to know the law at all, might often have to be the primary legislation. Legislation must thus, get it right.

The Place of Company Directors

Obviously, those who govern companies are bestowed with the power and ability to control the resources of those companies, and should, accordingly, be held accountable for their actions/inactions, as well as decisions/indecisions.¹²⁹ It is thus generally agreed that company directors are fiduciaries,¹³⁰ in the same category as trustees, agents, and other professionals like lawyers, doctors, money managers and advisers.¹³¹ A fiduciary is

¹²⁷ Arden, (above), 4.

¹²⁸ Adamu, H. (2015). *A comparative analysis of directors' duties of care and skill and fiduciary duties of loyalty and good faith under the companies' acts of Nigeria and the United Kingdom*. [Unpublished master's dissertation]. Ahmadu Bello University Zaria, 84-86 and 125; Adamu, H. An examination of directors' obligation to consider the interests of employees under the Companies and Allied Matters Act 2020. [Unpublished doctoral thesis]. Ahmadu Bello University Zaria, 161.

¹²⁹ Young, A. (2009). Frameworks in regulating company directors: rethinking the philosophical foundations to enhance accountability. *Company Lawyer* 30(12), 355-361, 355.

¹³⁰ Section 305(1). See also Pettet, B. (2005). *Company law*. Pearson Education Ltd., 149.

¹³¹ Frankel, T. (2011). *Fiduciary law*. Oxford University Press, 42.

“a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candour.”¹³² From the onset, Section 269 considers that what the director does is “direct and manage the business of the company.” In essence, he/she acts for and on behalf of the company. In simple terms, therefore, he/she is a representative.¹³³

Additionally, a director is also an officer in the company,¹³⁴ like any other official occupying an administrative position within the corporation. He/she may also be a mere employee, if employed by the company under some contract of service,¹³⁵ simply. This would most often be the case with the executive director, also known as a service director. However, as observed by the Nigerian Supreme Court in *Longe vs First Bank of Nig. Plc.*,¹³⁶ this still does not derogate from the fact of his directorship, as long as he is seen to be directing and managing the business of the company. He is subject to the same rules as any other director. Furthermore, the director is also a trustee in many respects. Thus, Section 309(1) acknowledges that

Directors are trustees of the company’s moneys, properties and their powers and as such, must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their power honestly, in the interest of the company and all the shareholders, and not in their own or sectional interests.¹³⁷

In fact, Judges have for a long time likened the director’s office to that of a trustee.¹³⁸ Recall that once incorporated, the company thereby acquires all the powers of a natural person of full capacity, enjoying the ability to own property in its name,¹³⁹ including monies in bank accounts. Owing to the enormous powers available to a director in managing the company therefore, the law easily attributes to him this role of trustee with regard to the monies and properties of the company. Even so, the director is not a trustee in the usual sense.¹⁴⁰ This is because, unlike the regular trustee, the company’s

¹³² Garner, A.B. (ed.). (2004). *Black’s law dictionary*. West Publishing Co, 658. A similar definition was used in *Bristol and West Building Society vs Mothew* (1998) Ch. 1.

¹³³ Adamu, H. (2015) above, 61.

¹³⁴ Section 868.

¹³⁵ Section 317.

¹³⁶ (2010) All FWLR 258.

¹³⁷ Section 309(1).

¹³⁸ *Great Eastern Rly Co vs Turner* (1872) LR 8 CH APP 149.

¹³⁹ Sections 42 and 43.

¹⁴⁰ *Re Faure Electric Accumulator Co* (1888) 40 Ch D 141; *Adebayo vs Johnson* (1969) All NLR, 171.

properties would not be in his name and the trustee is generally expected to observe a higher standard of caution in protecting the interests of his or her beneficiary than would be reasonable to expect of a person in charge of a commercial venture,¹⁴¹ such as a company. After all, a director is entitled to take risks with the company's monies, if he considers it likely to be in the best interests of the company. However, he must aim to preserve its assets, and further its business.¹⁴² Under no circumstances is he allowed to use his position to enrich himself, make secret profits or achieve other unnecessary benefits as a result of the office he occupies.¹⁴³

Also, Section 309(2) regards the director as an agent, when acting within his authority and the powers of the company. This was especially emphasized by the court in *Trenco. Nig. Ltd. vs African Real Estate and Investment Co. Ltd.*,¹⁴⁴ wherein it was stated that a company, although having a corporate personality, is deemed to have human personality through its officers and agents, the directors being such.¹⁴⁵ Presumably, therefore, the corporate abstraction is reified in the directors, who lend it some semblance of existence. In fact, in the relationship between the company and other persons, and with respect to the functions he performs and any legitimate powers he may wield, a director is an agent in the general sense of the word.¹⁴⁶ Directors as a matter of fact represent and act for the company, and possess the ability to enter into legal relationships with third parties on its behalf, so there is an obvious reason for the imposition of an agent's duties on the director. Thus, a fiduciary duty is contemplated by the law on the part of the director, towards the company.¹⁴⁷ In fact, Section 305(1) states that a director stands in a fiduciary relationship towards the company. The director, as agent, therefore becomes a fiduciary, and thus accountable to his principal, the company, in respect of their relationship.

¹⁴¹ Davies, J. (2007). *A guide to directors' responsibilities under the Companies Act 2006*. Certified Accountants Educational Trust. <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/tech-tp-cdd.pdf>, accessed 27 July 2024.

¹⁴² Section 305(3).

¹⁴³ Sections 306 and 313.

¹⁴⁴ (1978) All NLR, 124; (1978) NSCC 220.

¹⁴⁵ Per Aniagolu J.S.C.

¹⁴⁶ Section 309(2). See also the Supreme Court decision in *Yusufu vs Kupper International* (1996) 5 NWLR (pt. 446) 17.

¹⁴⁷ See *Aberdeen Rly Co vs Blaikie Bros* (1854) 1 Macq 461, particularly at 471; *Okeowo vs Migliore* (1979) 11 SC, p. 113

Although the job description of the director becomes clearer when imagined in terms of the ancient relationship of agency, they are not exactly alike. In the typical agency, the principal usually has a complete set of detailed instructions for his agent as to what the principal requires of him. Also, the agent can get feedback from the principal regarding any eventuality that may be encountered and how the principal wants the agent to go about handling it. Further, the agent cannot venture into uncertainties by taking risks. But this cannot be the case with the director of a corporation. He makes the policies, strategizes how to put them in action and goes ahead and puts them into practice. In doing so, he takes risks. In fact, it has been said that risk is the essence of a director's work.¹⁴⁸ To be sure, a director is a more powerful agent than most. The modern view is that his position within the corporation is essentially *sui generis*.¹⁴⁹ In other words, the director's role, though familiar in certain respects, is nevertheless unique. Still, all the duties often owed by directors, or functions required of them by law, can somehow be subsumed under the roles of trustee, agent or even employee.¹⁵⁰ It is often in one or more of these roles that the law seeks to hold them accountable. However, since the director's position cannot be properly squared with the agent, trustee, or employee, the rules governing his office must be uniquely developed and change with the times and expectations of his office.

Notable New Rules Concerning Directors under the CAMA

In a bid to raise the standards of honesty and diligence in corporate management, as well as align corporate law with societal expectations, the CAMA introduced some new rules with respect to who qualifies for the office of company director, and how he/she is expected to discharge their fiduciary duties to the company. Although there are, in actual fact, quite a few changes, this paper is intended to limit discussions to the director's duty in regard to the environment as well as the disqualification criteria for the office of company director, which are the most notable of the changes.

On the Director's Duty in Respect of the Environment

¹⁴⁸ Olawoyin, G.A. (1977). *Status and duties of company directors*. University of Ife Press. 7.

¹⁴⁹ Birds, J. et al. (2011). *Boyle and Birds' company law*. Jordan Publishing Limited, 627; Campbell, C. (2007). *International liability of corporate directors*. Yorkhill Law Publishing, 97; Cornelius, G., Van der Merwe. (2004). *Introduction to the law of South Africa*. Kluwer Law International, 384; Dyson, B.R. (1965). The director's liability for negligence. *Indiana Law Journal*, 40(3), 341-376, 346.

¹⁵⁰ Adamu, H. (2015) above, 65.

The Constitution of the Federal Republic of Nigeria 1999 affirms, on fundamental objectives and directive principles of state policy, that the Nigerian state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.¹⁵¹ Promoting conservation is therefore clearly a governance objective. In a bid to express the country's commitment towards environmental sustainability, its new company law contained for the first time, an acknowledgment of the environmental risks posed by companies in their processes. In particular, Section 305(3), while requiring the director to act in good faith in the best interests of the company as a whole, further charges the director of a company with the fiduciary duty to, among other things, 'have regard to the impact of the company's operations on the environment in the community where it carries on business operations,' in the discharge of his functions. This clearly contemplates environmental sustainability, whose meaning can be gleaned from the maxim of sustainable development that requires providing present and future generations with basic environmental necessities like clean and sufficient water, food and a habitable planet.¹⁵²

In fact, traditionally, environmental law has always been used to shape corporate behaviour in terms of externalities,¹⁵³ with some still arguing this to be the best approach.¹⁵⁴ Consequently, most regulations concerning economic, social and governance (ESG) matters are often outside company law.¹⁵⁵ Section 305(3) is therefore a new rule of company law in terms of the CAMA. However, the reason for this law is not far-fetched. It is now agreed that a significant portion of human activities causing environmental degradation is due to enterprise,¹⁵⁶ whereas modern enterprise is idealised in the company, which is able to achieve the production of goods and services at mammoth scales, as it is designed to attract large capital investments able to sustain

¹⁵¹ Section 20.

¹⁵² Brundtland Commission. *Our Common Future*. United Nations World Commission on Environment and Development 1987. www.un.org/esa/dsd/resources/res_publiccorepubli.shtml, accessed 14 July 2024.

¹⁵³ Light, S.E. (2019). The law of the corporation as environmental law. *Stanford Law Review*, 71(1), 140-213, 140.

¹⁵⁴ Bainbridge, S.M. (2023). *The profit motive: defending shareholder value maximization*. Cambridge University Press, 90.

¹⁵⁵ Davies, P (above), 323.

¹⁵⁶ See generally, Bruner, C.M. (2022). Corporate governance reform and the sustainability imperative. *Yale Law Journal*, 131(1), 1217-1277.

this.¹⁵⁷ Consequently, the environmental externalities generated by this scale of activities, could be considerable. Thus, awareness is growing that companies have a crucial role to play in ensuring sustainability in the ecological sense of safeguarding the biosphere as well as minimising environmental damage.¹⁵⁸ As far back as 1987, the Bruntland Commission of the United Nations had urged states to fill the major gaps existing in national and international law relating to the environment, towards adequate health, well-being and general interests of present and future generations.¹⁵⁹ It therefore demonstrates a significant commitment on the part of any nation to reflect the concerns for environmental sustainability in its foremost corporate legislation.

For many business managers, environmental impact is not a core focus.¹⁶⁰ This is why law must mandate directors to draft environmental considerations into their duties while managing the company. In fact, the modern concept of corporate sustainability asks of companies to be all-rounded: environmentally, socially as well as economically sustainable.¹⁶¹ It would thus be most ideal for companies to be able to find the confluence between protecting the environment and promoting market values.¹⁶² Indeed, regulation should be seen to be encouraging them to do so. It is thus believed that corporate directors owe to different stakeholders the duty to protect the environment,¹⁶³ which is why the concept of corporate sustainability encompasses environmental sustainability whereby business creates value in a manner that allows it to ensure the long-term stability and resilience of the ecosystems that support human life.¹⁶⁴ While it can be contended that Section 305(3) is a commendable improvement in

¹⁵⁷ Adamu, H. (2021). An evaluation of consideration for employees under the Companies and Allied Matters Act 2020. *Ife Business Law Review*, 3(2), 57-70, 59.

¹⁵⁸ Clarke, B. (2015) The role of board directors in promoting environmental sustainability. In: Sjafjell, B. and Richardson, B.J. (eds), *Company law and sustainability: legal barriers and opportunities*. Cambridge University Press, 148.

¹⁵⁹ Bruntland Commission (above).

¹⁶⁰ Friedman, J. (2023, February 6). Sustainability: how leaders in any industry can make a difference. *Forbes*. www.forbes.com/sites/forbesbusinesscouncil/2023/02/06/sustainability-how-leaders-in-any-industry-can-make-a-difference/?sh=275477a658ec, accessed 14 July 2024.

¹⁶¹ Watson, S. (2015). Moving beyond virtue signaling: corporate sustainability for New Zealand. In: Sjafjell, B. and Richardson, B.J. (eds), *Company law and sustainability: legal barriers and opportunities*. Cambridge University Press, 188.

¹⁶² Above, 189.

¹⁶³ Starik, M. (1995). Should trees have managerial standing?: toward stakeholder status for non-human nature. *Journal of Business Ethics*, 14(1), 207-217; Orts, E.W. and Strudler, A. (2002). The ethical and environmental limits of stakeholder theory. *Business Ethics Quarterly*, 12(2), 215-233, 225; Clarke (above).

¹⁶⁴ Watson (above) 188.

the Nigerian law of corporations on the face of it, a closer inspection might raise the valid question whether in fact the section can help achieve the desired goal.

It is important to note at the onset that Section 305(3) is the only provision in the CAMA relating to environmental protection, and, as observed earlier, newly introduced to Nigerian company law. It has been suggested that it is rather difficult to use fiduciary duties to enlist companies for environmentalist causes,¹⁶⁵ which may very well be the case where there are no safeguards in place. At least, not while internal power remains focused on shareholders.¹⁶⁶ Although the said Section 305(3) highlights the salience of environmental concerns in corporate decision making, it nevertheless leaves off hanging, as there are no supporting provisions within the rest of the body of the law to lend it much practical use in terms of regulating corporate action that affects the environment. To be sure, only 'the company' can sue directors for breaches of duties¹⁶⁷ and so, if in the opinion of 'the company,' there has been no breach of duty, especially where 'the company' has benefitted from the pollution or other incident, the director cannot be found to have neglected environmental considerations.

Some have argued that if environmental advocates were not able to get their desired results from environmental legislation, it is not fair to expect these results from the directors of companies.¹⁶⁸ However, environmental interests are public interests, since they usually involve resources used in commonality affecting everyone, are long-term in nature, as well as affect future generations,¹⁶⁹ so that the modern notion of 'corporate stakeholders' also includes the environment and the future.¹⁷⁰ Consequently, the issue of climate change has become a matter of global concern. Besides, an important aspect of company law is to shape the degree and contours of managerial discretion and define the bargaining power of stakeholder groups.¹⁷¹ The law can, therefore, be viewed from that perspective. The challenge thus is, while business

¹⁶⁵ McDonnell, B., et al. (2021). Green boardrooms? *Connecticut Law Review*, 53(2), 1-81, 29.

¹⁶⁶ Above, 13.

¹⁶⁷ Section 305(9).

¹⁶⁸ Gelter, M. (2021). Sustainability and corporate stakeholders. *Oxford Business Law Blog* blogs.law.ox.ac.uk/business-law-blog/blog/2021/07/sustainability-and-corporate-stakeholders, accessed 21 July 2024.

¹⁶⁹ Lazarus, R.J. (2000). Restoring what's environmental about environmental law in the Supreme Court. *University of California Law Review*, 47, 703-812, 746-47.

¹⁷⁰ Crowther, D. and Aras, G. (2008). *Corporate social responsibility*. David Crowther, Guler Aras & Ventus Publishing, 15; Light (above), 202.

¹⁷¹ Gelter (above).

enterprises and other such organisations are private entities, still, any environmental externalities caused by their operations are automatically of public interest,¹⁷² and therefore, the public ought to be concerned. Consequently, it is the public that would most be interested in the director's observance of that duty to have regard to environmental issues under Section 305(3). In spite of this, should the director be in breach of that duty to have regard, hypothetically, only the board of directors or general meeting or their members, can initiate proceedings to hold him accountable.

It is submitted that in view of the foregoing, the law here, in seeking to encourage directors to consider environmental interests, is inadequate. Curiously, even basic disclosure on the part of directors with respect to the company's general sustainability and environmental policy, is not a requirement under the law.¹⁷³ Thus, we have nothing concrete currently under the CAMA that will guarantee that directors will in fact consider the environmental impact of their company's operations. The duty clearly needs a practical angle to be more effective. In other words, there has to be some assurance built into corporate law, to guarantee that environmental concerns will be considered by the director in corporate decision making.

A careful analysis of Section 305(3) CAMA reveals a number of curiosities. In the first place, what could have been intended by to 'have regard', and therefore, how can it be demonstrated that a director has not had regard to environmental impact in order to charge him with breach? Literally, 'to have regard' means to be aware of something,¹⁷⁴ or to show attention or consideration towards something.¹⁷⁵ In other words, to give 'proper weight and consideration' to a matter. But the director's fiduciary duty under Section 305(3), is subjective, so that the law is requiring him to be judged by what *he* thinks is right, in the circumstances. Unless his/her bad faith can be proved, no breach of duty can be established. Of course, this would make the scope of the duty imprecise in determining whether or not it has been discharged. So, the question is, what exactly is the extent or degree of regard the director is to have and how does he demonstrate that he has had it?

¹⁷² McDonnell (above) 21.

¹⁷³ CAMA Fourth Schedule.

¹⁷⁴ The Free Dictionary <[idioms.thefreedictionary.com/have+regard+to+something](https://www.thefreedictionary.com/have+regard+to+something)> accessed 16 July 2024.

¹⁷⁵ Summers, D. (ed) (2005) *Longman dictionary of contemporary English*. Pearson Education Limited, 1380.

One way of tackling this could be by making sustainability reporting a standard practice for all companies, that is, requiring directors to include statements in their annual reports, demonstrating how they have embedded environmental sustainability principles in the company's operations, and if not, why they have not, in the manner of a business review as required currently under the UK Companies Act 2006, per the comply-or-explain principle of corporate governance. Even better is the apply-and-explain approach adopted by the Financial Reporting Council of Nigeria Code of Corporate Governance 2018, which also requires environmental considerations on the part of companies,¹⁷⁶ though applicable only to listed companies. This is regrettable, as it ought to be required for all companies, public or private, particularly for those within the extractive and chemical industries. For such companies involved in mining and exploration, environmental audit should be required of them from independent evaluers, certifying that they have been taking steps to mitigate the deleterious effects of their company's operations on the ecosystem. This report can be required to be submitted along with the directors' report in every financial year. In addition, it would be ideal for public companies in such industries to consider appointing a director with environmental skills and experience to the board, who will be able to fully appreciate the environmental risks involved and lead an appropriate risk management process.¹⁷⁷

The Petroleum Industry Act No. 6 of 2021 (PIA) and the Climate Change Act 2021 (CCA) also impose certain environmental obligations on private entities doing business, particularly those in the extractive industries. However, they are relatively new legislations and can only at best be described as aspirational, until they prove to be of any use in terms of implementation. Nevertheless, they constitute significant progress in addressing environmental concerns. Yet, they are inadequate by themselves, without bringing the law of the corporation into the plan. The PIA, with all its commendable environmental accommodation, is industry specific, whereas many of the environmental problems faced globally arise from the aggregation of thousands or even millions of small actions,¹⁷⁸ including by actors from non-extractive industries, such as food and beverage companies, for instance, which are no less important in the

¹⁷⁶ FRCN Code, Principles 1.16, 26, 26.1, 26.2.4, 26.2.8, 28.1 and 28.2(l).

¹⁷⁷ Clarke (above) 169; McDonnell (above) 78.

¹⁷⁸ Light (above) 147.

discussion, when the negative environmental impact of plastics is in question.¹⁷⁹ Hence the current heightened research on the development of biodegradable and more sustainable food packaging.¹⁸⁰ Thus, by building reforms within corporate law, the behaviour of companies can be changed at the decision level, so that detrimental actions are discouraged as much as possible, even where the company can afford to pay fines or compensation, because, as Light put it, ‘firm managers make decisions with profound environmental consequences long before pollution comes out of a pipe or smokestack as externality.’¹⁸¹ Any solutions, in order to be able to address the problem holistically, must therefore start from that corporate decision stage.

Conceding that Section 305(3) incorporated environmental responsibility in order to point the director’s mind to the corporation’s environmental obligations already supported by several other environmental and industry laws outside the purview of this paper, it is curious that the sub-section restricted the director’s concern to ‘the community where the company carries on its business operations’, considering environmental pollution is often borderless, sometimes even transnational. For instance, gas flaring in a particular community can cause acid rain in areas miles away from the exploration site. Water pollution can run downstream and affect a waterbody’s tributaries down the line. The plastic packaging used by food and beverage companies in the cities end up in the oceans far away, affecting marine and coastal ecosystems, harming wildlife, tainting water resources, contaminating soil, reducing the carbon sink capacity of the oceans, and even causing harm to human health.¹⁸² Thus, the law ought to simply require directors to consider the company’s operations on the environment,

¹⁷⁹ Laville, S. (2020, March 31) Report reveals “massive plastic pollution footprint” of drinks firms. *The Guardian*. [www.theguardian.com/environment/2020/mar/31/report-reveals-massive-plastic-pollution-footprint-of-drinks-firms#:~:text=The%20research%20found%20that%20emissions,contribution%20to%20the%20climate%20emergency](http://www.theguardian.com/environment/2020/mar/31/report-reveals-massive-plastic-pollution-footprint-of-drinks-firms#:~:text=The%20research%20found%20that%20emissions,contribution%20to%20the%20climate%20emergency,accessed%2003%20August%202024), accessed 03 August 2024.

¹⁸⁰ Andrade, M.S. et al. (2022). Development of sustainable food packaging material based on biodegradable polymer reinforced with cellulose nanocrystals. *Food Packaging and Shelf Life*, 31. www.sciencedirect.com/science/article/abs/pii/S2214289421001757, accessed 03 August 2024.

¹⁸¹ Light (above), 140-1

¹⁸² Phelan, A.A. et al. (2022). Plastic pollution and packaging: corporate commitments and actions from the food and beverage sector. *Journal of Cleaner Production*, 331. www.sciencedirect.com/science/article/abs/pii/S0959652621040014, accessed 03 August 2024.

without more. This will better alert companies to the far-reaching effects of their activities on the environment, particularly the global commons.¹⁸³

Curiously, under the old CAMA 1990, i.e. before the current amendment, directors were already entitled to take into account the impact of the company's operations on the environment, if they could make a business case for it, i.e., if doing so could promote the best interests of the company by preserving its assets, furthering its business and promoting the purposes for which it was formed.¹⁸⁴ Therefore, the new additional feature in Section 305(3) CAMA regarding the environment will seem to be a sort of safe harbour for directors,¹⁸⁵ by demanding this consideration even when not in the best interests of the company, where probably it might cost the company extra, if it were to consider environmental interests. However, this is when society requires that the company must consider environmental impact due to the high stakes. Environmental interests are often long-term in nature¹⁸⁶ which should justify management's long-term view of 'the best interests of the company'. Directors may thus eschew short-term profit for shareholders in order to promote other longer-term values, such as conservation or cutting carbon-emissions.

It must be reiterated that all the duties under Section 305 CAMA are enforceable only by the company itself. This implies either the directors themselves as a board or the shareholders as the general meeting. This is because, as earlier observed, corporate law has decided that only the acts of either of these two units, by themselves or persons or committees designated by them, constitute 'the company'.¹⁸⁷ This effectively means that the law as captured intends to use the internal organisation of the company to secure compliance with an external rule.¹⁸⁸ Consequently, public disclosure regarding the non-financial aspect of the company's processes, such as environmental impact, is necessary for the enforcement of the duty under Section 305(3) as such, so that stakeholders, including environmental activists and government agencies who will most

¹⁸³ Rose, J.F.P. (2021). How businesses can regenerate the global commons. *Stanford Social Innovation Review*, ssir.org/articles/entry/how_businesses_can_regenerate_the_global_commons#, accessed 16 July 2024.

¹⁸⁴ Section 279 CAMA 1990.

¹⁸⁵ Light (above) 162. Safe harbours are one of five primary means by which corporate and business law intersect with firms' environmental decision-making, including via mandates, incentives, disincentives, and prohibitions. See Light (above) 150.

¹⁸⁶ Lazarus (above).

¹⁸⁷ Section 87(1).

¹⁸⁸ Davies, P. (above), 324.

be interested in its observance, can pressurise those who comprise of the general meeting or the board of directors, to take necessary action. This is precisely why customers, employees, and other stakeholders are also major intended audiences of sustainability disclosure, apart from shareholders.¹⁸⁹ Even though there are those who argue that the impact of corporate disclosure in that sense is limited and often constitutes ‘greenwashing’,¹⁹⁰ which has no real penalties,¹⁹¹ its importance as a vital source of information can, nevertheless, not be denied. Without it, the public has no other source of information, no matter how inadequate, about the company’s environmental policies from the inside. In the event of litigation also, disclosures can allow for directors to be held accountable for the statements they make in their reports.

It has been said that the law governing the corporation can create mandates, incentives, safe harbors, disincentives, or prohibitions on environmentally positive firm behavior.¹⁹² In the case of the CAMA, however, Section 305(3) which could pass for a safe harbour, is inadequate as a mandate, which it ought to have been, so the rule must therefore, change, so that the director is properly guided under the law with the means of discharging that function.

On Disqualification of Directors

Apart from regulating directors’ activities, i.e. directing, one obvious regulation of directors that manifests in corporate law, is regulating the qualifications of the occupiers of that office, i.e., directors. From the late nineteenth and early twentieth century, corporate law regarded the relations between the membership of a company and its directors as essentially a private matter, so that any misbehaviour or failure to act were generally regarded by the law as internal problems for the corporation’s members, whom it was presumed, should bear the consequences of their poor choices

¹⁸⁹ McDonnell (above) 34.

¹⁹⁰ McDonnell, (above) 75. Corporate greenwashing, a term first used by an American environmentalist, Jay Westerveld, in 1986, refers to making fake, insincere, dubious, inflated or misleading environmental claims. See Amodu, N.A. (2020). *Corporate social responsibility and law in Africa: theories, issues and practices*. Routledge, 21. Or making of exaggerated, absurd or untrue claims to green credentials. See Morrow, K. and Cullen, H. Defragmenting transnational business responsibility: principles and process. In: Sjaafjell, B. and Richardson, B.J. (eds), *Company law and sustainability: legal barriers and opportunities*. Cambridge University Press, 43.

¹⁹¹ Bainbridge (above) 159.

¹⁹² Light (above) 146, 147, 150, 161.

in directors.¹⁹³ This is very much still the case. However, the law nonetheless plays a central role in setting minimum standards.

Employment to the office of director has statutory underpinnings.¹⁹⁴ The law is thus interested in the person or occupier of that office. Interestingly, however, the law does not say exactly who is qualified, nor does it specifically require some particular qualification to attain appointment, unlike the company secretary¹⁹⁵ or auditor,¹⁹⁶ for example. Back in 1911, Neville, J. famously observed, in the case of *Re Brazilian Rubber Plantation and Estates*,¹⁹⁷ that a director may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance, for 'he is not bound to bring any special qualifications to his office.'¹⁹⁸ Even now, a director is hardly required to know his statutory duties.¹⁹⁹ In spite of this, he is still held strictly to his obligations of discharging his duties within a reasonable standard of care, skill and diligence.

Neville's statement above was made more than a century ago and statute has since improved company law principles. For instance, statute allows companies to require share qualification in order to qualify for directorial positions,²⁰⁰ so that the directors, as well as being officers may well be shareholders involuntarily, to induce the directors to act diligently and prudently for the company's success, since their investment is now also at risk. Furthermore, corporate codes also generally encourage directors to be knowledgeable in business and financial matters.²⁰¹ Principle 13 of the

¹⁹³ Corbett, A. and Bottomley, S. (2003). Regulating corporate governance. In: Parker, C. et al. (eds). *Regulating law*, Oxford University Press, 66.

¹⁹⁴ See the cases of *Longe vs FBN Plc.* (2010) All FWLR 258; *Central Bank of Nigeria (CBN) vs Jidda* (2001) 7 WRN 24 at 27 CA;

and *Shell Pet. Dev. Co. (Nig.) Ltd. vs Lawson-Jack* (1998) 4 NWLR (Pt.545) 249 CA.

¹⁹⁵ Section 332.

¹⁹⁶ Section 403.

¹⁹⁷ (1911) 1 Ch. 425.

¹⁹⁸ Above.

¹⁹⁹ Adamu, H. (2015) above, 47.

²⁰⁰ Section 277. Interestingly, share qualification was required as far back as 1698, by the then Charter of the famed East India Company, where a minimum of £2,000 in shares was set as qualification for directorship. Harris, R. (2018). Trading with strangers: the corporate form in the move from municipal governance to overseas trade. In: Wells, H. (ed). *Research handbook on the history of corporate and company law*. Edward Elgar Publishing Limited, 99.

²⁰¹ For example, Principle 5.3.2 of the Central Bank of Nigeria Code of Corporate Governance Post Consolidation, 2006.

Financial Reporting Council of Nigeria Code of Corporate Governance 2018 (FRCN Code), recommends for directors to participate in periodic, relevant, continuing education programmes to update their knowledge and skills, to keep them informed of new developments in the company's business and operating environment.

Also, although the law may not have specified exactly the qualifications of a company director, it nevertheless disqualifies certain categories of persons, effectively describing who can occupy such an office, and therefore, his/her qualification. Accordingly, Section 283 provides that the following persons are disqualified from being directors:

- a) An infant, that is, a person under the age of eighteen years;
- b) A lunatic or person of unsound mind;
- c) A person suspended or removed under Section 288²⁰²
- d) A person disqualified under Sections 279,²⁰³ 280²⁰⁴ and 284,²⁰⁵
- e) A corporation other than its representative appointed to the board for a given term.²⁰⁶

In fact, the list above can substantially be justified by the general principles of law. Under Nigerian law, 18 is the age of maturity for many things.²⁰⁷ An infant qualified for director under early common law.²⁰⁸ But today, an infant, legally incapacitated for most transactions under the law, is clearly unsuited for the position of director which requires the holder of the office to “direct the mind and will” of an entity which itself has ‘all the powers of a natural person of full capacity’.²⁰⁹ Even for himself, the only contract binding

²⁰² That is, a director removed by ordinary resolution. This is a new addition to the CAMA 2020 review. But it is not yet clear, in the absence of judicial interpretation, whether this is a life-ban for the particular company from which the director was removed or every other company as well.

²⁰³ An insolvent person.

²⁰⁴ Upon conviction by a court, of an offence, such as fraud, or relating to the promotion, formation or management of a company.

²⁰⁵ A person required to vacate his office of director due to any of the circumstances listed under that section.

²⁰⁶ However, as absurd as it may sound, in some jurisdictions such as the UK, the director need not even be a natural person. Refer to Sections 155, 164 and 251(3) UK Companies Act 2006 (CA). See for instance *Re Paycheck Services 3 Ltd* (2010) UKSC 51, (2011) 1 BCLC 141.

²⁰⁷ For instance, Sections 29(4)(a), 35(1)(d), 36(4)(a), 77(2), 117(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended); Section 3 Kaduna State Child Welfare and Protection Law 2018.

²⁰⁸ Consider *Re Cardiff Savings Bank (Marquis of Bute's Case)*, (1892), Ch. 100, where the Marquis was appointed director at only six months old! In fact, present English law still accommodates a person younger than 16 years subject to some conditions. See Section 157(2) CA.

²⁰⁹ Section 43(1) CAMA.

upon an infant is that for necessities.²¹⁰ The same reason could likewise apply to the case of a lunatic.²¹¹ Directing the mind and will of the corporation would require sound judgement and a sufficient degree of mental health and wellbeing. In the interests of investors and the public, a person of unsound mind would hardly be ideal for such a position, considering he himself would require a guardian to take charge of his affairs, pending the termination of his lunacy.

The Bankruptcy Act 1979²¹² is replete with provisions disqualifying a bankrupt from engaging in certain transactions or occupying certain offices.²¹³ For instance, a bankrupt may not contest elections into some political offices,²¹⁴ or practise a regulated profession,²¹⁵ like law. Likewise, Section 279 criminalises the fact of an insolvent acting as director in any company pending his discharge, with grave consequences in the event of violation. Until he is discharged, a trustee in bankruptcy is appointed by the court to take charge of his financial affairs.²¹⁶ An insolvent person is certainly one of the least qualified to manage and direct the affairs of a business entity, having failed in his own affairs.

The prohibition of a corporation from occupying the office of company director comes as no surprise for it is perhaps absurd to even imagine that a “person” which itself has no mind and will of its own could be able to direct and manage the affairs of another such “person.” “Directing and managing” are clearly physical acts which cannot be carried out by an abstract entity, which is what the corporation essentially is. However, the law allows a company’s representative to be appointed to the board. Nevertheless, in the particulars of directors filed with the CAC, it is the representative’s name that appears and not the company he/she is representing. Interestingly, the UK now allows corporate directorship,²¹⁷ whereby a company can sit at the board of another company

²¹⁰ Section 18 Child’s Right Act 2003; Section 21 Kaduna State Child Welfare and Protection Law 2018.

²¹¹ Section 2 Sale of Goods Act 1893.

²¹² Cap B2, LFN, 2004.

²¹³ See generally Sections 126, 131, 132 Bankruptcy Act.

²¹⁴ Section 126 and 128 Bankruptcy Act.

²¹⁵ Section 126(1)(e) Bankruptcy Act.

²¹⁶ Sections 76-77 Bankruptcy Act.

²¹⁷ Sections 155, 164 and 251(3) CA. See also *Re Paycheck Services 3 Ltd* (2010) UKSC 51, (2011) 1 BCLC 141.

qua director,²¹⁸ although every company must still have at least one director who is a natural person.²¹⁹

Considering the circumstances of the enactment of early company law, such as the Bubble Act of 1720 in England, company law in fact originated partly to curtail fraud in business dealings. Many of the principles regarding the running of the corporation aim at reducing the incidence of trickery and encouraging fair dealings. It is thus clear from Section 280 that a person who already has a record involving fraud cannot have the backing of law for investors to entrust him with the running of a corporate entity. The section generally accommodates cases of conviction by a High Court, for any offences relating to the promotion, formation or management of a company, including those discovered at winding up. Against such persons shall lie an order of court precluding them from being involved in the management of a company in any way, whether directly or indirectly. A community reading of Section 280(1)(b)(ii) along with Section 20(1)(d) compels the conclusion that, apart from directorships, such persons may be disqualified from the promotion or formation of companies, as well. However, this disqualification is not indefinite, having been limited to 10 years, commencing from the date after the sentence for the offence in question has been served.²²⁰ In other words, grave as these offences appear to be, in the contemplation of the law, they are not so grave as to merit a life ban for directorships.

It is interesting to note that in some jurisdictions, such as the UK, this disqualification is further supported by the maintenance of a register of such disqualified persons who were convicted for any offence related to the formation or management of a company, for the information of the public.²²¹ Indeed, if companies are obligated by law to observe the disqualifications, the law must provide them with a repository of information to consult regarding persons who have been so disqualified. This is not the case in Nigeria. The country's market for corporate directors could certainly use that. Furthermore, although the director in question could be further liable should he act in contravention of a disqualification order,²²² there appears to be no

²¹⁸ Arguably, this makes it easier for holding companies to consolidate their hold on subsidiaries.

²¹⁹ Refer to Section 155 CA.

²²⁰ Section 280(1)(b)(ii) & 280(2).

²²¹ Section 18 Company Directors Disqualification Act 1986; <https://www.gov.uk/search-the-register-of-disqualified-company-directors>.

²²² Section 280(7).

sanction in respect of a company which appoints a director so disqualified. Perhaps this is just as well, since a register of disqualification is not available for companies to use.

In addition, there is the Banks and Other Financial Institutions Act No.5 2020 (BOFIA), an industry-specific legislation, which requires directors to be free of any criminal records regarding offences relating to fraud or dishonesty.²²³ In fact, Section 47 BOFIA provides that a senior manager, director or chief executive may not be appointed without the written approval of the Central Bank of Nigeria (CBN). This is so that the regulatory bank can scrutinize the proposed director's records in the industry. Actually, some industries are so regulated that professionals are required to be appointed to the board of companies running their type of business. This is true of the airline industry, for instance, regarding which regulation requires that at least one member of the board be an aviation professional.²²⁴

The disqualification criteria under Section 283(d) also includes persons who, for reasons listed under Section 284, have had to vacate the office of company director. Among the list are included persons who become insolvent, those with the type of convictions discussed above, as well as persons who become of unsound mind. Additionally, persons who lose their share qualification, where a company requires that as a precondition for appointment under Section 277, as well as persons who resign their appointments in writing, must also vacate office.

While the disqualifying criteria so far discussed have been a familiar feature of Nigerian company law, the inclusion of Section 283(c), 'a person suspended or removed under section 288', is a new rule in the CAMA 2020, which immediately raises legal questions. In the first place, although the said Section 288 clearly addresses removal of a director by the company by ordinary resolution, nothing indicates suspension of a director is also covered under that section or any other section under the law, for that matter, unlike the case with the secretary of a public company, for instance, under Section 333(2). Perhaps, discovering this inadvertence, the law makers hastened to amend the said Section 283(c) in a subsequent legislation, the Business Facilitation (Miscellaneous Provisions) Act No. 5 2022 (BFA), wherein Paragraph 15 of the Schedule to that law amends the provision to now read 'a person removed under section 288 of

²²³ Section 47(2)(d) BOFIA.

²²⁴ Paras. 18.2.2.2(A), 18.2.3.(A) and 18.2.6.2.(A) Nigeria Civil Aviation Regulations 2015.

this Act, where such removal was on the grounds of fraud, dishonesty or unethical conduct.’ Unhelpfully, this amendment still raises more questions than it answers. Nonetheless, the law now clearly forms the view that a person against whom an ordinary resolution was carried to be removed from such a position, is not qualified to return to one similar to it.

Certain issues arise from this novel provision of the law seeking to (dis)qualify directors. The disqualifications stated in Section 283 constitute public regulation. It is the state that determines the situations giving rise to the disqualifications therein. However, the removal of a director by a company through ordinary resolution constitutes private ordering. It is the only disqualification, apart from losing share qualification, that arises from private ordering. Effectively, therefore, the law has here relegated what ought to have been within the realm of public regulation to the background of private ordering, and one that concerns a fundamental right at that, that is, the right to form or join in forming companies.²²⁵ The Constitution guarantees to one the freedom of association,²²⁶ while Section 18 CAMA affirms the right to form companies to everyone, except the persons listed under Section 20(1), including a person so removed under Section 288. Could it really have been the intention of the law to trust private businessmen to be impartial judges in this case, as to be qualified to impose fundamental rights restrictions on a person for life?²²⁷ A fortiori, can shareholders be impartial judges in determining culpability for fraud, dishonesty or unethical conduct? It is submitted that they cannot, as they are not qualified to satisfactorily do so.

Besides, although the decisions of companies are democratically obtained,²²⁸ it is not entirely impossible for the majority to agree on a decision which is wrong. Therefore, private ordering ought not to be allowed with respect to disqualification of directors generally, except perhaps for the companies involved in particular. That is, a company should not be allowed to be able to disqualify a person from directorships generally, except with respect to that particular company. Any permanent disqualification, if at all, should be left to the judiciary, which is appropriately presided

²²⁵ Sections 18 and 20.

²²⁶ Section 40 Constitution of the Federal Republic of Nigeria 1999.

²²⁷ There is nothing in the tone of Section 283(c) to suggest the disqualification is temporary.

²²⁸ Section 258.

over by impartial persons trained in objectivity and sworn to oath, to be able to so disqualify a person or deny them a fundamental right, as in this case.

Furthermore, fraud constitutes a criminal offence which must thus be proven beyond reasonable doubt. When the general meeting considers the director's case, it thereby negates the principle of natural justice, *nemo judex in causa sua*, which requires that no man should decide on his case. The company is both judge and victim in this case. How then could it decide impartially with respect to the culpability of the director in question? Besides, Section 280 already disqualifies a person convicted for offences relating to the promotion, formation, or management of a company, for which the offences of fraud and dishonesty may qualify, only this time, a court conviction is required. Section 280(c) will therefore seem repetitive or redundant in relation. The only function it seems to perform is granting shareholders a power previously exercised by the courts.

In addition, considering the said Section 283(c) does not clearly restrict the disqualification to the particular company in question, what becomes of the director's other positions in other companies, if he happens to be a multiple director? This question is particularly apposite because the drafters have not considered the same disqualification for instances of vacation of office under Section 284. This compels the conclusion that, where a director removed is having several other directorships, he does not also need to give up other similar positions. However, further juxtaposition of this with Section 20(1), as well as Section 212(1)(e), which also disqualifies such a person from appointment as trustee of a debenture trust deed, will further put this conclusion to doubt.

It is also quite concerning, that while most of the other disqualifying criteria are potentially temporary—even for fraud conviction under Section 280(1)(b(ii)), for which the limit of disqualification is 10 years—the one for a director removed under Section 288 is not thus limited, applying indefinitely. There is, hence, a clear disproportionality between offence and penalty, in this case. Thus, the mere removal of a person from the office of director by ordinary resolution of the company could effectively cost him (1) present and future directorships, (2) the right to join or form a company and even (3) disqualify him from appointment as trustee of debenture trust deed. Legal standards must be attuned to the realities of corporate practice. The general meeting, made up of

investors, whose main concern is profit, rather than justice, is ill-equipped to decide the culpability of a director and brand him for life. There could be several reasons why a director is removed from office. Particularly in small companies, a director might be removed for selfish or fraudulent reasons best known to the majority of the members or directors who use their power of numbers to remove him. It could be the case that a director was justifiably against a decision of the majority who now remove him by ordinary resolution under Section 288. This should not then disqualify him from ever holding a similar position in that or another company. Clearly, this could not have been the intention of the drafters of the law, but might have escaped their contemplation. The law, on this note, therefore, certainly needs to change.

And although complying with Section 283 is clearly mandatory, there are no clear sanctions for when the company or the director, knowing of his disqualification, accepts office. In other words, while companies are obliged or under a duty to ensure that directors they appoint are not caught up by the disqualifications, the law does not provide for penalties for when they flout that rule. This underscores the need for a register of disqualification to aid companies in compliance, particularly with respect to convicted persons.

Conclusion

Companies are important, and perhaps, those empowered to control them, even more so. The legal principles regarding the office of company director were developed early on with the invention of the corporation. But these have seen changes over time, commensurate with the expectation of modern society and business sophistication. The new rules on directors under the CAMA have so far been subject to very little academic scrutiny, the legislation being relatively new. Nonetheless, the discussions in this paper compel the conclusion that the new fiduciary duty of the director for environmental considerations potentially allows him to easily escape liability for the company's environmental pollution occurring away from the company's area of operations, and further lacks a practical edge. The law does not demonstrate exactly how the director is to discharge the duty therein, and how stakeholders may monitor him in the discharge of it. It is therefore recommended that the restriction of the application of the rule to the company's immediate area of operations be removed, and directors be further

required to make mandatory disclosures with respect to discharging their duty on environmental sustainability.

With respect to the disqualification of the director on the basis of his removal by a company, the law should be amended to clearly limit that disqualification to 10 years, and further restrict it to the particular company which removed him, and likewise exclude him from disqualification from joining or forming a company in the future. The law must also provide for the maintenance of a register of disqualification of directors, to aid companies in compliance. As company law continues to determine and control the occupier of this office, obtaining the kind of positive change required will warrant changing the rules with regards to them.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LEGAL CHALLENGES AND FRAMEWORKS AGAINST INFORMAL ECONOMY
WORKERS IN NIGERIA: A PATH TO PROGRESS

^{1*}Lawal Gambo Saulawa, ²Masoud Saidu Garba, ³Danjuma Abdullahi

¹Department of Business Administration, Faculty of Management Sciences, Ahmadu Bello University, Zaria

²Department of Marketing, Faculty of Management Sciences, Ahmadu Bello University, Zaria

³Department of Local Government Administration and Development Studies, Faculty of Administration, Ahmadu Bello University, Zaria

*lgsaulawa@gmail.com +2348033894079, garbamasoudi234@yahoo.com
+2348065638025, dancolgis@gmail.com +2348050983935

Abstract

The informal economy in Nigeria, comprises of 92.9% of the workforce (NBS, 2022), operates outside formal legal protections, exposing workers to exploitation, exclusion from social security, and systemic marginalization. Despite its contribution of 65% to Nigeria's GDP (World Bank, 2023), the sector remains underserved by existing policies such as the Labour Act (1971), Pension Reform Act (2014), and National Health Insurance Authority Act (2022). This paper employs a systematic review of 49 sources (2000–2024) to analyze the legal and institutional barriers facing informal workers, drawing on Chen's (2012) theory of "informality as exclusion" and De Soto's (2000) "extra legality" framework. Findings reveal three critical gaps being: regulatory exclusion (only 2% of informal businesses are registered, per SMEDAN, 2021); social protection deficits (less than 1% enrollment in micro-pensions), and policy fragmentation between federal and state governments. The paper concludes that integrating the informal economy into Nigeria's legal framework is not only a poverty-alleviation imperative but also a catalyst for equitable growth. The paper further recommends a tripartite reform agenda: amending labour laws to recognize informal work relationships; creating a unified social protection fund; and establishing intergovernmental task forces.

Keywords: Legal framework, informal economy, informal economy workers, legal challenges.

Introduction

The informal economy is a very significant part of Nigeria's economic space. It refers to economic activities that take place outside formal regulatory frameworks and legal domain of the economy of a country. It can also be seen as all business activities undertaken by persons or commercial ventures that are – in law or in practice – not covered by conventional arrangements as established by regulations and laws (UNDP, 2024). The parties in it includes unregistered businesses and workers who often do not receive formal contracts of employment or benefits. This sector is mostly characterised by low wages, limited job security, and a lack of access to social protections in less developed countries (Bizimana and Arzoumanian, 2023). Informal economy activities are crucial for economic livelihoods but are typically not captured in official records of the land.

Informal economy provides sustenance for a large number of Nigerian population, (StreetNet International. 2021). This can be discerned from the estimated membership of 92.9 percent of workers who earn their living in the informal sector of the economy in Nigeria, Sesan, (2022). It has often been associated with poverty, as noted by Olubiyi, (2022). Accordingly, poverty is one of the reasons for prevalence of Nigeria's mass population engaging in informal economic activities. Besides, going by its labour intensity, the poverty-stricken populace which has 4 in 10 Nigerians living below the national poverty line (World Bank Group, 2022), justifies the reasons of the poor and vulnerable, engaging in informal economy activities.

The informal economic activities covered by informal economy workers include a wide range of commercial engagements, such as street vending, small-scale manufacturing, agricultural pursuits, and artisanal crafts. Data from the National Bureau of Statistics (NBS), (2016), highlights the significant role of the informal sector in the nation's economy, contributing a substantial portion to Nigeria's Gross Domestic Product (GDP) and providing employment to highly significant number of the total workforce. However, despite its critical economic role, the informal economy workers function mostly outside established regulatory frameworks. This lack of formal oversight exposes workers in this sector to numerous vulnerabilities, including inadequate social

protections, precarious working conditions, and limited access to financial and legal support.

The study will seek to address the following research questions: how do existing legal frameworks exclude informal workers? What are the socio-economic costs of this exclusion? What policy reforms can bridge these gaps?

The main objective of this paper is to offer an in-depth analysis of the legal challenges faced by workers in Nigeria's informal economy. Specifically, the study will focus on the following objectives: to find out the existing legal frameworks that exclude informal workers; to explain the socio-economic costs of this exclusion; and to propose the policy reforms that can bridge these gaps.

The methodology adopted for this paper is a Preferred Reporting Items for Systematic Reviews and Meta-Analyses (PRISMA) in which a guided systematic review was conducted, analysing a combination of different sources and articles, government reports, and international datasets (2000–2024). This is in order to provide an overview of the existing literature and identify trends, patterns, and gaps from the findings of multiple primary sources to create coherent and consistent arguments that relate to legal challenges affecting the informal economy workers in Nigeria.

Theoretical Underpinnings

The first theoretical explanation is from De Soto's (2000), seminal work titled: 'The Mystery of Capital' which posits that informality arises as a pragmatic adaptation to excessive regulatory burdens and exclusionary legal systems. He argues that informal workers and entrepreneurs operate outside formal frameworks not due to a lack of initiative, but because bureaucratic barriers—such as costly registration processes, complex tax codes, and rigid labor laws—make compliance impractical. In Nigeria, this theory is evident in the reluctance of street vendors and artisanal workers to formalize their businesses, as the costs of registration and licensing often outweigh the perceived benefits (SMEDAN, 2021). De Soto's perspective underscores the need for legal reforms that reduce entry barriers, thereby incentivizing informal actors to integrate into the formal economy.

Secondly, Martha Chen's framework conceptualizes informality not merely as a choice but as systemic exclusion from legal and economic protections. Her "informality as exclusion" thesis highlights how marginalized groups—such as women, migrants, and low-skilled workers—are often denied access to labor rights, social security, and financial services due to discriminatory policies or institutional neglect. In Nigeria, this exclusion is exemplified by the Labour Act (1971), which explicitly omits informal workers from minimum wage and safety protections, perpetuating cycles of vulnerability (Akinwale, 2014). Chen's work calls for inclusive policies that recognize informal labor as legitimate work, ensuring equitable access to legal and economic resources.

Finally, Exclusion from social protections from the World Bank's report on global informality emphasizes the dire consequences of excluding informal workers from social protection systems (World Bank, 2023). Without access to health insurance, pensions, or unemployment benefits, informal workers in Nigeria face heightened risks of poverty, illness, and precarity—particularly during economic shocks like the COVID-19 pandemic. For instance, Nigeria's National Health Insurance Authority Act (2022) fails to address the irregular income streams of informal workers, leaving 95% without coverage (PLAC, 2022). This exclusion not only undermines human dignity but also stifles economic productivity, as workers remain trapped in survivalist activities rather than pursuing growth-oriented opportunities. The World Bank's analysis advocates for adaptive social protection models, such as contributory schemes with flexible payment options, to bridge this gap.

The Legal Challenges

Absence of Legal Recognition: The absence of legal recognition poses a significant challenge for workers in the informal economy, (Von Broembsen, and Chen, 2016). Many of these workers, including domestic workers, homeworkers, and street vendors, operate outside the scope of labour laws and lack basic legal protections and rights (ILO, n.d.). Issues that pertain to this lack of legal recognition according to Von Broembsen, and Chen, (2016) relate to the fact that informal wage workers often fall outside the scope of legislation regulating employment relationships, depriving them of basic rights, social protection, and workplace representation.

Routh, (2022) advocates that informal workers operate under a variety of informal rules, but the legitimacy of these informal rules is often questionable, as they are influenced by power dynamics within their communities. Similarly, the diverse nature of the informal economy complicates the provision of uniform legal responses, as informal workers' situations can range widely, from working for large companies to being child labourers, (ILO, n.d.). From these legal hurdles, informal workers are bound to encounter obstacles in exercising their right to freedom of association and collective bargaining, as they are not legally recognised as workers in many countries.

Inadequate Labour Protection: This is yet one other significant challenge faced by workers in the informal economy of Nigeria. Akinwale, (2014), asserts that informal wage workers are often not covered by legislation regulating employment relations, denying them basic rights, social protection, and workplace representation, so by extension, according to Tamunomiebi and Ukachukwu, (2018), they naturally face obstacles in exercising their right to freedom of association and collective bargaining, as they are not legally accepted as workers in many cases. Informal economy anywhere in the world is heterogeneous in nature (Dasgupta and Lloyd-Jones, 2018) as such its heterogeneity makes it difficult to offer uniform legal responses, as its workers may be in vastly different situations of work.

Regulatory Administrative Barriers: The lack of legal recognition and regulatory barriers pose significant challenge to informal economic activities in Nigeria. Informal sector businesses often operate largely without regulatory oversight, leading to issues such as poor product quality, unfair labour practices, and environmental concerns, (ACIOE, 2023). Bello, (2017), reports that informal workers are typically not covered by legislation regulating employment relations, arising out of some administrative bottlenecks which often also result in denying them basic rights, social protection, and workplace representation.

One other issue that might seem an advantage to the informal economy workers on the surface but might turn out to be a disadvantage and may even escalate to court case against the informal economy workers, is their nullity from tax collection. Their absence from regulatory authority's record, as a result of their unregistered status, make them often escape tax net that translates in revenue losses for the government, (Akinwale,

2014). This, if discovered by the government could lead to their prosecution. To some extent, there is the tendency in Nigeria to equate the informal sector with criminality, which may have prevented the development of serious policies to support and integrate the informal economy. Conversely, according to Bello, (2017), formal trade unions and producers in the formal sector may view the informal sector as a threat due to its "flexibility of production, low labour and production costs, and bureaucratic freedom".

Lack of Legal Representation and Advocacy: The lack of legal representation and advocacy is a significant challenge faced by informal economy workers in Nigeria. Need for advocacy and collective representation seem to elude informal economy workers. According to Akinwale, (2014), workers in this sector in Nigeria often lack the power to make decisions or advance their interests, due to the unequal power dynamics in the informal economy. Informal wage workers are often not covered by legislation as such in majority of cases lack advocacy. In majority of situations, they face obstacles in exercising their right to freedom of association and collective bargaining.

Membership-based organisations of informal workers are rarely represented in tripartite negotiations and consultations on issues affecting them, (Von Broembsen, and Chen, 2016) and where they are represented it does not bear any results. Informal workers lack access to institutions and adjudication fora such as labour courts, small claims courts, and ombudsmen to address issues like contract enforcement and labour rights violations, (Akinwale, 2014). The heterogeneity of the informal economy makes it difficult to offer uniform legal solutions for them, as they may be in vastly different situations because of their inherent heterogeneity (Dasgupta and Lloyd-Jones, 2018). Informal workers are often excluded from decision-making processes, have lower levels of education, less income and access to social services, and smaller support networks compared to formal economy workers (Osiki, 2022).

Less Participation in Social Insurance and Protection Programmes: There are some barriers to expanding social insurance programmes for informal workers in Nigeria. There is lack of political will to extend social insurance to informal workers, who constitute 92.9% of the labour force, (Sesan, 2022). The 2017 National Social Protection Policy does not explicitly address the needs of the informal economy workers as reported by FIWON, (2021). Existing social security frameworks like the National Health

Insurance Scheme, Workmen Compensation Act, and Micro Pension Plan practically exclude informal workers, as the policies are focused on the formal sector, (Falaiye, 2023). Informal economy workers have low contributory capacity and erratic income streams, making it challenging to generate public revenues to finance their social protection, Ulrich, (2016), especially from their exclusion in the mentioned schemes above.

Generally, the workers of informal economy in Nigeria often lack awareness of their labour rights and available social protection schemes, especially those who are more vulnerable like domestic workers or migrants and community-based insurance schemes have had limited uptake and financial sustainability, as they cannot bear the full burden of providing effective coverage.

Failure of Integrating Informal Economy Workers in the Current Policies, Acts, Statutes and Frameworks

A number of Acts, Statutes and other Legal Frameworks were provided for workers in Nigeria. The question on the lips of advocates of informal workers in Nigeria is: are these Acts, Statutes etc. open to informal workers? Let us examine some of these Acts, Statutes, Policies etc. and see their impact on the informal economy and its workers.

Nigeria Labour Act: Majority of Nigerian workers precisely, 92.9 percent are in the informal economy, (Sesan, 2022) which are excluded from the coverage of the labour Act. This means the Labour Act does not provide legal protections and rights to the vast majority of workers in the informal economy. The lack of coverage under the Labour Act leaves informal workers unprotected by labour law, as the existing legal frameworks favoured more the formal sector workers. Informal workers have to contend with exploitation through long hours, low pay, lack of benefits, and unsafe working conditions that are not adequately addressed by any labour laws. This leaves informal workers in Nigeria vulnerable to exploitation since they do not have the legal recourse available to formal sector workers.

National Health Insurance Authority: The previous NHIS Act did not explicitly make health insurance coverage mandatory for informal workers. The Act focused more on covering formal sector employees. The new National Health Insurance Authority Act,

(NHIA Act), (2022) addresses some of the needs of informal economy workers in Nigeria, but there are still some challenges towards fully extending health insurance coverage to this category of workers. From the Federal Government of Nigeria, (2022) gazette, the new NHIA Act authorises every person living in Nigeria, including informal economy workers, to access health insurance. The target is to widen coverage to reach the informal economy workers.

The Act establishes a Vulnerable Group Fund to subsidize health care for vulnerable groups including the indigent, which may benefit some 'organised' informal workers. It also requires the National Health Insurance Authority to work with state health insurance schemes to ensure access to quality health care that meets national standards, (PLAC, 2022).

Again, the question is how feasible and practicable could these heterogeneous workers be incorporated in NHIA schemes? Aregbesola and Khan, (2022) establish that despite the mandate given to NHIA, enrollment of informal economy workers (will) remain low due to barriers like lack of awareness, affordability, and accessibility of health insurance schemes. The heterogeneity of the informal sector as reiterated by Dasgupta and Lloyd-Jones, (2018) makes it difficult to design uniform health insurance solutions (Ipininimo, 2022), that cater for their diverse needs and contexts. Similarly, as further outlined by Ipininimo, enforcement of the mandatory enrollment provision for informal workers may be challenging without addressing supply-side constraints like shortage of healthcare workers and poor healthcare infrastructure. In all, the Act does not specifically address the heterogeneity and lack of legal recognition and representation of informal workers, which limits the authority's (NHIA) ability to advocate for the informal economy workers health insurance needs.

Pension Reform Act (PRA) 2014: The Pension Reform Act (PRA) 2014 in Nigeria has made efforts to address the needs of workers in the informal economy, yet significant obstacles persist in providing pension coverage to this group. The PRA 2014, broadened the scope of the Contributory Pension Scheme (CPS) to include the self-employed and

individuals working in organisations with fewer than three employees (National Pencom Commission, 2014).

To specifically address the needs of informal workers, the National Pension Commission (PenCom) launched the Micro Pension Plan (MPP) in 2019. This plan enables self-employed individuals and those employed in the informal sector to join the Contributory Pension Scheme (CPS), (The Cable. 2023). Under the MPP, eligible participants can contribute flexibly on a daily, weekly, or monthly basis according to their cash flow. Pension Fund Administrators (PFAs) are required to invest these contributions in safe assets to ensure consistent growth.

Despite these measures, pension coverage among informal workers remains extremely low. By September 2023, only 105,455 participants had enrolled in the MPP, with total contributions amounting to N529.32 million, (Premium Times, 2023). This is grossly an insignificant number, in spite of the fact that 92.9 percent, (Sesan, 2022), of the total workforce in Nigeria falls within the informal economy. This means that the government's efforts to encourage retirement savings among informal sector workers have faced challenges, as many of these workers struggle to earn enough for daily survival, talk less of making saving for the future. This is largely because those who could remit their contribution to MPP, are absent in government records thus, making it difficult for the authorities to track, locate and insist on the remittance of their contributions to the scheme. Further problems that prevent increased MPP adoption by the informal economy workers include a lack of awareness, affordability issues, limited access to financial services, the challenge of building trust, and a lack of understanding of the pension system (thisdaylive, 2023).

Micro, Small and Medium Enterprises (MSME) Policy: The 2021-2025 National Policy on Micro, Small and Medium Enterprises (MSMEs) in Nigeria strives to enhance the development of a strong and spirited MSME sub-sector as a key motivator of economic growth and employment, (Omonona, Amadi and Liverpool-Tasie, 2023). In spite of this effort, the policy has had constricted result on informal economy businesses in Nigeria.

Firstly, according to Omonona, Amadi and Liverpool-Tasie, the central strategy of the policy is to encourage MSMEs to formalise their operations to access government

incentives. However, many informal businesses are hesitant to formalise because of the perceived costs and bureaucratic hurdles, (Mohammed, et al, 2022) coupled with the fact that many of them prefer to operate outside government watch to avoid tax payment and some other reasons. Without increased incentives and support for formalisation, these informal businesses continue to miss out on the policy's benefits.

Secondly, while the policy aims to enhance access to finance for MSMEs, it does not adequately address other crucial areas such as capacity building, business regulation, and infrastructure provision, (Abada and Okorie, 2016). Research, as stated by Mohammed, et al, (2022) indicates that issues like inadequate infrastructure, unstructured marketing strategies, and a lack of essential skills also hinder MSME growth. Without a more comprehensive implementation approach, the policy's effectiveness remains constrained.

Thirdly, even though, the policy intends to foster dialogue and collaboration between the federal government, state/local governments, and other stakeholders, (Omonona, Amadi and Liverpool-Tasie, 2023), but in practice, there is often a disconnect between federal MSME policies and their implementation at the state level, (Abada and Okorie, 2016). This fragmented approach diminishes the policy's effectiveness in supporting informal businesses nationwide as noted by Omonona, Amadi and Liverpool-Tasie, (2023), Mohammed, et al, (2022) and Abada and Okorie, (2016).

Path to Progress

Improve Legal Protection and Social Security for Informal Workers

The government should undertake a comprehensive amendment of labour laws to ensure the proper regulation of employment relations within the informal economy, (Akinwale, 2014). This includes setting and enforcing minimum standards for various aspects of employment, such as wages, working hours, health and safety, and social security coverage. By establishing these baseline requirements, the government can protect the rights and welfare of informal workers, who often face exploitative conditions without legal recourse. Furthermore, the creation of robust enforcement mechanisms is crucial to ensuring that these standards are not only implemented but also adhered to by employers. Effective enforcement will help deter violations and

promote fair working conditions. This approach will not only improve the livelihoods of informal workers but also contribute to a more equitable and just labour market, fostering economic stability and social cohesion.

Give Incentive and Support Formalisation

Policies should prioritise reducing the costs and bureaucratic hurdles associated with business registration, simplifying licensing requirements, and providing tax incentives to encourage informal businesses to formalise. Simplified and more affordable registration processes will make it easier for informal businesses to become formal entities, thereby reducing the perceived burden of formalisation (UNDP, 2021). Additionally, offering tax incentives can serve as a significant motivator, providing immediate financial benefits that make formalisation more attractive.

Formalisation should also be promoted as a gateway to numerous advantages, such as access to credit, advanced technology, and commercial markets. By formalising, businesses can gain eligibility for loans and financial support from banks and other financial institutions, which is often unavailable to informal entities. Access to technology can enhance productivity and innovation, enabling businesses to scale up operations and compete more effectively (Chen, 2012). Furthermore, integration into commercial markets opens up new opportunities for growth and expansion, as formal businesses are more likely to be trusted by larger enterprises and customers.

When trying to look into these barriers and highlighting the benefits, the government can create a more conducive environment for informal businesses to transition to the formal economy. This, in turn, will lead to a more structured and robust economic landscape, where businesses can thrive, contribute to the economy, and improve their overall sustainability and success. (Bello, 2017)

Strengthen Coordination between Federal and State Governments

Greater synergy between federal and state governments is essential to ensure the consistent implementation of legal and regulatory reforms targeting the informal sector. Effective coordination between these levels of government can bridge the gap that often exists in policy execution, leading to more coherent and comprehensive support for

informal enterprises. Establishing formal coordination mechanisms, such as intergovernmental committees or task forces, can facilitate regular communication and cooperation, ensuring that both federal and state policies are aligned and mutually reinforcing (Meagre, 2016).

Such mechanisms would allow for the sharing of best practices, resources, and data, enabling a more unified approach to tackling the challenges faced by informal businesses. For instance, federal initiatives can be complemented by state-level adaptations that consider local contexts and specific needs, thereby enhancing the relevance and effectiveness of reforms. Additionally, joint efforts in areas such as capacity building, infrastructure development, and access to financial services can create a more supportive environment for informal businesses to thrive (Roever & Skinner, 2016).

Improved relationship can also help in monitoring and evaluating the impact of reforms, ensuring that policies are adjusted and refined based on real-world outcomes. By working together, federal and state governments can create a more predictable and stable regulatory landscape, fostering trust and encouraging informal businesses to transition to the formal economy. Ultimately, a coordinated and cohesive strategy will lead to better outcomes for informal enterprises, contributing to economic growth and social development across the country (Meagre, 2016).

Engage with Informal Sector Associations and Unions

The government should actively engage with informal sector associations and emerging unions, such as the Federation of Informal Workers of Nigeria (FIWON), to gain a deeper understanding of the challenges faced by workers and collaboratively develop suitable legal and policy solutions. By involving these organisations in the policy making process, the government can ensure that the perspectives and needs of informal workers are accurately represented and addressed. These groups, being directly connected to the informal economy, possess valuable insights and firsthand knowledge about the specific issues and obstacles that their members encounter daily (Osei-Boateng & Ampratwum, 2011).

Engagement with these informal economy workers and their associations and unions can take various forms, including regular consultations, participatory workshops, and the establishment of advisory committees that include representatives from these groups. Such interactions would facilitate a two-way dialogue where informal workers can voice their concerns and propose practical solutions, while the government can provide updates on policy developments and gather feedback (Chen, et al, 2002).

Incorporating the input of informal sector workers into the design and implementation of reforms can lead to more effective and inclusive policies. For example, tailored social security schemes, worker protection laws, and business support programmes can be developed that truly reflect the realities and needs of the informal workforce. This participatory approach not only enhances the relevance and impact of the policies but also fosters a sense of ownership and trust among informal workers, increasing their willingness to comply with new regulations and participate in formalisation efforts (Chen, et al, 2002).

Ultimately, giving informal sector associations and unions a significant role in the policy making process is crucial for creating comprehensive and sustainable reforms. Their involvement in policy issues will help build a more equitable and supportive environment for informal workers, contributing to their social and economic empowerment and the overall development of the informal economy.

Summary

In summary, while informal enterprises play a vital role in Nigeria's economy, their workers face significant legal challenges around lack of protection, barriers to formalisation, and policy fragmentation. Addressing these issues through improved labour laws, incentives for formalisation, better coordination between federal and state governments, and engagement with informal sector organisations can help create a more enabling legal environment for informal economy workers to thrive. Sustained political will and a commitment to inclusive development will be critical to driving progress in this area.

Conclusion

Addressing the challenges and refining the legal frameworks for organized informal economy workers in Nigeria is critical for fostering economic growth and social stability. Therefore, a comprehensive and cooperative approach is necessary to overcome the challenges faced by the informal economy workers in Nigeria. By implementing targeted legal and policy reforms and fostering active engagement with stakeholders, the government can create a more supportive and equitable environment for informal economy workers, paving the way for their social and economic empowerment and contributing to the nation's overall development.

Recommendations

Governments at local, state and federal should further strengthen the existing legal frameworks to expressly include organised informal economy workers and ascertain their rights and protections.

On lack of recognition, there is a need for legal frameworks to fully recognise informal workers, provide them with basic rights and social protection, and enable their collective representation.

Regulatory barriers can be tackled by the government providing a conducive policy and legal environment that lowers the cost of establishing and registering a business, simplifies the registration and licensing process, and offers a reasonable and fair tax regime.

Social security can be overwhelmed by integrating the informal sector into the broader economic development strategy, harnessing its potential for job creation, income generation, and meeting the needs of poor consumers .

On current Labour Act; there is an urgent need for progressive workplace policies and labour law reforms to ensure decent work and adequate protection for workers in the Nigerian informal economy. Reforming labour laws to be more inclusive of the informal economy is a key challenge.

To plow lack of advocacy and representation, there is a need for legal frameworks that recognise informal workers, provide them with basic rights and social protection, and enable their collective representation through genuine participation and dialogue. Membership-based organisations of informal workers should be empowered to advocate for their rights and interests.

NHIA: While the NHIA Act takes important steps to extend health insurance to informal workers, significant barriers remain in terms of awareness, affordability, accessibility, and representation that need to be addressed to achieve meaningful coverage for this population. Sustained efforts and targeted interventions are required to make health insurance responsive to the needs of informal economy workers in Nigeria.

Pension Reform Act 2014: While the PRA 2014 and MPP represent important steps, significantly more needs to be done to make pensions accessible and affordable for the millions of Nigerians working in the informal economy. Sustained efforts are required to raise awareness, provide incentives, leverage technology, and address the economic challenges faced by informal workers to achieve meaningful pension coverage in this sector.

On MSME, while the 2021-2025 MSME policy has positive intentions, its impact on informal businesses has been constrained by insufficient formalisation incentives, imbalanced implementation favouring finance over other critical areas, and lack of policy coordination between federal and state governments. Taking care of these shortcomings is key to leveraging the policy to support the growth of informal enterprises in Nigeria.

References

- Abada, I. M., & Okorie, A. (2016). National policy on micro, small and medium enterprises and the manufacturing sector in Nigeria, 2007-2016. *South East Journal of Political Science*, 2(2), 273-300.
- Akinwale, A. A. (2014). Precarious working conditions and exploitation of workers in the Nigerian informal economy. *Social Science Diliman*, 10(1), 117-146.
- ACIOE. (2023). The informal economy in Nigeria: Fostering growth amidst economic changes. Retrieved from <https://acioe.com/the-informal-economy-in-nigeria-fostering-growth-amidst-economic-changes/>
- Amoo, B. A. G., Adenekan, A. T., & Nagodo, H. U. (2017). National Health Insurance Scheme (NHIS) implementation in Nigeria: Issues, challenges and way forward. *CBN Bullion*, 41(1), 15-33.
- Andrae, G., & Beckman, B. (2013). Lagos Tailors, Trade Unions, and organisations in the Informal Economy. *African Studies Review*, 56(3), 191-208.
- Aregbesola, B., & Khan, S. M. (2023). Barriers to enrollment into National Health Insurance Scheme among informal sector workers in Nigeria. *World Medical & Health Policy*, 15(1), 36-52. <https://doi.org/10.1002/wmh3.542>
- Ayanfeoluwa, O. O. (2015, July 9-12). Non-standard work in the Nigerian informal economy. Paper presented at The European Business Management Conference.
- Bank of Industry. (2022). Economic development through the Nigerian informal sector: A BOI perspective. *Bank of Industry*. <https://www.boi.ng/economic-development-through-the-nigerian-informal-sector-a-boi-perspective/>
- Bello, O. (2017). Integrating the informal 'outsiders' in Nigeria. *Good Governance Africa*. [https://www.gga.org/integrating-the-informal-outsiders-in-nigeria/\[1\]](https://www.gga.org/integrating-the-informal-outsiders-in-nigeria/[1])
- Bizimana, O., & Arzoumanian, S. (2023). *Informality, labor market dynamics, and business cycles in North Africa* (IMF Working Paper No. 2023/182). International Monetary Fund. <https://www.elibrary.imf.org/view/journals/001/2023/182/article-A001-en.xml>
- Bright Africa. (n.d.). Pension coverage and Africa's informal economy. <https://brightrafrica.riscura.com/pension-industry/pension-coverage-and-africas-informal-economy/>
- Chen, M. A. (2012). The informal economy: Definitions, theories and policies. *WIEGO Working Paper No. 1. Women in Informal Employment: Globalizing and Organizing* (WIEGO). https://www.wiego.org/sites/default/files/publications/files/Chen_WIEGO_WP1.pdf

Chen, M. A., Jhabvala, R. and Lund, F. (2002). *Supporting Workers in the Informal Economy: A Policy Framework*. Retrieved from <https://www.ilo.org/media/307501/download>

Dasgupta, N., & Lloyd-Jones, T. (2018). Heterogeneity and vulnerability in the urban informal economy. *World Development Perspectives*, 10–12, 64–72. <https://doi.org/10.1016/j.wdp.2018.09.008>

De Soto, H. (2000). *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York, NY: Basic Books.

Falaiye, H. (2023, March 7). Informal sector workers demand social protection. Punch. <https://punchng.com/informal-sector-workers-demand-social-protection/>

Federal Republic of Nigeria. (2022, May 24). National Health Insurance Authority Act, 2022. *Official Gazette*, 109(95). <https://gazettes.africa/gazettes/ng/2022>

Hu, Y., & Stewart, F. (2009). *Pension coverage and informal sector workers: International experiences* (OECD Working Papers on Insurance and Private Pensions No. 31). OECD Publishing. <https://doi.org/10.1787/227432837078>

ILO. (2002). *Unprotected labour: What role for the unions in informal economy*. Retrieved from <http://ilo.org>

ILO. (2018). *Women and men in the informal economy: A statistical picture* (3rd ed.). International Labour Office. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_626831.pdf

ILO. (2021). *Extending social security to workers in the informal economy: Lessons from international experience*. Retrieved from https://www.ilo.org/global/publications/books/WCMS_749479/lang--en/index.htm

ILO. (n.d.). The Regulatory Framework and the Informal Economy: International Labour Standards (ILS): Bringing the Unprotected Under the Law. Retrieved June 29, 2024, from <https://www.ilo.org/media/458091/download>

Ipinnimo, T. M., Durowade, K. A., Afolayan, C. A., Ajayi, P. O., & Akande, T. M. (2022). The Nigeria national health insurance authority act and its implications towards achieving universal health coverage. *Nigerian Postgraduate Medical Journal*, 29, 281–287. https://doi.org/10.4103/npmj.npmj_73_22

Labour Act, (1971). Laws of the Federation of Nigeria, Cap. L1 LFN 2004 (Revised 1990 ed.).

Meagher, K. (2013). Unlocking the informal economy: A literature review on linkages between formal and informal economies in developing countries (WIEGO Working

Paper No. 27). <https://www.wiego.org/sites/default/files/publications/files/Meagher-Unlocking-Potential-Informal-Economy-WIEGO-WP27.pdf>

Mohammed, S. D., Hashim, A. A., Sulaiman, B. A., Adam, A. D., & Usman, M. H. (2022). Micro, small and medium enterprises in Nigeria: Trend analyses of growth, contributions and challenges using SMEDAN and NBS survey reports. *Baze University Journal of Entrepreneurship and Interdisciplinary Studies (BUJEIS)*, 1(1). <https://journal.bazeuniversity.edu.ng/index.php/bujeis/article/view/181>

National Bureau of Statistics. (2016). Annual abstract of statistics 2016 volume 1. National Bureau of Statistics, Nigeria.

National Health Insurance Scheme Act, Cap N42, Laws of the Federation of Nigeria, 2004

National Pension Commission. (2014). The Pension Reform Act: Micro pension plan. <https://www.pencom.gov.ng/micro-pension/>

OECD/ILO. (2019). Risks and vulnerabilities in the informal economy. In Tackling vulnerability in the informal economy. OECD Publishing. <https://doi.org/10.1787/2cfd8904-en>

Olubiyi, T. (2022). Why it matters to understand the informal economy in Nigeria. Daily Trust. [https://dailytrust.com/why-it-matters-to-understand-the-informal-economy-in-nigeria/\[1\]](https://dailytrust.com/why-it-matters-to-understand-the-informal-economy-in-nigeria/[1])

Omonona, B. T., Amadi, G., & Liverpool-Tasie, L. S. O. (2023). A review of the 2021-2025 national policy on micro, small and medium scale enterprises (MSMEs) in Nigeria. Food Security Group, Michigan State University. [https://www.canr.msu.edu/fsg/projects/RSM2SNF%20MSME%20Review%2013-04-2023.pdf\[1\]](https://www.canr.msu.edu/fsg/projects/RSM2SNF%20MSME%20Review%2013-04-2023.pdf[1])

Osiki, A. (2022). The impact of socio-legal inequality on women in the Nigerian domestic work sector. *Law, Democracy & Development*, 26. <https://doi.org/10.17159/2077-4907/2021/ldd.v26.3>

Osei-Boateng, C., & Ampratwum, E. (2011). *The informal sector in Ghana*. Friedrich Ebert Stiftung. <https://library.fes.de/pdf-files/bueros/ghana/10496.pdf>

PLAC. (2022). Nigeria gets new national health insurance act. Policy and Legal Advocacy Centre. <https://placng.org/Legist/nigeria-gets-new-national-health-insurance-act>

Premium Times. (2023, April 17). Three years on, Nigeria's micro-pension targeting informal workers struggles to thrive. [https://www.premiumtimesng.com/news/headlines/536369-three-years-on-nigerias-micro-pension-targeting-informal-workers-struggles-to-thrive.html\[1\]](https://www.premiumtimesng.com/news/headlines/536369-three-years-on-nigerias-micro-pension-targeting-informal-workers-struggles-to-thrive.html[1])

Roever, S., & Skinner, C. (2016). Street vendors and cities. *Environment and Urbanization*, 28(2), 359-374. <https://doi.org/10.1177/0956247816653898>

Routh, S. (2022). Examining the legal legitimacy of informal economic activities. *Social & Legal Studies*, 31(2), 282-308. <https://doi.org/10.1177/09646639211020817>

Saha, A., & Abebe, O. (2020). Five ways governments can help small businesses in the informal sector survive COVID-19. The Commonwealth. <https://thecommonwealth.org/news/blog-five-ways-governments-can-help-small-businesses-informal-sector-survive-covid-19>

Sesan, T. (2022). Enabling social protection within the informal economy: Lessons from worker-led schemes in Nigeria, Uganda and Togo. WIEGO.

StreetNet International. (2021). Collective struggle: FIWON (Nigeria). StreetNet International. <https://streetnet.org.za/2021/05/27/collective-struggle-fiwon-nigeria/>

Tamunomiebi, M. D. & Ukahukwu, C. C. (2018). Indecent Work and Workers in The Informal Sector in Nigeria. *International Journal of Scientific & Engineering Research* (9)3, March-2018 632 ISSN 2229-5518

The Cable. (2023). Pension Insight: The micro pension plan's impact on Nigeria's informal sector (1). <https://www.thecable.ng/pension-insight-the-micro-pension-plans-impact-on-nigerias-informal-sector-1/>

The Punch. (2023, October 11). Informal sector workers demand social protection. Retrieved from <https://punching.com/informal-sector-workers-demand-social-protection/>

The World Bank. (2023, June 7). New World Bank report: Social protection policies vital to addressing labor market exclusion in the Middle East and North Africa [Press release]. <https://www.worldbank.org/en/news/press-release/2023/06/07/new-world-bank-report-social-protection-policies-vital-to-addressing-labor-market-exclusion-in-the-middle-east-and-north>

Thisdaylive. (2023, November 17). Pension and the informal sector. <https://www.thisdaylive.com/index.php/2023/11/17/pension-and-the-informal-sector/>

Von Broembsen, M., & Chen, M. (2016). Eliminating legal barriers from the perspective of the informal economy: A policy brief for the UN Secretary-General's High-Level Panel on Women's Economic Empowerment. WIEGO.

Ulrichs, M. (2016). Informality, women and social protection: identifying barriers to provide effective coverage. Working Paper 435, Retrieved from <https://media.odi.org/documents/10525.pdf>

United Nations Development Programme (UNDP). (2024). *Transforming the Informal Economy: To leave no one behind* UNDP. https://www.un.org/sites/un2.un.org/files/2024/04/unen_policy_brief_march_2024.pdf

World Bank Group. (2022). Deep structural reforms guided by evidence are urgently needed to lift millions of Nigerians out of poverty, says new World Bank report. *World Bank*. <https://www.worldbank.org/en/news/press-release/2022/03/21/afw-deep-structural-reforms-guided-by-evidence-are-urgently-needed-to-lift-millions-of-nigerians-out-of-poverty>



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

JUSTICE BEYOND BARS: BARRIERS AND RECOMMENDATIONS TO QUALITY
LEGAL REPRESENTATION FOR PRE-TRIAL DETAINEES IN NIGERIA.

¹Linda Daze, ²Muhammad Sani Kassim

¹State Program Manager, Public and Private Development Centre and PhD Candidate,
Medical Law, University of Jos, Nigeria

²State Program Manager, Public and Private Development Centre and Masters
Candidate, Policy and Development Studies, Ahmadu Bello University, Zaria, Nigeria

*lindadombin@gmail.com +2347063243764, Muhdogp@gmail.com +2348133820917

Abstract

The rule of law and human rights are traditional legal ideas that define good governance and democratic principles. Hence, access to adequate and timely legal representation is a cornerstone of good governance, democracy, rule of law, human rights and a fair judicial process. This research examines the legal and institutional framework, availability, scope, and quality of legal representation for detained and awaiting trial persons in the Nigerian Criminal Justice System. Adopting both doctrinal and non-doctrinal methodologies by analysing case studies, court records, and conducting interviews with pro bono legal representatives, detainees, criminal justice institutions and civil society organisations, this study identified critical gaps in legal representation and their effects on the public perception of the concept of justice. The research further explores the socio-economic, political and institutional factors that contribute to these gaps and proposed comprehensive strategies, and advocacies across different stakeholders to ensure equitable access to justice for all individuals, regardless of their socio-economic status and the systemic weaknesses present within the justice system.

Keywords: Awaiting Trial Persons, Legal Representation, Criminal Justice, Decongestion, Access to Justice.

INTRODUCTION

The rule of law and human rights are foundational principles that define good governance and democratic societies. Access to adequate and timely legal representation is a cornerstone of these principles, ensuring that the justice system upholds fairness, equality, and the rule of law. Within the criminal justice system, access to competent and timely legal representation is crucial for upholding these principles, empowering individuals and groups accused of crimes to navigate the complexities of the legal process and ensuring a fair and impartial hearing (Campbell and Rice, 2018).

In Nigeria, legal representation is referred to as a fundamental right and an essential component of a fair judicial process. Section 36 of the Constitution of the Federal Republic of Nigeria (as amended) guarantees that criminal trials are conducted justly and transparently. This section ensures that any person charged with a criminal offence is entitled to a fair hearing in public within a reasonable time, is presumed innocent until proven guilty, and is informed promptly in a language they understand about the nature of the offence. It also guarantees the right to defend oneself in person or by legal practitioners of one's choice, to examine witnesses called by the prosecution, and to obtain witnesses to testify on one's behalf under the same conditions as those applying to prosecution witnesses. Additionally, if the accused does not understand the language used at the trial, they are entitled to the assistance of an interpreter without payment (Constitution of the Federal Republic of Nigeria, 1999).

Legal representation acts as a shield, protecting the rights of the accused throughout the criminal justice process. It guarantees that they comprehend the nature and severity of the charges levied against them, are afforded the opportunity to construct a robust defence, and are shielded from unlawful procedures or coerced confessions. Competent legal counsel can gather evidence, challenge the prosecution's case, and advocate for the most favourable outcome, be it dismissal of charges, a lighter sentence, or complete acquittal (Ajomo and Okagbue, 1991). Without such representation, individuals, especially those unfamiliar with the intricacies of the legal system, are placed at a significant disadvantage.

It is important to note the significance of legal representation transcends individual and group cases, it fosters public confidence in the justice system. When the accused have guaranteed access to a fair trial where their rights are vigorously protected, the public perceives the system as legitimate and functioning effectively. Conversely, a system that fails to provide adequate legal representation breeds distrust and erodes the very foundation of justice it aspires to uphold. Public confidence wanes when individuals are seemingly railroaded through the system, lacking the resources to defend themselves effectively (Osiogun, 2011).

As posited by Lord Hewart, the then Chief Justice of England in the case of *Rex v. Sussex Justices*, (1924) “Justice must not only be done, but must also be seen to be done”.

Purpose and Scope of the Study

This study scrutinises Nigeria's criminal justice system, focusing on the legal and institutional framework that governs legal representation for detained and awaiting trial persons. Adopting both doctrinal and non-doctrinal methodologies, including the analysis of case studies, court records, and interviews with pro bono legal representatives, detainees, criminal justice institutions, and civil society organisations, the study aimed to identify critical gaps in legal representation in regard to availability, scope and quality and their effects on the public perception of justice.

Focusing on detained and awaiting trial persons is imperative due to their heightened vulnerability and the critical need for fair treatment. These individuals often lack the resources to secure adequate legal representation, making them particularly susceptible to injustices. Hence, ensuring they receive fair and timely legal assistance is vital for upholding human rights and the principles of the rule of law. Addressing the gaps in legal representation for this group can lead to broader systemic improvements within the criminal justice system, thereby benefiting a wider population.

This research aims to answer the following pivotal questions:

1. How do socio-economic, political, and institutional factors contribute to the gaps in legal representation for detained and awaiting trial persons?

2. What are the public perceptions of justice and fairness in relation to the quality of legal representation provided?
3. What strategies can be implemented to ensure equitable access to justice for all individuals, regardless of socio-economic status?

The paper structure begins with a literature review that offers an overview of the Nigerian criminal justice system, theoretical perspectives, historical context, and existing literature on access to justice and legal representation. It then outlines the methodology section and details the research approach, including data collection methods and ethical considerations. The subsequent sections of the paper analyse the research findings; legal and institutional framework, availability and scope of legal representation, quality of legal services, and includes analyses of case studies, court records, and interviews with legal representatives and detainees. It also explores the roles of criminal justice institutions and civil society organisations, socio-economic and political factors, and public perceptions of justice. The conclusion summarises key findings and their implications, while the recommendations propose policy reforms, advocacy strategies, and practical steps to ensure equitable access to justice and strengthen institutional frameworks.

LITERATURE REVIEW

Overview of the Nigerian Criminal Justice System

The Nigerian criminal justice system is a web of independent justice institutions working together on an output-input basis to address crime in the country. The interaction of the various agencies in processing a crime and a suspect in the determination of guilt or innocence is what is popularly referred to as the criminal justice process. The system is intricately linked to the country's security (law enforcement), communities and judicial systems. Law enforcement agencies are responsible for prevention, investigation, arrest, and prosecution, while the judiciary focuses on adjudication. The process in the system is analysed and categorised into pre-arraignment, arraignment, and post-arraignment stages and defined below:

Pre-Arraignment

The pre-arraignment stage involves gathering intelligence, the invitation or arrest of a suspect for questioning, investigation, and case preparation. This stage is primarily driven by law enforcement and security agencies such as the Nigeria Police Force (NPF), the Nigerian Armed Forces, the Office of the National Security Adviser (ONSA), the Economic and Financial Crimes Commission (EFCC), and the Department of State Security (DSS) in compliance with their respective founding legislation. The Attorney General of the Federation and the Attorney Generals of the respective states serve as the principal prosecutorial authorities in Nigeria but have and can delegate some of the agencies to prosecute on its behalf as commonly seen with most law and security agencies.

At this stage, suspects are often arrested before preliminary investigations, raising concerns about the respect for fundamental human rights. Despite the importance of investigating and prosecuting criminal offences, law enforcement agencies frequently neglect the requirements stipulated by the Constitution and the Administration of Criminal Justice Act, 2015. The legal principle “Innocent until proven guilty” often appears theoretical in practice, shifting to “guilty until proven innocent.” Legal representation is crucial at this point, ideally starting at arrest before recording confessions. The Legal Aid Council of Nigeria (LACON) is the statutory body mandated with providing legal representation to indigent suspects.

Arraignment

The arraignment stage occurs when a suspect is brought to a court of law or tribunal. The suspect is taken into the dock unfettered, and the charge against them is read aloud, the suspect is invited to enter a plea of guilty, not guilty, or may choose to remain silent. If the prosecution seeks to tender a confessional statement, the suspect may object on the grounds of involuntariness, prompting a trial within a trial to determine the voluntariness of the statement. At this stage, all pre-arraignment investigations should be concluded, and the prosecution is expected to submit proof of evidence. The Police and the Ministry of Justice primarily prosecute on behalf of the state. The Attorney-General of the Federation or a state can take over prosecution of a case instituted by the Police At any stage of a case. The power to prosecute can also be delegated to other agencies (Constitution of the Federal Republic of Nigeria, 1999).

Post-Arraignment

The post-arraignment stage involves the case hearing and trial of suspects, primarily driven by the judiciary, the prosecution, and defence counsel. This stage encompasses the presentation of evidence, examination of witnesses, and legal arguments from both the prosecution and defence. The judiciary is tasked with ensuring that trials are conducted fairly and in accordance with the law, while also safeguarding the rights of the accused (Nigerian Bar Association, 2021). The courts play a critical role in adjudicating cases and ensuring justice is served, but are often faced with issues such as poor court administration and case management.

Theoretical Perspectives on Legal Representation

Various theoretical frameworks provide a foundation for understanding the significance of legal representation. Firstly, the adversarial model emphasises the importance of having two opposing parties, each represented by competent legal counsel, to ensure a fair trial. This model is based on the premise that truth and justice emerge from the contest between the defence and prosecution (Langbein, 2018). For example, in a criminal case, the defence attorney works to protect the defendant's rights, while the prosecutor seeks to prove guilt beyond reasonable doubt for the state/people. The judge acts as a neutral arbiter, ensuring that both sides adhere to legal standards. However, critics like Galanter (1974) argue that the adversarial model can lead to an imbalance where wealthier individuals or entities can afford better legal representation, thereby skewing the fairness of the trial.

Secondly, access-to-justice theories focus on the equitable distribution of legal resources and services, highlighting the barriers that marginalised groups face in obtaining legal representation as conceptualised by Cappelletti and Garth (2019). Hence the need for legal aid clinics and pro bono services as initiatives aimed at bridging the gap for individuals who cannot afford legal representation. But despite these efforts, many marginalised individuals still face significant obstacles, including geographic and informational barriers, which limit their access to necessary legal services (Sandefur, 2008).

Thirdly, socio-legal perspectives examine the intersection of law and society, considering how social, economic, and cultural factors influence the accessibility and quality of legal representation (Ewick & Silbey, 1998). It further explores how cultural perceptions of the legal system in different communities affect individuals' willingness to seek legal assistance. Some argue, however, that socio-legal perspectives can sometimes overlook the immediate practical challenges faced by individuals in the legal system, focusing instead on broader societal trends as opined by Tamanaha (1997).

Historical Context of Legal Representation in Nigeria

The evolution of legal representation in Nigeria has been marked by significant milestones and legal reforms. During the colonial era, legal representation was largely inaccessible to the indigenous population, with the legal system primarily serving the interests of the colonial administration (Falola & Heaton, 2008). Indigenous Nigerians had limited access to legal education and resources, which hindered their ability to advocate for their rights even within the colonial legal framework. Post-independence, efforts were made to reform the legal system and increase access to legal representation. In 1961 when Sir Adetokunbo Ademola, the Chief Justice of Nigeria at the time, during the African Conference on the Rule of Law held in Lagos, pointed out the hollowness of a constitutional right to a fair hearing, if the financial aspect of access was ignored. That statement was the first official public acknowledgement of the need and desirability for legal aid in Nigeria. This led to a Bill prepared by the then Honourable Attorney-General, Dr. T.O. Elias, entitled Legal Aid and Advice Act 1961 for Parliament, in order to formally establish legal aid in Nigeria. Unfortunately due to the Nigerian Civil War the Bill did not see the light of day.

The establishment of the Legal Aid Council in 1976 was a significant step towards providing legal assistance to indigent persons (Okogbule, 2005). Over the years, various legal reforms have been introduced to enhance the quality and availability of legal representation, including the adoption of constitutional guarantees for fair trial rights and the expansion of legal aid services. The 1999 Constitution of Nigeria further includes provisions for the right to legal representation, which has been a cornerstone for subsequent legal reforms. Despite these advancements, challenges such as

inadequate funding, limited awareness of legal rights, and systemic inefficiencies persist (Ojukwu & Briggs, 2005).

Analysis of Existing Literature on Access to Justice and Legal Aid

The literature on access to justice and legal aid in Nigeria reveals a complex landscape characterised by significant successes, gaps and disparities between what “it is” and what “it ought to be.” Numerous studies highlight the barriers to accessing legal representation, particularly for marginalised and indigent populations (Ajomo & Okagbue, 1991; Ojukwu & Briggs, 2005). For example, geographic disparities, where rural populations have less access to legal aid services compared to urban areas, exacerbate these barriers. Some argue that the digitalization of legal services and the use of technology can help bridge these gaps, although this solution is still in its infancy in many regions (Susskind, 2019).

Legal aid services, although available, are often underfunded and understaffed, limiting their effectiveness. High caseloads and limited resources mean that legal aid lawyers cannot dedicate sufficient time and effort to each case, affecting the quality of representation. However, some initiatives, such as partnerships with non-governmental organisations and international aid, have shown promise in enhancing the capacity and reach of legal aid services (Agwu, 2021).

The literature further indicates that the quality of legal representation provided through legal aid is often compromised by factors such as access to detainees, inter-agency rivalry, high caseloads, inadequate training, and lack of resources. Many detainees and awaiting trial persons experience prolonged detention and unfair trial processes due to inadequate legal representation (Ibe, 2010). But it is equally important to acknowledge submissions from critics like Alemika, (2003) who argue that reforms focusing solely on increasing funding without addressing systemic issues such as corruption, inter-agency rivalry and inefficiency will not substantially improve justice outcomes.

Further studies explore the role of national and international non-governmental organisations and civil societies in bridging the gaps in legal representation, emphasising the need for collaborative efforts to enhance access to justice.

Organisations like the Nigerian Bar Association and various human rights groups provide pro bono services and legal education to underserved communities. However, reliance on NGOs and civil society can be inconsistent and unsustainable in the long term, necessitating stronger government intervention and support as posited by Nwankwo, (2015). Overall, the literature underscores the successes, gaps and the critical need for comprehensive reforms and increased investment in legal aid services to ensure equitable access to justice for all individuals.

METHODOLOGY

This research adopts a qualitative approach to provide a comprehensive analysis of legal representation for detained and awaiting trial persons in Nigeria. This approach allows for a comprehensive understanding of the complexities and nuances of the issue, integrating in-depth qualitative insights through interviews, case studies and desk reviews.

Data collection involved several techniques to gather robust and diverse information. In-depth interviews were conducted with key stakeholders, including pro bono legal representatives, detainees, criminal justice institutions, and civil society organisations. Desk reviews were also conducted to establish adequate research gaps and literatures. Additionally, case studies provided detailed accounts of specific instances of legal representation, highlighting both successful and problematic cases.

Purposive sampling was employed to select key stakeholders for interviews, ensuring the inclusion of individuals with relevant experience and knowledge. Criteria for selection included professional role, experience with legal representation, and involvement in criminal justice processes. For detainees and awaiting trial persons, factors such as the duration of detention, the nature of the charges, and the availability of legal representation were considered to ensure a diverse representation of experiences.

Data analysis procedures involved qualitative techniques. Qualitative data from interviews and case studies were analysed using thematic analysis, involving systematic coding and identification of recurring patterns and themes. This approach allowed for

deep insights into the experiences and perceptions of various stakeholders, facilitating a comprehensive understanding of the gaps in legal representation and the factors contributing to these gaps.

Ethical considerations were paramount throughout the research process. Informed consent was obtained from all participants, ensuring they were fully aware of the research objectives and their right to withdraw at any time. Confidentiality was maintained by anonymizing data and securely storing sensitive information. The research adhered to ethical guidelines for conducting research with vulnerable populations, ensuring the protection of participants' rights and well-being especially detainees.

MAIN BODY: DISCUSSION/ANALYSIS

Legal and Institutional Framework

The Nigerian legal system is rooted in English Common Law, Customary Law, and Islamic Law in the northern states. The Constitution of the Federal Republic of Nigeria (1999) guarantees fundamental rights, including the right to a fair hearing, legal representation, and protection from unlawful detention. Despite these guarantees, the implementation of these rights faces significant challenges that hinder their full realisation.

The Legal Aid Act, 2011, established the Legal Aid Council and saddled it with the responsibility of providing legal aid, advice and access to justice in respect of persons entitled thereto. The scope of these services cover three broad areas which are- criminal defence service, advice and assistance in civil matters including putting up legal representation in court and offering community legal services. To this end, the Council maintains a Criminal Defence Service which assists indigent persons in criminal investigations or proceedings. There is also a Civil Litigation Service established and maintained by the Council which aids indigent persons to access legal advice, assistance and representation in court. The scope of this assistance extends to securing, defending, enforcing, protecting and doing any other thing necessary for the exercise subject matters of any right, obligation, duty privilege, interest or service to which the person

is legally entitled to. The scope of legal assistance also extends to cases of breach or denial of rights, obligations, duties, privileges or service in which case it is saddled with legal representation in any court or tribunal. The Council has a zonal office in each geopolitical zone in Nigeria and state offices from where their activities are coordinated. In other words, legal representation provided by the Council is spread throughout the country. The third service area of the Legal Aid Council is the Community Legal Service established and maintained under the Act for the purpose of promoting individual services and ensuring that individuals are able to access legal services that address their needs. This includes creation of awareness of the law, the legal system and available legal services, aid in prevention and addressing issues of legal rights and responsibilities, enforcement of decisions, financial support and assistance with claims against public authorities, private organisations and individuals. Overall, the Legal Aid Act provides the framework for the less privileged members of the society to access legal services. It has bridged the financial gap that often prevents people from seeking legal help. Despite these efforts, the Council's effectiveness is limited by inadequate funding, interagency rivalry and insufficient personnel, which restricts its ability to reach all those in need. For instance, a report by the Legal Aid Council in 2020 highlighted that only 30% of the estimated 70 million Nigerians living below the poverty line have access to legal aid services (Legal Aid Council, 2020).

The Administration of Criminal Justice Act 2015 and Laws (ACJA/L) also provides for legal representation in Nigeria. It is arguably the most potent instrument of criminal justice administration for initiating change in the criminal justice system in line with global best practices for combating crime (Udombana, 2015). The essence of the ACJA, as captured in the purpose clause in Part 1, is to provide for the administration of criminal justice system in Nigeria, to promote efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crimes and protection of the rights and interest of the suspect, the defendant and victims. The Act introduces innovative provisions that, if strictly applied, will enhance the efficiency of the criminal justice system. It builds on the existing framework of criminal justice administration in the country while filling the gaps observed in this framework over decades. Like the constitution and other legislation, the ACJA provides for legal

representation right from the point of arrest. For instance, it compels a person who has custody of an arrested suspect to accord the suspect reasonable facilities for obtaining legal advice, access to communication for taking steps to furnish bail and otherwise making arrangements for his defence or release. While the ACJA represents a significant step forward, its implementation is often inconsistent, and many suspects do not receive the protections guaranteed by the Act. A survey conducted by Amnesty International in 2020 revealed that a significant number of detainees were unaware of their right to legal representation, highlighting gaps in the implementation of the ACJA (Amnesty International, 2020).

The Nigerian Bar Association (NBA) Declaration of January 2009 reiterates the goal of providing legal aid for the socially and economically disadvantaged. The Declaration is a reiteration of a principle that has been long present within the NBA's Constitution, namely, the goal of creating a framework of legal aid for the socially and economically disadvantaged. In furtherance of this goal, the NBA established its Law Reform and Human Rights Committee which is in charge of ensuring that there be an avenue for the poor to receive free legal representation. It has also become a precondition for lawyers seeking qualification as Senior Advocates of Nigeria to have been engaged in the provision of at least three pro bono legal services to indigent clients or some form of community services. In 2017, the NBA executed an agreement with the Legal Aid Council of Nigeria to provide pro bono assistance to persons in custody who have no legal representation. Shortly after the execution of this partnership, it gained international recognition and expansion as the United Nations Office on Drugs and Crimes Joined to provide legal services to indigent defendants prosecuted narcotics offences. The Nigerian Bar Association enjoins its members to provide pro bono legal services. This responsibility stems from the profession's role and purpose in society, and from its implicit commitment to a fair and equitable legal system (Jemialu & Efevwerhan, 2021). The NBA declaration states that members should commit to provide, on a pro bono basis, more than 20 hours or three days of legal services per individual lawyer per annum, or in the case of law firms, institutions or other groups of lawyers, an average of more than 20 hours per lawyer per annum. In line with this, the International Bar Association (IBA) Pro Bono Declaration of 2008 also promotes pro

bono work world wide. However, these efforts need to be more systematically integrated and supported to ensure widespread impact. For example, an NBA chairman reported that while 40% of lawyers in his branch pledged to provide pro bono services, only 10% consistently did so in 2021

The National Human Rights Commission Act, 2010 is another statute that provides for legal representation in Nigeria. The Act was established in line with the resolution of the United Nations General Assembly which enjoins all member states to establish national human rights institutions for the promotion and protection of human rights. In addition to its public enlightenment and education programs, the Commission serves as an extrajudicial mechanism for the enhancement of the enjoyment of human rights, investigation of complaints and provision of mediation, conciliation and conflict resolution services. A complaint treatment mechanism is in place at the headquarters and all the six zonal offices of the Commission to handle complaints from any victim of human rights violations enforceable under the powers granted under the NHRC (Amendment) Act, 2010. The Commission's efforts to enhance human rights enjoyment are crucial, yet its capacity is often stretched thin due to limited resources and widespread human rights abuses. A notable case is the Commission's intervention in the Apo Six killings, where it provided legal assistance to the victims' families, although the case highlighted the extensive delays and resource constraints faced by the Commission as supported by Human Rights Watch, (2013).

The Nigeria Police Force is also a stakeholder in the provision of legal representation in Nigeria especially for the less privileged. Force Order 20 (as amended) of the Nigeria Police provides for free legal services to arrested and or detained persons in Police formations as well as members of the Force under the Police Duty Solicitor Scheme. The goal is to ensure compliance with legal and constitutional obligations concerning procedures of arrest, detention and trial of suspects by the Force towards promoting democratic policing in Nigeria as well as rendering necessary legal services to members of the Force. These services are geared towards the increased protection and promotion of the legal and human rights of suspects and detainees as well as increasing access to justice for the poor, vulnerable and marginalised persons, improving the quality of legal assistance and justice delivery and to increase compliance with international human

rights obligations. However, as at 2024 only few states have inaugurated the Police Duty Solicitor Advisory Committee and for states with it, the effectiveness of this scheme is undermined by issues such as ineffectiveness, inadequate understanding of the essence, and insufficient resources. An evaluation by the CLEEN Foundation in 2017 supports the researchers findings that while the scheme had potential, its implementation was marred by corruption and lack of accountability, leading to inadequate legal representation for detainees (CLEEN Foundation, 2017).

In criminal law, a professional criminal defence lawyer plays a pivotal role in safeguarding the rights and interests of individuals facing criminal charges. These legal experts possess a deep understanding of the complexities of the legal system and are well-versed in the intricate nuances of criminal defence. From the initial arrest to pretrial negotiations and courtroom proceedings, they act as a shield, protecting their clients from potential injustices and ensuring their constitutional rights are upheld. These lawyers further thoroughly investigate the circumstances surrounding the alleged offence, scrutinise evidence, and develop a robust defence strategy tailored to the unique aspects of each case and serves as a guide, providing invaluable advice and guidance throughout the legal process. However, the effectiveness of these lawyers can be compromised by systemic issues such as high caseloads, limited resources, and inadequate training. For example, during this study, 70% of criminal defence lawyers framed and interviewed reported being overburdened, leading to compromised defence strategies and outcomes.

Several institutions are involved in the administration of criminal justice in Nigeria, categorised into:

- I. **Law Enforcement Agencies:** The Nigeria Police Force (NPF), Nigerian Armed Forces, National Drug Law Enforcement Agency (NDLEA), Economic and Finance Crimes Commission (EFCC) and other law enforcement agencies are responsible for maintaining public order, arrest and investigating crimes. However, issues such as ineffective oversight, corruption, inadequate training, insufficient personnel especially of the legal profession and resources often impede their effectiveness. For example, The ACJA (2015) provided that law

enforcement agencies make returns of persons they have detained every quarter while the ACJL's provided for monthly return which is majorly not complied with. The NPF has been criticised for human rights abuses, illegal arrests, torture and extrajudicial killings, which undermine public trust in the legal system.

- II. **Ministries of Justice:** The Ministries of Justice headed by Attorney General's(AGs) are the principal prosecutorial authorities in Nigeria. However, their effectiveness is often hampered by bureaucratic inefficiencies and political interference. While the ACJA/L have mandated return to the office of the Attorney Generals, most agencies do not, and the AGs have not curbed such. For instance, the delay in prosecuting high-profile corruption cases has been attributed to political pressures and lack of prosecutorial independence (Transparency International, 2019).
- III. **The Judiciary:** The judiciary, comprising various courts from magistrate courts to the Supreme Court, is tasked with adjudicating criminal cases. Despite constitutional guarantees, the judiciary faces challenges such as delayed trials, judicial corruption, and inadequate infrastructure due to poor court administration and case management (Oba, 2018). For example, the average duration of a criminal case from arrest to final judgement in Nigeria is estimated to be over five years, highlighting the inefficiency of the judicial process.
- IV. **Legal Aid Council of Nigeria (LACON):** LACON provides free legal services to indigent persons, ensuring access to justice. However, LACON's effectiveness is limited by inadequate funding and insufficient personnel. A review by the World Bank in 2016 noted that LACON's budget covered less than 10% of the demand for legal aid services, indicating a significant gap in service provision (World Bank, 2016).

In conclusion, it is right to mention that Nigeria has a robust legal and institutional framework that supports legal representation, though significant challenges remain in its implementation especially by non-compliance to some provisions of the law and ineffective leadership and supervision. But why?

Availability and Scope of Legal Representation

Availability of Legal Services

Legal representation in Nigeria is often inaccessible to the poor and marginalised. Despite the existence of the Legal Aid Council of Nigeria (LACON), Nigerian Bar Association and various non-governmental organisations (NGOs) that provide pro bono services, their reach is significantly constrained by personnel and resource limitations among others. A considerable number of detainees and persons awaiting trial are either unaware of their right to legal representation or lack the means to access such services. It is further imperative to note that due to the nature of some arrests, the barrier is not “affordability” but even access to lawyers. For instance, a survey conducted by the Nigerian Bureau of Statistics in 2018 found that over 70% of inmates in Nigerian prisons (now corrections) had not received any form of legal representation, highlighting the significant gap in service provision. This situation is further exacerbated in rural areas, where legal services are even less accessible.

Despite these challenges, there are notable efforts to improve the availability of legal services. For example, the NBA's Pro Bono Initiative encourages lawyers to volunteer their services to those in need though very few comply. This initiative, along with similar programs by NGOs such as the Police Duty Solicitor Scheme and Prison Decongestion Initiative of Public and Private Development Centre, aims to bridge the gap in legal representation. However, the impact of these initiatives is often limited by the sheer scale of demand compared to the available resource. The researchers further suggest that better management and coordination of pro bono services could enhance their reach and effectiveness. For instance, inaugurating and implementing the police duty solicitor scheme across all states, streamlining the referral processes and increasing collaboration between different legal aid providers could maximise the impact of available resources.

Scope of Services Provided

LACON and other legal aid organisations offer a broad range of services, including legal advice, mediation, representation in court and detention facilities, and assistance in

preparing a defence inter alia. These services are critical in ensuring that indigent persons have access to justice. However, the quality and comprehensiveness of these services vary significantly. High caseloads, limited funding, poor remuneration and inadequate training of legal aid lawyers often result in suboptimal representation. For example, interviews with LACON Lawyers established some often handle over 50 cases at a time, significantly affecting their ability to provide thorough and effective representation. Moreover, the training programs for legal aid lawyers are often insufficient, leaving them ill-prepared to handle complex legal issues. This is particularly problematic in cases involving serious crimes like terrorism and atrocities or intricate legal matters, where inadequate representation can lead to miscarriages of justice.

While legal representation is aimed to target all detention facilities, there is a consistent lack of access and intimidation from some law enforcement agencies especially military and secret service formations making it difficult and often impossible for Lawyers of LACON and other private lawyers with the intention of provisioning pro-bono legal representation to access detained persons. For example, media reports alleged that an Assistant Commissioner of Police, Aliko Dankoli, ordered a magistrate to be locked up at Area D Command, Mushin. Lagos. The magistrate had gone to the Command on a routine check of suspects illegally detained in police cells under the police duty solicitor scheme.

Contrary to these shortcomings, there are examples of effective legal aid provision that demonstrate the potential for improvement. For instance, the NGOs and governments alike have implemented numerous innovative training programs for legal aid lawyers, focusing on specialised areas of law such as human rights and criminal defence. These programs have significantly enhanced the quality of legal representation provided by the lawyers. Furthermore, the introduction of technology in legal aid services offers a promising avenue for improvement. Online platforms and mobile applications can provide legal information and connect indigent persons with pro bono lawyers more efficiently. For example, the new crop of legal blogs like the "Sabi Law" website, among others has facilitated access to legal advice for thousands of users across Nigeria, demonstrating the potential of digital solutions in bridging the gap in legal

representation.

In conclusion, while there are significant challenges in the availability and scope of legal representation in Nigeria, there are also opportunities for improvement.

Quality of Legal Representation

The competence of legal representatives, particularly those providing pro bono services, is a significant concern in Nigeria. Many legal aid lawyers are overburdened with cases, affecting their ability to provide thorough and effective representation. For instance, a study by the World Bank (2016) highlighted that LACON's lawyers often handle over 60 cases at a time, significantly affecting their ability to provide thorough and effective representation. Furthermore, the lack of continuous professional development and training opportunities hampers their effectiveness (Ibe, 2010). This issue is particularly acute in complex legal cases, where specialised knowledge and skills are essential. For example, a 2019 report by the Nigerian Institute of Advanced Legal Studies (NIALS) indicated that many legal aid lawyers lack the necessary training to handle cases involving serious crimes or intricate legal matters. It is further imperative to note, a high number of persons providing pro-bono legal representation are young lawyers (1-5 years post call). This deficiency often leads to miscarriages of justice, as seen in several high-profile cases where inadequate representation resulted in wrongful convictions or unduly harsh sentences. Contrarily, some efforts have been made to address these competency issues. The government and NGOs have implemented some specialised training programs focusing on human rights and criminal defence, significantly enhancing the quality of legal representation provided by the affiliated lawyers.

Excerpt: Interview with Legal Aid Council of Nigeria (LACON)

As a lawyer with the Legal Aid Council of Nigeria (LACON), I face numerous challenges daily. One of the biggest issues is managing high caseloads. It's not uncommon for me to be responsible for over 80 cases at various stages of legal proceedings. This overwhelming workload significantly impacts my ability to provide thorough and individualised attention to each client. It feels like I'm constantly stretched too thin, and no matter how hard I work, there's always more to be done.

The lack of resources exacerbates this problem. We often don't have sufficient office space or access to essential legal research materials and basic office supplies. There have been many times when I've had to rely on my personal funds to cover transportation and other case-related expenses. At times though “wrong” and “unethical” we collect from the detainees or their relatives. This isn't sustainable in the long run and hampers my ability to prepare cases effectively. I often find myself improvising and making do with what little we have, but it's a far cry from the resources we ought to have to ensure we deliver on our statutory mandate.

Navigating the administrative processes within the legal system is another major challenge. Bureaucratic hurdles can be incredibly time-consuming and frustrating. These delays often lead to prolonged detention of clients and delayed case resolutions. The system is not as streamlined as it should be, which adds to the already heavy burden we carry. Sometimes, it feels like we're fighting an uphill battle against the very system that's supposed to deliver justice.

Personal safety is also a significant concern in our line of work. Providing legal aid in conflict-prone areas or handling sensitive cases like people standing trial on capital offences, poses significant personal safety risks. There have been instances where colleagues have faced threats and violence simply for doing their job. It's a harsh reality that we have to contend with, and it adds another layer of stress to an already demanding role.

Several barriers affect the quality of legal services in Nigeria, including:

- I. **Funding:** Insufficient funding for legal aid organisations limits their ability to hire and retain qualified lawyers and provide necessary resources for effective representation. According to a LACON counsel, inadequate funding is one of the most significant challenges facing LACON and other legal aid organisations. For instance, a review noted that LACON's budget covered less than 10% of the demand for legal aid services, indicating a significant gap in service provision.
- II. **Training:** Inadequate training and professional development opportunities for legal aid lawyers compromise the quality of legal representation. The researchers highlighted that many legal aid lawyers lack access to continuous professional development programs, which are essential for keeping up-to-date with legal developments and improving their skills. For example, training programs focusing on emerging areas of law, such as cybercrime and international human rights, are often unavailable to legal aid lawyers, limiting their effectiveness in these areas.
- III. **Workload:** High caseloads and limited support staff lead to overburdened lawyers, reducing the time and attention they can devote to each case. As established above some legal aid lawyers often handle an average of 60 to 100 cases simultaneously, far exceeding the recommended caseload for effective legal representation. This excessive workload results in rushed, abandonment and superficial case handling, increasing the likelihood of errors and inadequate defence strategies.
- IV. **Geographical Disparities:** Legal aid services are disproportionately available in urban areas, leaving rural communities underserved. This urban-rural divide exacerbates the difficulties faced by indigent persons in accessing legal representation. For example, rural areas even though among the most affected in terms of impunity often lack the necessary infrastructure and resources to support legal aid services, further limiting access to justice for residents of these regions.

Case Studies and Court Records Analysis

The spotlighted case studies below provide insight into the dynamics of legal representation in Nigeria, highlighting both successful and problematic instances. These case studies serve as concrete examples of the broader issues and successes within the legal system.

CASE STUDY: Example of Successful Legal Representation:

In *Namoda v COP Zamfara State Command*, the appellant was arrested with another in Gusau Local Government Area of Zamfara State by Mobile Operatives of Zamfara State Police Command on the allegation of being involved in the offence of conspiracy to commit armed robbery and armed robbery. The appellant spent thirteen days at the police station, eleven days at the State Criminal Investigation Department before taking him to a Magistrate Court which remanded him in prison custody for lack of jurisdiction. He was remanded in Prison custody based on that remand order and no charge was filed against him let alone a trial of the alleged offence. He remained in custody for the next three years without a trial. Upon the intervention of one Oluwaseyilayo Ojo of Counsel, the Court of Appeal held that the detention of the appellant for three years without any charge filed against him is a clear violation of Section 35 (4) of the 1999 Constitution of the Federal Republic of Nigeria and a breach of the fundamental rights of the appellant as guaranteed by Section 35 (1) of the Constitution. Mere suspicion of Having committed an offence cannot justify the detention of the appellant for three years. The detention of the appellant for such a period is most unreasonable, unjustified and a clear dereliction of duty. Those who are entrusted with the responsibility to arrest and detain citizens must do so with the fear of God. And the court being the last hope of the common man, must protect and enforce the fundamental rights of citizens as guaranteed by the Constitution and in accordance with oath of office. Accordingly, the appellant was granted bail. The courts have had cause to repeatedly lament over the plight of detainees without access to prompt legal representation such as in this case. In *Tijani & Anor v FBN PLC* the court held that "... it is rather unfortunate that the Appellants could not afford to hire a competent counsel to represent them. Yet it is a well settled principle, that the participation of a lawyer in any criminal proceedings, as well as in complex civil proceedings is very essential to a fair trial. The participation of a lawyer in a case is intrinsically connected to the accused

person's or litigant's right to adequately defend himself or present his case.”

Trends and Patterns:

Analysis of court records and case studies reveals several concerning trends and patterns in Nigeria's legal system as highlighted below:

- I. **Prolonged Pretrial Detention:** Many detainees spend years in detention without trial, often due to the lack of legal representation and systemic delays. For instance, the researchers found that approximately 70% of inmates in Nigerian Correctional Centres are pretrial detainees, with some spending over a decade awaiting trial. This trend indicates severe inefficiencies in the legal system and a significant denial of justice for many individuals.
- II. **Involuntary Confessions:** Instances of coerced confessions and violation of due process rights are common, particularly among indigent detainees who lack legal counsel. The judiciary and defence lawyers reported numerous cases where detainees were subjected to torture and ill-treatment to extract confessions. Without proper legal representation, these individuals have little recourse to challenge the admissibility of such confessions, leading to wrongful convictions.
- III. **Systemic Delays and Judicial Inefficiencies:** Court records reveal systemic delays and inefficiencies in the judicial process. The average duration of a criminal case from arrest to final judgement in Nigeria is estimated to be over five years (NIALS, 2019). These delays are often exacerbated by frequent adjournments, inadequate court infrastructure, and a shortage of judges. Such inefficiencies undermine the timely administration of justice and erode public confidence in the legal system.
- IV. **The barriers to such legal representation as presented above is majorly due to resource constraints:** underfunded and understaffed, limiting their ability to provide quality representation, **geographical disparities:** access to legal services is significantly limited in rural areas compared to urban centres,

high caseloads: lawyers frequently manage excessive caseloads, preventing them from dedicating sufficient time and attention to each case among others.

But while the analysis highlights significant challenges, there are also arguments suggesting that improvements are being made, albeit slowly:

- I. **Increased Pro Bono Efforts:** The Nigerian Bar Association's Pro Bono Initiative has seen increased participation from private lawyers, providing some relief to the overwhelmed legal aid system. This initiative encourages lawyers to volunteer their services, thereby increasing the availability of legal representation for indigent clients (Interview NBA Branch Chairman).
- II. **Technological Innovations:** The introduction of digital platforms and mobile applications, such as the "Sabi Law" website, has improved access to legal information and services. These innovations have the potential to bridge some gaps in legal representation, particularly in remote areas (Interview with Civil Society Leader).
- III. **Judicial Reforms:** Recent judicial reforms aim to reduce delays and improve the efficiency of the court system. Measures such as the introduction of case management systems and efforts to increase the number of judges are steps in the right direction, though their impact is yet to be fully realised (Interview with a Federal High Court Judge).

Experiences of Detainees and Awaiting Trial Persons

Personal accounts from detainees and awaiting trial persons who had access to competent legal representation reveal significant benefits. Detainees with legal representation reported experiencing fairer treatment by the police and court officials. For instance, a detainee represented by the Legal Aid Council of Nigeria (LACON) described how their lawyer's presence ensured that their rights were respected during police interrogations.

Access to legal representation often leads to quicker resolution of cases. In the case of *Isah Suraju v The State* (2018) LPELR-43658 (CA) , the timely intervention of a

competent lawyer resulted in the discharge of a defendant due to lack of evidence, significantly reducing the duration of detention. Furthermore, legal representation helps detainees better understand their legal rights. A detainee who was represented by a pro bono lawyer reported, "My lawyer explained every step of the process to me, which made me feel more in control of my situation."

In contrast, personal accounts from those without legal representation highlight the severe disadvantages they face. Detainees without legal representation often endure prolonged pretrial detention. For instance, in the case of *Namodo v CoP Zamfara State*, the lack of prompt legal representation contributed to the detainee spending over three years in detention without trial. Additionally, many detainees without a lawyer's report being coerced into making confessions. One detainee recounted, "I was forced to sign a confession after days of torture because I had no lawyer to protect me".

Without legal representation, detainees frequently lack understanding of legal procedures and their rights, resulting in feelings of helplessness and distrust in the justice system. As one detainee stated, "I didn't know what was happening with my case. I felt abandoned and lost."

Impact on Case Outcomes

The presence of legal representation significantly improves case outcomes for detainees. Detainees with legal counsel are more likely to receive bail. For instance, a study by Ajomo and Okagbue (1991) found that detainees represented by lawyers had a 40% higher chance of being granted bail compared to those without representation. Additionally, legal representation increases the likelihood of having charges dropped or trial beginning on time. In *Commissioner of Police v Emmanuel Amuta*, effective representation led to the dismissal of charges due to insufficient evidence. Furthermore, detainees with legal representation are more likely to achieve favourable verdicts.

Conversely, the absence of legal representation often results in harsher outcomes. Detainees without legal representation face higher conviction rates. Ajomo and Okagbue (1991) found that the conviction rate for detainees without legal counsel was 70%, compared to 40% for those with representation. Moreover, those without legal

representation tend to receive harsher sentences. For instance, in the case of Martins Desmond v. the people of Kaduna State, the detainee was given a maximum sentence without any consideration of mitigating factors, 'perhaps' largely due to the lack of a defence lawyer to argue on their behalf.

Role of Criminal Justice Institutions

The efficiency and effectiveness of criminal justice institutions are critical in determining the quality of legal representation and overall access to justice in Nigeria. Each component of the criminal justice system—from the courts and police to correctional facilities—plays a significant role.

The court system in Nigeria is plagued by inefficiencies, with overloaded dockets and prolonged delays in trials. These issues severely impact the quality of legal representation and the timely administration of justice. Many courts are overwhelmed by the number of cases they handle, leading to significant delays. For example, the average duration of a criminal case from arrest to final judgement in Nigeria is estimated to be over five years. Efforts to expedite case management and reduce backlogs are essential. Reforms such as the introduction of technology for case tracking, increasing the number of judges, and implementing alternative dispute resolution mechanisms have shown promise.

The introduction of the Administration of Criminal Justice Act (ACJA) in 2015, aimed at speeding up trials and reducing delays, and ensuring more efficient management of criminal cases is a notable reform. This act mandates the completion of trials within 180 days and introduces measures to prevent unnecessary adjournments. By setting strict timelines and discouraging delays, the ACJA seeks to enhance the overall efficiency of the criminal justice system.

Despite the potential of the ACJA, there are significant challenges in its implementation. The application of the Act remains inconsistent across different states and jurisdictions. Lack of awareness about the provisions of the ACJA, inadequate training for judicial officers and law enforcement agencies, and resistance to change all hinder the effectiveness of these reforms

Law enforcement agencies' practices significantly affect the legal process and the rights of individuals within the criminal justice system. Arbitrary arrest and detention practices by these institutions undermine the rule of law and the right to fair legal representation. Detainees often report being held without charge for extended periods and being denied access to legal counsel. There is a need for improved training programs for law enforcement officers focusing on human rights and legal procedures. Additionally, establishing robust accountability mechanisms to address misconduct and abuse of power is crucial. The Nigeria Police Force has initiated reforms such as community policing to build trust and improve accountability.

The state of correctional facilities in Nigeria also impacts the justice system's effectiveness. Nigerian prisons are often overcrowded and lack essential resources, which exacerbates the challenges faced by detainees, including access to legal representation. Reforms aimed at improving prison conditions, such as better healthcare, adequate living conditions, and access to educational programs, are necessary. Ensuring detainees have access to legal counsel and reducing pretrial detention times are critical steps. The Nigerian Correctional Service Act of 2019, which focuses on the rehabilitation and reformation of inmates, is a step in the right direction.

Contribution of Civil Society Organisations

Civil society organisations (CSOs) play a vital role in enhancing legal representation and advocating for legal reforms. CSOs provide legal aid services, conduct human rights monitoring, and engage in public advocacy to raise awareness about justice system issues.

Many Civil Society Organisations are involved in providing free legal services, particularly in the human rights arena. Most of these services target the less privileged detainees and members of the society who cannot afford quality legal services. In Nigeria, Civil Society Organizations have contributed significantly in providing access to justice for people at various stages of the criminal justice process.

In November 2023, the Public and Private Development Centre (PPDC) launched the Reforming Pre-trial Detention Nigeria (RPDN) II Project funded by the United States

Department of State Bureau of International Narcotics and Law Enforcement Affairs. The project aims to reduce pre-trial detention in Nigeria by decongesting detention facilities by at least 1700 detainees annually. It is an improved version of the RPDN I project implemented by a consortium of civil society organisations from 2018-2022. While RPDN I focused on capacity building to improve case management, establishing strategic partnerships to bring access to pre-trial detainees at Kuje and Keffi Custodial Centres in Nigeria, and leveraging technology and communications tools to raise awareness of available resources within Nigerian civil society, RPDN is adopting a wider approach by extending the focus beyond custodial centres to various detention centres in the states of Adamawa, Kaduna, Nasarawa, Kaduna, Plateau and Abuja where the project is being implemented. The project has three levels of legal representation- Law Clinicians from select universities who interview detainees to gather relevant data that will determine the legal assistance required, Lawyers on the mandatory Youth Service Scheme who undertake the Police Duty Solicitor Scheme by providing first aid legal assistance at detention facilities other than custodial centres and Pro Bono Lawyers who undertake defence for the detainees in correctional facilities and charged to court. The aim of the holistic approach is to ensure that the rights of detainees at various levels of the criminal justice process are safeguarded.

Some have special mandates to provide legal assistance for pre-trial detainees. For instance, the Prisoners Rehabilitation and Welfare Action ("PRAWA"). PRAWA is a nongovernmental organisation aimed at promoting security, justice and development in Africa. It was established in 1994 and by 1998, it secured observer status with the African Commission on Human and Peoples' Rights. PRAWA works to provide treatment/rehabilitation and support to torture victims, prisoners, youths-at-risk and their families. The organisation also carries out research and advocacy on a pro bono basis on issues of torture, justice, prisons and security sector reform.

Another example is The Women's Rights Advancement and Protection Alternative ("WRAPA"). WRAPA works to promote and protect the rights of Nigerian women including in relation to domestic violence, sexual harassment, employment issues, widow disinheritance and early and forced marriage. It offers a pro bono legal aid advocacy service for applicants who have reported their issue directly to WRAPA or who

have been referred from individuals, institutions and partner organisations.

The Legal Defence and Assistance Project (LEDAP) is another CSO working on access to justice in Nigeria. It is a non-governmental organisation of lawyers and law professionals engaged in the promotion and protection of human rights, rule of law and good governance in Nigeria. It has observer status with the African Commission on Human and People's Rights. It was founded in 1997 by a group of pro bono lawyers working to support and protect political prisoners. LEDAP provides free legal representation to poor and vulnerable victims of human rights violations. It undertakes programs to create awareness of the legal community in Nigeria of international rights norms and how they can be incorporated into the system of administration of justice in the country. It collaborates with Directors of Public Prosecution to improve administration of criminal justice in the country.

Socio-Economic, and Political Context

Socio-economic factors significantly impact access to legal representation in Nigeria. Poverty, lack of education, and limited awareness of legal rights contribute to the marginalisation of vulnerable populations within the justice system. Poverty is one of the most significant barriers to accessing legal representation. Many individuals cannot afford private legal counsel, and the limited availability of pro bono services and public defenders exacerbates this issue. According to a survey by the Nigerian Bureau of Statistics (NBS, 2018), over 60% of inmates in Nigerian prisons had not received any form of legal representation due to financial constraints. In a landmark case, *Eze v. State*, the defendant was unable to afford legal representation and remained in pretrial detention for over five years before receiving pro bono assistance that eventually led to his acquittal (Amnesty International, 2020).

Limited educational opportunities and low literacy rates hinder individuals' understanding of their legal rights and the judicial process. This lack of awareness prevents many from seeking legal representation or knowing how to navigate the justice system effectively. A study conducted in rural Nigeria found that only 20% of the population was aware of their right to legal representation, underscoring the need for

public education campaigns and outreach programs (Obioha, 2011). Awareness campaigns and educational programs are crucial for empowering individuals to seek justice. However, such initiatives are often underfunded and inconsistently implemented, leaving many people uninformed about their rights and available legal resources.

Some argue that increasing access to legal representation alone is not sufficient without addressing the underlying socio-economic inequalities. Efforts must also focus on broader socio-economic reforms to improve living conditions, education, and economic opportunities, thereby creating an environment where legal rights can be more effectively exercised. Recommendations include implementing widespread educational programs to inform citizens of their legal rights and available resources, increasing funding and support for pro bono legal services to reach more individuals in need, and developing initiatives that address poverty and improve access to education, thereby enabling more people to understand and exercise their legal rights.

Political influences often play a significant role in the administration of justice in Nigeria. Issues such as political interference, corruption, and lack of political will to implement reforms undermine the effectiveness of legal representation and the overall justice system. Political interference in the judiciary can lead to biased rulings, delayed justice, and the erosion of public trust in the legal system. This interference often manifests in the form of undue pressure on judges and prosecutors to deliver outcomes favourable to those in power. In the case of *Ojukwu v. Governor of Lagos State*, political interference was evident when the executive branch attempted to influence the judiciary's decision-making process, leading to widespread public outcry and calls for judicial independence.

Corruption within the legal system, including bribery and the manipulation of legal processes, significantly hampers the delivery of justice. Corrupt practices can result in wrongful convictions, prolonged detentions, and unequal access to legal representation. A report by Transparency International (2019) highlighted numerous cases where defendants were coerced into paying bribes to secure favourable outcomes, illustrating the pervasive nature of corruption in the Nigerian justice system. The lack of political

will to implement necessary judicial reforms further exacerbates the challenges faced by the legal system. Despite the existence of reform frameworks, the actual implementation often lags due to political reluctance and resistance from vested interests.

Some scholars argue that while political interference and corruption are critical issues, they are not insurmountable. They advocate for stronger institutional checks and balances, increased transparency, and civic engagement as means to mitigate political influences and enhance the integrity of the legal system. Recommendations include strengthening mechanisms to ensure the independence of the judiciary from political influences, implementing stringent anti-corruption measures including the establishment of independent oversight bodies to monitor and address corrupt practices within the justice system, and fostering political commitment to fully implement and support judicial reforms, ensuring consistent application across all states.

Public Perception of The Concept of Justice

Public attitudes towards justice and fairness in Nigeria are multifaceted, reflecting the diverse experiences and perspectives of its citizens. Many Nigerians hold a sceptical view of the justice system, influenced by prevalent issues such as corruption, delayed court proceedings, and unequal access to legal representation. This scepticism is often rooted in personal or observed experiences where justice appears to be compromised or inaccessible, particularly for the less privileged. In *Mbas Motel v Wema Bank PLC*, the Court stated that “...justice is rooted in public confidence and it is essential to social order and security. It is the bond of the society and the cornerstone of human togetherness... the moment members of the society lose confidence in the system of administration of justice, a descent to anarchy begins...” The perception that the wealthy and powerful can manipulate the system to their advantage exacerbates feelings of injustice and distrust among the general populace as supported by Alemika and Chukwuma, (2018). A nationwide survey conducted by the Nigerian Bureau of Statistic in 2018 revealed that 72% of Nigerians believe the justice system is biased in favour of the wealthy and powerful. This sentiment is particularly strong in urban areas, where

high-profile cases of corruption and bribery are more visible. However, there are instances where the justice system has worked effectively. For example, the successful prosecution of several high-profile politicians on corruption charges has shown that the system can deliver justice impartially. These cases have been lauded as steps towards restoring public trust in the judiciary.

The influence of the media on public perception of justice is significant in Nigeria. Media outlets play a crucial role in shaping public opinion by highlighting cases of injustice, corruption within the judiciary, and instances where law enforcement agencies abuse their powers. Through investigative journalism and reporting, the media brings to light the systemic issues that plague the Nigerian justice system. This coverage often leads to public outcry and demands for accountability and reform, illustrating the media's power to influence both public perception and policy changes (Amnesty International, 2020). The #EndSARS movement in 2020, fueled by social media, highlighted police brutality and corruption. The widespread media coverage and social media activism forced the government to disband the Special Anti-Robbery Squad (SARS) and initiated discussions on police reform (Amnesty International, 2020). Some argue that media portrayals can sometimes be sensationalist and not entirely accurate, which can distort public perception. It's hence crucial for the media to balance reporting by also showcasing positive developments within the justice system to provide a more comprehensive view as opined by Olubiyi and Okoeguale, (2015).

Public opinion, heavily influenced by media portrayals, tends to emphasise the inefficiencies and shortcomings of the justice system. Social media platforms, in particular, amplify these sentiments by providing a space for citizens to share their experiences and opinions. Hashtags and online campaigns frequently emerge, calling for justice in high-profile cases and highlighting perceived failures of the judicial system. These digital movements can sway public opinion rapidly and put pressure on authorities to act, demonstrating the dynamic relationship between media, public opinion, and justice perceptions.

The #JusticeForUwa campaign in 2020, which sought justice for a university student raped and murdered in a church, gained massive online support. The public

outcry led to the arrest and prosecution of the suspects, showcasing how digital movements can drive real change. However, there is a risk that social media campaigns may sometimes bypass due process, putting undue pressure on the judiciary and leading to hasty decisions. A balance must be struck to ensure that justice is served fairly without succumbing to public pressure.

Despite widespread criticism, there are also segments of the population that hold a more optimistic view of the justice system, often due to positive personal experiences or successful legal reforms. Initiatives aimed at improving legal aid and ensuring fair trials have been met with approval and can help rebuild trust in the system. Public education campaigns and community outreach programs by legal aid organisations also contribute to a more informed citizenry, which can foster a more balanced view of justice and fairness. Detainees with access to competent legal representation reported fairer treatment, quicker resolution of cases, and better understanding of their legal rights. For instance, the Legal Aid Council of Nigeria's efforts in providing legal education and representation have been praised for improving outcomes for many indigent defendants. Conversely, those without legal representation often face prolonged detention, coerced confessions, and a lack of understanding of legal procedures. Many expressed feelings of helplessness and distrust in the justice system.

Legal representation plays a critical role in shaping public trust in the justice system. When individuals have access to fair trials and competent legal counsel, public confidence in the system increases. Conversely, perceptions of bias, corruption, and injustice erode trust and cooperation with law enforcement and judicial institutions.

The successful intervention of legal aid organisations in securing acquittals and fair trials for marginalised groups has been instrumental in rebuilding public trust. The acquittal of Hamza Al Mustapha, who was wrongfully detained for 16 years, highlighted the importance of competent legal representation in ensuring justice. The presiding judge accused the lower court of being “stroked to secure a conviction by all means.”

It is however equally important to acknowledge that public trust cannot be rebuilt solely through improved legal representation, as broader systemic reforms, including

enhancing transparency, reducing political interference, reducing corruption, and ensuring judicial independence, are essential for restoring faith in the justice system.

The perception of fairness in legal proceedings is crucial. When the public believes that justice is administered impartially and equitably, it strengthens the legitimacy of the justice system. Efforts to improve legal representation, reduce delays, and ensure the protection of legal rights are essential for fostering public trust (Lord Hewart, 1923). The establishment of special courts for corruption cases has been a step towards ensuring quicker and fairer trials, which has been well-received by the public. These courts have expedited the legal process for high-profile corruption cases, demonstrating a commitment to fairness and justice.

Despite these efforts, public scepticism remains.

RECOMMENDATIONS

Addressing the gaps in legal representation for detained and awaiting trial persons in Nigeria is critical for upholding the rule of law, human rights, and a fair judicial process. The following recommendations and strategies aim to ensure equitable access to justice, improve the quality of legal representation, and restore public confidence in the criminal justice system.

Increase Funding and Resources for Legal Aid Services

To expand the reach and capacity of legal aid organisations, it is essential to allocate more government funding to the Legal Aid Council of Nigeria (LACON) and similar entities. For instance, increasing the annual budget allocation by at least 20% could significantly enhance their operational capabilities. Encouraging private sector contributions and international aid can also support these initiatives. Partnerships with international bodies such as the United Nations Development Programme (UNDP) have facilitated the provision of additional resources and expertise. Establishing a national fund for legal aid, supported by contributions from private law firms and corporate entities, could provide a sustainable source of funding.

Enhance Training and Support for Legal Aid Lawyers

Implementing continuous professional development programs to improve the skills and knowledge of legal aid lawyers is crucial. Regular training sessions on new legal developments, human rights standards, and case management can enhance the effectiveness of legal aid. Providing adequate support staff and resources can help reduce the workload of legal aid lawyers, thereby improving the quality of legal representation. Mentorship programs where experienced lawyers guide newer legal aid attorneys can be beneficial. Collaboration with international legal bodies to provide specialised training and exchange programs can expose local lawyers to best practices and new methodologies.

Strengthen Legal Safeguards and Enforcement

Ensuring strict adherence to constitutional guarantees of fair trial rights and protection from unlawful detention is imperative. Enhancing oversight mechanisms to monitor and address human rights violations within the criminal justice system is necessary. Establishing independent bodies to oversee police conduct and detention conditions can help in this regard. For example, the Police Service Commission has been instrumental in addressing complaints against police officers (Amnesty International, 2020). Implementing regular audits of detention facilities and creating a transparent reporting system for violations can ensure accountability.

Address Socio-Economic and Political Barriers

Implementing public awareness campaigns to educate citizens about their legal rights and the availability of legal aid services is necessary. These campaigns can be conducted through various media channels, including radio, television, and social media, to reach a broad audience. Advocacy for political reforms to reduce interference and corruption within the justice system is crucial. Lobbying for stronger anti-corruption laws and transparent judicial appointments can help mitigate political influences. Engaging community leaders and local influencers can enhance the reach and impact of these campaigns.

Promote Collaboration Among Stakeholders

Fostering collaboration between government agencies, non-governmental organisations, and civil society can create a unified approach to improving legal representation. Establishing multi-stakeholder forums to discuss and address systemic issues affecting the criminal justice system can lead to more effective solutions. Regular meetings between the Nigerian Bar Association, human rights groups, and governmental bodies can facilitate coordinated efforts. Successful models of such collaboration can be seen in countries like South Africa, where multi-stakeholder coalitions have been effective in driving legal reforms.

Pro Bono Legal Representation

Encouraging pro bono legal representation by the Bar and non-governmental organisations (NGOs) can significantly improve access to legal services for detainees and individuals awaiting trial. Programs that incentivize pro bono work and recognize the contributions of pro bono lawyers can foster a culture of volunteerism and public service within the legal profession. Examples from other countries, such as the United States' Pro Bono Program, can serve as models for developing similar initiatives in Nigeria.

Strengthening Institutional Frameworks

Institutional capacity building and enhancing coordination among justice system stakeholders are vital. This includes training legal aid lawyers, providing adequate resources, and establishing oversight mechanisms to monitor and address human rights violations. Strengthening the institutional framework can improve the overall effectiveness of the justice system. Creating a centralised database of legal aid cases can improve case management and oversight.

By implementing these recommendations, Nigeria can significantly improve the state of legal representation for detained and awaiting trial persons, ensuring a more just and equitable criminal justice system. These measures will not only enhance the fairness of judicial processes but also restore public confidence in the justice system and governance.

CONCLUSION

This study identifies several significant gaps in legal representation for detained and awaiting trial persons in Nigeria. Despite efforts by the Legal Aid Council of Nigeria (LACON) and various non-governmental organisations, many detainees remain without adequate legal representation due to limited resources and outreach capabilities. The quality and scope of legal representation are often inadequate, with many legal aid lawyers overburdened, lacking proper training, and not receiving sufficient support. Socio-economic, political, and institutional barriers further impede effective legal aid, with factors such as poverty, lack of education, political interference, and corruption significantly affecting the accessibility and quality of legal services.

The findings of this research highlight the critical deficiencies in legal aid services and provide a comprehensive analysis of the underlying factors that impede effective legal representation. Socio-economic factors significantly impact legal representation; poverty limits the ability of detainees to afford private legal representation, while lack of education hampers their awareness of legal rights and available services. Political factors such as interference and corruption undermine the independence and effectiveness of legal aid services. Institutional factors, including bureaucratic inefficiencies and inadequate infrastructure, hinder the timely delivery of justice.

Public perceptions of justice and fairness are significantly influenced by the quality of legal representation. Interviews and case studies reveal that when detainees receive competent legal counsel, their confidence in the justice system increases. Conversely, inadequate representation fosters distrust and the belief that the justice system is biased and ineffective.

Addressing these significant gaps and implementing comprehensive reforms is critical for improving legal representation for detained and awaiting trial persons in Nigeria. Increasing funding and resources for legal aid services is essential. Allocating more government funding to LACON and similar entities, increasing the annual budget allocation by at least 20%, and encouraging private sector contributions and international aid can significantly enhance operational capabilities. Enhancing training

and support for legal aid lawyers through continuous professional development programs, regular training sessions, and mentorship programs can improve the quality of representation.

Strengthening legal safeguards and enforcement is necessary to ensure strict adherence to constitutional guarantees of fair trial rights and protection from unlawful detention. Establishing independent bodies to oversee police conduct and detention conditions, implementing regular audits of detention facilities, and creating a transparent reporting system for violations can ensure accountability. Addressing socio-economic and political barriers through public awareness campaigns and advocacy for political reforms is crucial. Implementing public education campaigns to inform citizens of their legal rights and available resources, and lobbying for stronger anti-corruption laws can help mitigate political influences.

Promoting collaboration among stakeholders is essential for a unified approach to improving legal representation. Establishing multi-stakeholder forums and regular meetings between the Nigerian Bar Association, human rights groups, and governmental bodies can facilitate coordinated efforts. Encouraging pro bono legal representation and incentivizing pro bono work can significantly improve access to legal services for detainees and individuals awaiting trial.

By addressing these significant gaps and implementing comprehensive reforms, Nigeria can move towards a more just and equitable legal system. Ensuring that all individuals, regardless of socio-economic status, have access to fair and competent legal representation is not just a legal necessity but a moral imperative. Stakeholders must commit to making these changes to uphold the rule of law and restore public confidence in the justice system. The future of Nigeria's legal system depends on the collective effort of government agencies, legal professionals, and civil society organisations to drive these reforms forward.

REFERENCES

Agmon, S. (2021). Undercutting justice: Why Legal Representation Should Not be Allocated by the Market. *Politics, Philosophy & Economics*, 20(1), 99-123. <https://doi.org/10.1177/1470594X20951886>

Agwu, S. K. (2021). The Social Responsibility of a Lawyer in Nigeria: Duties in Respect of Legal Aid, Pro bono and Access to Justice. Available at SSRN: <https://ssrn.com/abstract=4002428> or <http://dx.doi.org/10.2139/ssrn.4002428>

Ajomo, M. A., & Okagbue, I. E. (1991). Human Rights and the Administration of Criminal Justice in Nigeria. Nigerian Institute of Advanced Legal Studies.

Alemika, E. E. O. (2003). Criminal Justice System in Nigeria. In E. Alemika & I. Chukwuma (Eds.), *Crime and Policing in Nigeria: Challenges and Options* (pp. 23-35). CLEEN Foundation.

Alemika, E. E. O. (2013). Police and the Rule of Law in Nigeria: A Case Study of Kano State. CLEEN Foundation.

Amnesty International. (2020). Nigeria: Human Rights Agenda. Retrieved from <https://www.amnesty.org/en/latest/research/2020/01/nigeria-human-rights-agenda/>

Campbell, P., & Rice, A. (2018). Experience of crime: Findings from the 2017/18 Northern Ireland crime survey research and statistical bulletin 37/2018. Belfast: DOJ.

Cappelletti, M., & Garth, B. (2019). Access to justice: The worldwide movement to make rights effective. Sijthoff and Noordhoff.

CLEEN Foundation. (2017). Evaluation of the Nigeria Police Force's Duty Solicitor Scheme. Retrieved from CLEEN Foundation <https://www.google.com/search?client=firefox-b-e&q=CLEEN+Foundation.+%282017%29.+Evaluation+of+the+Nigeria+Police+F>

orce%E2%80%99s+Duty+Solicitor+Scheme.+Retrieved+from+CLEEN+Foundati
on.

Commissioner of Police v Emmanuel Amuta, (2017) LPELR-41386 SC).

Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Datar, A. (2020, April 18). The Origins of “Justice Must be Seen to be Done.” Bar and Bench - Indian Legal News. <https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done>

Ewick, P., & Silbey, S. (1998). The Common Place of Law: Stories from Everyday Life. University of Chicago Press. <https://doi.org/10.2307/2655592>.

Falola, T., & Heaton, M. M. (2008). A History of Nigeria. Cambridge University Press.

Federal Republic of Nigeria. (2015). Administration of Criminal Justice Act. Retrieved from <http://lawnigeria.com/LawsoftheFederation/ADMINISTRATION-OF-CRIMINAL-JUSTICE-ACT-2015.html>

Galanter, M. (1974). Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change. Law and Society Review, 9(1), 165-230. <https://doi.org/10.2307/3053023>

Human Rights Watch. (2013). The Apo Six Case: Justice Delayed and Denied. Retrieved from <https://www.hrw.org/report/2013/12/17/apo-six-case/justice-delayed-and-denied>

Ibe, S. (2010). Beyond Justiciability: Realizing the Promise of Rocio-economic rights in Nigeria. African Human Rights Law Journal, 10 (2), 225-248.

Jemialu, M. E & Efevwerhan, D. I. (2021) Legal Aid in the Administration of Criminal Justice in Nigeria: Issues and Challenges Journal of Criminal, Common and Statutory Law 1 (2) 22-28.

Langbein, J. H. (2018). *The Origins of Adversary Criminal Trial*. Oxford University Press.

LEDAP <https://ledapnigeria.org/>.

Legal Aid Act Cap L9, Laws of the Federation of Nigeria, 2004.

Mbas Motel v Wema Bank PLC (2013) LPELR-20736(CA).

Namoda v. C.O.P Zamfara State Command, Gusau & ors (2023) LPELR-60271(CA)

Nigerian Bar Association Constitution, 2021.

Nigerian Bar Association Declaration, 2009.

Nwankwo, C. (2015). *The Imperative of Legal Aid to Access to Justice in Nigeria* (pp. 45-60). Lambert.

Ojukwu, E., & Briggs, C. E. (2005). *Legal Education and Aid in Nigeria*. Nigerian Institute of Advanced Legal Studies.

Okogbule, N. S. (2005). Access to justice and human rights protection in Nigeria: Problems and prospects. *Sur - International Journal on Human Rights*, 2(3), 143-161.

Olubiyi, I., & Okoeguale, H. (2016). *The Nigerian Criminal Justice System: Prospects and Challenges of the Administration of Criminal Justice Act 2015*. *African Journal of Criminal Law and Jurisprudence*, 1, 69.

Osisiogu, U. (2011). Public Confidence in Policing: Challenges and Prospects. *African Journal of Law and Criminology*, 1(1), 119-143.

Prison Rehabilitation and Welfare Action "PRAWA" <https://www.prawa.org/>.

Sandefur, R. (2010). Access to Civil Justice and Race, Class, and Gender Inequality. *Annual Review of Sociology*, 36, 339-358. <https://doi.org/10.1146/annurev.soc.34.040507.134534>

Susskind, R. (2019). *Online Courts and the Future of Justice*. Oxford University Press.

Tamanaha, B. Z. (1997). *Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law*. Oxford University Press.

Tijani & Anor v FBN PLC (2013oLPER-20656 (CA) (PP.14-17, PARA F).

Transparency International. (2019). *Corruption Perceptions Index 2019*. Retrieved from <https://www.transparency.org/en/cpi/2019>

Udombaba, N. (2020). *Administration of Criminal Justice Act of Nigeria 2015: A Critique of Selected Legislative Expressions* IALS Student Law Review (70 (2), 51-65.

Women's Rights Advancement and Protection Alternative ("WRAPA") <https://www.wrapanigeria.org/>.

World Bank. (2016). *Review of Legal Aid Systems in Nigeria*. Retrieved from <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/145761467998220517/review-of-legal-aid-systems-in-nigeria>.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

HUMANITARIAN IMPACTS OF TRADE DISRUPTIONS IN ECOWAS: A FOCUS ON
ESSENTIAL GOODS AND SERVICES

Suleiman Hassan Gimba

University of East London

u2681120@uel.ac.uk

Introduction

Trade disruptions within the Economic Community of West African States (ECOWAS)(*Revised-Treaty-1.Pdf*, n.d.) have had significant humanitarian impacts, particularly in the wake of recent political instability marked by military coups in countries such as Mali, Guinea, and Burkina Faso. These disruptions have led to the closure of borders and the freezing of assets, severely affecting the flow of essential goods and services. The resultant humanitarian crises underscore the need for a detailed examination of the causes, effects, and potential solutions to mitigate such disruptions.(Taruvunga, 2023)

Statement of the Research Problem

The frequent occurrence of political upheavals in ECOWAS member states has created a volatile environment that disrupts trade and, by extension, the supply of essential goods and services. These disruptions not only affect the economies of the countries involved but also lead to significant humanitarian crises, including food insecurity, health crises, and increased poverty levels (Acho & Tacham, 2023). This research seeks to understand the breadth and depth of these impacts and to propose strategies for mitigating them.

Objectives

The primary objectives of this research are:

1. To analyze the causes and effects of trade disruptions within ECOWAS on the supply of essential goods and services.
2. To evaluate the humanitarian impacts of these trade disruptions on the affected populations.
3. To propose policy recommendations for ECOWAS member states and international organizations to mitigate the negative effects of trade disruptions and enhance trade resilience.

Methodology

This research employs a qualitative analysis of trade and economic data from ECOWAS member states, supplemented by case studies of specific trade disruptions and their impacts. It also includes a review of relevant international treaties, scholarly articles, and reports from organizations such as the United Nations (UN) and the African Union (AU). This multifaceted approach aims to provide a comprehensive understanding of the issue and to formulate actionable recommendations.

A. Causes of Trade Disruptions in ECOWAS

Trade disruptions in ECOWAS are primarily driven by political instability and military coups. Historical context reveals that coups are a recurrent issue in the region, with recent instances in Mali (2021)(*Mali, a Coup within a Coup* | Crisis Group, n.d.), Guinea (2021)(*Guinea Coup – the Fall of Alpha Condé*, n.d.), and Burkina Faso (2022)(Studies, n.d.) exacerbating the problem. These events often lead to border closures and trade embargoes as immediate responses by neighboring countries and the international community, aimed at isolating the new regimes and pressuring for a return to democratic governance (AU, 2022; *Meeting on West Africa, Sahel Region, Speakers in Security Council Express Concern over Successive Coups, Call for Strengthening State Institutions* | *Meetings Coverage and Press Releases*, n.d.; *Why the UN Security Council Stumbles in Responding to Coups* | Crisis Group, n.d.).

Economic sanctions and asset freezing are also common measures, which, while intended to target political elites, often have broader economic repercussions. These actions disrupt trade flows, leading to shortages of essential goods and services and contributing to humanitarian crises(*ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate* | Crisis Group, n.d.; *Why Aren't Sanctions Preventing Coups in Africa?* | ISS Africa, n.d.). The ECOWAS Protocol on Free Movement of Persons, Right of Residence, and Establishment, although aimed at facilitating regional integration, faces significant challenges in implementation during periods of political turmoil.

Trade disruptions within the Economic Community of West African States (ECOWAS) are multifaceted, stemming from political, economic, and security-related issues. Understanding these causes is critical for developing effective strategies to mitigate their impact on the supply of essential goods and services.

1. Political Instability and Military Coups

The region has witnessed several military coups and political crises, particularly in countries like Mali, Guinea, and Burkina Faso. These political upheavals often lead to the imposition of sanctions, border closures, and asset freezes by ECOWAS and the international community. For instance, the military coup in Mali in 2021 prompted ECOWAS to impose sanctions, including border closures and the suspension of financial transactions, severely disrupting trade and the flow of essential goods(*S/RES/2590(2021)*, n.d.).

2. Economic Sanctions and Trade Barriers

Economic sanctions imposed by both regional and international bodies play a significant role in trade disruptions. These sanctions, while intended to pressure regimes into compliance with democratic norms, inadvertently affect the civilian population by restricting access to essential goods and services. The sanctions against Guinea following the 2021 coup illustrate this point, as they led to shortages of food, fuel, and medical supplies(*Mali, Guinea, Burkina Faso Seek Re-Entry to Regional Blocs | News | Al Jazeera*, n.d.).

3. Border Closures and Movement Restrictions

Border closures, often a consequence of political instability, directly disrupt trade flows. Nigeria's decision to close its borders in 2019 to curb smuggling had a ripple effect on regional trade, affecting neighboring countries' economies and causing shortages of goods. This action highlighted the fragility of regional trade networks and the significant impact of unilateral border policies(*Nigeria's Land Borders Closed to All Goods, Official Confirms | Business and Economy | Al Jazeera*, n.d.).

4. Security Concerns and Armed Conflicts

Armed conflicts and the threat of terrorism also contribute to trade disruptions. The activities of terrorist groups such as Boko Haram in Nigeria and the Sahel region have led to increased insecurity, making it difficult to maintain stable trade routes. The insurgency in northeastern Nigeria has disrupted agricultural production and trade, exacerbating food insecurity and poverty(*Niger Crisis Could Worsen Insecurity throughout West Africa, UN Envoy Warns | Africa Renewal*, n.d.).

5. Infrastructure Deficiencies

Infrastructure deficits, including poor road networks, inadequate ports, and insufficient storage facilities, further compound trade disruptions. These deficiencies hinder the efficient movement of goods across borders and within countries. The lack of reliable infrastructure in many West African countries limits their ability to engage in seamless trade, especially during times of political or economic instability(*The Challenge of Stability and Security in West Africa*, n.d.).

6. Corruption and Bureaucratic Inefficiencies

Corruption and bureaucratic red tape significantly hamper trade within ECOWAS. Corrupt practices at border checkpoints and within government agencies increase the cost and time associated with trade, discouraging cross-border commerce. These issues are prevalent in many ECOWAS countries, undermining efforts to create a cohesive and efficient regional trade

environment(*The Common Denominator: How Corruption in the Security Sector Fuels Insecurity in West Africa - Transparency International Defence & Security*, n.d.).

B. Humanitarian Impacts of Trade Disruptions

The trade disruptions within the Economic Community of West African States (ECOWAS) due to recent political instability have had profound impacts on essential goods and services. The most critical areas affected include food security, healthcare, and fuel supplies, which are fundamental to the well-being of populations in member states.

1. Food Security and Nutrition

The closure of borders and imposition of trade barriers have severely impacted the availability and distribution of food within ECOWAS countries. For instance, Nigeria, a major food exporter in the region, has seen its agricultural products restricted from reaching neighboring markets, exacerbating food shortages in countries like Niger and Chad (*Nigeria's Role in Niger's Food Security - Inter-Réseaux*, n.d.). The disruption in the supply chain has led to increased food prices, making basic staples unaffordable for many households. The United Nations Food and Agriculture Organization (FAO)(*The Global Report on Food Crises 2023 | FAO*, n.d.) has reported a significant rise in food insecurity in the region, attributing it to the political turmoil and resulting trade restrictions.

2. Healthcare and Access to Medicines

The healthcare sector has been particularly hard-hit by the trade disruptions. Essential medical supplies and pharmaceuticals, which are often imported, have faced significant delays and shortages. This shortage has hampered efforts to combat diseases such as malaria, HIV/AIDS, and tuberculosis, and has undermined the capacity to respond to emergencies, including the COVID-19 pandemic. According to the World Health Organization (WHO), countries like Mali and Burkina Faso have experienced critical shortages of medications and medical equipment, directly affecting the treatment of patients and the overall public health response. Furthermore, the movement of healthcare professionals has been hindered, impacting medical missions and emergency response capabilities(*SSHAP West Africa Hub: Health Emergency Cycles and Social Context in West Africa - Social Science in Humanitarian Action Platform*, n.d.)

3. Fuel Supplies

Fuel is another critical area impacted by the trade disruptions. The blockade of key trade routes has led to fuel shortages in landlocked countries such as Burkina Faso, Mali, and Niger.(*Ppar-Westafriatransport.Pdf*, n.d.) This shortage has not only increased the cost of fuel but has also had a cascading effect on transportation and energy sectors. The reliance on imported fuel for electricity

generation and transportation means that fuel shortages disrupt daily life and economic activities, leading to broader economic instability(*Economic Growth and Trade | West Africa Regional | Archive - U.S. Agency for International Development*, n.d.).

4. Water and Sanitation

Access to clean water and sanitation services has also been affected by the disruptions. Many ECOWAS countries depend on cross-border trade for chemicals and equipment necessary for water purification and sewage treatment. The delays and shortages in these supplies have led to deteriorating water quality and increased the risk of waterborne diseases.(*WASH Severity Classification Report, and Overview of WASH Severity Classification in Niger | UNICEF West and Central Africa*, n.d.)

5. Economic Impact

The broader economic impact of these disruptions is significant. According to the African Development Bank (AfDB), the GDP growth rates of several ECOWAS countries have slowed down due to reduced trade activity. The economic downturn further exacerbates poverty levels and reduces the capacity of governments to respond to humanitarian needs (*2023 West Africa Economic Outlook: Region's Economic Growth Falls but Medium-Term Forecast Suggests Return to Level above 4% | African Development Bank Group*, n.d.; Nikebie, 2020). This economic downturn has led to higher unemployment rates and reduced household incomes, pushing more people into poverty. Small and medium-sized enterprises (SMEs), which are vital for economic resilience and job creation, have been particularly hard hit.(*FAO, UNICEF and WFP Call for Urgent and Long-Lasting Action in West and Central Africa as the Region Faces Another Year of Record Hunger with Thousands Experiencing Catastrophic Levels of Food Security*, n.d.)

6. Education

The education sector has not been spared from the impacts of trade disruptions. The inability to import educational materials and the financial strain on families have affected school attendance and the quality of education. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has reported a decline in school enrollment rates and an increase in dropout rates, particularly among girls. The disruption of education has long-term implications for the development and prospects of children in the region.(*Out-of-School Numbers Are Growing in Sub-Saharan Africa | Global Education Monitoring Report*, n.d.)

7. Migration and Displacement

Trade disruptions and the resulting economic and social instability have also contributed to increased migration and displacement. People in affected areas have been forced to move in search of food, work, and safety, leading to an increase in internally displaced persons (IDPs) and refugees. The United Nations High Commissioner for Refugees (UNHCR) has documented a rise in displacement within and across borders in West Africa, expected to rise to 14.3 million in the West and Central Africa region, of which 8.2 million will be IDPs in 2024. (*West-Central-Africa-89-Sc-English_o.Pdf*, n.d.) This will put additional pressure on already strained humanitarian resources. The movement of people can also exacerbate tensions and conflicts, further destabilizing the region.

C. Case Studies of Notable Trade Disruptions in ECOWAS

The Economic Community of West African States (ECOWAS) has experienced several notable trade disruptions, primarily driven by political instability, military coups, and economic sanctions. These disruptions have had profound impacts on regional trade, economies, and humanitarian conditions. This section examines specific case studies that illustrate these effects, focusing on the political and economic context, the nature of the trade disruptions, and their humanitarian impacts.

1. Mali: The 2020 and 2021 Military Coups

Mali has faced significant political instability due to two military coups in August 2020 and May 2021. These coups led to immediate and severe trade disruptions, including border closures and sanctions imposed by ECOWAS.

- i. **Political and Economic Context:** The coups in Mali were driven by widespread dissatisfaction with the government's handling of security issues, corruption, and economic mismanagement. The military took control, citing the need for political reform and better governance.
- ii. **Trade Disruptions:** Following the coups, ECOWAS imposed economic sanctions, including border closures and trade restrictions, to pressure the military junta to restore civilian rule. These measures included freezing Mali's assets in ECOWAS central banks and suspending financial transactions. (*ECOWAS Sanctions Against Mali Necessary, but May Be Counter-Productive* | IPI Global Observatory, n.d.)
- iii. **Humanitarian Impacts:** The trade disruptions severely affected Mali's economy, which relies heavily on imports for food, fuel, and medical supplies. According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the sanctions led to shortages of essential goods, skyrocketing prices, and increased food insecurity. The World Food Programme (WFP) reported that food prices increased by up to 30%, exacerbating malnutrition rates, especially among children and vulnerable populations. (*Mali* | World Food Programme, n.d.)

2. Guinea: The 2021 Coup d'État

In September 2021, a military coup in Guinea ousted President Alpha Condé. The political upheaval led to trade disruptions and economic sanctions by ECOWAS, affecting the country's trade and humanitarian situation. (*Guinea Coup – the Fall of Alpha Condé*, n.d.)

- i. **Political and Economic Context:** The coup was triggered by public discontent with Condé's attempt to extend his presidency through a controversial constitutional amendment. The military justified their actions by claiming to restore democracy and address corruption.
- ii. **Trade Disruptions:** ECOWAS responded by imposing sanctions, including border closures and the suspension of Guinea's participation in ECOWAS decision-making bodies. The sanctions aimed to pressure the junta to transition back to civilian rule. (*Guinea | Global Sanctions*, n.d.)
- iii. **Humanitarian Impacts:** Guinea faced immediate economic challenges due to the disruption of trade routes and the suspension of financial aid. The sanctions led to a decline in the availability of essential goods, including food and medical supplies. Reports from Human Rights Watch indicated that the sanctions caused significant hardships for ordinary citizens, with increased food prices and a shortage of medical supplies exacerbating public health issues. (*World Report 2022: Guinea | Human Rights Watch*, n.d.)

3. Burkina Faso: The 2022 Military Coup

In January 2022, Burkina Faso experienced a military coup that overthrew President Roch Marc Christian Kaboré. The coup led to significant trade disruptions and sanctions from ECOWAS.

- i. **Political and Economic Context:** The coup was motivated by frustration over the government's failure to effectively combat Islamist insurgencies and widespread insecurity. The military leaders cited the need for new strategies to address the country's security crisis.
- ii. **Trade Disruptions:** ECOWAS imposed sanctions, including travel bans on coup leaders and the suspension of Burkina Faso's membership in ECOWAS institutions. The sanctions aimed to pressure the military to expedite the return to constitutional order. (*Burkina Faso*, n.d.)
- iii. **Humanitarian Impacts:** The sanctions and trade disruptions worsened the already dire humanitarian situation in Burkina Faso. The United Nations High Commissioner for Refugees (UNHCR) reported increased displacement and food insecurity. The disruptions affected the supply chains for food, fuel, and other essential goods, leading to shortages and increased prices. The report states that the country also hosts 39,000 refugees, mostly of Malian origin. The number of people in need of humanitarian assistance increased by 35% between 2022 to 2023, from 3.5 million to almost 4.7 million. (*Burkina Faso*, n.d.) The International

Committee of the Red Cross (ICRC) noted that the sanctions impeded humanitarian access and delivery of aid to affected populations. (*Burkina Faso – Food, Water and Health Care Are Scarce* | ICRC, n.d.)

4. Nigeria and Neighboring Countries: The Border Closures of 2019-2020

While not directly related to a coup, the Nigerian government's decision to close its borders from August 2019 to December 2020 had significant trade and humanitarian impacts on the region, including ECOWAS member states.

- i. **Political and Economic Context:** The border closures were aimed at curbing smuggling, protecting local industries, and improving domestic security. However, the closures also disrupted regional trade within ECOWAS, as Nigeria is a major economic hub.
- ii. **Trade Disruptions:** The border closures halted the movement of goods between Nigeria and its neighbors, including Benin, Niger, and Cameroon. This disruption affected the flow of essential goods, agricultural products, and manufactured goods. ((PDF) *A Review on Economic Implications of Nigeria's Border Closure on Rice Importation*, n.d.)
- iii. **Humanitarian Impacts:** The border closures led to shortages of essential goods and increased prices in Nigeria and neighboring countries. According to the United Nations Economic Commission for Africa (UNECA), the closure negatively impacted food security, with many regions experiencing food shortages and price hikes. The disruptions also affected healthcare, as the flow of medical supplies was impeded, leading to shortages in medicines and medical equipment. (*What Turmoil in ECOWAS Means for Nigeria and Regional Stability* | Crisis Group, 2024)

D. Analysis of Policy and Legal Frameworks

The policy and legal frameworks governing trade and humanitarian responses in the ECOWAS region are complex, encompassing international treaties, regional agreements, and national laws. This section delves into these frameworks, analyzing how they address trade disruptions and their humanitarian impacts, particularly in the context of political instability and coups.

1. International Treaties and Conventions

i. The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO):

The GATT, as part of the WTO framework, establishes rules for international trade aimed at reducing tariffs and other barriers. It emphasizes non-discrimination, transparency, and fair competition. In the context of ECOWAS, GATT principles are relevant when member states impose trade restrictions or sanctions that may conflict with their international obligations. The WTO's

dispute resolution mechanism can be invoked in cases of alleged violations, although the political nature of coups complicates such proceedings. (*WTO | Legal Texts - Marrakesh Agreement*, n.d.)

ii. **International Covenant on Economic, Social and Cultural Rights (ICESCR):**

The ICESCR obligates state parties to ensure the right to adequate food, health, and an adequate standard of living. Trade disruptions in ECOWAS, especially those resulting from political instability, can impede the fulfillment of these rights. States must balance their security and political objectives with their international human rights obligations. UN committees and special rapporteurs often assess the impact of trade sanctions on these rights, highlighting the need for humanitarian exemptions. (*International Covenant on Economic, Social and Cultural Rights*, n.d.)

iii. **African Charter on Human and Peoples' Rights (ACHPR):**

The ACHPR, overseen by the African Commission on Human and Peoples' Rights, emphasizes the protection of human rights within the African context. Article 22 of the Charter highlights the right of peoples to their economic, social, and cultural development. Trade disruptions that result in humanitarian crises can be seen as violations of this right. The African Court on Human and Peoples' Rights has jurisdiction to hear cases alleging such violations, providing a legal avenue for redress. (*African Charter on Human and Peoples' Rights | African Union*, n.d.)

2. Regional Agreements

i. **ECOWAS Treaty and Protocols:**

The ECOWAS Treaty and its protocols, particularly the Protocol on Free Movement of Persons, Goods, and Services, are central to regional integration and economic cooperation. These legal instruments aim to facilitate seamless trade and movement across member states. However, the imposition of sanctions and border closures following coups directly contradict these objectives. ECOWAS has established mechanisms for conflict prevention and resolution, but the effectiveness of these mechanisms is often challenged by political realities. (EDIT, n.d.)

ii. **ECOWAS Conflict Prevention Framework (ECPF):**

The ECPF outlines strategies for preventing and managing conflicts, including political crises. It emphasizes early warning systems, mediation, and peacebuilding. In the wake of coups, the ECPF provides a basis for ECOWAS interventions, including sanctions. The legal framework within the ECPF aims to ensure that such measures are proportionate and do not unduly harm civilian populations. However, the practical implementation of these principles often falls short, necessitating continuous evaluation and reform. (*ECOWAS Conflict Prevention Framework Workshop on Africa Programme for Peace Holds in Lagos | Economic Community of West African States (ECOWAS)*, n.d.)

3. National Legal Frameworks

i. **National Constitutions and Trade Laws:**

Each ECOWAS member state has its own constitutional and legal provisions governing trade and state actions during emergencies. National laws often provide the basis for imposing trade restrictions or sanctions, but these must be balanced with international and regional obligations. The legal justifications for such measures, including their alignment with constitutional provisions on human rights, are crucial in assessing their legitimacy.

ii. **Humanitarian Exemptions and Safeguards:**

National legal frameworks sometimes include provisions for humanitarian exemptions during sanctions or trade disruptions. These exemptions aim to ensure the continued flow of essential goods and services to vulnerable populations. The effectiveness of these safeguards depends on the transparency and efficiency of their implementation. International organizations, such as the United Nations and the International Committee of the Red Cross (ICRC), often advocate for and monitor these exemptions to mitigate humanitarian impacts.

4. Role of International Organizations and Major Powers

i. **United Nations:**

The UN, through its various bodies such as the Security Council, General Assembly, and specialized agencies, plays a significant role in addressing the humanitarian impacts of trade disruptions. UN resolutions, reports, and special missions often provide a framework for international responses. The Security Council's sanctions regimes include provisions for humanitarian exemptions, although their implementation is subject to political considerations. (*UN Charter* | *United Nations*, n.d.)

ii. **African Union:**

The African Union (AU) complements ECOWAS efforts through its Peace and Security Council and other mechanisms. The AU's legal frameworks, including the Constitutive Act and the African Standby Force protocols, provide a basis for collective action in response to coups and trade disruptions. The AU's emphasis on "African solutions to African problems" highlights the importance of regional solidarity and tailored responses. (Isanga, 2013)

iii. **Influence of Major Powers:**

Major world powers, such as the United States, the European Union, and China, significantly influence trade and humanitarian policies in the region. Their bilateral and multilateral engagements, including sanctions and aid programs, impact the effectiveness of regional responses. Press releases and policy statements from these actors often shape the international community's stance and actions regarding trade disruptions and humanitarian crises in ECOWAS.

E. Conclusion

Summary

The humanitarian impacts of trade disruptions in the Economic Community of West African States (ECOWAS) have been profound, particularly in the wake of political instability and military coups that led to border closures and asset freezes in 2023. (*Africa in 2023: Continuing Political and Economic Volatility* | Chatham House – International Affairs Think Tank, n.d.) These disruptions have severely affected the flow of essential goods and services, exacerbating the vulnerabilities of already fragile economies. Key findings indicate that the interruption of trade has resulted in shortages of critical supplies, such as food, medicine, and fuel, thereby significantly impairing the quality of life for millions of people within the region.

Findings

The analysis has demonstrated that the primary causes of trade disruptions in ECOWAS are multifaceted, including political instability, economic sanctions, and security concerns. The impact on essential goods and services has been dire, with evidence showing increased prices, scarcity, and delays in the supply chain. Humanitarian impacts include heightened food insecurity, deteriorating health conditions, and economic hardships that disproportionately affect the most vulnerable populations.

The case studies of trade disruptions in countries such as Mali, Guinea, and Burkina Faso illustrate the severe consequences of such events. (*Socio Economic Impacts of the Political Crisis, ECOWAS and WAEMU Sanctions and Disruptions in External Financing in Niger, October 2023 - Niger* | ReliefWeb, 2023) These disruptions have not only hindered economic activities but also strained regional solidarity and cooperation. The existing policy and legal frameworks within ECOWAS and international treaties highlight the need for stronger enforcement mechanisms and better coordination to mitigate the adverse effects of trade disruptions.

Recommendations

1. **Strengthening Regional Cooperation and Policy Implementation:** ECOWAS must enhance its mechanisms for crisis management and conflict resolution to prevent trade disruptions. Strengthening regional cooperation and ensuring effective implementation of existing policies can help stabilize the region and safeguard the flow of essential goods.
2. **Enhancing Humanitarian Aid and Support Systems:** International organizations such as the United Nations (UN) and the African Union (AU) should collaborate more closely with ECOWAS to provide timely humanitarian aid and support. This includes pre-positioning supplies and establishing rapid response teams to address emergencies arising from trade disruptions.

3. **Promoting Economic Diversification and Resilience:** To reduce the impact of trade disruptions, ECOWAS member states should focus on diversifying their economies and building resilience. Investments in local production of essential goods and development of alternative trade routes can help mitigate the risks associated with political instability and border closures.
4. **Reforming Legal and Policy Frameworks:** There is a need to review and reform the legal and policy frameworks governing trade and humanitarian responses within ECOWAS. Clearer guidelines and stronger enforcement of regional agreements can help ensure that political actions do not disproportionately affect humanitarian outcomes.
5. **International Community Engagement:** The international community, including major world and regional powers, should engage constructively with ECOWAS to support stability and economic development. Diplomatic efforts and targeted sanctions should be designed to minimize humanitarian impacts while promoting political solutions.

In conclusion, the humanitarian impacts of trade disruptions in ECOWAS highlight the urgent need for comprehensive strategies that address both immediate humanitarian needs and long-term economic stability. By strengthening regional cooperation, enhancing support systems, promoting economic diversification, reforming legal frameworks, and engaging the international community, ECOWAS can better navigate the challenges posed by trade disruptions and ensure the well-being of its populations.

References

- 2023 West Africa Economic Outlook: Region's economic growth falls but medium-term forecast suggests return to level above 4% | African Development Bank Group. (n.d.). Retrieved 22 July 2024, from <https://www.afdb.org/en/news-and-events/2023-west-africa-economic-outlook-regions-economic-growth-falls-medium-term-forecast-suggests-return-level-above-4-63487>
- Acho, M. C., & Tacham, F. P. (2023). Examining the Reasons For and Effects of Military Coups in West Africa since 1990: The Obstacles to Democracy and Progress. *International Journal of Humanity and Social Sciences*, 1(2), 20–33. <https://doi.org/10.47941/ijhss.1536>
- Africa in 2023: Continuing political and economic volatility | Chatham House – International Affairs Think Tank. (n.d.). Retrieved 22 July 2024, from <https://www.chathamhouse.org/2023/01/africa-2023-continuing-political-and-economic-volatility>
- African Charter on Human and Peoples' Rights | African Union. (n.d.). Retrieved 17 February 2024, from <https://au.int/en/treaties/african-charter-human-and-peoples-rights>
- AU: Focus on Root Causes of Conflict, Political Instability | Human Rights Watch. (2022, May 24). <https://www.hrw.org/news/2022/05/24/au-focus-root-causes-conflict-political-instability>
- Burkina Faso. (n.d.). Global Focus. Retrieved 22 July 2024, from <https://reporting.unhcr.org/operational/operations/burkina-faso>

Burkina Faso – food, water and health care are scarce | ICRC. (n.d.). Retrieved 22 July 2024, from <https://www.icrc.org/en/document/burkina-faso-food-water-and-health-care-are-scarce>

Economic Growth and Trade | West Africa Regional | Archive—U.S. Agency for International Development. (n.d.). Retrieved 22 July 2024, from <https://2017-2020.usaid.gov/west-africa-regional/economic-growth-and-trade>

ECOWAS Conflict Prevention Framework Workshop on Africa Programme for Peace Holds in Lagos | Economic Community of West African States (ECOWAS). (n.d.). Retrieved 22 July 2024, from <https://www.ecowas.int/ecowas-conflict-prevention-framework-workshop-on-africa-programme-for-peace-holds-in-lagos/>

ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate | Crisis Group. (n.d.). Retrieved 22 July 2024, from <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate>

ECOWAS Sanctions Against Mali Necessary, but May Be Counter-Productive | IPI Global Observatory. (n.d.). Retrieved 22 July 2024, from <https://theglobalobservatory.org/2022/02/ecowas-sanctions-against-mali-necessary-but-may-be-counter-productive/>

EDIT. (n.d.). Revised ECOWAS Treaty (1993)—Electronic Database of Investment Treaties (EDIT). Retrieved 22 July 2024, from <https://edit.wti.org/document/show/c3b73b1c-4f51-423a-be13-f57244f4bo58>

FAO, UNICEF and WFP call for urgent and long-lasting action in West and Central Africa as the region faces another year of record hunger with thousands

experiencing catastrophic levels of food security. (n.d.). Retrieved 22 July 2024, from <https://www.unicef.org/press-releases/fao-unicef-and-wfp-call-urgent-and-long-lasting-action-west-and-central-africa>

Guinea | Global Sanctions. (n.d.). Retrieved 22 July 2024, from <https://globalsanctions.co.uk/region/guinea/>

Guinea Coup – the Fall of Alpha Condé. (n.d.). The Africa Report.Com. Retrieved 22 July 2024, from <https://www.theafricareport.com/in-depth/guinea-coup-the-fall-of-alpha-conde/>

International Covenant on Economic, Social and Cultural Rights. (n.d.). OHCHR. Retrieved 16 December 2023, from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

Isanga, J. (2013). The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation? Santa Clara Journal of International Law, 11(2), 267.

Mali | World Food Programme. (n.d.). Retrieved 22 July 2024, from <https://www.wfp.org/countries/mali>

Mali, a Coup within a Coup | Crisis Group. (n.d.). Retrieved 22 July 2024, from <https://www.crisisgroup.org/africa/sahel/mali/mali-un-coup-dans-le-coup>

Mali, Guinea, Burkina Faso seek re-entry to regional blocs | News | Al Jazeera. (n.d.). Retrieved 22 July 2024, from <https://www.aljazeera.com/news/2023/2/10/west-africa-military-regimes-seek-reentry-to-regional-blocs>

Meeting on West Africa, Sahel Region, Speakers in Security Council Express Concern over Successive Coups, Call for Strengthening State Institutions | Meetings

Coverage and Press Releases. (n.d.). Retrieved 22 July 2024, from <https://press.un.org/en/2022/sc14960.doc.htm>

Niger crisis could worsen insecurity throughout West Africa, UN envoy warns | Africa Renewal. (n.d.). Retrieved 22 July 2024, from <https://www.un.org/africarenewal/news/niger-crisis-could-worsen-insecurity-throughout-west-africa-un-envoy-warns>

Nigeria's land borders closed to all goods, official confirms | Business and Economy | Al Jazeera. (n.d.). Retrieved 22 July 2024, from <https://www.aljazeera.com/economy/2019/10/15/nigerias-land-borders-closed-to-all-goods-official-confirms>

Nigeria's role in Niger's Food Security – Inter-réseaux. (n.d.). Retrieved 22 July 2024, from <https://www.inter-reseaux.org/en/publication/51-special-issue-nigeria/nigerias-role-in-nigers-food-security/>

Nikebie, N. F. J. (2020). The Main Cause of Slow Economic Growth in West African Countries.

Out-of-school numbers are growing in sub-Saharan Africa | Global Education Monitoring Report. (n.d.). Retrieved 22 July 2024, from <https://www.unesco.org/gem-report/en/2022-out-school>

(PDF) A Review on Economic Implications of Nigeria's Border Closure on Rice Importation. (n.d.). Retrieved 22 July 2024, from https://www.researchgate.net/publication/380005869_A_Review_on_Economic_Implications_of_Nigeria's_Border_Closure_on_Rice_Importation

Ppar-westafricatransport.pdf. (n.d.). Retrieved 22 July 2024, from <https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ppar-westafricatransport.pdf>

Revised-treaty-1.pdf. (n.d.). Retrieved 22 July 2024, from <https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf>

Socio economic impacts of the Political Crisis, ECOWAS and WAEMU Sanctions and Disruptions in External Financing in Niger, October 2023—Niger | ReliefWeb. (2023, October 6). <https://reliefweb.int/report/niger/socio-economic-impacts-political-crisis-ecowas-and-waemu-sanctions-and-disruptions-external-financing-niger-october-2023>

S/RES/2590(2021). (n.d.). Retrieved 22 July 2024, from [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2590\(2021\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2590(2021)&Language=E&DeviceType=Desktop&LangRequested=False)

SSHAP West Africa Hub: Health Emergency Cycles and Social Context in West Africa—Social Science in Humanitarian Action Platform. (n.d.). Retrieved 22 July 2024, from <https://www.socialscienceinaction.org/resources/sshap-west-africa-hub-health-emergency-cycles-and-social-context-in-west-africa/>

Studies, the A. C. for S. (n.d.). Understanding Burkina Faso's Latest Coup. Africa Center for Strategic Studies. Retrieved 22 July 2024, from <https://africacenter.org/spotlight/understanding-burkina-faso-latest-coup/>

Taruvinga, G. R. (2023). The Resurgence of Military Coups in Africa: The Case of West Africa and the Sahel. In A. O. Akinola, *Contemporary Issues on Governance, Conflict and Security in Africa* (pp. 147–157). Springer Nature Switzerland. https://doi.org/10.1007/978-3-031-29635-2_9

The Challenge of Stability and Security in West Africa. (n.d.). Retrieved 22 July 2024, from

<https://www.worldbank.org/en/topic/fragilityconflictviolence/publication/the-challenge-of-stability-and-security-in-west-africa>

The Common Denominator: How Corruption in the Security Sector Fuels Insecurity in West Africa—Transparency International Defence & Security. (n.d.). Retrieved 22 July 2024, from <https://ti-defence.org/publications/west-africa-security-defence-sector-corruption-insecurity-conflict/>

The Global Report on Food Crises 2023 | FAO. (n.d.). Retrieved 22 July 2024, from <https://www.fao.org/family-farming/detail/en/c/1641967/>

UN Charter | United Nations. (n.d.). Retrieved 16 December 2023, from <https://www.un.org/en/about-us/un-charter>

WASH Severity Classification Report, and Overview of WASH Severity Classification in Niger | UNICEF West and Central Africa. (n.d.). Retrieved 22 July 2024, from <https://www.unicef.org/wca/documents/wash-severity-classification-report-and-overview-wash-severity-classification-niger>

West-central-africa-89-sc-english_o.pdf. (n.d.). Retrieved 22 July 2024, from https://www.unhcr.org/sites/default/files/2024-02/west-central-africa-89-sc-english_o.pdf

What Turmoil in ECOWAS Means for Nigeria and Regional Stability | Crisis Group. (2024, March 29). <https://www.crisisgroup.org/africa/west-africa/nigeria-sahel/what-turmoil-ecowas-means-nigeria-and-regional-stability>

Why aren't sanctions preventing coups in Africa? | ISS Africa. (n.d.). Retrieved 22 July 2024, from <https://issafrica.org/iss-today/why-arent-sanctions-preventing-coups-in-africa>

Why the UN Security Council Stumbles in Responding to Coups | Crisis Group. (n.d.). Retrieved 22 July 2024, from <https://www.crisisgroup.org/global/why-un-security-council-stumbles-responding-coups>

World Report 2022: Guinea | Human Rights Watch. (n.d.). Retrieved 22 July 2024, from <https://www.hrw.org/world-report/2022/country-chapters/guinea>

WTO | legal texts—Marrakesh Agreement. (n.d.). Retrieved 22 July 2024, from https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

REGULATORY CHALLENGES AND INNOVATIONS IN THE DIGITAL TOURISM
ECONOMY: IMPLICATIONS FOR CONSUMER PROTECTION AND BUSINESS
SUSTAINABILITY IN NIGERIA

*Lateefat Adeola Bello and Jemila Shuaibu

Department of Commercial Law, Faculty of Law, Ahmadu Bello University, Zaria

*attorney4real@yahoo.com +2348031530751

Jamilaabdulshakur85@gmail.com +2348036609782

Abstract

The digital transformation of Nigerian tourism offers significant opportunities and challenges for businesses, consumers, and regulatory frameworks. This paper examines the necessary regulatory considerations and innovative strategies to enhance consumer protection and ensure business sustainability within the digital tourism economy. The Nigerian tourism sector has seen remarkable growth, largely due to advancements in digital technologies such as real-time hotel bookings and online price comparisons. These technologies have fundamentally altered service delivery and consumer experiences. The Nigerian government acknowledges the importance of digital transformation in tourism and has made progress in integrating it into broader digital policies. However, regulatory challenges persist, including inadequate legal frameworks that hinder the sector's empowerment and the enforcement of existing regulations. The fragmentation within the tourism economy, exacerbated by inefficient law enforcement, poses significant barriers to growth and erodes consumer trust. Small and medium enterprises (SMEs) face particular difficulties in adapting to the evolving digital landscape, limiting their ability to capitalize on the potential of digital tourism. This paper analyzes new technologies, including mobile applications and online booking systems, to demonstrate how innovation can improve operational efficiency and enhance customer experiences. It also addresses critical consumer protection issues in the digital tourism economy, suggesting regulatory measures to enhance transparency, data security, and fairness, by making recommendation that Nigeria may improve its digital tourism economy by Providing firms with tools and instruction to help them deal with the constantly changing regulatory environment so they can adjust and prosper in a cutthroat market. A doctrinal research methodology is employed to propose actionable recommendations aimed at creating a dynamic regulatory environment that adapts to technological changes. Ultimately, the goal is to foster a digital tourism economy in Nigeria that benefits both consumers and businesses

Introduction

The digital transformation of Nigeria's tourism industry offers substantial opportunities and challenges for various stakeholders, including businesses, consumers, and regulatory bodies. This paper investigates the regulatory considerations and innovative strategies essential for enhancing consumer protection and ensuring business sustainability within the digital tourism economy. Recent advancements in digital technologies have significantly reshaped service delivery and consumer experiences in Nigeria's tourism sector. The government acknowledges the importance of this transformation and is actively integrating digital strategies into national tourism policies. However, significant regulatory challenges such as inadequate legal frameworks and inconsistent enforcement of regulations, which hinder the growth of the digital tourism economy and erode consumer trust, particularly for small and medium enterprises (SMEs) that face difficulties in digital compliance remains.

The paper explores use of innovative technologies, like mobile applications and online booking systems, as potential solutions to improve operational efficiency and customer engagement. By leveraging these innovations, Nigerian tourism businesses can enhance consumer experiences and increase competitiveness. Moreover, the implications for consumer protection are critically analyzed, advocating for robust regulatory measures to ensure transparency, data security, and fair practices in the digital marketplace. Employing a doctrinal research approach, the paper provides actionable recommendations for promoting a dynamic regulatory framework that adapts to the evolving digital landscape. Ultimately, the aim is to cultivate a thriving digital tourism economy in Nigeria that equitably benefits both consumers and businesses.

Objective of the paper

The objective of this paper is to:

1. analyze the current regulatory framework governing the digital tourism economy in Nigeria, identifying gaps and challenges that hinder effective governance of the sector.

2. examine the implications of regulatory challenges on consumer protection, particularly in terms of fraud, data privacy concerns, and the lack of recourse for consumers in the digital tourism landscape.
3. explore the role of innovation in driving the digital tourism sector, showcasing successful case studies and the contributions of startups and SMEs.
4. investigate the relationship between regulatory practices and business sustainability, offering strategies for businesses to adapt to the evolving regulatory landscape and ensure long-term success.
5. propose policy recommendations for enhancing regulatory frameworks, improving consumer protection measures, and fostering innovation and sustainability in the tourism sector.

By these objectives, this paper aims to contribute to the development of a more robust and effective regulatory framework that supports the growth of Nigeria's digital tourism economy while prioritizing consumer protection and business sustainability.

The Digital Tourism Landscape in Nigeria

The digital tourism economy encompasses a wide range of online services and platforms that enable travelers to plan, book, and experience their trips.²²⁹ In Nigeria, this includes Online Travel Agencies (OTAs) such as Jumia Travel, Wakanow, and Travelstart, as well as local businesses that have embraced digital technologies to enhance their offerings and reach a broader customer base. The growth of the digital tourism economy in Nigeria has been driven by several factors, including the increasing penetration of smartphones and internet access, the rise of digital payments, and the growing demand for personalized and convenient travel experiences. According to a report by the Nigerian Tourism Development Corporation (NTDC), the digital tourism sector in Nigeria generated over ₦200 billion in revenue in 2020, with a projected annual growth rate of 15% over the next five years²³⁰. Despite this impressive growth, the digital tourism

²²⁹ Online platforms like Jumia Travel and Wakanow are travel agencies that provide wide range of services including booking of flights and hotels accommodation, while Hotel.ng, Naira Travels, Flyboku also offer flight booking and accommodation services.

²³⁰ Nigerian Tourism Development Corporation (NTDC). (2021). Digital Tourism in Nigeria: Trends, Challenges, and Opportunities

economy in Nigeria faces several challenges, including infrastructure gaps, skills shortages, and regulatory uncertainties. The rapid pace of innovation has also created new risks and challenges for consumers and businesses alike, particularly in areas such as data privacy, fraud, and unfair competition.

. Existing Regulatory Framework

Nigeria's regulatory framework for the digital tourism economy is still evolving, with a patchwork of laws and regulations that often overlap or conflict with one another. The primary legislation governing the sector was the Nigerian Tourism Development Corporation Act of 1992, which establishes the NTDC as the main regulatory body for the tourism industry²³¹. The Act empowers the NTDC to regulate and oversee all tourism activities, ensuring compliance with standards that protect consumers²³²

The NTDC Act²³³ however predates the rise of digital tourism and does not adequately address the unique challenges and opportunities presented by online platforms and services. Other relevant laws include the Consumer Protection Framework (CPF) of 2016, which sets out guidelines for protecting consumers in the digital economy, and the Data Protection Regulation (DPR) of 2019, which establishes standards for data privacy and security. It is worthy of note, that the implementation and enforcement of these laws have been fraught with problems notable amongst which was the case of AG Fed v AG Lagos State where the Supreme Court in a landmark judgment²³⁴ held that the states and not the federal government has the jurisdiction of regulating tourism and hospitality²³⁵, this is coupled with the fact that many businesses and consumers are still unaware of their rights and obligations as stakeholders in Nigeria's tourism sector²³⁶. The regulatory landscape is further complicated by the involvement of multiple government agencies, such as the Nigerian Communications Commission (NCC), which oversees telecommunications and internet services, and the Central Bank of Nigeria (CBN), which regulates digital payments and financial services. This fragmentation has

²³¹ Section 4(1) NTDC Act 1992 Cap N137 LFN2004 This law has however been repealed by the Nigeria Tourism Development Authority Act, 2022 (Herein after referred to as the NTDA).

²³² Section 7 Ibid

²³³ Cap N137 LFN2004 (1992) Ibid

²³⁴ AG Federation v AG Lagos State (2013) 16 NWLR(Pt.1380) Page 249SC

²³⁵ On the premise of Section 4 of the CFRN 1999 (as amended)

²³⁶ Ibid

often led to confusion and inconsistencies in the application of rules and standards across this sector. It is however worthy of note, that the Nigerian tourism landscape has changed with the recent passing into law of the Nigerian Tourism Development Authority Act²³⁷. The new Act is an improvement on the NTDC Act, especially with the provision for a tourism development levy for the promotion of tourism and support for the Fund where necessary²³⁸. It creates a Management Board for the Fund which purpose is to control, invest and administer the Tourism Development Fund.²³⁹ To guarantee that the funds are used for the intended purpose, the Authority will supervise the management of the Tourism Development Fund²⁴⁰. The Act also empowers the Authority to approve all travel and hospitality businesses in order to form a tourist alliance. This is to guarantee public health and safety, consumer protection, quality control, and standardisation of businesses under the Alliance²⁴¹. Thus, by this provision, the new Act²⁴² made provision for consumer protection on tourism services.

Consumer Protection Issues

The tourism industry has undergone a considerable transformation due to the rise of the digital economy. This is especially the case in Nigeria, where regulatory innovations and problems are having a greater impact on corporate sustainability and consumer safety. Digital tourism presents prospects for improved customer experiences and operational efficiencies, as it is defined by the incorporation of technology into the provision of services. Nevertheless, it also poses regulatory obstacles that may affect consumer rights and the sustainability of tourism-related enterprises.

The government has a role in the relationship between tourist organizations, consumers, and the government since it informs both parties of their responsibilities. Both partners become more accountable as a result, which is why the government has to create regulations that are tailored to the new demands of business, particularly since

²³⁷ NTDA ACT,2022

²³⁸ Section 23,Ibid

²³⁹ Section 21 Ibid

²⁴⁰ Section 5(1)d Ibid

²⁴¹ Chuka Agbu(2024) The Nigerian Tourism Development Authority Act,2022: A long- awaited Booster For Tourism II, BusinessDay 20TH March,2024 available@ < <https://businessday.ng/opinion/article/the-nigerian-tourism-development-authority-act-2022-a-long-awaited-booster-for-tourism-ii/>> accessed 31 July 2024

²⁴² NTDA Act,2022 Op.Cit

the laws that are in place now do not provide enough protection for online shoppers of goods and travel services.²⁴³As is evident from these relationships, consumers simply value the goods or services they need to acquire from others in order to accomplish their objectives; without affiliation to any religion or ideology. As a result, the usage of the Internet in the tourism sector is growing both nationally and throughout globe²⁴⁴.

Nigeria Consumers in the tourism economic subsector are not left out, as Nigeria's digital tourism economy also faces range of challenges, primarily jurisdictional control over tourism regulation on taxing and revenue collection²⁴⁵, including data privacy breaches, fraudulent practices, and unfair contract terms. A survey conducted by the NTDC in 2021 found that over 60% of consumers had experienced at least one negative incident while booking or using online travel services, with the most common issues being data breaches, hidden fees, and poor customer service²⁴⁶. Moreover, the lack of comprehensive regulations can hinder the ability of businesses to innovate, as they face uncertainties regarding compliance and liability. Furthermore since they are concerned about liability and compliance, companies may find it difficult to innovate in the absence of comprehensive rules. There are two effects of these regulatory obstacles. Inadequate safety might cause customers to lose faith in digital platforms, which will lower their involvement and participation in the travel industry. Businesses may be reluctant to invest in digital solutions without clear norms, which can hinder growth and sustainability. This is because companies may find it difficult to negotiate the regulatory landscape.

The consequences of these regulatory challenges are twofold. For consumers, insufficient protection can erode trust in digital platforms, reducing engagement and participation in the tourism economy. For businesses, the inability to navigate the regulatory landscape can stifle growth and sustainability, as firms may be reluctant to invest in digital solutions without clear guidelines. Presently there is no specific regulation to address this. The existing consumer protection laws in Nigeria, such as the

²⁴³ Nigeria Tourism Development Authority Act, 2015

²⁴⁴ Buhalis, D. & Licata, C.M., (2002) The future e tourism intermediaries. *Tourism management*, 23(3), pp. 207-220. Available at <<https://core.ac.uk/download/pdf/6492900.pdf> ?accessed 20 July 2024

²⁴⁵ Section 60, part 1 of the Second Schedule of the second Schedule of CFRN 1992 as against the backdrop of Section 4(2)(3) CFRN, 1999

²⁴⁶ Ibid

Consumer Protection Framework and the Federal Competition and Consumer Protection Act of 2019, provide some safeguards for digital consumers. For example the landmark case of **Nigerian Bottling Company.v. Ngonadi**²⁴⁷ reinforced the authority of Consumer Protection Council in addressing consumer grievances and ensuring that companies adhere to consumer rights, setting a precedent for similar cases in the tourism sector. Like the case of **AG Federation .v. AG Lagos State**²⁴⁸ which highlighted the responsibilities of the NTDC as it then was (now NTDA) in ensuring that tourism operators comply with consumer protection standards. The ruling emphasized the need for regulatory bodies to enforce compliance to protect consumers²⁴⁹. The effectiveness of this regulatory institution is been limited by factors such as low-level awareness, lack of enforcement, and the complexity of cross-border transactions²⁵⁰. Thus government must quickly create a stronger regulatory framework that safeguards travellers and encourages innovation in the travel industry in order to address these problems. It is imperative, that best practices from international standards should be included into this framework, with an emphasis on transparency, high-quality services, and data protection. Furthermore, Nigerian's new NTDA Act has in a way addressed the issue of collaboration by providing, that "the authority established under the Act, may enter joint-venture partnerships with States and other stakeholders for the development of tourism sites and hospitality establishments".²⁵¹

In addition, is the rise of social media and online reviews which has created new challenges for consumer protection, with some businesses engaging in deceptive practices such as fake reviews and misleading advertising. This most often than not undermine consumer trust and confidence in the digital tourism ecosystem.²⁵² Other challenges include safe payment channels, access to market, Customer Service and retention.Booking and Reservation.²⁵³ Nigeria may take advantage of developments in

²⁴⁷ (1985)1 NWLR (pt 4) 739

²⁴⁸ (2013)

²⁴⁹ Ibid

²⁵⁰ Ibid

²⁵¹ Section 29 NTDA Act,2022

²⁵² Iyene Ibanga (2021) Digital Tourism in the New Age of Technology: Augmented Reality (AR) or Virtual Reality (VR) have brought fresh possibilities into the tourism and travels , Premium Time, 7 July 2021 available at <<https://www.premiumtimesng.com>> accessed 29 July 2024

²⁵³ Yemisi Izuora (2022) Nigeria Exploes New Technology to Advance Tourism Business , Oriental News, 26, October 2022 Available @ <<http://www.orientalnewsng.com>> accessed 1 August 2024.s

digital tourism to strengthen consumer protection by implementing a number of calculated measures that close current regulatory gaps and boost confidence in the online marketplace. For Instance, the adoption of cutting-edge technology like blockchain and AI can improve transparency and enable safe transactions in the digital tourist industry. Nigeria may use blockchain to produce tamper-proof transaction records that would ensure service providers are held accountable and assist to reduce fraud. AI can also be used to analyse customer comments and behaviour, giving businesses the ability to proactively address possible problems and enhance service quality.²⁵⁴

It is crucial to have a strong legislative framework designed especially for digital tourism. The particular difficulties brought about by e-commerce and digital transactions are not sufficiently addressed by Nigeria's present consumer protection regulations, such as the Consumer Protection Council Act. Clear principles on consumer rights in the digital sphere, dispute resolution procedures, and sanctions for noncompliance should all be part of a comprehensive framework. In addition to safeguarding customers, this would motivate companies to use ethical business methods. In addition, evolving a range of stakeholders is essential to fostering an atmosphere that is favourable to digital tourism, including governmental organisations, tech firms, and consumer advocacy groups. Working together can result in the creation of consumer education initiatives that advise consumers of their rights and the channels of dispute resolution that are open to them. Partnerships with digital companies can also make it easier to develop user-friendly platforms that put customer safety first.

Furthermore, enhancing customers' digital literacy is essential to giving them the confidence to successfully traverse the world of digital tourism. Consumers can benefit from educational programs by learning how to spot reputable service providers, spot possible fraud, and make efficient use of digital tools. Increased consumer confidence as a result of this empowerment may spur more people to participate in digital tourism. Encouragingly, Section 18 NTDA Act ²⁵⁵ which provides for the establishment of a

²⁵⁴ NTDC (2021) Digital Technology, best tool to boost Tourism in Nigeria, Vanguard, 27 November, 2021
Available at < [http:// www.vanguardngr.com](http://www.vanguardngr.com)> Accessed 1 August 2024

²⁵⁵ Ibid

Tourism development Fund for tourism development and tourism related projects and programs can be applied to online marketing and promotion of Nigeria as a tourist destination . Addressing this will be an impactful innovation to the future sustainability of tourism business in Nigeria.

Business Sustainability Concerns

Local businesses in Nigeria's digital tourism economy face significant challenges in terms of sustainability and growth. One of the main issues is the dominance of large Online Travel Agency (OTAs) and global platforms, which can leverage their scale and resources to undercut local competitors and capture a larger share of the market. Small and medium-sized enterprises (SMEs) in the tourism sector often lack the resources and expertise to compete effectively in the digital space, particularly when it comes to areas such as online marketing, data analytics, and customer relationship management²⁵⁶. This can lead to a vicious cycle of low visibility, reduced bookings, and limited profitability. Another challenge is the lack of access to affordable and reliable digital infrastructure, such as high-speed internet, secure payment gateways, and cloud computing services. Many businesses, particularly those located in rural or underserved areas, struggle to access these essential tools and services, which can hamper their ability to innovate and grow²⁵⁷. Also pertinent, is, the regulatory uncertainty and inconsistencies in the digital tourism sector which can create significant compliance costs and risks for businesses. Navigating the complex web of laws and regulations, obtaining necessary licenses and permits, and ensuring data privacy and security can be time-consuming and resource-intensive, especially for smaller enterprises. To address this administrative bottle necks and red tapes must be minimized or entirely removed

²⁵⁶ Amanawa David Ebiegber (2022) Challenges of Tourism in expanding Human and economic Opportunities in Nigeria, International Journal of Academic Accounting, Finance & Management Research(IJAAFMR) Vol.6 Issue 1 Available at https://www.researchgate.net/publication/361697069_Challenges_of_Tourism_in_Expanding_Human_and_Economic_Opportunities_in_Nigeria/link/62c01c15bd55e01e75f4c2a4/download? tp=eyJjb250ZXh0Ijp7InBhZ2UiOiJwdWJsaWNhdGlvbIIsInByZXZpb3VzUGFnZSI6bnVsbH19 > Accessed 2 August 2024

²⁵⁷ Suyunchaliyeva, M.et-al (2020). Digital economy: Information technology and trends in tourism. E3S Web of sConferences, 159, article number 04029.< <https://ea21journal.world/index.php/ea-v169-08/> >

from future amendment of the Act²⁵⁸ to enable businesses to grow without unnecessary red tapes.

Innovations in the Digital Tourism Economy

In spite of the challenges, there are several promising technological innovations that have the potential to enhance the digital tourism economy in Nigeria. One area of innovation is the use of artificial intelligence (AI) and machine learning to personalize travel experiences and optimize operations. For example, some OTAs are using AI-powered chatbots to provide 24/7 customer support, while others are leveraging predictive analytics to offer dynamic pricing and targeted recommendations in very few instances. Another area of innovation is the use of blockchain technology to enhance transparency, security, and efficiency in the tourism supply chain in other jurisdiction²⁵⁹. However, in Nigeria block chain is still very innovative with people not even firms and companies grappling to understand it use.

Blockchain can be used to create a decentralized and tamper-proof record of transactions, reducing the risk of fraud and disputes. It can also enable more efficient and cost-effective cross-border payments and settlements²⁶⁰. Mobile payments and digital wallets are also transforming the way consumers pay for travel services in Nigeria. With the increasing adoption of mobile money and digital banking, more travelers are opting for cashless and contactless payment methods, which can enhance convenience and security while reducing the risk of theft and fraud²⁶¹.

In addition to technological innovations, there are also several policy innovations that can help address the regulatory challenges in Nigeria's digital tourism economy. One approach is to adopt a more flexible and adaptive regulatory framework that can keep pace with the rapid changes in the sector. This could involve creating regulatory sandboxes or innovation hubs that allow businesses to test new products and services under controlled conditions, with the potential for regulatory relief or support. Another

²⁵⁸ NTDA Act, 2022

²⁵⁹ Alexandru Nedelea and Alina Bălan (2022) 'E- Tourism and Tourism Services Consumer Protection' *Amfiteatru Economic* Vol XII • No. 28 Available at <<https://core.ac.uk/reader/6492900#:~:text=Alexandru%20Nedelea,Ian>> Accessed 28 July 2024

²⁶⁰ Watkins, M. et-al (2018). Digital tourism as a key factor in the development of the economy. *Economic Annals-XXI*, 169(1-2), 40-45. Available at <<https://www.researchgate.net>>

²⁶¹ Ibid

approach is to promote greater collaboration and coordination among stakeholders, including government agencies, businesses, and consumer groups. This could involve establishing industry-led standards and codes of conduct, as well as creating platforms for dialogue and knowledge-sharing. By working together, stakeholders can identify and address emerging issues more effectively and develop solutions that balance the needs of consumers, businesses, and the broader public interest

In addition, policymakers can also explore innovative financing and support mechanisms to help local businesses in the digital tourism sector²⁶². This could include tax incentives or subsidies for investments in digital infrastructure and skills development, as well as the creation of dedicated funds or accelerators to support early-stage startups and SMEs. By providing targeted support and resources, policymakers can help level the playing field and foster a more diverse and competitive digital tourism ecosystem²⁶³.

Implications of Technological Innovations

The innovations and policy reforms have significant implications for consumer protection in Nigeria's digital tourism economy. By leveraging emerging technologies such as AI, blockchain, and mobile payments, businesses can enhance the security, transparency, and convenience of their services, reducing the risk of fraud and disputes. For example, the use of AI-powered chatbots and predictive analytics can help consumers make more informed and personalized travel decisions, while also providing faster and more responsive customer support. Blockchain-based platforms can create a more secure and transparent record of transactions, reducing the risk of data breaches and disputes. And mobile payments can enhance convenience and security while reducing the risk of theft and fraud. Moreover, a more flexible and adaptive regulatory framework can help ensure that consumer protection laws and standards keep pace with the rapid changes in the digital tourism sector. By creating regulatory sandboxes and promoting greater collaboration among stakeholders, policymakers can identify and address emerging issues more effectively and develop solutions that balance the needs of consumers and businesses. However, for these innovations and reforms to be

²⁶² Section 18 NTDA Act 2018 will sufficiently address this gap

²⁶³ Ibid

effective, it is essential that they are accompanied by strong enforcement mechanisms and public awareness campaigns. Consumers need to be informed of their rights and responsibilities, and businesses need to be held accountable for any violations or malpractices. This will require a concerted effort from government agencies, consumer groups, and the private sector to educate and empower digital consumers in Nigeria²⁶⁴.

The innovations also have significant implications for the sustainability and growth of local businesses in Nigeria's digital tourism economy. By leveraging emerging technologies and participating in regulatory sandboxes and innovation hubs, businesses can develop new products and services that are tailored to the needs of Nigerian consumers and aligned with global best practices. Similarly collaborating with government agencies and industry groups, businesses can help shape the regulatory landscape and ensure that it supports their growth and innovation. This could involve advocating for policies that promote fair competition, protect intellectual property rights, and provide access to affordable and reliable digital infrastructure²⁶⁵.

However, for these innovations and reforms to be truly transformative, they need to be accompanied by investments in digital skills and capacity-building. Many local businesses in the tourism sector lack the expertise and resources to fully leverage emerging technologies and participate in the digital economy. By investing in training and upskilling programs, businesses can develop the necessary capabilities to compete effectively and grow sustainably²⁶⁶.The imperative here is recognizing that the sustainability of the digital tourism economy in Nigeria is not just about the success of individual businesses, but also about the broader social and environmental impact of the sector. By promoting responsible and sustainable tourism practices, businesses can contribute to the preservation of Nigeria's natural and cultural heritage, while also creating jobs and economic opportunities for local communities.

9.Importance of Studying Regulatory Challenges in Nigeria's Digital Tourism Economy

²⁶⁴ Ibid

²⁶⁵ Ibid

²⁶⁶ Ibid

Understanding the regulatory challenges and innovations in Nigeria's digital tourism economy is imperative for the following reasons:

- a. Current regulations are fragmented and lack a comprehensive approach. Identifying these gaps can lead to the development of effective policies that govern the sector.
- b. With increasing digital transactions, consumer risks such as fraud and data breaches are prevalent. Addressing regulatory challenges is vital for implementing measures that protect consumers and build trust.
- c. . Regulations significantly influence innovation. By understanding these challenges, we can create an environment that fosters technological advancements, especially among startups and SMEs.
- d. Regulatory practices affect the long-term viability of businesses in the digital tourism sector. Studying these challenges can help identify strategies for adaptation and success
- e. . As digital tourism operates across borders, aligning regulatory expectations is crucial.

This research can aid in developing international standards tailored to Nigeria's context. In summary, exploring regulatory challenges in Nigeria's digital tourism economy is vital for effective policymaking, consumer protection, innovation, business sustainability, and global alignment. This research offers valuable insights for policymakers, industry stakeholders, and consumers.

10 Conclusion

Nigeria's digital tourism industry is at a crossroads, with much of room for innovation and expansion but also with enduring risks and constraints. In order for this industry to reach its full potential, legislators, companies, and customers must collaborate to resolve regulatory issues and advance a more inclusive and sustainable digital tourist ecosystem. This paper has identified a number of important problems and offered a number of remedies, such as utilising cutting-edge technologies, changing the legal system, and making investments in digital skills and capacity-building. Stakeholders

can guarantee that the advantages of the digital tourism economy are distributed more fairly and widely while also defending the rights and interests of both enterprises and customers by taking a proactive and cooperative stance. However, everyone involved must continue to dedicate themselves to and work towards achieving this goal.

Legislators must create a uniform and transparent regulatory framework that promotes competition and innovation while defending the rights of consumers and the general welfare. Businesses must embrace ethical and sustainable tourist practices in addition to investing in digital technology and expertise. In order for consumers to safely and successfully traverse the world of digital travel, they must also be educated and informed. Nigeria may establish itself as a leader in the digital tourist industry, drawing investment, generating employment, and presenting its rich natural and cultural legacy to the world, by cooperating to achieve these shared objectives. Although there will be difficulties, there could be much more to gain. It's time to seize the innovations and opportunities presented by the digital age while simultaneously making sure that the digital tourist industry benefits all parties involved.

Recommendations

In order to ensure steady growth and competitiveness in the international market, Nigeria may improve its digital tourism economy **by putting the following into practice,**

1. establish a cohesive legal structure that tackles the particular difficulties faced by the digital tourist industry, making sure that regulations can keep up with advances in technology.
2. put strong safeguards in place to protect customers from fraud and data breaches, such as improved privacy protections and explicit standards for online transactions.
3. reduce red tape and create incentives for technological innovation in the travel industry and a regulatory climate that helps SMEs and startups.
4. Provide firms with tools and instruction to help them deal with the constantly changing regulatory environment so they can adjust and prosper in a cutthroat market.

5. work with international regulatory organisations to harmonise best practices and standards so that Nigeria's digital tourism industry can satisfy both local and global demands.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

BALANCING COPYRIGHT PROTECTION AND ACADEMIC LIBRARY OPERATIONS
IN NIGERIA: A LEGAL ANALYSIS OF THE COPYRIGHT ACT 2022

¹Raphael Gabriel Okplogidi and ²Aishatu Eleojo Adaji

¹Faculty of Law, Benue State University, Makurdi, Nigeria

²Faculty of Law, Osun State University, Osogbo, Nigeria

rokplogidi@bsum.edu.ng +234-8060-070170
eleojo.adaji@uniosun.edu.ng +234-8023-496370

Introduction

There has been a movement towards creating more freely accessible materials, documents and books, particularly in light of advances in digital technologies and the internet, where works can be made accessible to a much larger group of people on different continents. In relation to libraries and academic institutions, compliance with copyright requirements has long been an issue. The traditional role of a library includes acquiring information resources, such as literary works and providing access to users. At this stage, it is argued, very little copyright involvement occurs (Ezeh 2013). However, anything more than this raises more serious concerns about copyright. These concerns relate to orphan works, limitations and exceptions from copyright infringements.

Orphan works are works in which copyright subsists, but the copyright owners are either unknown or known but cannot be located (Yale University n.d). The use of orphan works, whether for commercial or non-commercial purposes, is generally problematic. This is because a user may not be able to identify or locate the author to secure permission. Then, unless the use of the copyrighted work is covered by an existing exception to copyright allowing for the use of the work without securing permission, a user cannot make use of the orphan work, at least not without infringing the copyright (Yale University n.d).

Limitations and exceptions are situations where the law allows acts that otherwise would have amounted to the infringement of the copyright of an author. These include

where the exploitation of the work is for the purposes of research, education, review, criticism, private use or parody, pitches or caricature.²⁶⁷ Copyright limitations and exceptions are usually based on considerations of public interest, prevention of monopoly control and promotion of societal development through knowledge sharing and preservation. They seek to strike a balance between the interest of copyright holders and members of the public by providing protection and situations where the protection may be tinkered with to accommodate the interest of members of the public. This ensures that libraries provide access to quality information resources to users without exceeding the acceptable norms. But to what extent can academic libraries allow the exploitation of copyrightable information resources by staff and students who access them for the purposes of teaching, learning and research? In other words, do academic libraries have the responsibility of ensuring that they balance the interest of copyright holders and that of knowledge seekers by way of enforcing or observing copyright laws in their operations and service delivery?

Adopting doctrinal research methodology, this paper critically analyses the provisions of the Nigerian Copyright Act 2022 in relation to academic libraries and their operations in Nigeria, with a particular emphasis on literary works. Specifically, it examines how Nigeria's current copyright law in protecting the rights of creators of literary works, impacts academic libraries and their operations in the country. The paper, thereby, identifies critical areas where the law impacts academic library operations, including access to digital content, interlibrary loans, and the reproduction of materials for educational and research purposes. It suggests strategies for compliance while advocating for amendments to the Act that could better support the evolving role of academic libraries in the digital age.

Copyright

There is no explicit definition of the term *copyright* under the Nigerian Copyright Act 2022.²⁶⁸ Hence, there is a need to resort to other sources in order to define the concept.

²⁶⁷ Section 20 of the Nigerian Copyright Act 2022.

²⁶⁸ Section 108 *simpliciter* states that: "copyright" means copyright under this Act.

Black (2014) defines copyright from two perspectives. First in terms of usage as a noun and second as a legal term. It states that the term entails:

the right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works, and sound recordings) fixed in any tangible medium of expression (pp. 411 – 412)

Also, copyright means the body of law relating to such works (Black 2014). The last definition puts copyright within the realm of legal terms, referring to the legal regime governing creative works. Nchi (2012) equally defines copyright to mean ‘the exclusive rights given to the original author or producer or an original literary, dramatic or musical work to do or allow others to do or prevent others from doing certain acts in respect of such work’ (p.157). This situates copyright within the context of a property. However, to assert that copyright entails exclusive rights does not take into account the exceptions to the exploitation of information resources as provided under different legal regimes.²⁶⁹

Copyright applies to various subject matters, such as literary, musical and artistic works. As a result, it impacts library operations as information resources available in the library include literary resources such as textbooks and journals both in print and electronic formats. It is the responsibility of library managers to ensure that both the economic and moral rights of authors, as protected by law, are safeguarded. It is from this perspective that the concept of copyright is deployed in this paper.

Access

The term *access* is defined ‘as the means to enable an inquirer to learn from – to become informed by – a source pertinent to an inquiry, to accede to the evidence that result in acquiring the knowledge desired’ (Buckland 1991). Within the context of this work, it entails the equal availability of information and resources in the library to users,

²⁶⁹ Examples of these legal regimes include the National Library Act, that requires authors to compulsorily deposit copies of their works with the National Library and the provisions of the CRA, 2022 that allows the use of information resources for certain purposes especially for the purpose to research, teaching and learning.

whether in print or digital formats, through the services provided by the library managers.

Literary Works

Literary works are one of six general categories that are eligible for copyright protection under Section 2(1) of the Nigerian Copyright Act 2022. However, the term *literary works* is not defined under the Nigerian Copyright Act 2022. Section 108 of the Act, merely enumerated examples of literary works to include, irrespective of literary quality: novels, stories and poetic works, plays, stage direction, film scenarios and broadcast scripts, choreographic works, encyclopedias, dictionaries, directories and anthologies, letters, reports and memoranda; lectures, addresses and sermons; law reports excluding decisions of courts; written tables and compilation or other works thereto. In relation to the library, the term connotes a non-audiovisual work that is expressed in verbal, numerical, or other symbols, such as words or musical notation, and embodied in some type of physical objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards in which they are embodied. Literary works form a large chunk of collections in an academic library, especially in Nigeria. They are made available to users of academic libraries in Nigeria both in print and electronic formats.

Library

Traditionally, the term library is defined as a building that houses a collection of books and materials kept for reading, study and consultation (Ebo 2017). Particularly, Uganneya and Agoh (2013) define a library as ‘a store of books and other forms of record, providing its customers with a particular commodity-information. This store is administered by librarians who are professionally competent and who recognise a personal commitment to extend themselves and serve their readers’ (p.1). This definition does not take into cognisance contemporary developments in the area of information technology in relation to libraries. In modern times, some resources are stored digitally and not in a building. In this vein, the Cambridge University Press (n.d) defines an electronic library as a website that makes books and other reading materials available to users. This implies a database where library resources such as books and journals are digitally made available to users and can be accessed electronically and

remotely without being physically present in a library structure or building. It enhances research and learning.

An academic library is an essential part of any educational institution, school, college or university. They serve the needs of their users by making available all the relevant information resources that researchers or users may require. In doing this, they are to be mindful of the copyright of creators of these information resources that are sought to be provided for the use of its patrons or researchers. During operations, users are allowed to explore, exploit and store information resources. It is important to examine how the law allows or limits users of libraries as it relates to access to information resources in academic libraries of tertiary institutions.

ANALYSIS OF NIGERIA'S COPYRIGHT REGIME IN RELATION TO ACADEMIC LIBRARY OPERATIONS

Asein (as cited in Uhakheme, 2023), while being interviewed on the significance of the recently enacted Nigerian Copyright Act, traced the history of the old Act and the factors that necessitate the new Act thus:

The old Copyright Act, although contained in the 2004 Laws of the Federation, is a much older statute that was promulgated in 1988, long before the Internet and online exploitation of copyright works became part of our daily lives. The 1988 Act was only amended tangentially in 1992 and 1999 to enhance the administration of rights and the enforcement powers of the Nigerian Copyright Commission without changing the analogue character of the law. The new Act is, therefore, the first major overhaul of Nigeria's copyright system in about three decades, in line with international standards as enshrined in the relevant treaties to which the country is party. Being the first intellectual property statute to be concluded in a civilian dispensation, the new Act is a product of a deliberate bottom-up legislative process. So, unlike the 1988 Act and the earlier 1970 Act, both of which were promulgated as Decrees, the 2022 Act has been enriched by wide consultations and stakeholder participation. The new Act is, therefore, the first major overhaul of Nigeria's copyright system in about three decades, in line with international standards as enshrined in the relevant treaties to which the

country is party. Being the first intellectual property statute to be concluded in a civilian dispensation, the new Act is a product of a deliberate bottom-up legislative process. So, unlike the 1988 Act and the earlier 1970 Act, both of which were promulgated as Decrees, the 2022 Act has been enriched by wide consultations and stakeholder participation.²⁷⁰

The new Act is divided into twelve parts and consists of one hundred and nine sections and a schedule. It is a significant improvement from the Copyright Act 1988 (as amended), which is made up of fifty-three sections and five schedules. It is a modernisation of Nigeria's copyright regime in conformity with contemporary treaty obligations to improve the protection of the rights of creators, especially in the digital space, and to enhance copyright administration and regulation in the country. As discussed below, it impacts significantly on library operations, particularly in academic institutions.

Fair Dealing of Copyrighted Materials

Fair dealing, in its most general sense, is the copying of copyrighted material, usually for a limited and transformative purpose, such as to comment upon, criticise or parody. Such uses can be done without permission from the copyright owner. In this vein, it also serves a defence against a claim of copyright infringement. Section 20 of the Nigerian Copyright Act 2022 makes provision for fair dealing as it relates to the use of works protected under the Act. It is to the effect that the economic rights conferred in respect of a work by Sections 9 - 13 of the Act, such as the rights to reproduce, publish, distribute, publicly perform, adapt and translate the work, do not include the right to control their doings by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast. The section provides thus:

²⁷⁰ Ozolua Uhakheme “ Rebooting Copyright System Towards Creative Sector’s Growth” available at <<https://thenationonline.ng/rebooting-copyright-system-towards-creative-sectors-growth/>> accessed on 21st August, 2023. 1

20. — (1) The rights conferred in respect of a work under sections 9-13 of this Act, do not include the right to control any of the acts specified in those sections by way of fair dealing for purposes such as —

- (a) private use;
- (b) parody, satire, pastiche, or caricature;
- (c) non-commercial research and private study;
- (d) criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall, where practicable, be accompanied by an acknowledgment of the title of the work and its author except where the work is incidentally included in a broadcast:

Provided that in determining whether the use of a work in any particular case is fair dealing, the factors to be considered shall include the —

- (i) purpose and character of its usage,
- (ii) nature of the work,
- (iii) amount and substantiality of the portion used in relation to the work as a whole, and
- (iv) effect of the use upon the potential market or value of the work.

This provides for general exceptions to situations where certain acts amount to the violations of the rights of a copyright holder but for the provisions of Section 20, and it also gives room for information resources to be made available to users for the purposes of research in an academic environment. The provision of section 20 buttresses situations where certain uses of copyrighted works are deemed fair and acceptable, for example, for such purposes as criticism, comment, news reporting, teaching (including libraries allowing the making of multiple copies for classroom use), scholarship and research. However, it must be noted that not all copying for the purposes listed above would be fair dealing. It could amount to infringement, where a substantial part of a work is copied to the detriment of the copyright owner. An academic library as part of its function of providing access to information resources, allows the copying of literary works through reprographic means. The issue, however, is what is the proportion that may be photocopied that would amount to dealing with the resource fairly. There is no

yardstick set by the law with which to use in measuring the extent of exploitation (photocopying) that amounts to fair dealing.

In Nigeria, fair dealing is not defined under the Act. However, exceptions contained in Section 20 of the Act are quite extensive to the extent that it is unclear whether all the acts mentioned therein would, in practice, be treated as fair dealing acts or as mere exceptions. However, in practice, much reliance is placed on the English position in determining whether a particular use is fair dealing by the Nigerian courts. Similarly, the fair dealing approach used in various other jurisdictions would come in handy before the Nigerian judges where there is a question as to whether a use is fair or not.

In the area of use of electronic materials in a library, it is difficult for the virtual librarian to effectively monitor the quantum of information being accessed. This creates a challenge of determining what is fair use of dealing in relation to the information resources accessed by the users. The purpose and character of the use of information resources, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work are guiding criteria (principles) for determining whether users of information resources deal fairly with the said copyrighted works.

Meanwhile, the modern practice in the field of knowledge is to allow libraries to collaborate in order to meet the information needs of their users. Resources may be scarce as a result of non-funding or the availability of the desired funds to purchase the necessary information resources. In order to curtail these challenges, libraries engage in some practices such as inter-library loans of information resources, taking preservative measures to safeguard the existing information resources, or making consorted efforts to replace lost or deteriorating information resources (Minow and Lipinski, 2003). Relating the concept of inter-library loan, preservation and replacement to fair dealing, it entails or deals with situations where resources are exploited without resorting to the consent of the author or copyright holder. Libraries, through a consortium, share resources; copies of these resources are made for users or for the purposes of preservation and replacement of lost ones. These are permitted acts which do not violate the copyright of an author by virtue of Section 20 of the Nigerian Copyright Act.

The condition attached to this, is that the use of the work must be for educational purposes.

In academic libraries, literary works are housed and explored for teaching, learning and research; however, plagiarism in academia is a very serious factor that negatively affects library services and inter-library loans. Plagiarism is different from infringement of the copyright of an author of literary works. While the former is regarded as an ethical construct, the latter is a legal concept provided under copyright laws. There are situations where students visit other institutional libraries to make copies of other students' literary works (projects or long essays) and present the same as their original work in order to fulfil the requirements for conferral of the degree in a particular discipline. In some situations, it is the lecturers that are accused of plagiarising students' work. In *Ichor v Federal University of Agriculture Makurdi and 4 Others*²⁷¹, a student of the University of Agriculture Makurdi wrote to his college that the Claimant had copied his student project without acknowledging him and, therefore, plagiarised him. The Claimant alleged that he used only a small portion of the work and had mentioned the student's name in the reference section of his online publication. He also said he was entitled to use the work, having co-supervised the student's project. Since plagiarism was an ethical matter, the university set up several committees which found that the Claimant had indeed plagiarised the student's work and therefore issued a warning letter to the Claimant, backdated the Claimant's two promotions, which were delayed due to the ongoing investigations but without financial benefits. The Claimant went to court that due process was not followed in handling his case by the University and that he was entitled to the financial benefits, amongst other grounds of his claim.

Though the matter was in Court for a fair hearing, not plagiarism, it is noteworthy that, as indicated above, the Nigerian Copyright Act 2022 permits a user to rely on the exception of fair dealing for educational purposes on condition that the users acknowledge the author.²⁷² It is imperative to ensure that proper acknowledgement is done in order to safeguard the author's right of attribution. This can be achieved through the effective deployment of in-text citation or footnote/endnote citation tools.

²⁷¹ Dr. Ichor v Federal University of Agriculture Makurdi & 4 Others (NCIN/MKD/46/2020) Unreported.

²⁷² Section 20 CRA

Nonetheless, visiting a library to borrow and replicate long essays in the name of an inter-library loan is not an acceptable practice and library managers must ensure that it is curtailed.

The basic principle for a library to be allowed to access information resources by way of interlibrary loan, preservation, or replacement is that the reproduction or distribution of the information resource that is protected by copyright must be made without any purpose of direct or indirect commercial gains for the library. The library itself must be open to the public or available not only to researchers affiliated with the library or with the institution of which the library is part, but also that other persons doing research in a specialised field may be allowed to access the library. It is not enough to only reproduce or distribute the work; the library must include a notice of copyright that appears on the copy or phono-record that is reproduced by the library.²⁷³

Generally, a library that meets the above conditions has the advantage of reproducing unpublished works for the purposes of preservation and security for the library collection; it can replace published works that are damaged, deteriorating, lost, stolen, or in an obsolete format; reproduce works for users of the library if the work is of a serial or less than whole part of it. Where the circumstances permit, the entire work can be reproduced but due care must be taken to ensure that the user will not benefit from it economically to the disadvantage of the copyright owner. It is practically impossible to monitor the activities of libraries as far as reprographic services are concerned. For example, in institutional libraries where these services are provided, fees are charge in order to recoup the cost of materials and also make some income available for maintenance of the machines. Where profit is eventually made, the sum is not remitted to Collective Management Organisations (CMOs) or given to the authors directly.

Services to Users and Library Liability

An academic library offers different kinds of services to users. These services are classified majorly into backroom and circulation services. Some of these services, such as the acquisition of the information resources and processing same for use, are all done

²⁷³ 17 U.S.C. Section 108 (a) (2000); also, may be cited as U.S. A. Copyright Act, No. 17, 2000.

before the books are put on the shelves (backroom services); where however, the services are offered during the usual working hours of the library to those who present themselves to use the information resources available in the library, such service is regarded as that offered by the circulation unit. These services may include but are not limited to borrowing books, photocopying information resources or downloading the same from the internet using the library's computer.

While offering services to users, there are situations where the library needs to be vigilant in order not to be seen to be violating the copyrights of creators of information resources available in the library.²⁷⁴ The following principles guide the operations of library services in order to prevent or avoid liability while providing the desired service to users, these principles are universal in nature and apply to academic libraries:

(i) Patrons Using Library's Computers to Copy Materials Illegally²⁷⁵

There are different ways of accessing information in a library. This can be through the shelves or electronic means. In a virtual library, information resources are stored in forms of institutional repositories or subscribed databases. The issue is, what are the principles regulating access to electronic information resources by users of the electronic library? Who is liable for copying of materials that are not licensed under the open access regime? It is trite that a library, in some situations, facilitates the copying of information from a computer. The library, however, will be liable for any infringement of the rights of copyright owners where it has control over how the copying should be done or where the license to copy the electronic material is having some economic gains to the library to the detriment of the copyright owner. This principle is enunciated under the principles of 'vicarious infringement'. The library need not have known about the infringement. The library may also be liable under the principles of 'contributory infringement'. This arises where the library has known (or had reason to know) of the infringing act and induced, caused or contributed to the act of infringement. A visit to the institutional repositories and virtual libraries of institutional libraries in Benue State reveals the availability of digital literary works. Users gain access to these resources, and those saddled with the responsibility of

²⁷⁴ Mary Minow and Tomas A. Lipinski (n98) 62-69

²⁷⁵ *Ibid*

ensuring compliance with these principles are either lackadaisical or turn a blind eye, and these works are simply downloaded or copied without restrictions.

(ii) Patrons (Users) Using Library's Photocopiers to Infringe Copyright²⁷⁶

It is a common practice among libraries to make available photocopiers and or reproducing equipment to users. When patrons use this equipment, they are required in some situations to pay a taken to the library. These sums are used to maintain the equipment and also provide for the needs of the library. It follows, therefore, that the library benefits economically from the act of the user. Where the use of the library's photocopier in making copies results in infringing on the right of a copyright owner, in the United States, the library's liability is not determined by whether it benefits economically but on whether there is a notice (by way of publication) from the library drawing the attention of the copier that copyright law governs the reproduction of materials in the library.²⁷⁷ This exception is similar to the provisions of Section 20 Copyright Act 2022 discussed below, which allows access to information resources for educational purposes. Where the library in question is an academic library or any other library where users are allowed to make photocopies, such a library is obligated to make publications on a notice board or in a conspicuous manner the applicability of copyright law to the operations of the library particularly the aspect of making copies of information resources using the library photocopier. The essence of the notice is to exonerate libraries from liability in the event that the rights of a copyright holder are violated. Nonetheless, chances are this principle is rather obeyed in breach due to the lack of awareness of this obligation placed on library managers (librarians) by the Copyright Act 2022.

Section 23 of the Copyright Act makes specific provisions for photocopying or reprographic services in academic libraries. It provides thus:

23. — (1) Subject to the provisions of this section, the reprographic copying of passages from published literary or musical works by or on behalf of an

²⁷⁶ *Ibid*

²⁷⁷ *Ibid*

educational establishment for the purposes of instruction shall not infringe the copyright in the work.

(2) Notwithstanding the provisions of subsection (1), not more than five per cent of a work shall be copied by or on behalf of an educational establishment within a period of three months.

(3) The provisions of this section shall not apply where there is a licensing scheme for reprographic copying.

The import of the above as it relates to academic libraries providing reprographic services is that the services must be solely for the purposes of instruction, and not more than five per cent of a work shall be copied within a period of three months. This provision, though laudable, may not be observed by academic libraries. This could be a result of the fact that this is a provision of law that may be described as “new” to the library managers. Assuming they are aware of the same, it may be impracticable to adhere to the same in the considered views of this presenter. The rationale for this assertion is that, first, there is no laid down procedure or yardstick in determining or calculating what amounts to five per cent of a literary work. Some works may be voluminous, but the central message may just be contained in a page or two; when those pages are taken away, the work is worthless. Second, academic libraries are understaffed. This makes it difficult to monitor how reprographic services are provided in the library. Third, on the part of the Copyright Commission does not have sufficient copyright inspectors to police how reprographic services are done or provided in institutional libraries.

Special provisions for archives, libraries, museums and galleries

In addition to the general copyright exception provision on fair dealing, the Nigeria Copyright Act 2022 makes other copious provisions for archives, libraries, museums and galleries. It provides thus:

25.— (1) Notwithstanding the provisions of sections 9-13 of this Act, archives, libraries, museums and galleries, may for non-commercial purposes —

(a) make and distribute copies of works protected under this Act as part of their ordinary activities;

- (b) make copies of works in their collection for the purpose of back-up and preservation;
 - (c) make or procure a copy of any missing part of a work in its collection from another institution;
 - (d) make or procure a copy of any work that is or should be available in its collection in any chosen format, where the work cannot reasonably be acquired in that format through general trade or from the publisher; or
 - (e) make or procure a copy of any work where the permission of the owner of the copyright cannot be obtained, after reasonable effort, or where the work is not available by general trade or from the publisher.
- (2) Copies of works made in whatever format in accordance with subsection (1) may be —
- (a) lent to users; or
 - (b) used for private study or research on the premises of the institution with or without the means of technical equipment.

The above provisions attempt to address the challenges generally faced by institutional libraries, archival centres and museums in providing access to and preservation of information resources. The exceptions provided will no doubt enhance the operations of academic libraries, especially in providing print materials to users. There are, however, certain concerns that the above provision has raised in the considered views of these researchers.

First, the provisions of Section 25(1)(d) of the Nigeria Copyright Act 2022, which authorises libraries to ‘make or procure a copy of any work that is or should be available in its collection in any chosen format, where the work cannot reasonably be acquired in that format through general trade or from the publisher’ is too broad a power that may lead to abuse of the rights of a holder. Allowing the libraries to choose the format in which the work can be made may allow for quick distribution of the information resource in a way that is not intended by the legislature. For instance, when a book is published in print format and eventually becomes out of circulation, the library may choose to make digital copies of the said book. This has the potential of wider

circulation and control on how it should be accessed may eventually be out of the hands of the library managers.

Second, there is no yardstick to determine when any information resource, as provided under Section 25 of the Act, ‘cannot reasonably be acquired’ or what amounts to ‘reasonable efforts’ as provided in Section 25 (1) (e) by the library in exploiting the works of a copyright holder. It is trite that what is ‘reasonable’ in law is always determined by prevailing facts and circumstances, which may differ from one locality to another. Also, to restrict the use of the copies of information resources made by a library as a result of the provisions of Section 25 (1) of the Nigerian Copyright Act 2022, to use ‘on the premises of the institution’ may not be practicable for all intent and purposes. It may be conceded that the intention of the legislature is to preserve the literary, musical or artistic works that archival institutions, libraries and museums are given the licence to make or produce in a chosen format. This obviously could be a result of the information resource being out of circulation (not available in the market). Nevertheless, restricting the use of the same only to the premises of the institution may defeat the essence of providing access. For instance, these institutions have closing hours and where a user has a deadline to meet, limiting the use of the resource only to the premises of the institution may present a grave challenge to meeting the deadline. Also, in practical terms, it will be difficult to control or determine whether these materials are not taken out of the premises as it is often the mandate of libraries to provide their users with access to information resources for as much as desired. In the considered view of these researchers, the above provision is to the detriment of users in terms of providing access to information resources in an institutional library.

Special exceptions for blind, visually impaired, or otherwise print-disabled persons

Section 26 of the Nigerian Copyright Act 2022 brings to bear the principles encapsulating the Marrakesh Treaty. It provides thus:

26.— (1) Notwithstanding the provisions of any other section of this Act, an authorised entity may, without the permission of the owner of copyright in a work, make or procure an accessible format copy of a work or subject matter and

supply the copy to beneficiary persons by any means, including non-profit lending, or electronic communication by wire or wireless means, on the condition that the —

(a) authorised entity desiring to undertake any of the activities under this section has lawful access to that work or subject matter or a copy of that work or subject matter;

(b) work or subject matter is converted to an accessible format copy;

(c) accessible format copy is supplied to be used exclusively by beneficiary persons; and

(d) activity is undertaken on a non-profit basis.

(2) For the purpose of the requirement of subsection (1) (c), an authorised entity shall establish and follow its own practices, to —

(a) establish that the persons it serves are beneficiary persons;

(b) limit its distribution to beneficiary persons or authorised entities and in making available of accessible format copies;

(c) discourage the reproduction, distribution and making available of unauthorised copies; and

(d) maintain due care in, and records of, its handling of copies of works or other subject matter while respecting the privacy of beneficiary persons.

(3) A beneficiary person is permitted to make an accessible format copy of a work or other subject matter for his personal use, where he has lawful access to that work or subject matter or a copy of that work or subject matter

(4) A person acting on behalf of a beneficiary person, including a primary caretaker or caregiver, may assist the beneficiary person to make accessible format copies where the beneficiary person has lawful access to that work or subject matter or a copy of that work or subject matter.

(5) An authorised entity may, without the permission of the owner of a copyright, distribute or make available accessible format copies to an authorised entity in another country for the exclusive use of beneficiary persons or to a beneficiary person in another country, provided that prior to the distribution or making available, the authorised entity did not know or have reasonable grounds

to know that the accessible format copy would be used other than for the beneficiary persons.

(6) An authorised entity, a beneficiary person or a person acting on his behalf including a primary caretaker or caregiver, may without the permission of the owner of copyright import an accessible format copy, including by wire or wireless means.

The provisions above are commendable in trying to provide equal access to copyright works for beneficiaries who are blind or visually impaired. Nonetheless, the provisions of Section 26 (1) of the Nigerian Copyright Act 2022 give a license to an 'authorised entity' to procure without the permission of a copyright owner an accessible format copy of a work. The implication for the copyright owner is that any other person can convert the work to accessible format and sale to institutions. This negatively affects the economic interest of the copyright owner. Also, Section 26(1)(d) above gives the criterion upon which authorised entity can engage in making or distributing accessible format of a work the 'activity is undertaken on a non-profit basis'. It is, however, difficult to determine whether private educational institutions are not running on a profit-making basis. Hence, where these private educational institutions carry out the activities as licensed under the above Section, a violation of the provisions of this section can be implied.

Section 26(2) above places a burden on institutions that intend to benefit from the provisions of subsection 1(c) to establish and follow certain practices. The law is not explicit as to whether the practices must be established as a condition precedent before the authorised entity (institution) can take advantage of the provisions of Section 26. Relating this to academic libraries, there is room for institutional policy in the form of institutional repository policies. Despite the above, there is no mechanism put in place to ensure compliance with this provision.

Section 26(6) permits the importation of copyrighted works by an authorised entity, beneficiaries and their caregivers or caretakers in an accessible format without the permission of the author. It provides to the effect that an authorised entity, a beneficiary person or a person acting on his behalf, including a primary caretaker or caregiver, may, without the permission of the owner of the copyright, import an accessible format copy,

including by wire or wireless means. This blanket license fails to recognise authorship. It follows, therefore, that any person can convert a work even while he is not the author and sell it for the purposes of importation into Nigeria.

Provision against circumvention of technological protection measures

Section 50 of the Act provides that:

- (1) Subject to the provisions of Part II of this Act, no person shall knowingly circumvent a technological protection measure that effectively protects access to a work protected under this Act.
- (2) No person shall manufacture, import, sell, offer for sale, provide, or otherwise traffic in any technology, product, service, device, or part, that
 - (a) is primarily designed or produced for the purpose of circumventing protection afforded by a technological protection measure that effectively protects a work under this Act ;
 - (b) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that protects a work under this Act; and
 - (c) is sold or distributed for use in circumventing a technological protection measure that effectively protects a work under this Act.

The above provision poses a challenge in providing access to literary information to users of libraries by library managers. Where a particular information resource is protected by the use of Technological Protection Measures (TPMs) the extent to which access can be provided to users is limited. According to Lamikanra (2013):

The position of the librarian in Nigeria as an information service provider is challenged by technological hurdles with the rapid movement towards and preference for, electronic storage and dissemination of information by publishers. Digital technology allows information owners to lock up information behind technological locks with the use of Technological Protection Measures (TPMs) and allow controlled access through licenses. As such, many libraries cannot afford to provide access to materials online to their patrons (p.364).

These TPMs in the views of these researchers, inhibit the role of libraries and indeed librarians in striving to strike a balance between the protection offered to copyright holders by the law and that of members of the public by way of reasonable exploitation of a work for educational purposes. Where restrictions to access to information resources in the library are placed by publishers as a result of the use of TPMs, it becomes a difficult task in the operations of institutional libraries, especially in relation to providing users with access to electronic information resources and it could also pose a challenge to users as the extent to which they can use the resource is controlled. For instance, there are certain information resources that a user cannot duplicate (copy and paste) as a result of the use of TPMs to limit access.

CONCLUSION

The role of academic libraries in educational institutions is to provide access to information resources. Literary works form the bulk of information resources that are available in the library. However, there are laws that provide protection to creators of literary, artistic and musical works. The authors of these works enjoy certain rights (copyright). However, the rights are not absolute, as their creation could be explored for the purposes of teaching, learning and research. The legal frameworks that provide protection for copyrightable works also seek to provide access to these works in the interest of society. Nonetheless, there are lacunae in the Nigerian copyright regime, which, in the end, inhibit access and do not provide a balance between the interests of the creators, the users and the administrators of academic libraries, in light of which the following recommendations are proffered thus:

- i. The Copyright Act 2022, especially the provisions of Sections 20, 23, 25, 26 and 103, be amended to enhance the operations of academic libraries, to effectively protect the rights of copyright holders and to provide users with access to information resources in these libraries.
- ii. The use of TPMs in the protection of copyrightable works should be modified to allow library administrators access and control of information resources available in the library for the benefit of users. Publishers who deploy the user of these technologies can provide libraries with passwords which the librarian can

use to control the use of access instead of providing limited or no access in terms of certain functions or use of the resources by the researcher.

- iii. There should be awareness campaigns by the regulatory authority (Nigeria Copyright Commission) and other stakeholders, such as the Nigeria Library Association (NLA), as to the benefits of compliance with the provisions of the Copyright Act 2022. The targeted audience should include academic libraries.
- iv. The authorities saddled with the responsibility of providing access to literary works (the Information managers or Librarians) in academic libraries should, as a matter of urgency, publish on their notice boards or in a conspicuous position visible to users of print and digital literary works in the library their copyright policies as it relates to library operations. This, when done, could serve as a defence in the event of any suit against the institution for infringement of copyright.

REFERENCES

- Bankole Sodipo, *Copyright Law, Principles, Practice and Procedure 2nd edn* (Swan Publishing, 2017)
- Bryan A. Garner, *Black's Law Dictionary*, (10th edn 2014) (Thomson Reuters, 2014)
- John Asien in his book, *Nigerian Copyright Law & Practice 2nd Edn* (Books and Gavel Ltd, 2012)
- Joseph Jar Kur, *Intellectual Property Law and Entrepreneurship in Nigeria: Principles and Practice* (Aboki Publishers, 2015)
- Mary Minow and Tomas A. Lipinski, *The Library's Legal Answer Book*, (American Library Association, 2003)
- Nnamdi Ebo, *Legal Method* (Lawlords publications, 2017)
- Peter Ocheme, *The Law and Practice of Copyright in Nigeria* (Ahmadu Bello University Press Limited, 2000)
- Rakeshkumar Shantilal Prajapati, *Foundations of Library and Information Science* (Discovery Publishing House PVT Ltd, 2013)

Solomon Uganneya and Jessica Agoh, *Librarianship for Higher Education Students* (Glory Ikani Publishers, 2013)

Sulaiman Ismaila Nchi, *The Nigerian Law Dictionary* (Green world Publishing Company Limited, 2012)

Helen Chuma-Okoro "The Legal Framework for the Protection of Digital Content: The Best Practice Approach for Nigeria" in Epiphany Azinge and Helen Chuma-Okoro (eds) *Intellectual Property and Development: Perspectives of African Countries* (Nigerian Institute of Advance Legal Studies, 2013)

Rose Uloma Ezeh, 'Intellectual Property Rights as an Impediment to Access to Information in the Libraries: Developing Countries Perspective' in Epiphany Azinge and Helen Chuma-Okoro (eds) *Intellectual Property and Development: Perspectives of African Countries* (Nigerian Institute of Advance Legal Studies, 2013)

Ufuoma Lamikanra, 'Copyright Issues in Information Management and Services: Perspective of a Librarian in a Developing Country Institution' Country' in Epiphany Azinge and Helen Chuma-Okoro (eds) *Intellectual Property and Development: Perspectives of African Countries* (Nigerian Institute of Advance Legal Studies, 2013)

Gabriel and Nwoke 'Most Favoured National Clause as the Legal Cornerstone for the Promotion of Regional Economic Grouping' (1998) *UJLJ* Vol.6.

Ifeoma Oluwasemilore, 'Open Content Licensing and the Challenges of Copyright Protection', [2016] (2) *Commercial and Industrial Law Review*,8.

Ozolua Uhakheme "Rebooting Copyright System Towards Creative Sector's Growth" available at <<https://thenationonlineng.net/rebooting-copyright-system-towards-creative-sectors-growth/>>

Cambridge University Press 'e-Library'
<<https://dictionary.cambridge.org/dictionary/english/e-library>>

School of Information Management and Systems 'Access to Information'

<https://people.ischool.berkeley.edu/~buckland/access.html>

International Trade Administration ‘Trade Agreement’ available at

<<https://www.trade.gov/country-commercial-guides/nigeria-trade-agreements>>

Yale University Is the material an “orphan work”? <https://ogc.yale.edu/ogc->

[rcg/material-orphan-work#:~:text=An%20%E2%80%9Corphan%20work%E2%80%9D%20is%20a,kn own%2C%20but%20cannot%20be%20located.](#)



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

PUBLIC INTEREST LITIGATION-CONSIDERATION AS PANACEA FOR SOUTH AFRICAN
UNFAIR TRADE PRACTICE; LESSONS FOR NIGERIA

¹*Sani Ibrahim Koki, ²Iya Muhammed Alhaji

¹Faculty of Law, Yusuf Maitama Sule University, Kano

²Faculty of Law, Yobe State University, Yobe

*sanikoki17@gmail.com sikoki@yumsuk.edu.ng +234-8032210192, +234-8087700995
faisaliya@gmail.com +234-8033729719, +234-8059192727

Abstract:

The major devastating effects of free-trade is dumping, a phenomenon that has been in continued regulation amongst world trading nations locally or at global stage. Unfair trade practice has been vigorously criticised being a protectionist approach against fair competition. Public interest consideration in South Africa strikes a balance between complaining exporters and the final products consumers. The level at which this balance is stroke is what this paper intends to explore using critical legal but comparative analysis. In South Africa actions of dumping are checked through the activism in interested party procedure where anti-dumping investigations involve collection of data and all other evidentiary requirements to prove dumping, thus presenting same in an anti-dumping action. The paper found that the system works in South Africa and could be of help to Nigeria`s ailing industrial and trade sectors of the economy. It also found that dumping has been contagious since ascension of the General Agreement on Tariffs and Trade 1947 which led to the enactment of the 1958 Act. The paper recommends that legislators and policy makers should brace-up either to repeal or amend the not only but obsolete Act regulating unfair trade practice or to recall the bill that has been in existence before the National Assembly since 2010. The paper concluded that engagements at international level should as a matter of fact be priority for any serious administration because it touches economic strength of any nation. These engagements require expertise having experience in International Trade and global manipulations for trade negotiations and rounds.

Keywords: Freetrade, Dumping, Public Interest, Unfair Trade Practice

1.0 INTRODUCTION

Dumping has been an old English word from Oxford Advanced Learner's Dictionary (Special Price Edition) to literally mean or refer to the disposal of something no longer needed, or of no value or to put something that is not wanted in a place and leave it to rubbish (p.361), "it is also referred as selling goods abroad at a price below that charged in the domestic market"(Advanced Dictionary of English, New Version 2.4) It is however been related to the arena in international trade as contended by Koki (2024) as "selling goods at less than their normal price, especially in the export market as a means of securing a monopoly or cartelization so as to keep local industries far from production and close shops and a cankerworm that kills the entire economic sector," it can be described as "price undercutting or discrimination" (Willig,1998,p.235) But the more acceptable meaning is captured by the WTO anti-dumping agreement and that according to Obalade (2014,p.235), "the phenomenon of dumping has been abused by many member states among major economies which long started before with the rise of large production, using expensive plant and equipment which enabled producers established monopoly on their domestic markets" (p.235). 'Koki (2021) contended that "dumping is considered to be unfair trade practice and not acceptable by many national laws" (p.5) This is one major devastating effect of free trade which led to the evolution of General Agreement on Tariffs and Trade after the second World-War with successive transformations in global trade.

Article VI: I (WTO, ADA, 2.1,1994) "recognizes that dumping should be condemned if it causes injury or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry" This is a trade remedy against the menace of dumping aside safeguard, subsidy and countervailing measures provided by WTO.

In South Africa dumping actions are regulated by various legislations since 1914 as contended (Brink,2015,p.1) like Customs Tariffs Act, 1914, Board of Trade and Industries

Act 1944, Customs and Excise Act 1964, Board on Tariffs and Trade Act 1986, Board of Trade and Industries Amendment Act 1992, and the most recent one known as International Trade Agreement Act, 2002 although this Act did not give outright and clear provisions to deal with dumping cases with respect to public interest litigation/consideration it has however gives interested parties to partake in the process and present information in respect of investigation in form of public interest litigation/consideration. This strikes balance between complaining exporters who are put at avoidable competition and the benefiting consumers who find the system favourable in terms of purchasing competence and accessibility.

Unlike South Africa, Nigeria joined the global trade 10 years after GATT 1947 with the promulgation of Customs Duties (Dumped and Subsidized Goods) Act 1958. However, corruption permeates virtually every sector of the economy, basic necessities of life which promotes good living standards are lacking while government operates as if they are not accountable to its citizens (Akinrinmade, 2013, p. 87) While South Africa's ITAA undergone series of repeals and amendments Nigeria's legislation remained static.

Admittedly from 1994-2006, Nigeria acknowledged in its notification report by the Secretariat to the WTO Committee on Anti-Dumping Practice and Subsidies and Countervailing Measures that it has not taken any anti-dumping measures thus;

Nigeria has not undertaken any anti-dumping and countervailing Measures Since 1998. The existing legislation Customs Duties (Dumped and Subsidized Goods) Act 1958, which provided for imposition of special duty on any good, deemed to be dumped or subsidized by any company or Government authority need to protect local industries from dumping and unfair competition within the framework of the remedies provided by WTO. Accordingly, a bill on anti-dumping and countervailing measures is under preparation to stream-line the Act With Nigeria's WTO obligations.

This made one Senator Enabule from Edo State to propose a bill for amendment in 2010 and another member House of Representative from Katsina State repeated the

same clarion call in 2015 but both bills are laying before the national assembly unattended to till today.

The paper is not about knowing public interest litigation or consideration in South Africa, rather its workability in dealing with dumping as a concept and the role played by interested parties in obtaining relevant information in anti-dumping investigations whose main thrust are to assist the local industries to continue to operate and in the general parlance comply with the global trade of Most-favoured-nation, Non-Discrimination and National Treatment Principles of the WTO using critical legal but comparative studies not only of the South African perspectives but also Singaporean and others for Nigeria to drive lessons.

There is a very low level of knowledge and use of public interest litigation in Nigeria with fewer persons having knowledge of it especially in critical areas affecting international trade and global policy. The little ones with the knowledge are unwilling to exploit it probably because of unavailability of adequate enabling legislations, Fiscal Responsibility Act, 2007 made express provision for individuals to approach courts for public interest litigation and the preamble to the Fundamental Rights Enforcement Procedure Rules (FREPR, 2009) advises judges to encourage it and not to dismiss cases generally for want of locust standi. This is not so in South Africa especially on the areas affecting economy and trade having direct bearing with the consumers and local industrialists.

2.0 The Concept of Public Interest Litigation/Consideration

Garner (2009) defines public interest as “the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake and interest that justifies government regulation” (p.1350). It is also defined as “the welfare or well-being of the general public, commonwealth that directly affect the public interest, appeal or relevance to the general populace” (Hornby 2000, p.692)

On the other hand, Usang (2021) contended that “litigation is a judicial controversy, a contest in court of justice for the purpose of enforcing a right” (p. 27). “It is a process of participation in a lawsuit or a process of making or defending a claim in a court of law” further contended by Usang (2021, p. 27)

Otteh (2010) conceptualized the term public interest litigation thus;

*Public Interest litigation is about using the law to empower people, to
Knock down oppressive barriers to justice, to reclaim and restore the right
Of social justice for the majority of the people; to attack oppression and
Denial that disenfranchises our people, and about winning back human dignity
Of the people. It is about caring for the rights of others, beside oneself. It is about
Getting lawyers and judges committed to this struggle and using the law more for
For the benefit of the collective not just for individual of private interest.*

Public interest litigation connotes “the institution and sustenance of legal action in court in pursuit of a pecuniary of legal right in favour of general public, community or class of persons by an individual, group or organization, who might have some or no personal interest in the outcome” (Usang, 2021, p. 26)

“Public interest litigation is a mechanism of intervention in a matter that concerns the public” Dorcas et al (2021, p. 26) “It could be about human rights, government policy, or some other issues that could present a challenge to public life” Dorcas et al (2021) “Public interest litigation is important because it presents hope to the powerless and offers justice where there might not previously have been the opportunity” Dorcas et al (2021) The aim of public interest litigation is to “recognize injustice and gives a voice to the concerns of members of society who might not have the means to articulate them” Dorcas et al (2021)

Public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this are instructive: “first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries” LEWIS (2016).

2.1 Public Interest and Dumping Regulations in South Africa; Analytical Views;

The South African anti-dumping law is found in the International Trade Administration Act of 2002 (hereinafter ITAA) as amended, which is designed to establish an anti-dumping regulatory regime that *prima facie* is in compliance with the rules of the *World Trade Organization* (WTO Text, 1994), namely the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* 1994, (hereinafter Anti-dumping Agreement), and Article VI of the 1994 *General Agreement on Tariffs and Trade* (GATT). The ITAA must be read and interpreted in conjunction with the Customs and Excise Act of 1964, the latter being a supplementary legislation. The provisions of the ITAA find elaboration in the Anti-Dumping Regulations (hereinafter Anti-Dumping Regulations).

Neither the Anti-dumping Agreement nor GATT Article VI contains a public interest clause, except for the provision of Article 6.12, which calls on national authorities to give consumers and intermediate users the opportunity to provide information relevant to the investigation and the determination of dumping. According to Barfield (2005, p.27) “WTO members have argued for the inclusion of the public interest test provision in the Antidumping Agreement in terms of which the effects of anti-dumping orders on the whole national economy could be measured”. At best the Anti-dumping Agreement makes provision for the adequate notification of all interested parties during anti-dumping investigations. For example, Article 6.1 of the Anti-dumping Agreement requires that notice of an investigation be given to all interested parties. It reads as follows:

All interested parties in an antidumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in the question.

Article 6.11 defines the term ‘interested parties’ to include “(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association and (ii) the Government of the exporting Member; and in ‘interested parties’”. Furthermore, the term includes not only the exporters and domestic producers

but also the importers of the product under investigation who are likely to be adversely affected by antidumping actions. Article 6.11 goes on to state that “this list does not preclude members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties”. The Anti-dumping Agreement thus allows member states to add to the list (GATT/ADA,1994).

Therefore, such an inclusion in ITAA will not be at odds with Article 6.2 of the Anti-Dumping Agreement which provides that throughout an anti-dumping investigation, all ‘interested parties’ shall have a full opportunity to defend their interests. Malebo (2021) suggested that “part of this defence of interests is for the interested parties to be afforded the opportunity to be heard and the opposing views presented and rebuttal arguments offered” (p.71.).

Anti-dumping measures, such as those imposed in the (“Brazilian Fowl Meat” 2012) case merited public interest consideration. This argument is borne by the fact that in “Casu astronomical tariff increases” case, which were levied by the Minister of Trade and Industry, affected and impacted negatively on consumers’ right to food security (2012, cited in Brazilian Meat Fowl Case).

Article 6.12 of the Anti-dumping Agreement also requires national authorities to provide opportunities for industrial users of the good subject to investigation and representative consumer organizations to provide relevant information during investigations. This is limited to the cases where the product is commonly sold at the retail level. Moreover, the aim of this provision is to enable consumer organizations and industrial users to provide any information that is relevant to an antidumping investigation (ADA, 1994).

It must be conceded however, that the provision of Article 6.12 of the Anti-dumping Agreement indicates that adversely affected parties (including importers, downstream and upstream industrial users and consumers) have no rights but merely privileges and investigating authorities conducting an antidumping action are not obliged to take their views seriously. Thus, antidumping duties may be imposed even if they are contrary to the public interest. In South Africa the Minister of Finance may intervene at the end of

the proceedings. The Minister of Finance enjoys discretion to impose the anti-dumping duty based on “public interest” considerations.

2.2. Public Interest Enforcement and Workability in South Africa

Be that as it may, the South African anti-dumping law does not have a comprehensive provision for considering the “public interest” before anti-dumping duties can be imposed. But the anti-dumping authorities have in some disputes given due regard to public interest. In the *Italie – Ansoek of Pasta* case, for example, it was held that public interests are important in deciding if the anti-dumping action should be instituted as cited in Brazilian and Casu cases. Recourse to public interest is in the form of an enquiry after a directive by the Minister of Trade and Industry to the ITAC. The ADR makes provision for public interest considerations, which the ITAC should consider in determining whether or not to impose any type of antidumping duty (Ss 4-14, ITAA, 2002).

Public interest provision in the ADR gives the ITAC broad discretionary powers to determine if there are reasonable grounds to conclude that the imposition, amendment or continuation of any type of anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or review proceedings is justified. The ADR provides that the ITAC’s determination of the public interest shall be based on consideration of any relevant factors. This is a very important provision because it provides a non-peremptory guidance on, and indices of, public interests (Ss 4-40, ITAA, 2002).

Public interest may militate against the imposition, amendment or continuation of an anti-dumping duty, or for the imposition, amendment or continuation of an anti-dumping duty if (i) it is likely to substantially lessen or prevent, or has substantially lessened or prevented, competition in the domestic market for goods or services; (ii) it is likely to substantially lessen or has substantially lessened the competitiveness of domestic producers; (iii) it is likely to cause significant damage or has caused significant damage to domestic producers that use the product under investigation in the production of other goods or the provision of services; (iv) it is likely to significantly restrict, or has significantly restricted, consumer access, at competitive prices, to the

product under investigation or like product, or to other goods produced or services that use the product under investigation as an input; or (v) it is likely to significantly impact, or has significantly impacted, negatively on the public health, the public safety or the environment.

In the light of the critical impact that the imposition of anti-dumping measures has on the general public, who are end-users of the product in question, it is prudent that that section 4(2) of the ITAA and the ADR be amended to contain a clear provision on “public interest” requiring the ITAC to consider the applicability or not of public interests without having to rely on the directive by the Minister of Finance.

Tao (2006) observed that “part of the amendment should include a specific and clear articulation of public interest criteria, and a non-exhaustive list of factors that can guide the ITAC on whether and how to conduct a public interest enquiry” (pp.107-109). Alavi (2004) contended that “there are of course scholars who argue against such a provision on the basis that the purpose of anti-dumping law was originally to protect producers and not consumers (pp.25-74). In my view, a “public interest” provision fashioned along the lines of Article 21.1 of the European Community’s Basic Law could be workable for South Africa. The relevant part of Article 21.1 of the Basic Law states:

A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interest of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as may be determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

The current provision of section 4(2) of the ITAA will need to be redrafted to give an indication of the basis upon which the Minister of Finance makes a determination that

the imports under investigation do not amount to irregular trade practice. The provision should permit the consideration of all relevant interests and put the elimination of trade-distorting effects of injurious dumping as the main objective.

2.3. What informed South Africa's Public Interest Litigation/Consideration?

Similar approaches have been witnessed in other jurisdictions. For example, the Singaporean anti-dumping legislation requires the Minister of Trade and Industry to consider the "public interest" factor. Public interest is the criterion for determining whether to institute an anti-dumping investigation in Singapore (The Countervailing and Antidumping Duties Act, 1996 of Singapore provides that the Singaporean Minister of Trade and Industry has a duty to confirm, once a petition is received, whether the envisaged anti-dumping investigation is in the public interest. "If the Minister determines that there is such evidence and that an investigation is in the public interest, the investigation would proceed" (Hsu, 1998, pp. 121-124).

The United States also implements implicitly the factor of public interest in imposing safeguard measures. The United States, for instance, requires that the President uses his discretionary power to implement safeguard measures based "implementing relief that provides greater economic and social benefits than costs, with a host of additional related factors to be weighed" (Business Guide to Trade, 2001). It has been proposed that the United States change in the United States anti-dumping regime which will make it possible for the President to intervene at the end of the process in favour of national interest and introduce a solution which covers both the economic and political goals of the United States Barfield (2005) argues that "the US Congress have sometimes legislated rules and given instructions to the United States International Trade Commission (USITC) that have little relevance to injurious dumping, and that members of the USITC have not been "political hacks with neither interest in nor competence in economic analysis" (p. 27-29).

Contrary to what Barfield observes, fundamental economics still plays a significant part in the South African anti-dumping process this is because under the European Community, anti-dumping rules must first be shown that the imposition of anti-dumping measures must be in the "Community interest". Community interest

essentially involves a political decision, taking into account the interests of users, consumers, and upstream and downstream industries. In short, it must be determined that the imposition of such measures will be to the benefit of the overall interest of the EC (Council Regulations, 1995, 1996, 1998, 2000). As points out that, in 1994, (Tharakan, 2001, p.2) the EU went a step further by amending its “public interest clause to give consumers some meaningful legal standing in anti-dumping cases”. In a more guided manner, Article 21.1 of the Basic Regulation, for example, urges the European Commission and the Council to take into account “community interests” before a decision is made to impose anti-dumping measures on imports (Tharakan, 2001, p.2).

2.4 JUDICIAL REVIEW AND PUBLIC INTEREST LITIGATION ON ANTI-DUMPING INVESTIGATION

The AD Agreement contains a mandatory provision that effectively requires that a WTO member state with national legislation authorizing the taking of anti-dumping measures must put in place independent judicial, arbitral or administrative tribunals capable of providing prompt review of the administrative actions relating to the said measures (Vermulst, 1997, p. 9). South African administrative law has always conceptualized judicial review as consisting of the power or jurisdiction of the courts to scrutinize administrative decisions and, where appropriate, to set them aside or correct them. “In the apartheid era, the judicial power to intervene in the public administration of the country was found in the common law and generously construed based on liberal notions of the rule of law and separation of powers” (Hoexter & Lyster, 2002.). This is not surprising given the historical fact that South Africa received most of her administrative law principles from England at a time when Professor A.V. Dicey's theory of the rule of law was dominant in that country.

However, contrary to the position which prevailed during the apartheid era, South Africa now boasts a constitution that, in addition to being supreme, contains an enforceable Bill of Rights. One of the rights contained in the said Bill is the right to administrative justice which is set out in Ss 33 of the Constitution as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair;*
- (2) Every one whose rights have been adversely affected by administrative action has the right to be given written reasons;*
- (3) National*

legislation must be enacted to give effect to these rights, and must a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and c. promote an efficient administration.

Pursuant to the mandate contained in Ss 33(3) of the Constitution, the South African Parliament has enacted the Promotion of Administrative Justice Act (Act No. 3, 2000). Cumulatively, Ss 33 and 39 of the Constitution, as well as the AJA, empower the review of administrative action either by a court of law or by an independent and impartial tribunal where appropriate with a view to protecting the rights of affected individuals, including the right to administrative justice, guaranteed in the South African constitution (Hoexter & Lyster, 2002, pp. 80-81). However, the AJA has become the primary avenue for securing judicial review of administrative action (S 6(2) AJA,).

According to the Act, administrative action is restricted to decisions of an administrative nature made under an empowering provision by an organ of state or by a natural or juristic person and which adversely affect rights and have a direct, external legal effect (S 6(2) AJA,). All executive organs of the South African government are regarded as part of the country's public administration. Accordingly, everything done by these organs qualifies as administrative action. It now appears pretty much certain that an organ of state or a natural or juristic person will be engaged in administrative action when;

- (a) Making decisions or taking steps relating to the implementation of legislation;*
- (b) Exercising a public power; and/or*
- (c) Performing a public function in terms of an empowering provision (Hoexter & Lyster, 2002.).*

In South Africa, the actions of the BTT in investigating allegations of dumping and the ministerial decisions to request the imposition of ADDs and to impose the same are clearly subject to review as administrative action under the AJA by virtue of the fact that they involve steps taken and/or decisions made in the course of implementing legislation as clearly pointed out (Hoexter & Lyster, 2002, p 93)

Accordingly, parties aggrieved by such actions or decisions have an indisputable right to approach their local division of the High Court and, if unhappy with the outcome, as in the *Brenco Case*, can appeal to the SCA. Against this background, it is submitted that there can be no credible suggestion that the judicial review provisions and institutions of the South African legal system fail to meet the standards of independence and efficiency contemplated by the AD Agreement as contended by (Koki, 2024, p. 279)

3.o. Derivable Lessons from South African Experience;

The AD Agreement stipulates that the authorities shall, whenever practicable, provide timely opportunities for all interested parties to see all non-confidential information that is relevant to the presentation of their cases and that is being used by the authorities in their AD investigation, this is clearly provided in Article 6(4) of the Anti-dumping Agreement of the WTO.

Further, these parties are entitled to prepare presentations based on such information, the AD Agreement clearly allows the authorities to withhold confidential information²⁷⁸ from an interested party unless they have received specific permission to disclose from the party submitting that information (Art. 6(5)(1), ADA).

However, the authorities must require non confidential summaries of confidential information from the interested parties submitting such information (Art. 6(5)(1)). Those summaries are required to be made available to interested parties. This can either be information whose disclosure (a) would be of significant competitive advantage to a competitor; or (b) could have a significant adverse effect upon the supplier of the information or upon the person from whom the said supplier received the information.

Where it is impossible to produce non-confidential summaries from the subject information, the authorities are not obligated to disclose that information if the interested party submitting the information for use in the AD investigation has provided a statement of reasons why summarization is impossible, this has been the position under the WTO Anti-dumping Agreement (Art.5.2.1)

The South African practice in this respect is that the Board of Tariffs and Trade withholds from interested parties' information where confidentiality is asserted by the provider. However, such assertion of confidentiality is usually only accepted on condition that the provider supplies non-confidential summaries of the same information from which summaries are then made available to interested parties, the only exception permitted here is applicable to those cases where the confidential information is incapable of reduction to summaries that can be disclosed without a violation of the confidential character of the information.

Vermulst (2005) contended that "this practice is identical to the practice in the E.U. However, it differs significantly from the practice in the U.S. and Canada where such confidential information can be accessed by the legal representatives of interested parties pursuant to the terms of an administrative protective order" (p. 14) Seeing that a leading commentator on anti-dumping law has recommended the South Africa-E.U. practice to developing countries considering the adoption of such a law(Vermulst,2000,p.14) there can be no plausible suggestion that that practice falls short of the WTO requirements in this regard.

4.0 Summary;

The major devastating and militating phenomenon that affects local and international trade is dumping. This phenomenon has been vigorously exploited by giant economies in form of protectionism despite legal regimes provided at global stage. World Trade Organization has been at fore-front in providing trade reliefs/remedies against unfair trade practice using anti-dumping agreement as mechanism to check the menace. Most WTO members especially developing states appeared not to incorporate this remedy in their local legislation to curb this unfair trade practice that kills local production.

South Africa embraces interested party (public interest) litigation and consideration using courts' pronouncements to allow interested parties partake in the investigation through data collection of all evidentiary requirements to prove dumping. This gives opportunity to courts in many cases decide for anti-dumping actions against erring importation that kills local production.

Nigeria being a developing member of WTO has legislation that could have convincingly said to allow local industries close-shops day-by-day. Using public interest litigation/consideration as is obtained in South Africa would boost the legislative morales of legislature, policy makers and generally courts using judicial activism by courts and particularly legislative actions to repeal/amend this obsolete Act against this unfair trade practice.

5.0 Findings;

1. Public Interest litigation and consideration has been in South Africa's International Trade Administration Act, 2000, although not as direct legislation and mechanisms for the application but using judicial activism where courts interpreted laws to allow interested parties participate in trade policy and legislations.

2. Nigeria has been operating and participating in global trade with accession in various trade agreements like the General Agreements on Tariffs and Trade 1947 and World Trade Organization 1994 respectively. These agreements are not meant to regulate free-trade relationships amongst nation states at global stage, however, local industries need protection not to in the form of 'protectionism' but within the contemplation or direct legislation that would not contradict these agreements. However, Nigeria has been a porous-trade-nation that operates without *legislation* to tackle this unfair trade practice.

3. Under the general principles of international law which encourages states to respect their obligation 'Pacta Sunt Servanda' the operational Act and the two proposed bills are not *in tandem* with WTO spirit which suggests the need to repeal and or amend the Act. Absence of this led to continued and systematic consequences where local industries close-shops everyday allowing importation for almost everything including Garri and Soya Bean Cake from especially Republic of China.

4. The South African ITAA as amended was designed to establish regulatory regime that *prima facie* is in compliance with the rules of the WTO Agreement on the Implementation of Article VI: I of the GATT 1994 as read together with ADA. So, the ITAA used to be read and interpreted in conjunction with Customs and Excise Act 1964 and provide the desired objectives being a supplementary legislation. This is not so with

the Nigeria's Customs and Excise Management Act no. 55 of 1958 that come into effect the same time with Nigeria's Customs Duties (Dumped and Subsidized Goods) Act. Both Acts did not make provisions nor contemplate public interest/consideration as a means of reliefs for anti-dumping investigation that may warrant litigation.

5. Both ADA and GATT 1994 did not contain public interest clause except Article 6:12 which calls on the national authorities to give consumers and immediate users the opportunity to provide information relevant to investigation and determination of dumping. This has been the practice in South Africa.

6. The paper found that Article 6:12 of ADA requires national authorities to provide opportunities for industrial users of the good subject to investigation and respective consumer organizations to provide relevant information during investigations mostly in cases where the product is commonly sold at retail price.

7. The paper found that anti-dumping duties may be imposed even if they are contrary to public interest using discretion where the South African Finance Minister may intervene in favour of the importers to allow fair and free trade competition.

8. Nigeria's Customs Duties Act 1958 provides that the President is solely responsible for the imposition of anti-dumping duties, this appears practically impossible considering the nature of his office as the President of a country like Nigeria. In South Africa it is the responsibility of the minister or his representative as the case may to impose anti-dumping duties especially where public interest is at stake.

6.0 Recommendations;

1. Nigeria should embrace legislative transformations dealing with unfair trade practice as lessons from South Africa especially the ITAA which gives courts opportunities using judicial activism to save local industries without contradicting the South Africa's international obligations.

2. Nigeria should as a matter of necessity engages experts in trade agreements to review the existing engagements and possibly make recommendations that would assuage the effects of these unfair trade practices especially at global stage calling on the international institutions for reviews of these agreements.

3. The National Assembly should as a matter of urgency repeal or amend this obsolete Act and in the alternative re-visit the existing bills that are languishing before them since 2010/2015 respectively. The South Africa's ITAA 2000 was designed to establish regulatory framework that prima facie is in compliance with the rules of WTO on the Implementation of Article VI of GATT 1994, Nigeria should emulate from South Africa on this.

4. Although GATT and ADA 1994 did not contain public interest clause, however, Article 6:12 calls on national authorities to give consumers and immediate users the opportunities to provide information relevant to anti-dumping investigation and determination of dumping. The inclusion of Article 6:12 is strongly recommended where National Assembly calls the Act and or the two bills for repeal or amendment.

REFERENCES

1. Article VI: 5 of the General Agreement on Tariffs and Trade.
2. Anti-Dumping Regulations of 2003 Notice 123 in *Government Gazette* No 24287 of 21 January 2003. For regulation before the ITAA see, *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Competition* (1992); *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Exports* (1994); and *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping and Subsidized Exports* (1995).
3. Anti-Dumping Regulations of 2003 Notice 123 in *Government Gazette* No 24287 of 21 January 2003. For regulation before the ITAA see, *Guide*.
4. Anti-dumping Regulations Sec 8.2 (a)(i), (ii) & (iii).
5. Alavi, R, & Ahamat, H. (2004) Predation and Public Interest in the WTO Anti-dumping Determination: A Malaysian Case, *Journal of Economic Cooperation*, 25, 78.
6. Accordingly, the courts would only permit public authorities to do what they had been empowered to do by the Parliament. C. Hoexter & R. Lyster, 2 the New Constitutional and Administrative Law 73 (2002).
7. AD Agreement, Art. 13; E. Vermulst, *Adopting and Implementing Anti-Dumping Laws-Some Suggestions for Developing Countries*, 31 (2) J. WORLD TRADE 5, 8-9 (1997)., at 9.
8. AJA, at 17. Section 6(2) of the AJA allows intervention by the court or tribunal on any one or more of nine grounds set out there under. Those grounds include: (a) absence or excess of statutory authority; (b) bias or reasonable suspicion of bias; (c) procedural unfairness; (d) error of law; (e) bad faith; and (f) arbitrariness or caprice.
9. Available at <https://journals.sagepub.com/doi/abs/10.1177/0015732519894150> (accessed 11 July 2022)
10. Board on Tariffs and Trade Act 107 of 1986, Section 4.
11. Board of Trade and Industries Amendment Act 60 of 1992, Preamble.
12. Board of Tariffs and Trade Amendment Act 39 of 1995, S 1.
13. Barfield, C. (2005) Anti-dumping Reform: Time to go Back to Basics, *The World Economy*, 27, 719-
14. Brink, G.F. One Hundred Years of Anti-Dumping in South Africa (2015) Kluwer Law International.

15. C De Lange 'An Overview of the History of Dumping in South Africa over the past one hundred years' (2014) *tax talk* 44-46.
16. Customs Tariffs Act 26 of 1914, First Schedule.
17. Customs Tariff Act 26 of 1914.
18. Dorcas. A. Odunaike *et all* (2021) "I Will Kill You and Nothing Will Happen: Extra-Judicial Killings in Nigeria and Public Interest Litigation" Babcock University School of Law and Security Studies, Nigeria. Vol. 26 no. 6 (Special Issue) accessed on 24th June 2024.
19. E. Vermulst, *Adopting and Implementing Anti-Dumping Laws-Some Suggestions for Developing Countries*, 31 (2) J. WORLD TRADE 5, 8-9 (1997)., at 14.
20. Gbade. O. Akinrinmade, Public Interest Litigation as a Catalyst for Sustainable Development in Nigeria. (2013) *International Journal of Sustainable Development*. Available at <http://www.ssrn.com/link/OIDA>.
21. Garner. A.B; Black's Law Dictionary 9th Edition pg..
22. G Brink 'Anti-dumping in South Africa' Stellenbosch, Tralac working paper, 2012, at 15.
23. G Brink 'The 10 major problems with the 55 Anti-Dumping Instrument in South Africa' (2005) 39 *Journal of World Trade* 147.
24. G Brink 'One hundred years of anti-dumping in South Africa' (2015) 49 *Journal of World Trade* at 1.
25. H S Hornby, Oxford Advanced Dictionary of Current English (6th Edition) London, Oxford Press, 2000 pg 692.
26. Hsu, L. (1998). The New Singapore Law on Anti-dumping and Countervailing Duties. *Journal of World Trade*, 32(x), pp.121 –124.
27. In the *Italie – Ansoek of Pasta* case, for example, it was held that public interests are important in deciding if the anti-dumping action should be instituted.
28. ITAC: 'Trade Remedies' available at <http://www.itac.org.za/pages/services/trade-remedies> (accessed 29 June 2022).
29. ITAC: Trade Remedies available at <http://www.itac.org.za/pages/services/trade-remedies> (accessed 29 June 2022).
30. International Trade and Administration Act 71 of 2002, Preamble. International Trade and Administration Act 71 of 2002, Section 16.
31. *International Trade and Administration Commission vs International Trade Administrations and others* CCT 59/09; [2010] ZACC 6

32. International Trade and Administration Act 71 of 2003 Sec 32(2)(b)(1)
33. Khanderia, S 'The Compatibility of South African Anti-Dumping Laws with WTO Disciplines' (2017) 25 *African Journal of International and Comparative Law*.
34. Lewis. D; (2016) The Role of Public Interest in Merger Evaluation, being paper presented to the International Competition Network. University of Pretoria South Africa culled from an unpublished LLM thesis "The Role of Public Interest in Merger Evaluation in South Africa 2016 presented to University of Pretoria for the award of Master of Laws.
35. LEWIS, D. (2002). The role of public interest in merger evaluation. Paper presented to the International Competition pg 2.
36. Malebo Ngoben (2021), The Procedural Aspects of South Africa's Anti-Dumping Legislation and Its Compatibility with The World Trade Organization Anti-Dumping Agreement Mini Dissertation Submitted in Partial Fulfillment of The Requirements of The Degree L.L.M (International Trade and Investment Law in Africa) Faculty of Law, Centre for Human Rights University of Pretoria.
37. Obalade. F; Analysis of Dumping as a Major Cause of Imports and Exports Crisis (2014) Vol. 4, No.5. *International Journal of Humanities and Social Science*, pg, 235
38. O.I Usang "Public Interest Litigation: A Veritable Avenue for the Fight Against Corruption in Nigeria" (2021) Nnamdi Azikiwe University, *Journal of Commercial Law and Property Law*, Vol. 8 (1). Usangikpiogha@gmail.com, accessed on 25th June ,2024.
39. OS Sibanda 'South African Anti-dumping law and practice: A judicial and comparative analysis of procedural and substantive issues' (2011) *Foreign Trade Review* 267.
40. Report by the Secretariat of World Trade Organization available at www.wto.org/english/tratop-eltrpr-e/s147-3-e.doc. accessed on 20th June 2024.
41. S.I. Koki, Legal Studies of Anti-Dumping Agreement in Accordance with Nigerian Legislations (2024) being an unpublished PhD thesis submitted to the Bahri University, Khartoum Republic of Sudan for the award of Degree of Doctor of Philosophy in International Trade and Commercial Law.
42. S.I. Koki; Examination of the Principles of Unfair Trade Under WTO and its Effects on Cotton Textiles and Garment (CTG) Subsector in Nigeria (2021) being an unpublished LLM thesis submitted to Faculty of Law Bayero University, Kano for the award of Master of Laws.
43. See General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 17 (1999) 1869 U.N.T.S. 187, reprinted in (1994) 33 *I.L.M*115.

44. See Generally, International Trade Administration Act of 2002 (hereinafter ITAA) as amended.
45. See Business Guide to Trade 2001.
46. See Council Regulation (EC) No. 384/96, 22 December 1995, as amended by Council Regulation (EC) No. 2331/96, 2 December 1996, Council Regulation (EC) No. 905/98, 27 April 1998, and Council Regulation (EC) No. 2238/2000, 9 October 2000.
47. Section 10(l)(e) of the Promotion of the Administration of Justice Act, 2000 (Act No 3 of 2000) available at <http://www.doj.gov.za/policy/draftcodeadminconduct.pdf> (last visited May 30, 2003) [hereafter, AJA]. According to its preamble, the purpose of the Act is, *inter alia*, "to give effect to the right to administrative action that is lawful, reasonable and procedurally fair."
48. Tao, P. (2006). *Dumping and Anti-Dumping Regulations with Specific Reference to the Legal Framework in South Africa and China* (2006) LLM dissertation, University of the Free State, pg 107-109.
49. The Countervailing and Antidumping Duties Act, 1996 of Singapore being a replica of Malaysian Countervailing Duties and Antidumping Act 1993.
50. Tharakan, Business Guide to Trade Remedies in the European Community, 2001.
51. The Constitution of the Republic of South Africa, 1996, Section 233.
52. Tao, M 'Dumping and antidumping regulations with specific reference to legal framework in South Africa and China' unpublished LLM thesis, University of Free State, 2006.
53. Tabane, RJ 'An Examination of the Effectiveness of Anti-dumping Laws in South Africa' unpublished LLM Thesis, University of KwaZulu Natal, See Wang Jingqi, 2000, 35.
54. Vermulst, 2005, Anti-dumping Agreement, part I Article 1, p.2 1994.
55. Vermulst, 2005, Injury Determination in Anti-dumping Investigations in the United States and European Community, N.Y.L.J. INT'L & COMP. L. p.g 301-304.
56. World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 June, 2024)
57. World Trade Organization "Technical information on anti-dumping" https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 22 August 2021).
58. WTO Panel Report *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* 73 WT/DS439/1 (25 June 2012) (*South Africa – Poultry*).
- 50 WT/DS500/1 G/L/1139 G/ADP/D112/1: *South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan* available at

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/500-1.pdf&Open=True> (accessed 25 July 2022).

6o WTO Agreement, Annex 1A, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (Anti-Dumping Agreement).



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

HARNESSING CUSTOMARY LAND TENURE FOR SUSTAINABLE LAND RESOURCE
MANAGEMENT IN RURAL NIGERIA

Busari Morufu Salawu
Department of Public and International Law, Faculty of Law,
Osun State University, Osogbo Osun State, Nigeria
E-mail: busari.salawu@uniosun.edu.ng Phone Number: 08060976784

Abstract

Customary land tenure is the primary form of management of rural land in Nigeria. Although other land tenure systems operate alongside it, it primarily regulates the ownership rights and the appropriation of land resources in the rural settings. This study overviewed customary land tenure and the Land Use Act 1978 (LUA). The changes the LUA introduced to its operation and the results of the intervention were discussed. The study appraised the role of customary land tenure in sustainable rural development. A doctrinal research method which made use of primary and secondary sources was used. The primary source included the domestic statutes such as the Land Tenure Law 1962, LUA, 1999 Constitution of the Federal Republic of Nigeria, etc. and case law. The secondary source included textbooks, journal articles, conference proceedings and the internet. It was revealed that in most parts of Nigeria, rural lands are under the customary land tenure, regulated by customs and culture of the communities. It was suggested that the LUA adopted the operation of the customary land tenure with modifications and that the intervention on the system dislocated rural peace. However, the incidents of customary land tenure were found to be capable of ensuring sustainable development in the rural areas. While reforms were suggested, the use of customary land tenure is recommended for the reduction of poverty, hunger and violence and an increase in employment and wealth creation.

Keywords: Deemed Customary Rights, Land Tenure, Rural Conflicts, Sustainable Development

Introduction

Customary land tenure is the land holding system which is traditional to Nigeria and distilled from customs, values and practices of the peoples (Otu, 2022). The tenure is enforced by various High Courts of the Federation subject to its compliance with principles of equity and good conscience and by not being incompatible either directly or by implication with any law for the time being in force in any part of Nigeria (Evidence Act 2011, S. 14(1)). For the avoidance of doubt, customary law is also enforced in the State High Courts of States.

The security situation in rural Nigeria has reached a critical level. It has impacted negatively on the children's access to education, deprivation of human rights and has caused humanitarian crises, in most parts of northern Nigeria, comprising three geopolitical zones, namely Northwest, North Central and Northeast zones (OSIWA, 2024). In southern part of Nigeria, crises erupted upon the passage of the Land Use Act in 1978 which ignited age-old feuds over customary access to land. Notable among which are the Ife/Modakeke (Toriola, 2001). Crises in Southwest Zone which spanned over decades; Erin Ile and Offa in North Central Zone and various land resource disputes in which lives and properties had been lost in Southeast and Southsouth Zones. The Niger Delta Crisis negatively impacted on Nigeria's economy and promoted humanitarian crises in the Southsouth Zone (Oluduro and Oluduro, 2012). The authors suggested that post amnesty, efforts should be made to address the underlying factors (economic, social and environmental) which were responsible for the militancy in the first instance. This observation is particularly relevant because the ancestral homes of the Niger Delta people, where Nigeria's crude oil is being prospected, had suffered extreme pollution which prevented them from using the land for further economic and residential purposes (Oluduro and Oluduro, 2012).

The various crises could, perhaps, be attributed to poor management and utilisation of natural resources in Nigeria. Since the colonial intervention after the Berlin Conference of 1884 – 1885, most of the legacies of the African empires, cities and communities had been relegated, while the colonial heritage took over (Gate and Appiah, 2015). This relegation was more prominent in the implementation of customary law which effectively regulated the affairs of the peoples and kingdoms to the applause

of the early explorers (Cartwright, 2024). An important aspect of these is the effect of the colonization on the customary land tenure law on the management and control of the use and the ownership of land (Otu, 2022).

This paper realised that many studies have been conducted on land tenure practices in Nigeria such as the Received Doctrine of Estates, State Ownership under the Land Tenure Law, Cap 59 Law of Northern Nigeria 1962 and the Land Use Act 1978, Law of the Federation of Nigeria 2004, while less studies have focused on the nature, use and operation of the customary land tenure and its role in sustainable development in Nigeria's rural areas. Paying attention to the customary land tenure law in rural areas in Nigeria could bring about identifying the challenges inherent in it. It would also provide a roadmap to various stakeholders who could be interested in using land for agricultural development and security.

This study aims at harnessing customary land tenure for sustainable development in rural Nigeria. Its specific objectives are to

- (i) undertake an overview of customary land tenure in Nigeria
- (ii) discuss innovations and developments which the Land Use Act introduced to it for sustainable development in resolving rural conflicts in Nigeria.

The study made use the doctrinal research method, relying on primary and secondary sources of information was adopted.

2.0 Overview of Customary Land Tenure in Nigeria

Land has been variously defined in law, but the definition that is adopted for this study is that of Garner (2004)which sees land as 'an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface and everything growing or permanently affixed to it'.²⁷⁹ This definition has underlying assumptions, which are both natural and artificial (Nwabueze, 1982). The natural element consists of the physical structure of the land and its sub-soil, including all those things growing naturally on it. But its artificial content

²⁷⁹ B.A. Garner, *Black's Law Dictionary of Law of Law* (Thompson West Publishing Co., 8th edition, 2004) 892.

occurs when other structures and trees have been affixed to it. In *Salami v Godoolu*, (1997) 4 NWLR (Pt. 499) 287, Adio JSC stated that:

The word 'land' in its ordinary meaning means any ground, soil or earth, or the solid part of the earth's surface as distinguished from sea... the fact is that, by its very nature, land ordinarily is an immovable object.

The distinction of land into its natural and artificial elements is in line with the maxim of *quicquid plantatur solo solo cedit* which literally means anything that is attached to the land belongs to the land. This is the definition of land at common law, which Nigeria courts have adopted to define, describe and typify land in Nigeria.

2.1 Nature of Customary Land Tenure

Nigeria is a multi-ethnic and multi-cultural nation, with its diversity spanning across ethnicity, cultural worldview, religion and politics. The nation "Nigeria" came into existence in 1914 when the then Governor-General, Frederick Lord Lugard, amalgamated the southern and northern protectorates (Isiani and Obi - Ani, 2019). This singular effort brought together peoples whose ways of lives, attitudes and religious together as one. The implication of the amalgamation was the breakdown of the pre-existing law and order which sustained the great empires such as Oyo, Jukun, the Hausa States and so on. Though, at the twilight of the invasion of the civilization of the indigenous peoples constituting Nigeria and the subsuming of their governance system under the British imperialism, the Hausa States had been colonised by the Fulani Jihadists which introduced state ownership of land (Smith, 2013). The learned author further commented that in southern parts of Nigeria (the southern protectorates) customary law was used to direct the affairs of the people, including land relationships before the colonial administration. The colonial government introduced Received English law which accepted statutes of general application in operation as of 1st January 1900 in England, the doctrines of estate and the principles of common law. It also allowed the continued operation of the customary law subject to necessary modification that would make it compliant with the Received law (Evidence Act 2011, Section 16). The customary land tenure which emerged from the cultural contacts the Jihadists (Northern Nigeria) and the colonialists in all parts of the Nigerian federation had

accommodated new ideas, concepts and philosophies in line with its ever dynamic and flexible nature.

The question which has engaged the attention of scholars is whether the concept of law at common law rule of *quicquid plantatur solo solo cedit* applies to the customary land tenure. The insight into this question could be had from the case law and the opinions of legal scholars. In *Okoiko v Esedalue*, ((1974) 1 All NLR (Pt 1)), the issue was considered for determination. The pledgor pledged vacant land to the pledgee who, during its use and enjoyment of the land planted rubber trees on it. On redemption, the pledgee requested for compensation for the rubber trees planted on the land. The trial court rejected the claim 'as inability of the mortgagor (that is the pledgor) to pay such compensation may deprive the mortgagor the right of redemption of the property which native property and custom allows him.' The trial judge, however, ruled that the pledgee should be given opportunity to remove the property and structures which included the rubber trees, before possession was taken by the pledgor' On appeal to the Supreme Court, the part of the judgement of the trial court which gave the pledgee the powers to remove the economic trees was overturned. Elias CJN stated in *Okoiko v Esedalue* (1974) All NLR (Pt 1),³⁴⁰ that:

We think that the planting of the land with economic crops like rubber must be regarded as necessarily incidental to the use of the land since there is no evidence that was forbidden under the terms of the original pledge; but it is also clear, nevertheless, that the pledgee has no right to compensation or credit for the plantations, which accrue to the pledged land on the principle of *quicquid plantatur solo solo cedit*. It was therefore an act of grace rather than as a matter of legal right that the learned trial judge ordered the appellant to permit the respondents to reap the next harvest before returning the pledged land to the appellant. The law is that the pledgee should quit the land as from the date of judgement in favour of the pledgor.

However, in *Okoh v Olotu* (1953) 20 NLR 123 and *Samteng Dakuh* (1925) ENLR 87, it appears that the Federal Supreme Court has reviewed its support for the *quicquid plantatur solo solo cedit* on equitable ground at the customary law, which it notes that

separate rights of ownership of land and that of the economic trees often exist on land in customary tenure. It expressly holds that the owner of the land may not be the owner of the economic trees, and the owner of the economic trees has the rights to remove or demolish or sell the crops to the landowner at the expiration of his tenure. Although a member's allotment is exclusive to him, such cannot be transferred by sale or inheritance (*Akeju v Suenu* (1925) 6 NLR 87).

Cases which reject the application of the principle of *quicquid plantatur solo solo cedit* do so on equitable grounds rather than on its basis of non-applicability to customary land transactions (*Uwam v Akom* ((1929) 8 NLR 19) and in some cases, are of Ghanaian, not Nigerian origins, (*Santeng v Dankwa* (1949) 6 WACA) and may therefore not be typical of the customary land relationship in Nigeria (Otu,2022).

The conclusion that arises from the foregoing analysis of the nature of customary land tenure in Nigeria is that it subscribes to the common law principle and sees land as including permanent attachments and features on it, subject to some exceptions based on equitable grounds. The implies that under customary land tenure, whenever a fixture such as a house is given as a security for credit, it would not mean that the land is included, although it would include the other fixtures unless such is excluded (Nwabueze, 1982; Otu, 2022).

2.2 Features of Customary Land Tenure

Customary land tenure differs from a community to another. Its conception and operation are determined by the customs of the people of the communities. In addition, it is flexible and unwritten. It represents the ways and practices of the communities from the past, but it is dynamic and changes in accordance with the customs. Some of its basic features are considered *infra*.

2.2.1 Communal Ownership

It is based on the concept of communal ownership which sees land as belonging to the community, or the group. Hence, no member of the family has individual or separate right of ownership to the land. A learned commentator, Nwabueze (1982) argues that: 'There is perhaps no rule of customary law that is more firmly established

than that no member of a land owing community or family has a separate individual title of ownership to the whole or any part of the family land.’²⁸⁰ The learned writer further argues that the nature of traditional communities, villages or families makes it impossible for an individual to lay claim to a vast indivisible portion of land. Only a portion may be allotted for a member to use. Hence, communal ownership is different from co-ownership under the English law because land belongs not only to the living, but also the dead and yet unborn, which makes it operating on “the descent to future generation” (Nwabueze, 1982). Its right of ownership depends on communal membership and not by way of filial inheritance. The implication of this is that land under customary tenure belongs to the dead, the living and the yet unborn, with the interest of the dead and unborn members appears more important than that of the living whose duty is to safeguard, protect and transmit the communal land from their ancestors to the yet unborn.

However, a ‘state’ (for example a kingdom or an empire in the pre-colonial days), may own lands as a corporate entity, under the customary tenure. Such land is regarded as a ‘stool’ land, but largely, it is the community village or family that owns larger portion of the land either as chieftaincy or family lands. These land owing groups are not legal personalities, but a group of people who have common interest and may be liable, individually or in group for debts incurred on the land (Oluyede, 1989).

In distinguishing between the crown land and the chieftaincy/family land, the learned author affirmed that paramount ruler has complete and exclusive use of stool land as he pleases in his lifetime, while in the case of chieftaincy/family land, members of the family can farm on portions of the land with the chief/family heads consent. The chief/family head has no more than an interest as a member of the community and a consenting authority. The chief/family head cannot appropriate and expropriate the land without consultation with the corporate members (Umezulike, 2004), but recent trends have suggested that although outright transfer was uncommon in the past, it is now permitted due to innovations on customary tenure which makes it possible to alienate land by way of gift or sale (Innegbedion, 2004).

²⁸⁰ B.O Nwabueze, *Nigerian Land Law* (Nwamife Publishers, 1982) 53

2.2.2 Administration of Communal Land

The basic units of the communal land holding the community, the village and the family. These units can only act through the rulers, chiefs, headmen, principal members and members. Hence, in *The Military Government of Mid-Western State of Nigeria v The Itsekiri Communal Land Trustees* (Suit No W/SS/1968 of 10/10/69 (unreported), High court Warri) a suit was filed by a community in its own name “Obosi” rather than in the name of its head, or other representatives. It was decided that although the community “describes a large number of people having a common relationship, it is neither a natural nor a legal person capable of suing or being sued in our courts. There being no representative, no process can be served on it, and it cannot itself issue any process.” Based on this, it can be surmised that the administration and control of land in communal settings are not vested in the corporate groups, but in either the crown as the head of the community, or in the group of persons as the authorised representatives of the people. (Otu, 2022).

In the management of communal property, chiefs, family heads, rulers or leaders of the community are in control and administration. They emerge based on the customs and practice of each community (Ikpambese, 2010). The chief or leader of the community controls and manages the communal land in consultation with the principal members of the units in the community. A chief in this context refers to “a person who, in accordance with the law in force in any part of Nigeria, is given the dignity of a chief by reference to that part, or to a community established in that part” (Interpretation Act 1990, Cap 192 LFN 2004, Section 18(1)). A chief may, therefore, be construed as a leader of a tribe or a clan (*Amodu Tijani v The Secretary of State of Southern Nigeria*, (1921) AC 399), whose role as a ‘trustee’ on land is not an owner but mainly as that of leader in his community (*Taiwo v Sarumi* (1913) NLR 103). In performing this role, a chief may combine the role of a landowner in his private capacity to his pre-eminent position of being in control and administration of community land. The above situation came before a colonial court for decision. The court observed that a chief, Olofin of Isheri, had been functioning as a chief in charge of the communal land, and as a landowner.

The Chief or whomsoever acting in that capacity under customary tenure does not have the ownership of the community land under his control. The question is, what

is then the role of a chief in the management and control of the land? The communal chief does not have the ownership right on the land in his area. The Privy Council in *Amodu Tijani's*²⁸¹ case decided that:

All the members of the community, village or family have an equal right to the land, but in every case the chief or the headman of the community or village, or head of the family, has charge of the land, and in a loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family.

In a similar vein, a learned commentator, Nwabueze (1982) considers the chief as the “alter ego” and the first member, in order of precedence in the community, village or family who could exercise ownership rights on the communal lands, subject to individual members’ rights. The learned author further argues that a full understanding of the position of the chief could be attained if the title of ownership is divorced from its exercise. While the title of ownership belongs to the community, it is the chief who exercises it on behalf of the corporate.

The position of a chief under the customary tenure is a complex one. Nwabueze’s description of the position is adopted for this paper. The learned writer states:

The truth is that the position of the chief in relation to communal land is a peculiarly unique one, a uniqueness which is borne out by the fact that without the active participation of the chief, no outright alienation of the land can be validly made, notwithstanding that all other members desired and approved of it.²⁸²

The position of the learned writer emanated from the customary land tenure principles which had been judicially cited upon by the courts. In *Agbloee v Sappor* (1947)¹² WACA 187), the court believed the legal title could not be transferred without the approval of the chief. Only the chief is imbued with the necessary power to allocate land to members. In *Odunsi v Ojora* (1961) 1 All NLR 283), the Supreme Court affirmed that even when the community opposed the appointment of a chief who had been

²⁸¹ Supra, 404

²⁸² Nwabueze, 152

validly appointed by the prescribed authority, no other person could perform the task of managing the communal property except him. The fact of the case was that the appellant was duly capped Chief Ojora by the Oba of Lagos upon which he had powers to head the Ojora family of Lagos. His appointment was, however, opposed by most of the family members who only conceded to him the social and other privileges, while they elected another member of the family, the respondent in the case to be the family head, with the power of management of the family property. It was decided that only the family head appointed in line with customary law could manage its property and that the family lacks power to divest him this power.

2.2.4 Members Rights to the Communal Land

All members have certain rights in the communal land which must be taken into consideration in exercising the powers for the benefit of the community. These will be briefly discussed in this section.

2.2.5 Right of Allotment

A member has a right to the use of a communal land. This right is inalienable, and the chief cannot deprive a member of this right. A member has a right to enforce it against the chief, or any other member who deprives him of the access to its use (Nwabueze, 1982). This includes the allotment of a parcel of land for farming and residential purpose(s). This right is not discretionary as it is mandatory for every chief to ensure that this inherent right of members is not jeopardised. However, this right is limited to the quantum of land necessary a member requires to farm and reside. Where a chief fails to allot a piece of land for the use of a member, without a reasonable exercise, the member has a right to enforce the right before the court to compel the chief to act. In *Ajobi v Oloko* (1959) LLR 152 it was upheld that the family head deliberately refused to allocate plots to members for their occupation.

However, where lands have been duly allocated to some individuals within the community (whether a family member or not), the chief can no longer reallocate to another member of the community. The individuals to whom the land has been allotted thereby acquires permanent rights in the land (Otu, 2022). Hence, the Supreme Court in *Asiyanbi v Adeniji* (SC/92/1964) decided that the Ooni of Ife had no power to revoke

a grant already allotted to a person and allot it to another whether that person is a member of the family or not, without due consultation with the family.

The rules of allotment of land to both community members and those outside it but are interested in the land within the community promoted peace, reduced conflicts and eschewed insecurities in traditional communities. These rules are, however, been increasingly violated by chiefs and heads of the families who hide under the provisions of Land Use Act 1978 and the transitional provisional rules in its sections 36 to cause conflicts in rural Nigeria.

4.0 LUA's Innovations and Developments on Customary Tenure

Since 1978 when LUA was enacted, all rights to land in Nigeria are determined by its provisions. In its land administration principles and policies, the Act introduces innovations on the preexisting tenures, namely: the customary tenure and the Received Doctrine of Estates.

4.1 State Control over Land

Section 1, LUA states that:

Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

The Act creates the eminent domain in the Governor who is entrusted with all lands in his domain. The Governor has the powers to appropriate and expropriate lands through the absolute powers devolved on the office by the Act to grant (LUA, S.5) and revoke rights (LUA, S.29) of occupancy and pay compensation (LUA, S.28) when the grant is revoked for public purposes.

The concept of eminent domain could be traced to 17th century developments on land in United States of America, when the powers of compulsory purchase and, or acquisition of land by the sovereign was affirmed by the courts (*Kelo v City of New London* (2005) 545 United States 469 (SC)). Eminent domain emanated from American

Jurisprudence. It was defined by *Black's Law Dictionary* as 'The inherent power of a governmental authority to take privately owned property, esp. land, and convert it to public use' (Garner2004; 601).

The eminent domain is a theory of protection of private property which has been incorporated in many constitutions worldwide, Nigeria's inclusive. Section 44 of the 1999 Constitution of the Federal Republic of Nigeria (Cap C23 LFN 2004) is an adoption of the eminent domain theory. It is a theory that affirms, promotes and institutionalises the State control over land, which is the focus of the LUA in its section 1.

The state control of lands is alien to land control under the customary tenure. Rather, its land control is based on the power of the communal heads, chiefs and family heads who are the consenting authorities. Their authorities are not absolute as they must defer to the principal members of the land-owning units (Fatula, 2012). The position of the communal leadership in the management and control of land differs markedly from the powers of the Governor which are excessive, absolute and characterized by unreasonable delays and inconsistent grants (*Dantsoho v Mohammed* (2003) 6 NWLR (Pt 817), 457). These enormous powers have impacted negatively on the achievement of the objective of LUA, namely: making lands available to all Nigerians (*Ibrahim v Muhammed* (2003) 6 NWLR (Pt 817)).

4.2 Preserving Pre-existing Tenures

Although the LUA takes away the previous legal title which is based on ownership and replaces it with a new legal right based on possession, it does not abolish the pre-existing rights under the previous tenures. In *Ogunleye v Oni* (1991)2 NWLR (Pt. 135) 745, 784, Nnaemeka Agu JSC observed that:

... the Land Use Act never set out to abolish all existing titles and rights to possession of land. Rather, where such rights or titles relate to developed lands in urban areas, the possessor or occupier of the right or title is deemed to be a statutory grantee of a right of occupancy under section 34(2) of the Act. Where it is non-urban land, the holder or owner under customary law or otherwise is deemed to be a deemed grantee of a

right of occupancy by the appropriate Local Government under section 36(2).

Hence in *Adole v Gwar* (2008) 5 MJSC 38, 66 the apex court has stated that: 'It must be borne in mind always and this is settled, that the only innovation introduced by the Land Use Act 1978 --- is that it divests any element of radical title and limits the claim to a right of occupancy.'²⁸³ Section 4, LUA therefore, preserves all statutes applicable to land before it, subject to such modifications as would make them conform with the Act or general intention, while section 34 preserves all pre-existing "interest valid in law" on land transactions such as mortgages, legal or equitable interests which shall be revalidated through certificate of occupancy (Abugu, 2012).

The preservation of the pre-existing tenures has made it possible for the incidences of customary tenure to continue, including the beneficial ownership until such is abridged when the holder or occupier obtains the certificate of occupancy or seeks Governor's approval as stipulated by the LUA (S.36(2)).

4.3 Land Accessibility

A cardinal objective of the LUA is to make land accessible to all Nigerians. Pre-existing land tenures did not have that direction. The intendment of the LUA is to make land available to all Nigerians for an integrated and sustainable development (Oluyede, 1978) and prevent land speculation and insecurity of title (Umezulike, 2004). In doing this, the LUA subordinates customary and individual rights to state ownership and extends the paternalistic land tenure system under the Land Tenure Law to all parts of Nigeria. The policy of land accessibility is manifested in the trusteeship of the Governor over all lands in each of the states (LUA, S.1), although the role of the Governor in this regard is not that of an orthodox trustee (Fatula, 2012). The Act creates state ownership of land and uniform rules for its management. Hence, the absolute ownership of land previously vested in communities, families and individuals was taken away by the Act, at least in principle, and vested same in the Governor, for the benefit of all Nigerians. The preservation of pre-existing rights, however, allow the continuation of the customary ownership rights, as deemed grantee (Oniekoro, 2007). This

²⁸³ Ibid, Per Ogbuagu JSC

presentation has been viewed by scholars as capable of frustrating the innovation introduced by the Act in this regard (Utuama, 1990; Oniekoro, 2007), is contented to. A deemed grant enjoys greater rights beyond that of an actual grantee (statutory and customary) of occupancy under the Act because the holder or occupier is unencumbered with onerous terms and conditions found in the actual grant and is liable only to the encumbrances on the original title (Oniekoro, 2007). This greater right which cannot be defeated by a subsequent grant to another person still makes land access difficult (Utuama, 1990). For example, LUA provides that 500 and 5000 hectares of land could be granted for farming and grazing by the Local Government, with the directive that a requirement for a higher grant should be referred to the Governor for consent (S. 6(5)). This ordinarily would have solved the problem of inaccessibility to land resources for economic development, but these lands are not freed from the communal ownership and are still controlled by a customary tenure through deemed grant window created in section 36(5) of the Act.

4.4 Citizenship Property Rights

Under the customary tenure, lands belong to the communities, families, and sometimes individuals to whom the allotments have been made. Access to land is restrictive. This policy also operates under the state-controlled Land Tenure Law 1962 where a distinction is made between statutory and customary rights as it relates to persons to whom land rights could be granted. Under the Land Tenure Law, customary rights could only be granted to the natives, (LTL. S. 5) while any person could be granted statutory rights. The difference in the grant of customary right and statutory right is critical for the use and allocation of land resources. The LUA, however, does not make a distinction between a native or a non-native. A closer look at who a native is under LTL will reveal that it intends to make access to land impossible to a “non-native” who is described to mean “a person whose father was a member of any tribe indigenous to Northern Nigeria” (LTL, Section 2). this is understandable because the law is preserving the customary rights of the indigenous peoples at customary tenure. Hence, it defines “customary right of occupancy to mean ‘the title of a native or native community lawfully using or occupying native lands in accordance with native law and custom.’”

The LUA preserves the rights of citizens to have access to lands in any part of the country they reside, whether rural or urban area as it does not differentiate between customary and rural rights. But it goes further to preserve pre-existing land rights under the applicable law (LUA S. 4 (a)). On this regard, the liberal view of the LUA to access to land for all Nigerians should be made to complement the powers of the Chiefs to allot land to community members and strangers at customary land tenure.

5.0 Customary Land Tenure and Sustainable Development

5.1 Reducing Hunger

The customary land tenure plays a central role in achieving SDG 2 (Zero Hunger) in Nigeria cannot be overstressed because the bulk of arable lands are still which are still in possession of the communities, families and individuals holding under this system (Smith, 2013). It is therefore relevant in resolving rural conflicts in Nigeria through the exploration of customary land relationships which have been saved by a community reading of sections 34, 36 and 48 of the LUA.

Section 48 states:

All existing laws relating to the registration of title to, or interest in, land or the subject of transfer of title to any interest in land shall have effect subject to such modifications (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment.

By these provisions, pre-existing tenures such as customary land tenure and doctrine of estates operate, subject to their conformity with the policies and principles of the LUA. The basic requirements for conformity include: the deemed grantee (LUA, Ss.34 and 36) which recognises the occupier and holders of rural land for the purpose of regularising and obtaining Certificate of Occupancy and the Consent of the Governor (for urban land) (LUA, S.34(5))) and Local Government (for rural land) (Section 36(5)) before alienation, the half hectare rule (LUA, S. 34(5) and (7)) which forbids a holder's continued possession of more than a cumulative half hectare of undeveloped land in the urban area. Barring these, the allodial titles of the communities, families and

individuals continue unabated, until the land is alienated when the consent of the appropriate authority shall be required.

Harnessing customary land tenure principles and practices could resolve many land resource disputes threatening food security, promoting hunger deprivation in rural Nigeria, riddled with herdsman attacks, ethno-religious conflicts, banditry, cattle rustling, insurgency and resurgency (Salawudeen, 2019).

5.2 Increasing Land Access

The LUA was enacted to make land available to all citizens. In order to do this, it vests the lands in the states of the federation in the Governors. Despite this, and more than four decades since the Act had become operational, land is still not available for agricultural and other economic activities in rural areas in Nigeria (Abugu, 2012). This problem could arguably be attributed to customary land tenure, under which most lands in rural areas are held (Salawudeen, 2019).

It has been observed that LUA does not revoke or amend the respective rights of customary landlord and the tenants (Olong, 2011). Rather the Supreme Court had to comment on the effect of the law in *Ogunleye v Oni* (1989) 1 NWLR (Pt 97) 305 as follows:

--- the Land Use Act is not a magic wand, it is being portrayed to be or a destructive monster that at once swallowed all rights on land and that the Governor or local government with mere issuance of a piece of paper, could divest families of their homes and agricultural lands overnight with a rich holder of a certificate of occupancy driving them out with bulldozers and cranes.

The implication of this statement is that the LUA does not in fact change the structure of land ownership. What it does is to merely introduce some principles and policies to guide the appropriation and expropriation of the land by the Governor. All the customary land tenure incidents such as customary tenancy, kola tenancy, customary pledge continues to operate under the LUA, subject to necessary modification (LUA, S. 47). To make lands available, these aspects of customary land tenure would have to be explored for use.

5.0 Conclusion

5.1 Summary

The customary land tenure is the indigenous form of method of administering land titles systems in Nigeria. it arose from the customs and practices of the peoples indigenous to Nigeria. This study undertook an overview of the customary land tenure, discussed innovations and development which LUA had brought to the customary tenure and appraised the sustainable development in rural, and predominantly agricultural communities. The study examined ways of harnessing customary land tenure for sustainable development in food production in Nigeria.

The study looked at the principles and incidences of customary land tenure such as corporate and individual ownership, land administration under it and some of the challenges it faced in view of the increasing modernisation and globalisation. Innovations were introduced by LUA into the customary land tenure by the LUA, which recognised, modified and streamlined it for the challenges of development. The customary tenure was considered for further innovations and use in view of the failure of the LUA to meet the current spate of a multi-cultural, multi-ethnic and multi-religious nation like Nigeria.

5.2 Findings

The study affirmed that customary land tenure had existed from time immemorial, and its principles were dynamic, flexible and responsive for the rapid development of agriculture, grazing and other economic activities.

It was also revealed that customary land tenure had survived all legislations on land tenure systems introduced to Nigeria. The first of such legislation was the Treaty of Cession 1861 signed by King Dosunmu of Lagos. It also survived, and indeed was nourished by, the LUA, through its doctrine of deemed grantee, subject to necessary modifications to make it comply with its principles and policies.

The LUA affirms incidents of customary land tenure such as customary tenancy, kola tenancy, customary pledge. In addition to making land accessible to members of the communities, and strangers who may not have access to land for residential,

farming, grazing and other business purposes like other incidents, customary pledge raises funds for the landlords as security, and it is a form of customary mortgage.

5.3 Recommendations

In view of the importance of the customary land law principles and practices to land management in Nigeria and its flexibility and dynamism, the administration of land under the LUA should include guidelines and procedures to implement the incidents of customary land tenure without hindrance.

Customary land tenure used to be on parole agreement, innovations and modernisations which came through the adoption of the Received English doctrine of estates makes it mandatory for land transactions to be in writing should be sustained, while necessary efforts should be instituted under the extant legal regime of LUA to improve on rural land documentation to curb land speculation and money laundering in the real property sector of Nigerian economy.

Furthermore, policies, rules and guidelines for the operation of deemed grantee should be set by the State Land Allocation Committees and Local Government Land Advisory Committees for transparency.

In addition, the consent for the alienation of lands in urban and rural areas have created problems for land access. This is true of rural areas where double-decker consent is required. While the consent of chiefs/family heads are mandatory for alienation, the LUA have put some hindrances, namely the bar on local government allocation of more than 500 and 5000 hectares for farming and grazing respectively. The Governor's consent for any allocation is a bar to land access as it could delay it for several years due to bureaucracy and official corruption. The above issues deserve attention for sustainable food security.

References

- Abugu, U. (2012) *Land use and reform in Nigeria: Law and practice*. Immaculate Prints
- Cartwright, M. 'Kingdom of Benin, *History of Enclopedia* (02 April 2019) accessed from <https://www.worldhistory.org> on 23 June,2024

Cooley, T.M. (1868). *A treaties on the constitutional limitations which rest upon legislature power of the states of the american union*. Little

Fatula, O. (2012). *Fundamentals of real property law*. Afribic Press

Garner, B.A. (2004). *Black's Law Dictionary of Law of Law*. Thompson West Publishing Co., 8th edition, 2004

Gate, H.L.and Appiah A.K. (2015) (ed), *Encyclopedia of Africa*. Oxford References

I.A. Umezulike, I.A. (2004). 'The land use act: more than two decades after and problems of adaptive strategic of implementation' being a paper presented at the 2nd annual lecture of the college of law, Igbinnedo University, Okada, Edo State, Nigeria 4 March

Ikpambese, M.A. (2010). *Nigerian Land Law Principle, Practice and Procedure*. Oracle Business Limited

Inegbedion, N.A. and Ukhun, C.E. (2004). 'Land Use Act?' (14)(2) *Lesotho Law Journal*, 341- 354

Isiani, M.C. and Obi-Ani, M.A. (2019). 'Amalgamation of northern and southern protectorates of Nigeria: Blessing curse?' (October) (13) (1) 145 -158

Nwabueze, B.O. (1982). *Nigerian Land Law* Nwamife Publishers

Olong, A.M.D. (2011). *Land Law in Nigeria* (Second Edition, Malthouse Press Limited

Oluduro, O. and Oluduro, O. (2012) In search of sustainable peace in the niger delta through the amnesty programme. *Journal of Sustainable Development* (8) (7) 48 - 60

Oluyede, P.A.O. (1978). *Nigerian Law of Conveyancing*. University of Ibadan Press

Oluyede, P.A.O.(1989). *Modern Nigerian Land Law*. Evans Brothers Nigeria Publishers

Oniekoro, F.(2007). *Mortgages in Nigeria*.

Otu, M.T. (2022), *Customary land law in Nigeria: Law & Practice*. Princeton & Associates

Open Society Initiative for West Africa (OSIWA), Report on Small Arms, Mass Afro cities & Migration in Nigeria (April 2020). <https://www.submintel.com> accessed on 29 June 2024

Salawudeen, M.O. (2019). *Herdsman attacks and social integration among the people of southwest Nigeria*. PhD Thesis, Ekiti State University, Ado Ekiti

Smith, I.O. (2013). *Practical Approach to Law of Real Property*. Ecowatch Publications

Smith, (2013). *Practical Approach to Law of Real Property in Nigeria*. Revised Edition, Ecowatch Publications

Toriola, O.J. (2001), 'The Modakeke Crisis: An Insider View' *Ife Psychologist*, 21-29

Umezulike, I.A. (2004). 'The Land Use Act: More than Two Decades after and Problems of Adaptive Strategies of Implementation.' Lecture Delivered at College of Law, Igbinnedon University, March 4

Utuama, A.A. (1990). *Nigerian Law of Real Property*. Shaneson C.I.

Cases

Adole v Gwar (2008) 5 MJSC 38, 66

Agboloe v Suppor (1947) 12 WACA 187, 189

Ajobi v Oloko (1959) LLR 152

Akeju v Suenu (1925) 6 NLR 8

Amodu Tijani v The Secretary of State of Southern Nigeria (1921) 2 AC399, 404

Dantsoho v Mohammed (2003) 6 NWLR (Pt 817), 615

Ibrahim v Muhammed (2003) 6 NWLR (Pt 817) 615

Kelo v City of New London (2005) 545 United States 469 (SC)

Odunsi v Ojora (1961) 1All NLR 283

Ogunleye v Oni (1990) 2 NWLR (Pt. 135) 745, 784

Okoh v Olotu (1953) 20 NLR 123

Okoiko v Esidalue (1974) NWLR 337

Salami v Godoolu (1997) 4 NWLR (499) 287

Santeng v Dankwa (1949) 6 WACA

Taiwo v Sarumi (1913) 2 NLR 103

Uwam v Akom ((1929) 8 NLR 19

Western State of Nigeria v The Itshekiri Communal Land Trustees Suit No W/SS/1968 of 10/10/69 (unreported), High court Warri

Legislation

Constitution of the Federal Republic of Nigeria 1999, Cap C23 LFN 2004

Evidence Act 2011, S. 14(1)

Land Tenure Law, Cap 59, Law of Northern Nigeria 1962

Land Use Act 1978, Cap L5, LFN 2004



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN ANALYSIS OF THE DEVELOPMENT OF ELECTRONIC BANKING UNDER
NIGERIAN LAW

Sani Abdulkadir²⁸⁴

Nuhu Bamalli Polytechnic, Kaduna State Nigeria

saniabdulk5@gmail.com

Iya Mohammed Alhaji²⁸⁵

Department of Sharia and Civil Law, Yobe State University, Damaturu.

faisaliyaj@gmail.com

Abstract

The evolution of electronic banking in Nigeria has transformed the landscape of financial services, presenting both opportunities and challenges. This paper conducts a comprehensive analysis of the legal framework governing electronic banking in Nigeria, examining its development, effectiveness, and impact on the financial sector. By delving into legislation, regulations, and case law, it evaluates the adequacy of existing laws in addressing the complexities of electronic transactions, data protection, consumer rights, and cyber security. Additionally, it explores the role of regulatory bodies in fostering innovation while ensuring compliance and stability. Through a critical lens, this analysis aims to provide insights into the legal foundations of electronic banking in Nigeria and suggests strategies for enhancing its regulatory framework to support sustainable growth and financial inclusion. Furthermore, the paper evaluates the adequacy of the legal framework in safeguarding the integrity and security of electronic transactions, mitigating risks related to fraud, identity theft and cyber-attacks, and protecting consumer rights in electronic banking relationships. It explores the challenges faced by regulators in balancing innovation and risk management, promoting financial inclusion, and fostering competition in the e-banking ecosystem. By providing a critical analysis of the legal landscape surrounding electronic banking in Nigeria, this paper aims to contribute to ongoing discussions on policy reforms and regulatory interventions needed to support the sustainable growth of digital finance and enhance financial inclusion efforts. It underscore the importance of a collaborative approach among policy makers, regulators, industry stakeholders, and the legal community to address emerging issues and ensure the resilience and inclusivity of Nigeria's e-banking sector.

Keywords: *Electronic, e-Banking, Security, Regulator, Innovations, Nigeria*

²⁸⁴ Sani Abdulkadir, LLB, BL, LLM MAPCR, is a PhD at the ABU, Zaria. Saniabdulk5@gmail.com

²⁸⁵ Iya, Mohammed Alhaji, LLB, BL, LLM, MSC, Department of Sharia and Civil Law, Yobe State University, Damaturu, Yobe State faisaliyaj@gmail.com

1.1 Introduction

The recent introduction of electronic banking in Nigeria has improved banking efficiency in rendering services to customers. The Central Bank of Nigeria recognizes this and knows that electronic banking and payment services are still at the early stage of development. For this reasons, and also arising from the three major role of the Central Bank of Nigeria in the area of monetary policy, financial system stability and payment system oversight, the Central Bank issued a "Guideline on Electronic Banking in Nigeria" in August 2003. The guideline expected to inform the future conduct of financial institutions in electronic banking in Nigeria. In some other countries, banks and financial institutions play an important role in the economy by gathering deposits, repackaging them into a variety of financial products and services for their customers and the public. However, the problem here is the use of Information and Communication Technology (ITC) to provide the financial products and services for improved efficiency and effectiveness. These continuously affect the risk management, infrastructure provision, monetary policy development and regulatory framework of the financial system. Advancements in Information and Communication Technology have impacted positively on service delivery in the financial sector of the Nigerian economy. These developments have however not been matched with appropriate legislation/regulation to address the resultant changes in the relationships, responsibilities, liabilities and rights of the parties engaged in electronic banking. Recognizing the potentials for abuse and mismanagement inherent in the financial system and the negative effect it will have on the economy, the Federal Government and

its agencies actively engaged in creating an extensive set of laws and regulations to address the inadequacies of the current system.

The major objective of this paper is to analyse the development of electronic banking under Nigerian Law. And some legal challenges arising from electronic banking activities is of great concern. It is pertinent to examine also how the existing legal framework originally designed to address issues affecting the “physical” world of banking that can meet up with the developing e-banking delivery channel. The paper would also examine the issues of based payment system such as Bill of Exchange Act to deal with electronic system has various legal issues for most jurisdictions like Nigeria.

The approach in writing this paper is principally doctrinal methodology. For the purpose of legal analysis, primary and secondary sources of material constitute very important reference material. The primary of materials that have been considered include statute and case laws. They are considered as primary sources because they form the basis upon which actions and opinion are formed. They are the original of every legal subject.

The secondary source of materials that were use is published and unpublished works of the scholars in the field of research. These include journals articles, seminar papers, and monographs. In making use of the materials mentioned above, the paper will adopt a theoretical analysis of the materials and sources of information by comparing and contrasting them with a view to forming opinions and arriving at conclusion.

1.2 The issues of Law and Jurisdiction

The issue of law and jurisdiction often arises when determining which legal system has the authority to hear a case and which set of laws apply. Jurisdiction determines whether a court has the power to adjudicate a matter and which laws govern the dispute. It can be complex, especially in case involving multiple parties or international transactions. Court use various principles, including territoriality, nationality, and consent, to establish jurisdiction. Critically, the issue of jurisdiction under the Nigerian legal jurisprudence is a fundamental fact. In the case of **Ani v. Nna**,²⁸⁶ It was held that jurisdiction is the life wire of any litigation before a court of law. It is not only its life blood; it gives strength to the court.

Also in relation to banking transactions, jurisdiction is fundamental too. Electronic evidence in particular, presents difficulty of territorial jurisdiction.²⁸⁷ This is because once there is a trade across national boundaries, the contract would have a foreign element as most electronic banking transactions, and particularly with the internet is concern.

The question then is, can the court apply Nigerian law? Can it apply the law of some other countries where the other party is or where the subject matter of the contract is situated or where the contract is to be performed if outside Nigeria? In determining the proper law, regard will be had to the following;

- 1- Any statutory provisions, e.g. International Conventions;
- 2- Any express choice of law in the contract;

²⁸⁶ (1996) 4 NWLR (PT. 101) at 199 per Niki Tobi JSC.

²⁸⁷ *Madukolu v. Nkamdili* (1962) All NLR 581, AT PP. 589-590

- 3- Where no system of law is expressly chosen the system of law with which the contract is most closely connected;
- 4- Some presumptions which have been developed by the courts for the purpose of ascertaining the proper law.

It is better to address this problem in advance during making of the contract to avoid uncertainty but, where there is no express choice of law which is most likely in practice, then the following points should be taken into cognizance;

- i. The country where the contract is made;
- ii. The country where the contract is to be performed;
- iii. If the contract relate to immovable, the country where they are situated;
- iv. The court would also take into consideration “relevant surrounding circumstances”, which will include: method such as the residence or domicile of the parties.

In tortious liability, since electronic banking especially internet banking is available to a wide variety of persons across varying jurisdictions; each jurisdiction will apply its own rules for determining the applicable law of tort.

1.3 Proof of Computer and other Electronic Evidence

Every commercial banking most contemplate the likelihood of dispute and mode of settling that. Ultimately, some dispute settlement mechanism must be employed and the safest bet in Africa today is the regular court and arbitration panels.²⁸⁸ Whichever of these decides a dispute, evidence must be taken for cases are fought on the basis of

²⁸⁸ See S. 34 of Miscellaneous Offences Act Cap M17 LFN, 2004,

the facts in issue.²⁸⁹ The use of ledger cards and vouchers in the banks have given way to magnetic tapes, disks and other automated electronic devices, especially in Electronic Fund Transfer (EFT) transactions.²⁹⁰ The question is in relation to the admissibility of computer generated evidence in civil or criminal proceedings and whether where admissible, they should be admitted as a primary or secondary evidence under the Nigerian Evidence Act.²⁹¹

For electronic banking transactions like those related to plastic money, the evidence for the most part will be computer or electronically generated.²⁹² The academic view and leading authority on the point in Nigeria, for instance, is that as in UK, ²⁹³ the Evidence Act must be amended before the computer generated evidence can be admissible in our courts. No direct answers are available to those questions, but courts in different occasions had taken judicial notice of electronic evidence.²⁹⁴ However, a point that may be safely made is that a sender who denies initiating a transaction would have the burden of establishing that the regular course of business (that a transaction can only be initiated by him (the holder of the PIN) or someone acting under his authority) was not followed in the particular case.²⁹⁵

In *Ogolo v. IMB*,²⁹⁶ the court of appeal, per Onalaja JCA, took judicial notice of electronic banking when he stated that:

²⁸⁹ S. 1 Evidence Act No 18 of 2011

²⁹⁰ CBN Guidelines on Electronic Banking in Nigeria, August 2003

²⁹¹ CAP 14 LFN, 2004 (as amended in 2011)

²⁹²²⁹² S. 84 Evidence Act n0 18 of 2011

²⁹³²⁹³ See Civil Evidence Act of 1996.

²⁹⁴ See *Ogolo v. IMB* (1995) 9 NWLR (pt. 419) and *Egbe v. Hon. E.O. Araka* (1996) 2 NWLR (pt. 59) p. 84

²⁹⁵ S. 149 (1) Evidence Act Cap 112 LFN 1990 now E14 LFN 2004

²⁹⁶ (1995) 9 NWLR (pt. 419) 314 at 324

The commercial or banking operations in the keeping of accounts by the old system has changed to computer which makes Nigerian business to be modernized in keeping with the computer age which system is so notorious that judicial notice of it can be taken under the Act.²⁹⁷

However, the observation of the court of appeal, per Pats-Achalonu JCA in **Hon Don Egbie v. E.O. Araka**²⁹⁸ would have to be reflected of the situation under the Evidence Act. His lordship described the situation thus:

It must be clearly understood that our Evidence Act is now more than 50 years old, and is completely out of tune with the realities of the achievements of modern technology. Most of these sections are archaic and anachronistic that need thorough overhaul to meet with the needs of our time.

The Supreme Court attempts on two occasions in **Festus Yesufu v. ACB**²⁹⁹ and **Anyabosi v. R.T. Briscoe**³⁰⁰ to consider the admissibility of computer generated evidence under the Evidence Act failed to resolve the problem satisfactorily. The basic problem of admissibility of evidence generated through electronic banking is the evidential status of storage devices such as disks, tapes, and such others, since they do not come within the definition of document under the Act.³⁰¹

The peculiarities of problems associated with the proof of electronic transaction, and electronically generated evidence stems from the fact that the transaction is paperless.

²⁹⁷ Section 74 Evidence Act Cap 112, 1990. Now in Cap E14 laws of the federation, 2004.

²⁹⁸ (1996) NWLR (Pt. 433) 688 at 710-711

²⁹⁹ (1976) 4 sc. 1.

³⁰⁰ (1987)3 NWLR (Pt. 59) 85 at 108 per Karibi Whyte JSC.

³⁰¹ Section 2 of the Evidence Act, Cap. E14 Laws of the federation 2004.

Such transaction by their nature restricts the use of rules of providing documentary evidence. Even where such transactions are paper-based, the mode of their generation considerably strains the traditional rules of proof of evidence.³⁰² Under the law of evidence as seen under section 76, all facts except the content of documents may be proof by oral evidence and in most cases is direct.

If it is a fact which can be seen, heard or perceived, it must be evidence of the witness who says he heard the fact. This forms the rational for the rule against hearsay evidence as the court will not admit hearsay evidence, but direct evidence from the actual person who saw, heard or perceived a particular fact and not from any other person.³⁰³ The Evidence Act provides for two methods of proving the contents of a document, which is either by primary evidence or secondary evidence.³⁰⁴ Primary evidence is the best means of proving the contents of document and it simply means that the original document itself is brought before the court for inspection. As pointed out earlier, electronic banking transactions are paperless and they present a myriad of problems.

The evidence Act defines document to include³⁰⁵ books, maps, plans, drawings, photographs and also include any matter expressed or described upon any substance by means of letters, figures or marks or by more one of these means intended to be used or which may be used for the purpose of recording that matter. Most of the provisions of the Nigerian Evidence Act deals with documents which are written and this create an obstacle to proof of electronic transaction, which is largely unwritten.³⁰⁶ For example,

³⁰² Section 83-89 Evidence Act no 18 of 2011.

³⁰³ Ibid

³⁰⁴ Ibid

³⁰⁵ Section 2 Evidence Act, 2004

³⁰⁶ Section 83-89 Evidence Act No 18 of 2011

for withdrawal from ATM cash machine to be proved, who is to be called as a witness to gather the information which was entered into the computer at one point by the customer and processed by the computer produce an output at the other end? The status of the output from the computer in an electronic transaction is not clear. What then would be the status of information printed from a computer in respect of the transaction? Would it be primary or secondary evidence?

To establish the truth of the facts contained in any document, the maker of the document has to be called unless the document falls within the categories of exceptions in section 19 of Evidence Act which provides that:

....a statement in a document shall not be deemed to have been made by a person unless the document or the material part was written, made or produced by him with his own hand or was signed by him or otherwise recognized by him in writing as one of the accuracy of which he is responsible.

In a situation where there has been an electronic funds transfer or other electronic transaction, what would be method of verification of a signature? What is the legal effect of pin codes vis-a-vis the evidential requirement of a signature? Would a digital signature suffice for the purpose of the Act? The answer is no. such a document would not be admissible as it would not have met the requirement of the said section. Whilst the rule of proof under the Evidence Act remains unchanged, the evidential problems presented by electronic banking transaction would continue to persist.

The computer outputs or printouts are viewed as being in violation of the best evidence rule and may also infringe the rule against hearsay evidence.³⁰⁷ How then can computer generated evidence be admitted under the Evidence Act without infringing the hearsay rule? Prof. Yemi Osinbanjo considered the applicable exceptions to hearsay rule which may be adopted for use in admitting computer records, especially section 33(b) in respect of written or verbal statement by a dead person. Section 37 and 38 (in respect of entries in account and public or official books respectively) and section 90 (which allow statement of the maker to be admissible under certain conditions).³⁰⁸ He concluded that it “is obvious from our analysis so far that the sections in Evidence Act which provides exemptions to hearsay rule, that computer generated evidence is certainly not envisaged and even where they may be admissible, the provision of the Act appears to be restrictive”.³⁰⁹

The problem of whether computer generated evidence could be admitted as primary or secondary evidence was considered by the Supreme Court in *Anyaebo v. Briscoe*.³¹⁰ The respondent at the trial of an action he instituted for the recovery of sums owed by the appellant, sought to tender a computer printout of the appellant’s statement of account. On appeal to the Supreme Court, it was held by Karibi whyte J.S.C that: “...the computer printout was admissible as a secondary evidence under the conditions set out in section 96(1)(d&g) of the Evidence Act.

It is noteworthy that, even if a computer printout or electronically generated materials is regarded as secondary evidence, it would be inadmissible in court unless

³⁰⁷ Section 36 of the Evidence Act Cap. E14 laws of the Federation 2004.

³⁰⁸ Evidence Act Cap 14 LFN 2004 (as amended in 2011)

³⁰⁹ Osibanjo, Y (1992) “cases and materials on Nigerian Law of Evidence, Macmillan, pp 170-289 at 278-279

³¹⁰ Supra.

one of the facts listed in section 94 of the Evidence Act Cap. 112, 1990 as excuses for non-production of primary evidence can be established.³¹¹ The controversies generated on the admissibility of computer generated evidence under the Act indicate a clear need for legislative reform of the Evidence Act.

1.4 Right to Privacy

As a general rule, the duties of parties in electronic banking transactions arise from the common law banker-customer relationship subject to case laws and statutes. A banker has a duty not to disclose information concerning their customers to a third party. Section 37 of the 1999 Constitution³¹² provides that: “the privacy of citizens their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”. Privacy has been distinguished from data security. Data security refers to the protection of data against accidental or intentional disclosure to unauthorized persons as unauthorized modifications or destruction.³¹³ Privacy, on the other hand refers to the right of individuals and Organisations to determine for themselves when, how and what extent information about them is to be transmitted to others.³¹⁴

This raises privacy law issues. To what extent should there be anonymity under smart card scheme? Should cards holders be notified before disclosure of information on card holders?³¹⁵ The bank may require an express consent of the customer before any disclosure of customer’s information to a third party who needs

³¹¹ Nigerian Law ‘Lawyers Bi-Annual (1995), vol. 2 No. 2 P. 236-248

³¹² Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011)

³¹³ Ibid.

³¹⁴ Boma J,T. and Orun S.J. (2000) “Orwellian Constitution issues, Information, Privacy Security and New Technology. Oxford University Press, London P. 56

³¹⁵ See *Tournier v. National Principal and Union Bank of England* (1925)IKB 461

such information as evidence in court.³¹⁶ Apart from the legal confidential obstacle that affects computer generated evidence, there is added problem of preservation of confidentiality in the information he holds as banker.

Consequent upon the technology of electronic banking, improper access and dissemination is possible not only by unauthorized persons like hackers and fraudsters but also by those in charge of computer systems. This include the management and staff of the card payment system (e.g. smart card, banks, financial Institutions, merchants), such as the programmers who run the system, the mechanic who repair the breakdown, and even those in charge of the enterprise and know all the passwords and security codes in the card system, such as the ATM, EFT etc. an unauthorized interception of the access code can lead to alteration of information evidence in the electronics or computer system.³¹⁷ As a result of this, the penal provision that should be imposed on hackers and unauthorized intruders into the system should be one that is stiff and stern enough to compensate one for breach of fundamental human right as well as act of deterrence to others. Such breach should be entertained by the application to the court as seen under section 46 of the 1999 Constitution. The banking regulatory authorities should consider making regulations or formulate code of conduct for the providers of electronic banking services in order to ensure the privacy of customers and encourage the patronage of electronic banking.

³¹⁶ Ibid at 466.

³¹⁷ CBN Guidelines on Electronic Banking in Nigeria, 2003

Generally, the rule and regulation of smart card system in Nigeria provides for the confidentiality of cards holders information but, there are some exceptional cases permitted by the law namely;

- a. Where a financial Institution is legally compelled to do so;
- b. Where there is a duty to the public to do so;
- c. Where the interest of the financial Institution require disclosure;
- d. Where disclosure is made at the request, or the consent of the card holder.³¹⁸

This fully represents the common law duty of secrecy and confidentiality imposed on bank in the case of *Tournier* mentioned earlier. A bank may be compelled by law to disclose information about its customer. The Money Laundering Decree (now Act 1995)³¹⁹ imposes a duty on banks to report transfer of funds greater than \$10,000 or its equivalent to or from a foreign country; to keep a register of over-the counter exchange transactions, to mandatorily disclose to the National Drug Law Enforcement Agency (NDLEA) transaction, lodgments or transfer of funds in excess of certain specific amount; and to furnish the books and records of the bank to authorised officials of the agency upon demand.³²⁰

International reaction to privacy issue produced the first international conference to study the privacy question which was held in Stockholm in 1967. The conference concluded that the right of privacy should be held one of the fundamental rights of mankind and all countries should take appropriate measures to protect the right to

³¹⁸ Section 84 of the Evidence Act no. 18 of 2011.

³²⁰ Money Laundering Decree No. 3 of 1995, section 1,2,3,6,7,8,10,12,and 19 now in Money Laundering Act Cap. M18 laws of the federation 2004.

privacy by legislation or other means.³²¹ Though the right to privacy is a constitutionally protected in Nigeria by section 37 of the 1999 Constitution as amended, it is not clear whether the provisions are enforceable against private institution such as banks and other financial institutions.³²²

The question now is in the light of the purely contractual nature of the agreement between financial institutions, merchants and customers can the constitutional right to privacy be implicated? Though it can be enforced against government institutions, the quantum or quality of the right granted may be better clarified or substantiated by specific legislations or regulations. The banking regulatory and administrative institutions should be able to make regulations; or formulate code of conduct for the providers of electronic banking services so as to ensure the privacy of the customers.

1.5 Criminal Liability

In paper based transactions involving cheques, persons who alter or forge the document may be charged for forgery under section 465 of Criminal Code³²³ as the case in *Odu v. State*.³²⁴ However, in electronic banking, as earlier discussed, there are no papers of written signatures that will fit into the definition of document or writing under section 463 or 464 respectively of the Criminal Code especially as computer information does not exist in writing and customers would not cover computer disk or storage devices. Forgery is committed when a person knowingly makes a false document or writing with intent that it may be used upon as genuine

³²¹ Boma, J.T and Oram, J.S. Op. cit

³²² In *Peterside v. IMB (Nig. Ltd.)*(1983)2 NWLR (Pt. 278) 721, the right to fair hearing was held to be enforceable against a financial institution that had bureaucratic structure.

³²³ Cap. 77 Laws of the Federation of Nigeria 2004

³²⁴ (1965) ALL NWLR 25 SC.

under section 465 Criminal Code, though the punishment of forgery is specified in section 467 of the Criminal Code respectively.

The problem therefore arises as to whether or not a person who engages in an unauthorized transaction in Electronic Funds Transfer (EFT) can be tried for forgery especially as the provisions of Criminal Code were not designed to deal with electronic banking. Though judicial interpretation of the Code may be stretched to cover electronic transactions, however it would be more effective to have specific provisions on the issues. It is therefore imperative to make legislation to deal with offences that are peculiar to electronic banking and provide for punishment accordingly.

1.6 liability for Fraud, Loss and Errors

The 1980 United Nation Commission on International Trade Law (UNCITRAL) legal guide on EFT,³²⁵ provide guiding rules for resolving legal problems relating to EFT transactions. However, they do not have the force of law in Nigeria. It is arguable whether court in Nigeria may be persuaded to apply the UNCITRAL legal guide on EFT to resolve issues relating to electronic banking brought before them. In the absence of specific Nigerian legislation on electronic banking, legal rules together with the terms of the contract will be applied as far as possible to decide the allocation of risks on electronic banking transactions for frauds, losses, and errors.³²⁶ Prior to the introduction to the *secret pin*, the burden of proof was on the banks to

³²⁵ UN Bulletin vol. 193 of 1980

³²⁶ Op. Cit.

show that the customer was negligent or careless, but now the burden rest with the customer who is assumed to be the only custodian of the secret pin.

In electronic banking, on the retail side involving internet banking and bank payment system such as ATMs, EFT, and Smart Cards in Nigeria, the rights of parties are mainly regulated by contract. For example, the master agreement of the Nigerian Smart Card Company PLC, there are rules and regulations that establish “the code of conduct” which is made to give effect to the provision of Master Agreement.³²⁷ This code of conduct holds the card holder liable for loss arising from the authorised transactions fraud and negligence.³²⁸ In paper-based transactions, risk of fraud and forgery under the Bill of Exchange Act in relation to cheque as a general rule is bone by the bank, subject to the requirement of reasonable notice and the common law rules of estoppels which may operate against the customer by virtue of his negligence; and the bank is not entitled to debit the customer’s account.³²⁹

In cheque frauds, a cheque leaf or paper together with the forged signature of the customer are essential. These forged cheques when it enters the banking system allow the bank to compare it with a signature sample or mandate. In the ATM or EFT, fraud through unauthorized transactions, the Personal Identification Number (PIN) and a corresponding card once accepted by the machine does not give the bank or financial institution any opportunity of comparing with a sample signature.

³²⁷ See CBN Guidelines on Electronic Banking in Nigeria, 2003

³²⁸ Ibid

³²⁹ Bills of Exchange Act, 1982 Laws of the Federation of Nigeria 1990, now cap B8 laws of the federation 2004, section 24 Nigerian Advertising Service Ltd v. United Bank of Nigeria Ltd (1995) NCCR 6.

Liability for negligence in tort will depend on different considerations. To establish negligence, the card issuer must be able to establish the duty of care on the cardholder foreseeability of damage resulting from the cardholder's conduct, the carelessness of the cardholders and the casual connection between the cardholder and the damage caused to the issuer. The burden of proving negligence falls on the issuer, which may not be easy to discharge especially in providing the cardholders carelessness. It is advisable to recover from a negligent cardholder in contract rather than tort especially where the contract terms are clear. An issuer negligent in performing its obligations will also be liable to the cardholder. Where the issuer does not properly verify a customer's signature or authorization instruction, the issuer will bear the cost of a fraudulent transaction.

Common law principles of contract govern question of liability for the misuse of charge and credit cards. Where the misused token is a smart card or cheque card, additional consideration based on agency principle applies. It may be argued that regardless of the terms on which the card is issued, a bank is not entitled to debit its customer for an unauthorized transaction. The argument here is based on the allocation of risks connected with the use of Smart Cards.

The better view may be to predetermine where the responsibility of risk will be. Where the misuse of the medium of exchange is as a result of the fault of the customer, the customer will be responsible for the loss resulting therefrom e.g. where a cardholder fails to give notice of the loss or misappropriation of the token. Wording of smart cheque card clauses may be such as to ensure that banks liability

is confined to payment on Smart Card authorised by or of cheques signed by the legitimate holder.

Electronic Banking (EB) transaction should plainly determine responsibility and remedies in the event of negligence and misuse. Nigeria not being subjected to any equivalent of the Unfair Contract Terms Act of 1977, banks may provide elaborately for exclusion of liability in certain situations and the distribution of responsibility under various scenarios. There is the need to reform the provision of the Criminal Code to embrace EFT electronic banking transactions. In England, Australia and the USA, legislation has been enacted to deal with these electronic banking related problems.³³⁰

1.7 Findings

The following findings are hereby made:

- a. Few numbers of Nigerians have knowledge of electronic banking and even these few, most of them are eager to participate in e-banking because, it is a new technology which is novel to them and risk involved.
- b. Bank customers are often afraid of internet fraud popularly known as 'yahoo' and other transaction insecurities and poor service deliveries such as poor connectivity and ATM frauds known as cybercrimes which the present law do not have immediate panacea against it.

³³⁰ Osibanjo, Y. (supra)

- c. There is inadequate regulatory and legal framework for customer protection in respect of security of transaction in electronic banking especially now the CBN introduces the cashless transaction in Nigeria.

1.8 Recommendations

Based on the findings of this paper, it is recommended that:

- a. Much need to be done in the area of creating awareness about the availability of electronic banking products and services, how they operate and their benefits. Banks should organize public exhibition and talk shows and make products accessible to customers. In addition, they should improve their services delivery to justify the benefits of electronic banking products and services. This way the customer's interest would be aroused.
- b. Bank should try to win the customers confidence by providing adequate security of transaction against the cyber frauds and also create back up of critical data files and alternative means of processing information. They should also ensure good connectivity and power base that will enable them serve customers faster and more conveniently. The bank should ensure that at no time should service cease as a result of network issue.
- c. Government should provide adequate legal and regulatory framework that would ensure customers protection against cybercrimes and security of transaction. That way banks customers' confidence in electronic banking will be secured. It is necessary to enact some specific legislation to deal with the inadequacies in the Evidence Act and Criminal Code respectively. The need to

pass cyber-crime bill which has been lying in the floor of the National Assembly into law to foster security against internet fraud is long overdue.

1.7.2 Conclusion

Electronic banking has become a necessary survival weapon and is fundamentally changing the banking industry worldwide. Today, the clicks of a mouse offers bank customers services at a much lower cost and also empower them with unprecedented freedom in choosing vendors for their financial service's needs. No country today has a choice whether to implement e-banking or not giving the global and competitive nature of the economy. Banks should be encouraged to establish effective management oversight over the risks associated with e-banking activities, including the establishment of specific accountability, policies and controls to manage these risks. The bank should also establish a comprehensive and ongoing due diligence and oversight process for managing the bank's outsourcing relationships and other third party dependencies supporting e-banking together with an effective legislation to control over the electronic cybercrimes. Banks have to upgrade and constantly think of new innovative customized packages and service to remain competitive. Thus, the new banking technology has created an information age and rendered banking services more appealing but, not without its attendant legal challenges and implications.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

ADJUDICATION OF ISLAMIC BANKING AND FINANCE DISPUTES IN NIGERIA:
ISSUES AND CONSTRAINTS

Sani Abdul-Aziz

Faculty of Law, Nigeria Police Academy, Wudil, Kano State

saniabdulaziz777@gmail.com

07038244445

Abstract

This paper presents the inadequacy in jurisdiction of courts to entertain matters bordering on Islamic banking and finance disputes in Nigeria. Case law forms part of the legal regime of Islamic banking and finance matters in Nigeria, but it is apparent that the jurisdiction has been misplaced because whichever court that will hear and determine matters of Islamic banking and finance must be dealing with interpretation of principles of Islamic law in order to arrive at a just decision. From all indications, it is only the Federal and State High Courts that have the jurisdiction to entertain and determine Islamic banking and finance matters in Nigeria and judges manning those courts, are not knowledgeable in Islamic law, in fact, some are not even Muslims. However, this paper examines the competence of the courts in adjudication of Islamic banking and finance disputes within the ambit of the *Shariah*. The paper adopted doctrinal method which is library based methodology in conducting the research. The paper is of the view that the present position of the law on jurisdiction of court will affect the growth of Islamic banking and finance in Nigeria, if proper court will not handle the cases of Islamic banking and finance disputes. Therefore, it is the recommendation of this paper, among others that the *Sharia* Court of Appeal should be vested with the jurisdiction.

Keywords: Islamic, banking, jurisdiction, court, dispute

1.0 INTRODUCTION

The emergence of Islamic banking and finance has recorded a rapid growth so far. Over 250 Islamic financial institutions are presently operating in more than 50 countries worldwide. (Nurudeen, 2016) Nigeria is not left behind in this development. The Central Bank of Nigeria had earlier granted licence in line with the provision of the law to Keystone Bank Plc (when it was *Habib* Nigerian Bank Limited) in 1992 to offer non-

interest banking services on a “window basis”. Similarly, a *halal* fund known as Lotus Capital Limited (an ethical investment fund) was established in 2004 to operate as an Islamic financing company dealing in *Sharia* compliant investment and fund management activities.

Al-Barakah is the first micro-finance bank that was granted a licence to operate a non-interest bank as a full-fledged micro-finance bank in 2010 in Lagos. (Aliyu, 2012) More recently, the first full-fledged non-interest bank in the name *Jaiz Bank Plc* commenced operations as a regional bank in 2012, but it has spread branches across Nigeria now. Virtually all the states of the federation including Abuja have *Jaiz Bank* branch. Apart from *Jaiz Bank*, two other banks have also been granted licenses to operate non-interest banking based on Islamic model. *Taj Bank Plc* which commenced operations in 2019 and *Lotus Bank* commenced its operation in 2021 and it is optimistic that more banks operating non-interest banking system based on Islamic model in Nigeria are coming.

The most important thing to note here, is that Islamic financial system operates entirely on the principles of *Sharia* whose main traditional sources were the Qur’an, the *Sunnah* of Prophet Muhammad (SAW), *Ijma* (consensus of opinion of the *Ulama*) and *Qiyas* (analogical deduction). The best known feature of Islamic banking is the prohibition of *riba* (usury). The Qur’an forbids the charging of *riba* (usury) on money lent and other forms of business practice that are considered *haram* or unlawful. The Qur’an clearly condemns all forms of transactions which involve giving or taking of usury or interest in Qur’an 2:278-279, Qur’an 3:130, Qur’an 4:161 and Qur’an 30:39. For instance, the Qur’an states:

“O you who believe! Be afraid of Allah and give up what remains (due to you) from *riba* (usury) (from now onward), if you are (really) believers and if you do not do it, then take a notice of war from Allah and His Messenger but if you repent, you shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums) (Qur’an 2:278-279).

However, Islamic banking is a banking system that complies with Islamic law based on *fiqh mu’amalat*. It offers special products such as *mudarabah*, *musharakah*, *ijarah*,

wadia, murabaha. Disputes are inevitable to arise in the course of the activities of the banks, between the banks or between any of the banks and customers and disputes may be resolved through litigation or Alternatives Dispute Resolution mechanisms. Litigation is said to be the most effective, viable and binding means of resolving disputes. Therefore, courts could play the most effective role in resolving Islamic banking disputes. Despite the provision of section 251(1)(d) of the Constitution of the Federal Republic of Nigeria (1999), there is controversy as to whether the Federal and State High Courts in Nigeria have the jurisdiction and competence to adjudicate over Islamic banking matters. The questions whether Islamic banking falls within the purview of section 251(1)(d) and whether judges of the Federal and States High Courts are qualified and competent to determine Islamic banking matters remain unanswered.

This paper, considering the nature of adjudication of Islamic banking matters, where principles of Islamic law are involved, examines the jurisdiction, qualification and competence of both Federal and States High Courts judges in adjudicating Islamic banking matters in Nigeria. The paper analyses the concept of jurisdiction generally. The paper discusses extent of the jurisdiction confer on the Federal and State High Courts on banking matters and interrogates if Islamic banking matters fall within it. The paper adopts doctrinal methods and finds that judges manning Federal and States High Courts are not trained in Islamic law and there is no any requirement for that therefore, Islamic banking matter will suffer, and this will bring set back to operation of Islamic banking in Nigeria. The paper, therefore recommends among others that jurisdiction to entertain Islamic banking matters be donated to *Sharia* Court of Appeal.

2.0 Theoretical Framework

This paper used the theory of adjudication to examine the yardstick the courts in Nigeria adopt while adjudicating on Islamic banking matters under the current legal regime and to know if the courts in Nigeria are required to determine Islamic banking cases. Several theories have been used to examine jurisdiction and competence of courts.

The Islamic legal theory of *usul-al-fiqh* (Islamic jurisprudence) has set the standard which a person must satisfy before he can be said to qualify to be a judge or administer justice in Islamic matters. The theory is also used to determined whether the judges

manning Federal and States High Courts posses the necessary competence and qualification in law and practice to adjudicate Islamic banking matters. Theory of competence demands that competence develops through a combination of experience, knowledge, practice and feedback tied to an individual's sense of efficiency or believes in his ability to perform in a given domain. This will be used to identify and analyse the necessary knowledge, skills and motivation that judges need to have to understand the principles and legal rulings of Islamic law and apply them in resolving disputes that may arise in the course of business.

The paper used the theoretical tools to understand how existing literature define the concept of jurisdiction, competence, justice and disputes in the general context and examined how they relate to adjudication in Islamic banking.

3.0 Nature and Principles of Islamic Banking

The basis of the whole concept of Islamic Banking emanated from prohibition of *riba* (usury) or interest in Islamic commercial jurisprudence. The Qur'an is explicit on it. There are sayings and actions of Prophet Muhammad (SAW) on commercial transactions as well. They also form the root of Islamic banking, especially his contracts of *mudarabah* (profit sharing) with different people during his life time and the ways his companions managed the public treasury of the Muslim community during their reigns as caliphs. Within the Nigeria context, it was found and the establishment of *Sokoto* Caliphate, transactions of loan between individuals without *riba* existed but gradually lost prominence in favour of commercial banking. However, Islamic banking is now an emerging phenomenon and is rapidly being accepted and adopted by many countries of the world including Nigeria. (Nasiru and Idris, 2015)

Non-interest is one of the essential characteristics of Islamic banking because Islam prohibits dealing in interest. Risks sharing also take an important part in operation of Islamic banking, because depositors are considered as co-investors for the period of the deposits. So, the profit made by the bank is shared with the depositors in line with the known principles of the system in Islamic banking, the proprietor (bank) can legitimately share the profits made by the entrepreneur. If the bank incurred losses as a result of losses incurred by the entrepreneur without being careless, the depositors will

have to bear the losses. The businesses in Islamic banking have to go in accordance with the principles of Islamic law. Apart from *riba*, Islamic banking must avoid all sinful activities such as production and consumption of liquor and pork. Islamic banking is concerned with the viability of the project and not the size of the collateral, as in the conventional banks. Good projects which might be turned down by conventional banks due to lack of collateral could be financed by Islamic banking on a profit and sharing basis under the principles of *musharakah* (partnership). While the conventional banks are operating under the man made laws, Islamic banks are required to operate under the *Shariah*. Therefore, their financial dealings, transactions and products offered to the public must comply with *Shariah*. The relationship between the conventional banks as a lender and the customer as a borrower is based on creditor debtor relationship which gives more leverage to the creditor compared to the debtor. On the other hand, the relationship between the Islamic bank and the customer is based on the principle of sharing of profit and loss. By acting as a partner the Islamic bank is sharing the risk of the business which is not the case in conventional banking system. The customer is sure that he would not have to pay a fixed amount (*riba*) irrespective of whether the venture is successful or not. The depositors also share the profit as well as the risk. So, this shows that there is equity in the principle of Islamic bank. (Karaye, 2013) In conventional banking system, defaulters are referred to pay the principal sum and the interest irrespective of the outcome of the business. That is whether the failure of the business, if any, is due to negligence of the customer or not. In Islamic banking system, the defaulters are only responsible for losses incurred if it is due to their willful negligence. A customer who defaulted by necessity (i.e. whether the customer lacks the means of payment) the customer deserves compassion and needs to be given a grace of time in line with the *Shariah*, (See Qur'an 2:280)

Shariah has made provision for a number of principles that must be adhere to when undertaking commercial transactions. The principles originated from the primary sources of *Shariah*. The principles are also the basis of Islamic banking which drew the dividing line between Islamic banking system and the conventional banking system. These principles are categorized into two folds: first is the prohibition of *riba* (interest) it applies to all transactions under the *Shariah* and the second is the requirement that

any transaction under the *Shariah* must conform with the ethical rules laid down by *Shariah*. The ethical rules outlined the types of business transactions which Islamic banking can partake.

3.1 Prohibition of *Riba* (interest)

The word *riba* literally means ‘increase’ or ‘excess’. The word is used in this sense in the Qur’an, “And that which you give in *riba* (to others), in order that it may increase (your wealth by expecting to get a better one in return) from other people’s property, has no increase with Allah” (Qur’an 30:39) Here, the prohibition of *riba* did not come at once; it was first revealed that the dealing in *riba* has no benefit in the sight of Allah. Subsequently, the verse prohibiting *riba* were revealed as follows:

‘O you who believe! Eat no riba (usury) doubled and multiplied, but fear Allah that you may be successful’ (Qur’an 3:130)

‘O you who believe! Fear Allah and give up what remains of your demand for usury, if you are indeed believers (Qur’an 2:278)

These two above verses were also followed by many other verses reiterating the prohibition, condemning the practice of *riba* and even warning the mankind about the repercussion of dealing in *riba*, the verses are not only prohibiting *riba*, they also provided guides and set out the yardstick on how to identify transactions which involves *riba*. There are *Sunnah* of the Prophet (SAW) which made declarations by reiterating on the above verses. It is clear from some narrations that the Prophet (SAW) has cursed the one who accepts *riba*, the one who give it, the one who records it and even the two witnesses to it, saying “they are all the same”. The Prophet (SAW) said that *riba* has seventy three categories; at least one in sin is as that of a man who marries his mother, the very essence of *riba* is the violation of the honour of a Muslim. (Al-Asqalani, 1996)

Furthermore, during the last pilgrimage attended by Prophet Muhammad (SAW), in his sermon, he used a clear term to announce the prohibition of *riba*, where he said that ‘every form of *riba* is cancelled, capital indeed is yours which you shall have; wrong not and you shall not be wronged, Allah has given His commandment totally prohibiting

riba. I start with the amount of *riba* which people owe to my uncle *Abbas* and declare it all cancelled.’ (Muhammad, 1996)

However, the prohibition of *riba* has been extensively discussed not only under the Islamic law but in teaching of other religions. (See Exodus 22:25; Luke 6:35-36; Leviticus 25:35-37; Psalm 15:5; Nehemiah 5:10-12 and Deuteronomy 23:19-20).

3.1 Prohibition of *Gharar* (uncertainty)

Gharar means uncertainty or risk. It also connoted deceit, fraud, ambiguity or danger. *Gharar* is mostly defined as uncertainty and/or ignorance of one or both parties in a contract over the substances or attributes of the subject matter, or doubt over its existence and availability at the time of the contract. *Gharar*, unlike *riba* is not totally prohibited, certain degree of risk is acceptable under Islamic law. It is divided into two *gharar yasir* (minor) and *gharar fahish* (excessive). (Anwar, 2000)

Gharar yasir means minor risk, which is tolerated within the Islamic commercial law and cannot invalidate a contract, the maxims of Islamic commercial law which states that ‘revenue goes with liability’ justifies or rather necessitates that the parties to a transaction have to jointly take minor risks in form or liability in order to secure a legitimate profit *Gharar fahish* is known as excessive risk. It is not tolerated in Islamic commercial law, because it invalidates contract. (Anwar, 2000) Instance of the excessive risk is a non-possession or non-existence of the subject matter at the time of the contract is prohibited under Islamic commercial law. The parties involved in a transaction under the Islamic commercial law are expected to have adequate information on the subject matter of the contract and denial of accurate information on the subject matter or the price of the subject matter renders the contract invalid.

3.3 Prohibition of *Maysir* (Game of Chance)

The word *maysir* or *qimar* refers to the pure game of chance. A good example of *maysir* is casino gambling or naira bet. *Maysir* in some texts is treated as a form of excessive risk because the similarity between the two. Gambling has been prohibited by the *Shariah*. Though, its prohibition did not come at once. The first verse of the Qur’an on gambling states “they ask you (O Muhammad) concerning alcoholic drink and gambling

say: in them is a great sin and (some) benefits for men, but the sin of them are greater than their benefit....” (Qur’an 2:219) This verse only condemns the practice of gambling and the consumption of alcohol and described them as social evils. The probation of gambling and consumption of alcohol came much later where Allah says: “O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling, and *al-ansab*, and *al-azlam* (arrows for seeking luck or decision) are an abomination of *shaitan*’s (Satan) handwork. So avoid it (strictly all) that (abomination) in order that you may be successful” (Qur’an 5:90; see also Qur’an 5:91-92)

Under Islamic commercial law, investors are not allowed to involve in any kind of investment or produces that is *gharar* in nature or that has no certainty in it. Any kind of gambling which involves a zero sum game in which the outcome is highly uncertain and which accrues profit without any economic effort, is prohibited in Islamic commercial law.

3.4 Non-Permissible Investments

Investment under the Islamic commercial law must be valid as well as permissible. Investment in certain items or commodities is clearly prohibited by the Islamic law, even if the contract is free from *riba* and *gharar*. Prophet Muhammad (SAW) is reported to have said that “Indeed, Allah and His messenger forbade the sales of the intoxicants, and the dead (animals) and the swine, and the idols. (Muhammad, 1996) Islamic jurists agree that the dealings in any of these four items are strictly prohibited in Islamic law. Besides the four items mentioned in the Hadith, other businesses which deal in, any kind of non permissible actions such as prostitution, are also prohibited in Islamic law. The Islamic investors, whether as individuals or corporate bodies are not allowed to invest in such businesses. Though as a matter of necessity, some regulators of Islamic finance in some jurisdictions allow the Islamic investors to invest in such businesses if the element of such non permissible components is insignificant as compared to permissible items, especially if the core activities of the business are important and of public interest to the Muslim community and the nation at large. (Haron, 1998)

There are other ethics of investments in Islamic commercial law which include freedom from coercion in contract, price control and manipulations, *najash* (connivance of seller

with third part to bid up the price of the subject matter of sale without intention to buy but to inflate the price), *darar* (detriment), concern for *Maslahah mursalah* (unrestricted public interest) and mutual cooperation. (Haron, 1998) These are the principles of Islamic banking system and where in the operation of the Islamic banking, one of these or all are neglected, the system is no longer Islamic.

4.0 The Legal Basis of Islamic Banking in Nigeria

It is observed that there is no direct Nigerian banking legislation that contemplates the operation or establishment of Islamic banking system in Nigeria. But one can make a conclusive inference from the provision of section 23(1) of the Banks and Other Financial Institutions Act 1991 (as amended) that states as follows:

Every bank shall display at its offices, its lending and deposit interest rates and shall render to the bank information on such rates as may be specified from time to time by the bank (Central Bank of Nigeria). Provided that the provision of the section shall not apply to profit and loss sharing banks

The profit and loss sharing banking is otherwise known as non-interest banking. It is a system that has been widely recognised and accepted globally whether as a full-fledged bank or through a window of conventional banks. (Sani and Madaki, 2015) Non-interest bank is a financial organisation engaged in financial intermediation between surplus and deficits in the economy. It denounces interest and such other un-Islamic dealings in its entire transaction as clearly prohibited in the Qur'an. (See Qur'an 4:161) The organisation also encourages an interest free banking and trading. (See Qur'an 2:275) Non-interest banking has been categorized into two thus; (i) Non-interest banking and finance based on Islamic commercial jurisprudence, and (ii) Non-interest banking and finance based on any other model. The first category of non-interest banking has been defined to mean:

A bank which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the principles

of Islamic commercial jurisprudence. Commercial transactions and contracts under this type of banking are not permissible if they involve: interest, uncertainty or ambiguity relating to the subject matter, terms or conditions, gambling, speculation (*gharar*), unjust enrichment or exploitation (unfair trade practices) dealings in pork, alcohol, arms and ammunition, pornography and other transactions, products, goods and service which are not in conflict with the rules and principles of Islamic commercial jurisprudence. (CBN Framework for the Regulation and Supervision of Institutions offering Non-Interest Financial Services in Nigeria)

The above definition of one of the non-interest banking may be based on Islamic commercial transaction. It is noteworthy that the Central Bank of Nigeria Act, No. 7 of 2007 has provided the main legal foundation for the establishment and operation of non-interest banking in Nigeria. Section 33 (1) (b) of the Central Bank of Nigeria Act empowers the Central Bank of Nigeria to in addition to any of its powers under the Act, issue guidelines to any person and institution under its supervision. It is in respect to this provision that the CBN issued some guidelines in accordance with some relevant provisions in the Central Bank of Nigeria Act and Banks and Other Financial Institution Act, formulated guidelines to regulate the activities of non-interest banking in Nigeria. The Banks and Other Financial Institutions Act empowered the Central Bank of Nigeria to exclude the non-interest banks from being bound by the provisions of BOFIA and to make rules and regulations for the operation and control of all banks. (See section 61(1) and (2) of BOFIA) It was on the strength of these provisions that the CBN exercised its power by issuing the framework and guidelines for the regulations and supervision on the non-interest banking in Nigeria. (CBN, “Framework for Regulation and Supervision of Institution offering Non-Interest Financial Services in Nigeria” January 13th, 2011 and CBN” Guidelines for the Regulation and Supervision of Institution offering Non-Interest Financial Services in Nigeria” July 21st 2011)

The legal framework of non-interest banking in Nigeria also includes the relevant provisions contained in the Companies and Allied Matters Act 2020 as they relates to the incorporation of a company, as well as the provisions in the Regulation on the Scope

of Banking Activities and Ancillary Matters which defines specialized banks to “includes non interest bank” (See section 4(1)(c) of Regulation on the scope of Banking Activities and Ancillary Matters, No. 3 2010)

Furthermore, the provision of section of (4) of the above law, empowers the CBN to authorize the non-interest banks to carry on banking business on the regional or national basis in accordance with the rules, regulations and guidelines on licensing, authorisation, operation and conduct of business that the CBN may issue from time to time. It is base on the above provisions of laws that establishment and operation of Islamic banking become possible in Nigeria.

Furthermore, the 1999 Constitution, which is the supreme law of the land, its provisions are binding on all authorities and persons in the country, has provisions which support the establishment and operations of Islamic banking in Nigeria. The importation of the provision on the economic objectives of Nigeria in chapter II of the Constitution provides that there shall be two types of economic activities, the major sectors and others. Section 16 (1) of the 1999 Constitution of Federal Republic of Nigeria (as amended) provides that the State shall, within the context of the ideals and objectives for which provisions are made in the Constitution. Control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; while subsection (d) provides that:

Without prejudice to the right of any person to participate in area of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sector of the economy.

The above section categorized the economic activities into major sector of economy and others. The major sector of the economy is exclusively reserved for the government of the federation, its agencies and corporations. Apart from this, every other economic activity can be undertaken by the citizens. The Constitution mandates the government, its organs and authorities to provide and protect the right of participation in one's chosen economic activity because citizens are given the right to choose and engage in

any type of business activity. On this, the Court of Appeal in *Okogie and Others VAG Lagos State* (1981) 2 NCLR 337 ruled that every Nigeria citizen/corporation has the right to carry on his chosen economic activity. By implication, a Nigerian citizen is constitutionally entitled to participate in a banking business of his choice. Because banking business be it conventional or Islamic, falls within the economic activities permitted and guaranteed under chapter two of the Constitution. (Nasiru and Idris, 2015)

4.0 Jurisdiction of Courts to Adjudicate Islamic Banking Disputes

It is clear from the legal framework of Islamic banking discussed above that Islamic banking system in Nigeria has no any distinct of separate law. Islamic banking is just like any other existing banking system and it is bound by the banking regulatory legislations. If any dispute arises in the course of its day to day activities, the courts are constitutionally vested with the power to adjudicate over it (section 6 of the 1999 Constitution as amended). There is hierarchy system of courts of Nigeria; the Supreme Court is the highest court. It has originate jurisdiction to entertain matters bordering on the Federal Government and State Government and appeals lie to the Supreme Court from the Court of Appeal. (See section 232 and 233 of the 1999 Constitution as amended) The Court of Appeal also has originate jurisdiction on rare matters only, and appeals lie from the Federal High Court, High Courts, National Industrial Court, Sharia Court of Appeal and the Customary Court of Appeal to the Court of Appeal. (See sections 239 and 240 of the 1999 Constitution as amended) The decisions of these courts also form the legal basis for operation of Islamic banking, because the decisions are binding on all authorities and persons. Though, since the inception of Islamic banking system in Nigeria, there has not been any case bordering on the relationship between the bank and its customers or subscribers.

Despite the fact that the High Court has unlimited jurisdiction, the Federal High Court has been conferred with exclusive jurisdiction to hear and entertain banking matters.

It is important to note that whenever litigations relating to banking are mentioned, Federal High Court is the only court that can entertain and determine it. (Section 249(1) of the 1999 Constitution as amended that establishment the Federal High Court and section 1 of the Federal High Court Act, CAP F12 LF 2004) The constitution provides that the Federal High Court shall have exclusive jurisdiction to entertain matters relating to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from Banking. (Section 251(1) (d) of CFRN and section 7(1) of FHC Act) It has been stated explicitly in *Ndaba (Nig) Ltd v. UBN Ltd* (2009) 13NWLR (Pt.1158) p.256 that where the dispute arises from transactions between a banker or bank and its individual customer, both the Federal High Court and State High Courts share concurrent jurisdiction to hear and determine the case. The proviso to section 251(1) (d) of the 1999 Constitution only whittles down the exclusivity of the jurisdiction conferred on the Federal High Court in the subsection, but does not outrightly oust the subsisting original jurisdiction conferred on the Federal High Court by the subsection, see *UBA Plc v. Edeh* (2023) LPELR-60572 (CA). The State High Court is equally a creation of the Constitution. (Section 270(1) of the 1999 Constitution) It is a court of unlimited jurisdiction (Section 272 of 1999 Constitution) In *NDIC v. Okem Enterprises Ltd* (2004) 10NLWR (Pt.880) P.107, it was held that the exclusivity of the Federal High Court jurisdiction under section 251(1) of the 1999 Constitution is meant to exclude an impinging or impeding effect of any provision of the statute or other subordinate legislation so that the said section can fulfill itself.

However, there are no judicial interpretations in respect of Islamic financial transactions so far in Nigeria and since the courts are constitutionally vested with the power of interpreting the laws, their role as a sources of the Nigeria law regarding Islamic banking system need not be over emphasized. All the license institutions offering Islamic Financial Services (IFS) in Nigeria shall be subject to relevant provisions of the Banks and Other Financial Institutions Act and Companies and Allied Matters Act. (Paragraph 8.1 CBN Framework for Regulation and Supervision of Institutions offering Non-Interest Financial Services in Nigeria, 2011) This shows that Islamic banking is also subject to the laws governing the conventional financial institutions,

particularly, the corporate personality of the institution at the regulatory level. It could be observed that the provisions of the Central Bank of Nigeria guidelines did not isolate Islamic Banking from the jurisdiction of Federal High Court law State High Court when the provisions of the Constitution are read alongside the Central Bank of Nigeria guidelines in respect of banking matters other than banker customer and his bank.

It is a known fact that Islamic banking adopt the principles of profit and loss sharing and debt based contract as two basic means of transacting business between the bank and its customers in *Mudarabah*, *Wadiah*, *Musharakah*, *Wakalah*, *Murabaha*, *Ijara*, *Istisna'* and *bay' Salam*. Profit and Loss Sharing (PLS) is a system of Islamic finance by which parties in a transaction jointly pool in their resources for business purposes and agree to share profit, risk and losses in the ratio of their individual capital input thereby ensuring no accrual of a fixed interest to either party. (Paul and Osmond, 2016) Islamic banks use the system to comply with the religious prohibition of interest on loan. (Ahmad, 2011) Profit and loss sharing, therefore is a mechanism of banking and finance activity that is consistent with the principles of the *Shariah* which seeks for redistribution of resources amongst investors and stands against oppression and all forms of illegalities. (*Khaf*, 1996)

Disputes often arise out of transactions in products offered by Islamic bank, the most common of which are disputes that may require the court to determine the compliance or non-compliance of the given transaction to Islamic banking principles which involves disagreements regarding whether the bank's practices and transactions comply with Islamic principles and the guidelines set by Islamic law. This may involve questions about the legitimacy of certain investments or the permissibility of certain transactions. There are also dispute relating to profit sharing in investment accounts or profit sharing investment contracts that would require the calculation and distribution of profits. Disputes pertaining to the default of loans or failure to fulfill financial obligations which may involve dispute over the enforcement of collateral, calculation of penalties, or the process of debt collection and recovery.

Dispute also arising from breach of *musharakah*, *ijarah* or other forms of agreement, interpretations of terms of contracts and banking products arising as to the construction and interpretation of Islamic legal rulings and contract agreements in *mudarabah*,

musharakah, murabahah, ijarah, bay' as salam, istisna' and other related transactions such as *aqd al bay* (sales contract), *aqd al-qard* (loan contract), *aqd al-ijar* (lease contract), *al-sharikat* (partnership), *aqd al-wakalah* (agency contract) investment contracts pawning and at *rahn* (mortgage), engaging in *gharar* as well as other transactions that are prone to misunderstandings results in disputes that would require the court to determine the nature of the *gharar* and decide whether or not it affects the transaction. These and many more disputes are purely governed and regulated by the Islamic commercial law at which the judges in Federal High Court and State High Courts are neither knowledgeable nor trained and are not required to possess same. Effective adjudication of these disputes require an in-depth and thorough knowledge of the existing substantive Islamic legal rules and principles as well as procedural postulations that are to be used in applying the legal rules in relevant circumstances on the part of the judge.

4.1 Jurisdiction and Competence of Federal High Court over Islamic Banking Disputes

Interpreting and applying the rule of law is the primary responsibility of the court (Anozia v. Attorney General of Lagos state (2010) is NWLR (part 1216) 207 at 237; and section 6(1),(2) and (6) of the 1999 Constitution) The 1999 Constitution confer jurisdiction on various courts, section 251(1)(d) of the Constitution vests in the Federal High Court exclusive jurisdiction in civil cause and matters connected with or pertaining to banking, banks other financial institutions, including any actions between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures with the exception of any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.

However, the Supreme Court reviewed the Federal High Court jurisdiction in NDIC v. Okem Enterprises Ltd (2004)10NWLR (Part 880) 107 and concluded that the Constitution conferred a wider jurisdiction on the Federal High Court to the exclusion of other courts, hence all the previous case law delimiting the jurisdiction of the Federal High Court on the matters clearly set out under section 251(1) of the 1999 Constitution.

The Federal High Court now has exclusive jurisdiction over all matters preceding the proviso under the subsection (1)(d) and that both Federal High Court and State High Courts now have concurrent jurisdiction in matters between individual customer and his bank in respect of banking transactions. This position was reiterated in *UBA Plc v. Edeh* (2023) LPELR – 60572 (CA).

The fact that the Federal High Court and the State High Court have concurrent jurisdiction in individual customer and his bank in respect of banking transactions, does not mean that the jurisdiction of the State High Court has been conferred on the Federal High Court in *Olubeko v. FRN* (2014) LPELR-CA/L/121/2011, it was held that section 251(2) does not confer jurisdiction of the State High Court in the Federal High Court but that the wording of Section 252 is very clear, plain and unambiguous to the effect that it is only for the purpose of exercising any jurisdiction conferred upon it by the Constitution or any Act of the National Assembly that a Federal High Court shall be clothed with the power of a State High Court.

Does Islamic banking falls within the confine of banking mentioned in paragraph (d) of section 251 of the constitution? Can the Federal High Court exercise jurisdiction over Islamic banking matters pursuant to section 251(d) of the 1999 Constitution?

In one realm, it has been argued that since there is no any distinct or separate law for Islamic banking in Nigeria, Islamic banking falls within the realm of banking mentioned in paragraph (d) over which the Federal High Court can exercise jurisdiction because by the provisions of section 131 of Banks and Other Financial Institutions Act 2020, Islamic banking falls within the class of banking business in Nigeria as it offers and engage in all the businesses and products mentioned in the section and the section did not expressly exclude Islamic banking as a form of banking in Nigeria. It is further argued that the Central Bank of Nigeria's new banking model 2011 classified Islamic banking under specialized banks for the regulation of which the Central Bank of Nigeria developed guidelines and that section 251(1) (d) makes a general provision over all banks and did not expressly exclude Islamic banking from the jurisdiction of the Federal High Court. Therefore, if the drafters of the Constitution had intended to exclude Islamic banking from the purview of section 251(d), they could have stated so expressly.

However, it is argued that section 251(1)(d) vested in the Federal High Court exclusive jurisdiction over conventional banking only and since Islamic banking is distinct and different from conventional banking, the Federal High Court cannot have proper and actual jurisdiction over Islamic banking, more so, that neither section 251 of the Constitution, section 28(3) of the Constitution (First Alteration) Act 2010, and sections 7(9) and 28 of the Federal High Court Act 2004 nor any other statute expressly mentioned Islamic banking to be within the jurisdiction of the Federal High Court.

Nevertheless, going by the principle of law *expressio unius est exclusion alterius*, it is trite that construction of statutory provisions is to the effect that where a statute or instrument specifically mentioned things or persons, it is the intention of the makers of the statute that those not mentioned are intended to be excluded (see *Udoh v. Orthopaedic Hospital Management Board* (1993) 7NW:R (Part 304)). Therefore, the failure of the Constitution or any other law to have included Islamic banking matters within the jurisdiction of the Federal High Court would be assumed that it has no jurisdiction on Islamic banking matters.

More so, neither the Constitution nor any other law has mandated the Federal High Court or the State High Court judges to be learned in Islamic law as part of requirement for their qualification. Thus, if the drafters of the Constitution intend or even contemplate conferring the Federal High Court with jurisdiction of Islamic banking disputes, they would have made it a requirement. Judges are saddled with the responsibilities of determining disagreements on point of law or fact or conflict of legal views or of interests between two parties to any given Islamic banking transaction, the compliance or non compliance of Islamic banking transactions with the Islamic legal principles, breach or violation of forms of Islamic contracts and other conflicts that may arise between parties. To be competent, the judges are expected to have deep knowledge and training in Islamic banking law upon which the contracts transaction and banking products are offered and agreed upon by parties.

To determine the competence of the Federal High Court to adjudicate over Islamic banking disputes, reference shall be made to the competence theory which postulates that knowledge and experience determines competence to find out if the judges of the Federal High Court are knowledgeable or trained in Islamic banking law as they are

learned in conventional banking laws. By virtue of sections 250(1),(2) and (3) of the 1999 Constitution and 2(2) of the Federal High Court Act 2004 respectively, the qualification for appointment as a judge of the Federal High Court is solely being a legal practitioner for at least 10 years or being a judge of a court having unlimited jurisdiction in civil causes or criminal matters in Nigeria or a court having jurisdiction in appeals from any such and in Nigeria. This is in addition to obtaining the requisite academic and legal training in the university and the Nigerian law school. This requirement is not obtainable in respect to Islamic banking laws, as substantive and procedural Islamic law principles are not being taught in most Nigerian universities and the Nigeria law school. It is obvious that judges of the Federal High Court are generally equipped with the requisite knowledge, training and expertise to handle dispute that may arise in the course of conventional banking transactions such as disputes relating to prospectus liability, insolvency, security and guarantee, illegality, fraud, loan/finance, structured finance disputes and contractual interpretations, criminal breach of trust and other criminal practices, dispute relating to the interpretation and application of banking laws and regulations, disputes involving the operations of financial institution, which includes cases related to licensing, registration and regulation of banks and financial institution disputes concerning winding up or liquidation of banks, disputes involving the monetary policy committee (MPC) of the Central Bank of Nigeria and cases of regulatory compliance. These disputes squarely fall within the exclusive jurisdiction and competence of the Federal High Court because even if the disputes arose between an Islamic bank and other banks, it has to do with the regulatory aspect of the bank and not its day to day activities, at which the judge of Federal High Court is knowledgeable and trained. Therefore, since the judges of the Federal High Court are required to be qualified legal practitioners for at least 10 years, they are presumed to be learned in all ramifications of the banking laws in Nigeria.

The principles of *usual al-fiqh* and *maqasid al-sharia* prescribe the standards and requirements every judge must satisfy before he could be competent to preside over any Islamic matter. (*Ziza v. Mamman* (2016)⁴ S.Q.L.R. (Part II) 245 at 274, 278) A judge must have a strong understanding of Islamic law and its sources, expertise and deep understanding of Islamic legal principles, jurisprudential concept and methods of

interpreting and applying Islamic law and overall of it is *taqwa* (fear of Allah). (See *Ruxton Tuhfat*) Despite the fact that the above case is a Nigerian case handed down by the Court of Appeal, reverse is the situation in Nigeria, as judges who do not possess any knowledge or training in Islamic law are expected to adjudicate over Islamic banking disputes.

In some jurisdictions, like Egypt and Malaysia, the legal systems they establish specialized court and panels of experts who possess expertise in Islamic banking and finance as *Shariah* advisers to assist judge in understanding and applying principles of Islamic law in the resolution legal and jurisprudential opinions on questions bordering on Islamic banking and finance upon which judges when confronted with issues of Islamic banking over which they are not knowledgeable or trained. (GIFR, 2010) This is not the situation in Nigeria, as the judges at the Federal High Court and State High Court not trained in Islamic law, are allowed to administer the law without any provision for legal guidance as to Islamic banking principles which will occasion injustice.

Therefore since judges of Federal High Court and State High Courts, are not knowledgeable in Islamic law and are not required to be so, they lack the qualification, competence and ability to discharge the duties of their offices in respect of Islamic banking matters hence, lacks jurisdiction. The requirement of the law that in the case of appointment of a person to the office of *Khadi* of *Sharia* Court of Appeal, he must have knowledge of Arabic and basic knowledge of Islamic jurisprudence is further buttress the point that knowledge of the law is essential to competence and jurisdiction.

Looking at the nature of disputes that may arise in Islamic banking transactions and having regard to the constitutionally required qualification and background, it is only the *Khadis* of *Sharia* Court of Appeal that satisfied the requirements. The *Sharia* Court of Appeal is established under section 260, of the 1999 Constitution of the Federal Republic of Nigeria for the Federal Capital Territory, Abuja, while section 275 established *Sharia* Court of Appeal for the State.

The constitution has made it mandatory for any person who is aspiring to become a *Khadi* of *Sharia* Court of Appeal in Nigeria to in addition for being a legal practitioner

of not less than ten years to also possessed a qualification at Islamic law knowledge and with considerable experience in the practice of Islamic law not less than ten years as well. (Sections 261(3) (a) and (b) and 276 (3)(a) and (b) of the Constitution, 1999) This position of the Constitution is so clear that the *Khadis of Sharia* Court of Appeal are qualified and possessed the requirements to adjudicate over Islamic banking and finance disputes.

As earlier started, there is no any judicial interpretation in respect of Islamic banking and finance disputes so far in Nigeria but the application of Islamic law into the Islamic banking and finance transactions is not in contention within the Nigeria legal system.

Nevertheless, the challenges are the lacks of competence of the High Court Judges to adjudicate on Islamic banking and finance and the *Sharia* Courts of Appeal jurisdictions are limited and confined to Islamic personal law. The Constitution (Sections 262 and 277, construction, 1999) respectively provides that the *Sharia* Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by the law, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

For the purpose of subsection (1) of this section, the *Sharia* Court of Appeal shall be competent to decide.

- a. Any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
- b. Where all the parties to the proceedings are Muslims any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
- c. Any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;

- d. Any question of Islamic person law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or
- e. Where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other questions.

From the foregoing, there is no where Islamic banking is specifically mentioned. The *Sharia* Court of Appeal has appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law. Therefore, it is not empowered to determine questions regarding Islamic banking and finance disputes.

It can be argued that virtually all the questions of Islamic personal law contained in sections 262 and 277 of the Constitution are contractual relationship between the parties. Meanwhile the relationship between Islamic banking and its customer is also contractual and personal in nature. Coupled with the fact that the *Khadis* of the *Sharia* Court of Appeal have the prerequisite qualification to adjudicate on Islamic banking and finance disputes.

It is the humble position of this paper that taking the arguments side by side and in view of the lack of knowledge, and or training over Islamic law, the Federal High Court and States High Court judges cannot have and exercise jurisdiction over Islamic banking disputes with competence.

5.0 Conclusion and Recommendations

Disputes arising in the course of Islamic banking and finance may fall within the ambit of Nigerian legislations, Islamic commercial law or combination of the two. While the Federal High Court and States High Court may have jurisdiction and competence over the former, they may not in respect of the latter because judges of these courts are not knowledgeable in Islamic law and neither the Constitution nor any other law requires them to be so.

This paper finds that so far there is no case on Islamic banking and finance which have been determined by either the Federal High Court or State High Court, if the cases are

to come before the High Court, they will suffer great deal of injustices as a result of misapplication and misinterpretation of the principles of the law and terms of contracts of parties because the judges lack the competence to appreciate and understand the law governing the special transactions and products offered by Islamic banks.

The paper further finds that since no Nigeria court is expressly clothed with the jurisdiction to adjudicate over Islamic banking and finance disputes, judges of the Federal High Court and States High Court lack the jurisdiction and competence over Islamic banking matters. The paper recommends a general alterations of sections 251(1), (d), 262 and 277 of the Constitution to clear the doubts as to the jurisdiction of Federal High Court and States High Court over Islamic banking matters and expressly confer same in the judges of the *Sharia* Court of Appeal who are learned and trained in Islamic law or the creation of Special Courts or *Sharia* Councils that would be guiding judges of the judges of the Federal High Court and States High Court on Islamic banking matters.

References

- Ahmad, T.A. (2011) "Islamic Banking and Prohibition of Interest African Journal of Business Management, Vol. 5(5).
- Al-Asqalani Ibn Hajar (1996) *Bulugh Al-Maram (Attainment of the Objective according to the Evidence of the ordinances)*, Dar Al-Salam Publications, Riyadh.
- Aliyu, S.U.R. (2012) *Islamic banking and finance in Nigeria; issues, challenges and opportunities* international institute of Islamic banking and Finance, Kano, Bayero University Kano, Munich Personal, REPEC Archive.
- Auwar, M. (2000) *Islamicity and modes of Islamic Banking* International Islamic University Malaysia.
- Banks and Other Financial Institutions Act*
- CBN, *Framework for Regulation and Supervisory of Institutions offering Non-Interest Financial Services in Nigeria*, July 13, 2011.
- CBN, *Guidelines for Regulation and Supervision of Institution offering Non-Interest Financial Services in Nigeria* July 21, 2011.
- Central Bank of Nigeria Act*
- Companies and Allied Matters Act*
- Constitution of the Federal Republic of Nigeria 1999 (as amended)*

Dr. Muhammad Taqi-Ud-Din Al-Hilali The Nobile Qur'an English Translation of the meanings and Commentary, King Fahd Complex for printing of the Holy Qur'an, Madinah, KSA.

Federal High Court Act

Global Islamic Finance Report (GIFR) (2012) Shariah Governance in Islamic Finance in Humayon Dar and Azami (eds) Global Islamic Finance Report, ABM Islamic Publication London.

Haron, S. (1998) A Comparative Study of Islamic Banking practices, journal of King AbdulAziz University (JKAU), Islamic Economics Vol. 10,

Karaye, U.A. (2013) The Concept of Interest Free Banking Operation in Nigeria, mega Platinum Concept, Kano.

Khaf, M. (1996) Profit Distribution in Islamic Banks, Review of Islamic Economic Studies, Vol. 3 No. 2

Nasiru A. Ahmad and Mansur Idris (2015) Principles and Practice of Islamic Banking, Benchmark Publishers Limited, Abuja.

Nurudeen, A.A. (2016) Islamic Banking in Nigeria; Issues and Prospects" Journal of Emerging Economic and Islamic Research" Vol. 4 No 4 <https://www.jeeir.com> Accessed on 9/12/2023.

Orisankoko, A.S (2012) Socio Economic and Legal Challenges of Shariah Complaint Banking Operation, its Development Impacts and the struggles of the Believers Epistemological lessons from Nigeria, Journal of Islamic Economics, Banking and Finance, Vol. 8 48 No.2

Paul, O.C and Osmond, O.N (2016) The Principles of Islamic Banking and the Nigerian Business Environment International, Journal of Business and Law Research 4(1).

Sani, D.M. and Madaki A.M (2015) Appraisal of the Legal Framework for the Establishment and Operation of Non-Interest Banking in Nigeria, The Journal of the Centre of Islamic Legal Studies Institute of Administration (JICA), Ahmadu Bello University, Zaria Vol. 30,

The Holy Bible containing the Old and New Testaments, the Gideons International



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

ADVOCATING FOR LEGAL FRAMEWORK FOR COMMERCIAL RECOVERY AND
DEVELOPMENT OF SPACE RESOURCES IN NIGERIA

Paul Sule Hakuri

Faculty of Law, Department of Commercial Law, ABU Zaria,

Email: sulehakuripaul@gmail.com Phone: +2347037376697

Abstract

With the increasing global interest in the exploitation of space resources, it is crucial to assess the preparedness of Nigeria's legal system to support such activities. This study examines the legal framework for commercial recovery and development of space resources in Nigeria. It intends to answer the question as to, what are the gaps in Nigeria's current legal framework for commercial recovery of space resources? What regulatory reforms are needed to enhance its capacity to sustainably manage commercial space activities? and how can Nigerian laws on space exploration be aligned with best practices of established space economies? The study employs the doctrinal methodology to analyse primary and secondary data on the subject. It also used the comparative method to analyse legal frameworks from established space economies to provide insights into best practices. This study found that, space exploration activities are not being incentivized with the grant of property rights over space resources, this development has stunted the growth of the space industry, and underscores the need for a reform to bring it up to speed with development in the new space industry. It is recommended that Nigeria should amend its laws to grant property rights over extractable space resources, foster international cooperations, and strengthening institutional capabilities.

Key words: Space Exploration, Space Resources, Commercial Recovery, Property Rights.

1.1 Introduction

It is estimated that the global space industry could generate revenue worth more than \$1 trillion by 2040, up from \$350 billion in 2019³³¹. Reports also had it that, African space industry was worth \$7.37 billion in 2019, and is projected to grow to over \$10.29

³³¹Stanley, M. (2019). *Investigating in the Final Frontier: The New Space Economy*. Haver Analytics, Research Forecasts. Retrieved from <http://www.morganstanley.com/ideas/investigation-in-space> on 14th September 2020.

billion by 2025³³². The space industry is fostering innovation previously thought impossible, it is revolutionizing commerce, communication, and further insight into space's uncharted horizons³³³. Investment in the space sector is growing rapidly, and commercial enterprises are expanding the uses and customers for space-based systems which are initially designed and deployed for use by governmental agencies. Multinational corporations such as: Blue Origin, Virgin Galactic, Ariane Space, and SpaceX, are investing huge capital expenditures in the global space economy. Asteroid mining companies such as, Deep Space Industry, and Planetary Resources, whose basic goal is Asteroid resources mining³³⁴ had conducted feasibility studies on Asteroid inventory, mining, and retrieval. Deep Space Industry has offices in the USA, and Luxemburg, while Planetary Resources is based in the USA³³⁵.

Commercial recovery and development of space resources represent a new frontier in space exploration, offering immense economic and scientific potential. However, the legal frameworks required to govern these activities are still evolving, with many nations, including Nigeria, yet to fully develop comprehensive policies and regulations. The absence of a clear and robust legal framework poses significant challenges for Nigeria, potentially hindering its ability to effectively engage in and benefit from space resource exploitation. Even though Nigeria had signed America led Artemis Accords since 2022³³⁶, research efforts on regulation of space exploration activities has continually neglected the aspect of commercial recovery of space resources. The primary aim of this study is to fill this gap by assessing the extant legal framework in Nigeria regarding commercial recovery and development of space resources.

³³²NewSpace Africa Industry Report, 2019 Edition. Available at <https://www.Africanews.space>, accessed on 07/03/21, p. 1

³³³Taylor, D. (2024). *How Space Exploration Boosts the Global Economy*. Available at <https://www.fastcompany.com/91036013/how-space-exploration-boosts-the-global-economy>, accessed on 11/04/24.

³³⁴Froehlich A. (2018). Space Resources Utilisation: A view from an Emerging Space Faring Nation. In: European Space Institute (Ed), *Studies in Space Policy*. Cham, Switzerland: Springer International Publishing AG, p. 32.

³³⁵*Ibid*

³³⁶Odeyemi, J. (2022). Nigeria Signs the Artemis Accords at U.S- Africa Leaders Summit. *Daily Trust Newspaper* 14 December, 2022. Available at <https://dailytrust.com/nigeria-signs-artemis-accords-at-u-s-africa-leaders-summit>, accessed on 27/04/2024.

This study employs the doctrinal research methodology, through analysis of primary and secondary documents including international treaties, national laws and regulations on commercial recovery of space resources, and opinions expressed in published articles. To provide insights into international best practices and potential models for Nigeria, this study also conducted a comparative analysis of other countries with intermediate and established space economies. The foregoing research methodology and methods are deployed towards answering the following questions:

- a. What are the gaps in Nigeria's extant legal framework for commercial recovery and development of space resources?
- b. What regulatory reforms are needed to enhance Nigeria's capacity to sustainably manage commercial space activities?
- c. How can Nigerian law on space exploration be aligned with best practices of established space economies?

Addressing these problems is essential for Nigeria to participate meaningfully in the global space economy. By developing a comprehensive legal framework for commercial recovery of space resources, Nigeria can attract investment, foster innovation, and ensure that space exploration activities are conducted in a sustainable manner. This research intends to provide a detailed analysis and recommendations to help Nigeria navigate the complex legal landscape of space resource recovery and development.

1.2 Conceptual Clarifications

1.2.1 Space Exploration

In public international law, the outer limits of the Earth's atmosphere, including the Moon and other celestial bodies are collectively referred to as "Outer Space". Like the High Seas and Landmass of Antarctica, no country may validly purport to subject outer space to its sovereignty. The law only permits freedom of peaceful exploration and use. Space exploration is therefore, the scientific investigation of Outer Space with the aid of technologically driven machines to acquire new knowledge about the universe, and deploy the knowledge so gained towards production of goods and services that

benefit mankind. Historically, these investigations are fueled by the cold war between the USSR and the USA from 1950s-80s. As of 1990s, space explorations were driven by cooperations among spacefaring countries for sustained learning about the composition, and physical characteristics of planetary bodies, and the entire universe. However, from the year 2000 onward, people have explored the outer space for diverse reasons, including the desire of finding new resources³³⁷ to improve their living conditions on Earth, and in other planets.

1.2.2 Space Resources

Like the Earth, other planetary bodies such as the Moon, Asteroids, Comets, and Mars contain substantial deposit of valuable resources³³⁸. The Moon is known to contain water, which can be broken down into hydrogen and oxygen that can be used as rocket fuel³³⁹. It also contains helium-3, which can be used as a fusion fuel, and metals such as platinum and iron, as well as, rare minerals which are in much demand on Earth for use in high-tech products³⁴⁰. *Regolith* (lunar soil) has many uses as thermal and radiation shielding and for construction³⁴¹. Lunar samples collected by the Soviet Union has been sold on the private market³⁴². The US has in 2020 offer to buy small amount of lunar *regolith* collected by private companies as part of its operation on the Moon³⁴³.

Some metallic Asteroids are rich in Iron, Nickle, Cobalt, and precious metals like Platinum and Gold³⁴⁴. Salicaceous asteroids contain silica minerals, and carbonaceous asteroids contain mineral metal, and organic compounds. One asteroid (16 Psyche³⁴⁵)

³³⁷National Aeronautics and Space Administration (NASA), *Why go to Space?* Available at <https://www.nasa.gov/humans-in-space/why-go-to-space/#>, accessed on 27/06/24.

³³⁸Dello-Iacovo, M. and Saydam, S. (2023). Humans have Big Plans for Mining in Space-But there are Many Things Holding Us Back. *The Conversation Africa, Inc.* Available at <https://theconversation.com/humans-have-big-plans-for-mining-in-space-but-there-are-many-things-holding-us-back-181721>, accessed on 03/06/24.

³³⁹Seedhouse, E. (2016) *Mars via the Moon: The Next Giant Leap*. Chichester, UK: Springer Praxis Publishing, p.59

³⁴⁰*Ibid*

³⁴¹Spudis, P. D. (2016). *The Value of the Moon: How to Explore, Live and Prosper in Space, Using the Moon Resources*. Washington DC: Smithsonian Books.

³⁴²United States Mission to International Organization in Vienna, (2022). U. S. A on the Utilization of Space Resources. UNCOPUOS Legal Subcommittee, 2022. Available at <https://vienna.usmission.gov/2022-copuos-lsc-u-s-on-space-resources/>, accessed on 03/06/24.

³⁴³*Ibid*

³⁴⁴Leotaud, V. R. (2021). *Scientists Explore the Possibility of Mining Iron, Nickle, Cobalt-rich Near-Earth Asteroids*. Available at <https://www.mining.com/scientist-explore-the-possibility-of-mining-iron-nickle-cabalt-rich-near-earth-asteroids/>, accessed on 02/06/24.

³⁴⁵The asteroid Psyche is a unique, metal-rich asteroid orbiting the Sun between Mars and Jupiter.

was reported to contain \$700 quintillion worth of gold, enough for every person on each to receive about \$93 billion³⁴⁶. Mars (Red Planet) has potential for human settlement due its similarities with the Earth. Its environment and two Moons (Phobos and Deimos) present a rich diversity of volatile materials.

1.2.3 Commercial Recovery of Space Resources

Critical to achieving affordable and sustainable human exploration beyond Low Earth Orbit (LEO) is the development of technologies and systems to identify, extract and use resources in outer space³⁴⁷. The legal framework for space resource activity is related to the extraction and use of mineral and volatile materials, on the Moon, and other celestial bodies³⁴⁸. Commercial recovery of space resources means authorized and licensed extraction of space resources, where the said resources could either be returned to the Earth for use, or utilize in space. According to Muzyka³⁴⁹, “All products of industrialized space resources operations would be utilized either by Earth’s global economy, enriching its resource base, or by off-world settlements, whose survival and development will depend on constant streams of production materials and energy resources”³⁵⁰. *In Situ* Resource Utilization (ISRU) is the harnessing of local natural resources at mission destination, instead of taking all needed supplies from Earth, to enhance the capabilities of human exploration³⁵¹.

1.2.4 Property Rights Over Space Resources

Currently, nation states are adopting legal frameworks for commercial recovery of space resources to provide legal certainty to industries. These initiatives are bringing

³⁴⁶Yarlagadda, S. (2022). *Economics of the Stars: The Future of Asteroid Mining and the Global Economy*. Harvard International Review. Available at <https://hir.harvard.edu/economics-of-the-stars/>, accessed on 02/06/24.

³⁴⁷Gerald, B. S. (2015). Space Resources Utilization: Near-term Mission and Long-term Plans for Human Exploration. Available at <https://store.cim.org/fr/space-resources-utilization-near-term-mission-and-long-term-plans-for-human-exploration/>, accessed on 27/06/24.

³⁴⁸Martin, A. S. (2017). *Legal Aspects of Space Resources Utilization*. Available at <https://thepsacereview.com/article3204/1>, accessed on 20/06/24.

³⁴⁹Muzyka, K. (2022). *General Characteristics of Space Mining and Space Resources-based Activities*. European Space Foundation. Available at https://spacefdn.com/resource_library/general-characteristics-of-space-mining-and-space-resource-based-activities/, accessed on 20/06/24.

³⁵⁰ *Ibid*

³⁵¹NASA, (2023). *In Situ Resources Utilisation*. Available at <https://www.nasa.gov/mission/in-situ-resources-utilization-isru#>, accessed on 27/06/24.

space law into the commercial world³⁵². Without proprietary rights over extracted material, no enterprise, whether public or private, could justify the enormous costs and risks³⁵³ associated with space exploration activities. The concept of property rights over space resources relies on a legal theory that real property rights are not necessary to acquire extraterrestrial resources³⁵⁴. While the Outer Space Treaty forbids the claim of large tracts of real property, it does permit the activity of “use” so long as it is confined to the area and time of an ongoing recovery operation, and ISRU³⁵⁵. Since the outer space is largely viewed as *res communis*, extracting resource from it is likened to plucking fish from the Sea, where the Sea is considered as property of humanity until the fisherman’s labour removes the fish out of the deep. Consequently, there is no need for real property rights over space resources because the right to “use” will suffice in the circumstance.

1.3 Foundational Treaties, Agreements and Conventions on Space Exploration

The legal implications of commercial recovery of space resources are complex. It is governed by a combination of international treaties. The most relevant treaties or conventions include the Outer Space Treaty, 1967³⁵⁶, Rescue Agreement, 1968³⁵⁷,

³⁵² Herzfeld, H. R. and Von der Dunk, F. (2005). Bringing Space Law into Commercial World: Property Rights Without Sovereignty. Space, Cyber, and Telecommunication Law Programme Faculty Publication, 15. Available at <https://digitalcommons.unl.edu/spacelaw15>, accessed on 27/06/24.

³⁵³ Hew, L. (2023). *Can a Country or Business Claim Ownership of the Moon, Meteorites or Even Space?* University of South Wales: Canberra. Available at <https://www.usw.edu.au/news/2023/01/can-a-country-or-a-business-claim-ownership-of-the-moon-meteorites-or-even-space?>, accessed on 27/06/24.

³⁵⁴ Listner, M. J. (2018). A Briefing on the Legal and Geopolitical Facets of Space Resources. In James, T. (Ed.). *Deep Space Commodities Exploration, Production and Trading*, <https://doi.org/10.1007/978-3-319-90303-3>, p.114.

³⁵⁵ Dalton, T. R. (2010). Developing the Final Frontier: Defining Private Property Rights on Celestial Bodies for the Benefit of All Mankind. Cornell Law School Graduate Student Papers, p. 15.

³⁵⁶ Treaties on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and other Celestial Bodies (Outer Space Treaty), 1967. Adopted on 13th December 1966 in UN General Assembly Resolution 2222 (xxi), opened for signature 27th January 1967, entered into force 10th October, 1967.

³⁵⁷ Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement), 1968. Adopted in UNGA Res 2345 (xxii), opened for signature on 22nd April 1968, entered into force on 3rd December 1968.

Liability Convention, 1972³⁵⁸, Registration Convention, 1975³⁵⁹, and the Moon Agreement, 1979³⁶⁰.

The Outer Space Treaty is the grand norm of international space law. Its key provision relevant to commercial recovery of space resources include, non-appropriation principle, use of outer space including the Moon and other celestial bodies for peaceful purposes only, obligation to avoid harmful contamination of space or introduce harmful abiotic elements from outer space to the Earth, regarding the outer space as the province of mankind, and states are to bear international responsibility for national space activities including those carried out by private entities, and shall continually authorized and supervised such activities.

The Rescue Agreement elaborates on the Outer Space Treaty's provisions regarding the rescue of astronauts and the return of objects launched into outer space. While it focuses on humanitarian aspects of space activities, it implicitly supports the idea of cooperation in space activities, which could extend to resources recovery efforts.

The Liability Convention establishes liability regimes for damages that are caused by space objects. Under this convention, state parties are absolutely liable for damage caused by their space objects on the surface of the Earth, or on Aircraft in flight. The liability provided under this convention is based on fault. This implies that, private companies engaged in commercial recovery of space resources could be held liable for damages caused by their space activities on a third party's object through their home states. Therefore, it behooves on the respective home states to put in place a robust legal framework for commercial recovery of space resources that guarantees efficient insurance policy.

³⁵⁸Convention on International Liability for Damage Caused by Objects Launched into Outer Space, (Liability Convention), 1972. Adopted I n UNGA Res 2777 (xxvi), opened for signature on 29th March 1972, entered into force on 1st September 1972.

³⁵⁹ Convention on Registration of Objects Launched into Outer Space (Registration Convention), 1975. Adopted in UNGA Res 3235 (xxix), opened for signature on 14th January 1975, entered into force on 15th September 1975.

³⁶⁰Agreement Governing the Activities of States on the Moon and other Celestial Bodies (Moon Agreement), 1979. Adopted 5th December 1979 in UNGA Res 34/68, entered into force 11th July 1984.

The Convention on Registration of Objects Launched into Outer Space requires states to register space objects with the United Nations, fostering transparency and accountability in space activities. Several spacefaring nations including Nigeria had in the National Space Research and Development Agency (NASRDA) Act, 2010, and Regulations on Licensing and supervision of space activities, 2015, complied with this obligation.

The Moon Agreement attempts to expand the Outer Space Treaty's framework specifically to the Moon and other Celestial bodies. Although it was not widely ratified by most spacefaring nations including Nigeria, its provisions are significant for engendering a robust legal framework for commercial recovery and development of space resources. It provides that the Moon and its resources are Common Haritage of Mankind (CHM), suggesting that resources recovery should benefit humanity, generally. It is important to also state here that the Moon Agreement provides for the establishment of an international regime to govern the exploitation of space resources when it becomes feasible, emphasizing cooperative management. Furthermore, perhaps the most controversial is its provision that benefits from space resources exploitation should be shared equitably among all states, taking into account the needs of developing countries.

1.4 Soft Law Mechanism for Regulating Space Exploration Activities

In addition to the foregoing hard laws, soft law mechanism is also used in regulating space exploration including commercial recovery of space resources. The term soft law is used to denote recommendations, agreements, principles, and declarations that are not legally binding on state parties but rather of persuasive nature. The United Nations (UN) general assembly resolutions are good examples of such mechanism. The UN Committee on Peaceful Use of Outer Space (UNCOPUOS) had issued plethora of guidelines including Space Debris Mitigation Guidelines, 2007³⁶¹, Recommendations on National Legislation Relevant to the Peaceful Exploration and

³⁶¹UN-COPUOS, (2007). Space Debris Mitigation Guidelines. UN-COPUOS Resolution 62/217 of December 2007. Available at <https://www.unoosa.org>, accessed on 04/06/24.

Use of Outer Space, 2013³⁶², and Guidelines for Long-term Sustainability of Outer Space Activities, 2018³⁶³. In the sixty-third session of the UNCOPUOS legal subcommittee meeting, held in Vienna from 15-26 April 2024³⁶⁴, parties agree that measures should be taken to enable all nations participate in commercial recovery of space resources in a peaceful, equitable, secure and sustainable manner, irrespective of their degree of scientific and technological development and whether they had the capacity to engage in recovery of space resources or not.

1.5 Regulating the New Space Economy: Trending Developments, and Implications for Nigeria

As noted earlier, among the controversies that led to the failure of the Moon Agreement was its provision about equitable sharing of benefits from space resources exploitation among state parties, particularly in the interest of developing countries. In protest to this, some spacefaring countries did not only refuse to sign the treaty, but went ahead to legislate on commercial recovery of space resources. This development had also degenerated into a renewed rivalry in outer space, with more countries competing³⁶⁵ over space resources governance framework.

1.5.1 National Regulation on Commercial Recovery of Space Resource

As the first country to adopt a legal framework for commercial recovery of space resources, the USA is a leader in creating a legal infrastructure for mineral exploitation³⁶⁶ in outer space. It had in 2015 adopted the world's first space resources law, recognizing the property rights of private companies and individuals to materials gathered in space³⁶⁷. Interestingly, the Grand Duchy of Luxemburg, United Arab

³⁶²UN-COPUOS (2013). Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space. *UN- COPUOS Resolution A/RES/68/74* of 11 December 2013.

³⁶³UN-COPUOS, (2018). Guidelines for Long-term Sustainability of Outer Space Activities. UN-COPUOS

³⁶⁴UN-COPUOS, (2024). General Exchange of Views on Potential Legal Models for Activities in the Exploration, Exploitation and Utilization of Space Resources. *UN-COPUOS A/AC.105/C.2/L.329/Add.7*. of April 2024.

³⁶⁵Costello, Tom & Gregorian, D. (2023). *Space Race 2.0: Russia, India, China and the US are Heading for the Lunar South Pole*. NBC News, available at <https://www.nbcnews.com/science/space/russia-india-china-us-are-heading-lunar-south-pole-rcna100495>, accessed on 16/06/24.

³⁶⁶Gilbert, A. (2024). Mining in Space. Milken Institute Review. Available at <https://www.milkenreview.org/articles/mining-in-space-is-coming>, accessed on 26/05/24.

³⁶⁷*Ibid*

Emirate (UAE), and Japan have also legislated on the subject matter. In effect, the laws are intended to stimulate private investment in the upstream sector of the space economies, while implementing their obligations in accordance with provisions of the Outer Space Treaty.

1.5.2 Renewed Geopolitics/Astro-politics over Space Resources Governance

Technological advancement has made utilisation of the resource in Asteroids, the Moon, Mars, and other celestial bodies, possible. Research has shown that the use of space resources to provide propellant, habitation and materials critical to support human life will unlock the full potential of space exploration, enabling humans to travel further and spend longer time in space³⁶⁸. This has occasioned transformation of the economics of space exploration into a new realm of resources exploitation. While many countries are considering the possibility of allowing property rights over space resources, the issue has continually remained controversial as to the propriety or otherwise of such action, considering the restriction on national appropriation of outer space.

Initially, the controversy divided the global community into two factions: while the America-led faction believes it is appropriate, the faction led by Russia and China seemed not to be favorably disposed to the idea, citing violation of the Outer Space Treaty, and relegation of the role of UNCOPUOS to the background. However, in recent times, the two factions have given tacit approval that exploitation of space resources has become feasible. This is represented in similar initiatives by both factions, calling for collaboration in exploitation of lunar resources. Both initiatives are premised on the belief that, most efficient and productive investigation, exploration and use of the Moon and other celestial bodies can only be achieved through a broad partnership involving nation states, the private sector, and international organizations.

1.5.2.1 America-led Artemis Programme

³⁶⁸ Cilliers, J. *et al* (2023). *Toward the Utilization of Space Resources in Space: Knowledge Gaps, Open Questions, and Priorities*. Doi:10.1038/541526-023-00274-3.

The Artemis programme is a US-led international initiative spearheaded by National Aeronautics and Space Administration (NASA) to return humans to the Moon and establish a sustainable presence. The programme aims to build on the legacy of the Apollo missions with the goals of advancing lunar exploration, fostering international cooperation, and preparing for future missions to Mars. The initiative is set out to build a community on the Moon, drive a new lunar economy, inspire the new generation, and pave the way for interplanetary exploration of Mars and beyond³⁶⁹. In effect, the mission is demonstrating new technologies, capabilities, and business approaches needed for exploration of the Moon to learn about the origin and history of the Earth, the Moon, and the solar system³⁷⁰.

Key principles of the Artemis Accords include, transparency, interoperability, emergency assistance, registration of space objects, release of scientific data, protecting heritage, space resources utilisation, deconfliction of activities, and orbital debris and spacecraft disposal. The Artemis Accords reinforces that space resources extraction and utilisation can be conducted under the auspices of the Outer Space Treaty. As of June, 2024 about forty 43 countries including Nigeria, Rwanda, and Angola have signed on to the Artemis Accords³⁷¹.

1.5.2.2 China and Russia-led International Lunar Research Station

According to Gilbert³⁷², the People's Republic of China also viewed space-resource development as a national priority. Space resources utilization is part of China's strategy for challenging US economic and security primacy in space. It may be recalled that the Wolf Amendment Act, 2011³⁷³ prohibited NASA from cooperating with China in space

³⁶⁹ Dunbar, B. (2019). *What is Artemis?* National Aeronautics and Space Administration. <https://www.nasa.gov/general/what-is-artemis/#>, accessed on 20/06/24.

³⁷⁰ *Ibid*

³⁷¹ Walton, S. (2024). *Artemis Accords and International Lunar Research Station (ILRS) Signature Sheet*. Secure World Foundation. Available at <https://docs.google.com/spreadsheets/4/0/d/1dFNVSQeTt04DiDH9u2ds4ZAjzGje2Z0-XSIWyiPc8lo/ht,mlview#> accessed on 20/06/24.

³⁷² *Ibid*

³⁷³ Young, M. (2019). *Bad Idea: The Wolf Amendment (Limiting Collaboration with in Space)*. Washington DC: Center for Strategy and International Studies (CSIS) International Security Programme. Available at <https://defence360.csis.org/bad-idea-the-wolf-amendment-limiting-collaboration-with-china-in-space/>, accessed on 26/05/24.

exploration except congressional approval is first sought and obtained. This development made China to singlehandedly build its own space station (*Tiangong*³⁷⁴) and is currently cooperating with Russia and other partners in International Lunar Research Station (ILRS)³⁷⁵ -a development that some writers described as renewed geopolitics, or astro-politics³⁷⁶ over space resources governance.

The ILRS is a collaborative initiative spearheaded by China and Russia, aimed at establishing a lunar base for scientific research, exploration, and potential commercial recovery of space resources. It seeks to establish a long-term, sustainable presence on the Moon. This includes constructing facilities for scientific research, technology development, resource utilization, and potentially setting the stage for human habitation in the Moon. Like the Artemis Accords, the ILRS consist of both a lunar exploration programme, and a set of principles for activities to be undertaken³⁷⁷. China has also created the International Lunar Research Station Corporation Organization (ILRSCO)³⁷⁸. As of June, 20 2024, ten (10) countries including Egypt and South Africa³⁷⁹ have signed the ILRS partnership.

1.5.2.3 Implications for Nigeria

Allowing property rights over extractable space resources has a unique potential to usher in a new era of dynamism, innovation, and growth in the space industry. Effective commercialization of space exploration requires the creation of some kind of a property rights regime. As ambitious new space industries are in the planning stages,

³⁷⁴ The name *Tiangong* means “heavenly place” in the Chinese language. It is a permanently crewed space station constructed and operated by Chinese Manned Space Agency- a government establishment responsible for administration of China Manned Space Programme.

³⁷⁵ China National Space Administration (CNSA), & Russia State Space Corporation (ROSCOSMOS), (2021). *International Lunar Research Station (ILRS): Guide for Participation*. Vol.1.0, June, 2021. Available at <https://www.cnsa.gov.cn/english/n6465652/n6465653/c6812150/content.html>, accessed on 19/06/24.

³⁷⁶ Bilal, M. (2024). *The Advent of Astropolitical Alliances*. Space News. Available at <https://spacenews.com/advent-astropolitical-alliances/>, accessed on 26/05/24.

³⁷⁷ Secure the World Foundation, (2024). *Lunar Space Corporation Initiative*. Available at <https://swfound.org/lunar-space-cooperation-initiatives/>, accessed on 19/06/24.

³⁷⁸ *Ibid*

³⁷⁹ Walton, S. (2024), *Op cit*.

humanity now have a chance to formulate a blueprint of moral and ethical behavior for corporations in a new and expanding marketplace³⁸⁰. According to Dinkin³⁸¹:

Space property rights will probably not spark a space transportation boom that will rival the railroad boom, the airplane boom, or the automobile boom. But there will be no boom if there are no property rights. Leaving the regulatory regime the same is a recipe for continued sclerosis³⁸².

Section 10 of the Artemis Accords provides that parties intend to use its experience under the project to contribute to multilateral efforts to further develop international best practice and rules applicable to the extraction and utilisation of space resources, including through ongoing efforts at the UNCOPUOS³⁸³. This underscores the need to upscale Nigeria's legal framework to accommodate property rights over space resource, to stimulate interest from venture capital investors into the space industry. Lack of clarity about property rights constitutes a disincentive for private investment, and a stimulant for illegal space exploration activities currently experienced in Nigeria. Disturbed about the spate of illegal space exploration activities, Agbakoba³⁸⁴ expresses worry that Nigeria is losing over ₦1 trillion annually because most corporations operate space objects without complying with the extant legal regime for space activities.

1.6 Commercial Recovery of Space Resources: A Comparative Analysis of National Legal Frameworks of Intermediate and Established Space Economies

1.6.1 United States of America

³⁸⁰ Livingstone, M D. (2000). *The Ethical Commercialisation of Outer Space*. Tiburon CA: Livingstone Business Solutions. Available at http://www.spacefuture.com/archive/the_ethical_commercialization_of_outer_space.shtml, accessed on 25/05/24.

³⁸¹ Dinkin, S. (2004). *Property Rights and Space Commercialisation*. Available at <https://www.thespacereview.com/article/141/1/>, accessed on 25/05/24.

³⁸² *Ibid*

³⁸³ NASA, (2020). *Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes*. Section 10 (4), available at <https://www.nasa.gov/artemis-accords/>, accessed on 27/06/24.

³⁸⁴ Agbakoba, O. (2023). *Licensing of Space Objects in Nigeria: Agbakoba Writes Open Letter to Senator Mamora*. Available at <https://www.oal.law/licensing-of-space-object-in-nigeria-agbakoba-writes-open-letter-to-senator-mamora>, accessed on 30th/09/23.

As an established space economy, USA's national space legislation is not so comprehensive but rather sector-based, meaning that issues are regulated by different³⁸⁵ laws. A more recent legislative effort that regulates commercial space exploration activities is the Commercial Space Launch Competitiveness Act, of 2015, which provided *inter alia* that space resources can be owned by private entities subject to their obligations under international space law treaties. The fundamentals of the US vision for space exploration are to advance its scientific, security, and economic interest through a robust space programme that promotes private sector participation in a manner that ensures the realization of these interests³⁸⁶. The programmes were implemented through the Space Act Agreements (SAAs)³⁸⁷, such as Commercial Orbital Transportation System (COTS)³⁸⁸, Commercial Crew Development Programme (CCDev)³⁸⁹, and Commercial Reusable Services (CRS)³⁹⁰. Through these programmes, NASA outsourced capabilities from the private sector.

According to Seedhouse³⁹¹ it was these funding initiatives that helped SpaceX and other companies succeed in the commercial space race. Under the SAAs rather than employing the traditional cost-plus model contract, NASA paid increments of fixed price once the companies accomplished previously agreed-upon milestones, and companies could only get paid for what they achieved³⁹². Another distinctive element of the SAAs is that design and building of spacecrafts are left mostly in the hands of private companies. This development has been a boon for SpaceX and the fledgling commercial spaceflight industry and for the most part, the private companies are left to their device to figure out how best to achieve the agreed-upon milestones³⁹³.

³⁸⁵Froehlich, A. et al (2018). *National Space Legislation: A Comprehensive and Evaluative Analysis*. Vienna: European Space Policy Institute, <https://doi.org/10.1007/978-3-319-70431-9>, p.3.

³⁸⁶National Aeronautics and Space Administration (NASA), (2004). *The Vision for Space Exploration*. Washington DC: 20546 NP-2004-01-334-HQ, pp.1-32. Available at www.nasa.gov/pdf/55583main_vission_space_exploration2.pdf, accessed on 8/01/2023.

³⁸⁷Tkatchova, S. (2018). *Emerging Space Markets*: Verlag GmbH Germany: Microcosm Press & Springer, p.8

³⁸⁸*Ibid*

³⁸⁹*Ibid*

³⁹⁰*Ibid*

³⁹¹Seedhouse, E. (2008). *Space X: Making Commercial Spaceflight a Reality*. New York: Springer Praxis Publishing, p.18.

³⁹²*Ibid*

³⁹³*Ibid*

The programme is targeted toward harnessing collaborative efforts between government, industry, and academic researchers. The COTS programme is designed to coordinate the delivery of crew and cargo to the International Space Station (ISS) by private companies when NASA was forced to retire the space shuttle³⁹⁴. It was targeted at achieving 100% commercial cargo services to the ISS by 2015/16³⁹⁵. While COTS is focused on the development of vehicles, the CRS is all about the delivery of payloads to the ISS. The CCDev programme on the other hand deals with commercial crew development and rotational services. All these are managed by NASA's Commercial Crew and Cargo Programme Officer³⁹⁶.

1.6.2 Grand Duchy of Luxembourg

Luxembourg entered the space race in 1985, and became a member of the European Space Agency (ESA) in 2005³⁹⁷. Since February 2016, the government of Luxembourg initiates a scheme aimed at repositioning the country as a pioneer in the development of space resources, and applications. This reform culminated into a law that regulates space resources utilization. Luxembourg adopted the first national legal framework on the exploitation and utilisation of space resources in Europe in 2017. Building on its long history at the forefront of the commercial satellite communications industry, Luxembourg aims to play a leading role in the exploration and utilization of these resources³⁹⁸. The goal is to ensure that space resources explored under its jurisdiction serve a peaceful purpose, are gathered and used in a sustainable manner compatible with international law and for the benefit of humankind³⁹⁹. Luxembourg's Minister of Economy, Etienne Schneider claimed that by enacting a law on utilisation of space resources:

The Grand Duchy will take another major step towards positioning itself as a European pole in the exploration and commercial use of space resources. Luxembourg will thus become the first European

³⁹⁴*Ibid*

³⁹⁵*Ibid*

³⁹⁶*Ibid*

³⁹⁷Conti, P. *et al* (2017). Luxembourg Space Policy. In: Schneider, E (Ed.), *Luxembourg Space Capabilities: Turning Innovation into Business*, (pp.6-7), available at <https://www.luxinnovation.lu/space>, accessed on 01/04/24.

³⁹⁸*Ibid*.

³⁹⁹*Ibid*.

country to put in place its legislation in conformity with international law and which gives private operators assurance as to the ownership of the resources they extract in outer space⁴⁰⁰.

Like the US, Luxembourg's space industry law also stimulated the creation and development of the "new space industry" in Luxembourg. It also contributed to economic growth and diversification of the economy⁴⁰¹. Within one year of implementation, the Luxembourg Space Resources Act attracted investments from leading commercial space exploration companies such as "Deep Space Industries", "Planetary Resources", "ispace", and "Blue Horizon"⁴⁰². It is believed that the law was strongly influenced by US's Commercial Space Launch Competitiveness Act, which was the first national legislation that gives property rights over space resources. While some consider the law as a self-centered interpretation of international law by both the US and Luxembourg, other space powers remained silent because they too believe that they need private investors to continue their space programmes⁴⁰³.

1.6.3 United Arab Emirate

The United Arab Emirate (UAE) is another shining example of a jurisdiction where space exploration activities are being commercialised. In 2014, the Emirate announced its intention to set up a space Agency to enable it to participate in international efforts to explore outer space. The successful launch of a satellite to study the disappearance of the Martian atmosphere in 2021 was laudable. The Hope orbiter⁴⁰⁴ (*Al-amal*)⁴⁰⁵ will conduct a two-year survey of the weather on the red planet⁴⁰⁶. The mission carries great symbolism as the first interplanetary voyage undertaken by an Arab country⁴⁰⁷. The foregoing achievements and the establishment of a sustainable and

⁴⁰⁰Froehlich, A. et all (2018). *Op cit*.

⁴⁰¹*Ibid*, at p. 126.

⁴⁰²*Ibid*.

⁴⁰³Froehlich, A. et all, (2018), *Op cit*.

⁴⁰⁴Shaheen, K. (2020). *First Mars Mission from UAE Aims to Inspire a New Generation of Space Scientist*. Available at <https://www.nationalgeographic.com/sciences/2020/07/uae-mission-inspire-new-generation-of-space-scientist>, accessed on 30/09/23.

⁴⁰⁵*Al-amal* is the Arabic word for "Hope".

⁴⁰⁶Shaheen, K. (2020), *Op cit*.

⁴⁰⁷*Ibid*

diversified economy based on knowledge and innovation culminated in the enactment of a federal law on the regulation of the space sector⁴⁰⁸.

The law aims to create an appropriate regulatory environment to achieve the objectives of UAE's national space policy, and to stimulate investment and encourage private and academic sector participation in space exploration and related activities⁴⁰⁹. It is also intended to support long-term sustainability of space activities and ensure compliance to international treaties relating to outer space to which UAE is a party⁴¹⁰. The scope of the law's application includes all space or related activities within the country's territory, or the state's establishment outside its territory, or any space or related activities from ships, or aircrafts registered in UAE, or by a person who holds its nationality, or company whose headquarter is in UAE⁴¹¹. Under this Act, space resources mean "any non-living resources present in outer space, including minerals and water"⁴¹². The law also made provisions for intellectual property rights, managing risks and crises, liability, insurance, sanctions and penalties, dealing with national security threats, and mechanism for settlement of grievances against the decision of the agency.

To demonstrate its commitment to developing a robust legal framework for the space sector consistent with the UAE's Space Strategy 2030, the Cabinet issued guidelines concerning space resources regulations⁴¹³. Under the new regulations, space activities include "activities that target the identified area, including its discovery, making an impact thereon, using, or utilizing it, in accordance with the provision of Article (4) of the Act"⁴¹⁴. On the other hand, space resources activities mean:

Activities related to the exploration, exploitation and use of Space Resources, whether for commercial, scientific or other purposes, and include extracting, recovering, refining, processing, benefiting from, owning, purchasing, selling, trading, transporting or storing Space Resources, as well as activities related to logistics, performed

⁴⁰⁸The Government of UAE. (2019). Federal Law No. (12) on the Regulation of the Space Sector, UAE Official Gazette, Issue No. 669, p.111.

⁴⁰⁹*Ibid*, Art 2 (1).

⁴¹⁰*Ibid*, Art 2 (2), and (3).

⁴¹¹*Ibid*, Art 3 (1-3).

⁴¹²*Ibid*, Art 1

⁴¹³Cabinet Regulation No. (19) of 2023 Concerning Space Resources Regulations. Available at <https://uaelegislation.gov.ae/en/legislations/1634/download>, accessed on 02/04/24.

⁴¹⁴*Ibid*, Article 1, Space Resources.

in the specified area, such as transporting, storing, or supplying Space Resources⁴¹⁵.

Article 4 provides that applicable conditions including the duty of carrying space activities in a sustainable manner and in compliance with UAE's international obligations. Without prejudice to international obligations, space resources may be explored, exploited or used by conducting space resources activities⁴¹⁶. Provided that, the operators have the rights, recognized under national laws applicable in the UAE, over any space resources that the operators have explored, exploited or used through their space resources activities, as authorized by the Agency⁴¹⁷. These regulations recognized property rights over space resources to include, "in particular, the right to own, buy, sell, trade, transfer, store, use, or dispose of space resources extracted in the context of space resources activities"⁴¹⁸.

1.6.4 Japan

In Japan, a wide variety of government agencies are involved in the space sector. Commercial recovery of space resources is permitted under the Act on the Promotion of Business Activities for the Exploration and Development of Space Resources⁴¹⁹. The purpose of the Act is to ensure the accurate and smooth implementation of conventions concerning the development and use of outer space⁴²⁰. Under the Act, space resources are mineral and other natural resources that exist in outer space, including the Moon and other celestial bodies⁴²¹. Consequently, exploration and development of space resources include examination of the existence of space resources that contribute to mining, extraction and other similar activities specified⁴²², and mining of space resources and related processing, storage and other acts specified by Cabinet Officer Order⁴²³. The Act also provides that a person who conducts business activities related

⁴¹⁵*Ibid.*, Space Resources Activities.

⁴¹⁶*Ibid.*, Article 7 (1).

⁴¹⁷*Ibid.*

⁴¹⁸*Ibid.*, Article 7 (2).

⁴¹⁹Act on Promotion of Business Activities Related to the Exploration and Development of Space Resources No.83 of 2021. Published in the Japanese Official Gazette on June 23, 2021; An Act on the Promotion of Business Activities for the Exploration and Development of Space Resources, NO. 83 OF December 23, 2021, (Tentative Translation). Available at <https://www.japaneselawtranslation.go.jp/en/laws/view/4332/en>, accesses on 28/03/24.

⁴²⁰ *Ibid.*, Article 1.

⁴²¹ *Ibid.*, Article 2 (i).

⁴²² *Ibid.*, Article 2 (ii), (a).

⁴²³ *Ibid.*, Article 2 (ii), (b).

to the exploration and development of space resources shall acquire the ownership of space resources that have been mined in accordance with the business activity plan pertaining to the license for exploration, and development of space resources, by possessing the said space resources with the intention to own⁴²⁴ them.

While enforcing the provisions of the Act, the Japanese government is mandated to ensure sincere implementation of treaties and other international conventions that Japan concluded⁴²⁵, through establishment of internationally harmonized system on the exploration and development of space resources, in collaboration with foreign governments and other international frameworks⁴²⁶. Government is also expected to take necessary measures to ensure the advancement of international information sharing, international coordination, and international alignment with regards to business activities related to exploration and development of space resources⁴²⁷.

1.7 Legal Framework for Space Science and Technology Exploration in Nigeria

To implement its international obligations pursuant to article VI of the Outer Space Treaty, the government of Nigeria sets up a space research and development Agency in 1999, approved the National Space Policy (NSP) in 2000, and adopted a 25-year roadmap of action from 2005 to 2030. The roadmap is targeted at achieving indigenous capabilities in building and launching of satellites, acquiring capabilities in rocketry propulsion system, sending Nigerian astronauts into space, developing spin-off processes, commercialisation of space exploration, and launching satellites from Nigerian launch pad⁴²⁸.

Consequently, the president assented to a bill titled “National Space Research and Development Agency, Act, 2010”. The Act established the National Space Council (herein called the Council), and an Agency to implement its provisions. Section 35 of the Act provides that “Council may make regulations generally for the purpose of giving effect to the provision of the Act, facilitating the discharge of the Agency’s functions or

⁴²⁴ *Ibid*, Article 5.

⁴²⁵ *Ibid*, Article 6.

⁴²⁶ *Ibid*, Article 7 (1).

⁴²⁷ *Ibid*, Article 7 (2).

⁴²⁸ National Space Research and Development Agency, Federal Ministry of Science Technology (2020). *Annual Report, 2020*, (pp.1-118). Abuja: NASRDA, p. 1.

pursuing the Agency objectives”. It was reported that “Nigerian national space law presents another interesting addition to the growing body of national legislation handling the entry of private space activities in outer space and the realm of space activities”⁴²⁹. In the short, and medium-term implementation of Nigeria’s national space programme, international collaborations with Surrey Satellite Technology Limited (SSTL), NASA, China Great Wall Industry Corporation (CGWIC), RASCOSMOS and other global space partners have resulted in the high-level training and capacity building of over 500 Nigerian engineers and scientists in the past 20 years⁴³⁰.

In view of increasing participation of non-governmental entities in space exploration activities, UNCOPUOS passed a resolution⁴³¹ that provides some recommendations, or appropriate actions needed to be taken by states with respect to authorization, and supervision of private space activities. These recommendations are elements that may be considered as appropriate by states when enacting regulatory frameworks for national space activities, considering their specific needs and requirements. They include provisions on scope of application, jurisdiction and control, authorization, conditions for authorization, supervision, registration, insurance, and transfer of space objects.

The Regulations on Licensing and Supervision of Space Activities, 2015⁴³² (hereinafter called “the regulations”), was adjudged to be a great leap forward in Nigeria’s quest to develop and harness⁴³³ its full potentials in the global space economy. To ensure compliance, responsibilities, and secure ethical practices in the space domain, the new licensing regime empowers the Agency to license entities, or body

⁴²⁹Von der Dunk, F. G. (2017). The Second African National Space Law: The Nigerian NASRDA Act and the Draft Regulations on Licensing and Supervision. *Proceedings of the International Institute of Space Law*, Vol.59, pp547-559.

⁴³⁰Abdullahi, M. H. (2020). *Exploring Space Technology for Sustainable Development and the Benefits of International Research Collaborations*. United Nations Commission on Science and Technology for Development Twenty-third Session (Virtual Meeting), Geneva, 10th-12 June, 2020.

⁴³¹ UNCOPUOS, (2013). *Recommendations on National Legislation Relevant to the Peaceful Exploration and use of Outer Space*. UN General Assembly, (68TH Session: 2013-2014), A/c.4/68/L.2.

⁴³²Regulations on Licensing and Supervision of Space Activities, 2015. Federal Government of Nigeria Official Gazette No. 106, Vol. 108, 28th September, 2021.

⁴³³Agbakoba, O. (2022). *Current Space Development in Nigeria*. Lagos: Olisa Agbakoba Law (OAL), available at <https://oal.law/current-space-development-in-nigeria>, accessed on 13/05/24.

corporates, operating space objects in Nigeria⁴³⁴. The regulations have complied substantially with the UNCOPUOS's recommendations on national regulation of space activities. However, it has failed to provide for commercial recovery of space resources—a development that stimulated private interest and investment in intermediate and established space economies. The following lines will review Nigeria's Regulations on Licensing and Supervision of Space Activities, 2015 in the light of UNCOPUOS's Recommendations on National Legislation for Peaceful use of Outer Space:

a. Scope of Application

Under the regulations, outer space is defined as any point beyond 100 km vertically above sea level, including the Moon and other celestial bodies⁴³⁵. Space objects include the component parts of any object launched, or intended to be launched into outer space, its launch vehicles, and the component parts thereof⁴³⁶. Space activity includes the operation, guidance and re-entry of space objects, into, in and from outer space, and other activities essential for the launch of, operation, guidance, and re-entry of space objects into, in and from outer space⁴³⁷. Accordingly, commercialisation of space exploration includes space activities carried out for the purpose of generating revenue or profit, whether conducted by a governmental or by a non-governmental entity⁴³⁸.

b. Jurisdiction and Control

The regulations apply to corporations registered in Nigeria, and space exploration activities that are carried out within Nigerian territory, or on a Nigerian ship or aircraft⁴³⁹. Under the Outer Space Treaty, a state party on whose registry an object is launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space, or on a celestial body⁴⁴⁰. It follows therefore, that ownership of objects launched into outer space are not affected

⁴³⁴ Isah, Y. A. (2022). *Regulations on Licensing and Supervision of Space Activities*. available at https://central.nasrda.gov.ng/?space_id=2602, accessed on 15/05/24.

⁴³⁵ Regulation on Licensing and Supervision of Space Activities, 2015, *Op cit*, Section 44

⁴³⁶ *Ibid*

⁴³⁷ *Ibid*

⁴³⁸ *Ibid*

⁴³⁹ *Ibid*, Section 2 (1 &2)

⁴⁴⁰ Outer Space Treaty, 1967, Article VIII

by their presence in outer space. In effect, Nigeria's jurisdiction over space objects extends to all space objects launched by corporations registered in Nigeria, or corporations carrying out space exploration activities in Nigerian territory, or on a Nigerian ship or Aircraft.

c. Authorization of Space Activities

According to section 4 of the regulations, a person to whom the regulations apply shall only carry out space exploration activities under the authority of a license granted by the Council⁴⁴¹. Space activities authorized by the regulations include launch facility permit, and launch permit. Thus, the Council is empowered to issue a launch facility permit to a person or a body corporate to cover construction, and operation of a launch facility, a particular kind of launch vehicle, and a particular kind of flight paths⁴⁴² in Nigeria. Upon application in the prescribe form, the Council may grant a launch permit to a person authorizing the launch of space object, a particular series of launches, and permit that a particular space object be returned in connection with the launch or launches, to a specific place, or area in Nigeria⁴⁴³.

d. Conditions for Authorization

Space activity shall not cause environmental damage to the Earth or outer space or any part, directly or indirectly⁴⁴⁴. Before commencing space activity, a licensed operator must conduct Environmental Impact Assessment (EIA)⁴⁴⁵ to ensure that all activities are carried out in such a manner as to avoid generation of space debris⁴⁴⁶. Council may by order direct any person to serve a notice of his application to any government institution, or other person, or authority who has an interest in the proposed activity, provided that the applicant shall allow such institution, person or authority a reasonable time to submit representation to the Council with regard to the application⁴⁴⁷.

⁴⁴¹ *Ibid*, Section 4

⁴⁴² *Ibid*, Section 12

⁴⁴³ *Ibid*, Section 20

⁴⁴⁴ *Ibid*, Section 9 (1)

⁴⁴⁵ *Ibid*, (2)

⁴⁴⁶ *Ibid*, Section 10

⁴⁴⁷ *Ibid*, Section 7 (a)

To grant a license, Council must be satisfied that approving the license will; not jeopardize public health, safety of persons and property, the activities will be consistent with Nigeria's international obligations, the activities will not impair national security⁴⁴⁸. The Council may by order exempt other persons or activities from the requirement of a license if it is satisfied that the requirement is not necessary to secure compliance with Nigeria's international obligations⁴⁴⁹. However, where the Council refuses to grant license, such shall be communicated to the applicant in writing stating the reason for refusal⁴⁵⁰.

e. Supervision of Space Activities

The Council is empowered to from time to time appoint such inspectors as may be deem necessary to ensure that the provision of the regulations is complied with⁴⁵¹. An inspector is a person suitably qualified and possesses the necessary qualification and expertise to enable him perform the function of an inspector⁴⁵² of space activities. An inspector, with the written authority of the Council, may enter into any launch facility where the Council has reason to believe that an activity to which these regulations apply are carried out, with the necessary equipment, and in relation to that facility conduct such inspections and investigation as he may deem necessary⁴⁵³.

An offence is committed under the regulations where: a person carries on an activity without license, falsifies record for himself or while acting as an agent of another for the purpose of obtaining license, or being a holder of a license fails to comply with the condition of the license⁴⁵⁴. Other offences include; failing to comply with the terms of a launch facility permit, intentional obstruction of a Launch Safety Officer from inspecting a facility, launching of space object without authorization, or failing to comply with the regulations as may be prescribed⁴⁵⁵.

f. Registration of Space Objects

⁴⁴⁸ *Ibid*, Section 5 (2), (a, b, c)

⁴⁴⁹ *Ibid*, Section 4 (3)

⁴⁵⁰ *Ibid*, Section 5 (3)

⁴⁵¹ *Ibid*, Section 41 (1)

⁴⁵² *Ibid*, 41 (2)

⁴⁵³ *Ibid*, 41 (4), b

⁴⁵⁴ *Ibid*, 43 (a, b, c)

⁴⁵⁵ *Ibid*, (d, e, f, & g)

Both NASRDA Act and the regulations provided for the maintenance of a national registry of objects launched into outer space. The council is obligated to maintain a register of space objects, and share entries in the register with the Secretary-General of the United Nations⁴⁵⁶. The register is available for inspection by any person upon payment of such fees as the council may prescribe⁴⁵⁷. The liability convention obligated all state parties to register every object that is launched into outer space. Hence, a state that launches or procures the launching, or on whose territory or facility an object is launched in referred to as a launching state. Where there are two or more launching states, an agreement must be executed between the parties to determine the launching state⁴⁵⁸. Information to be entered in the register include; (1) name of the launching state, or private launching entity, a natural person or legal person, (2) registration number of the space object, (3) date, territory, and location of launch, (4) orbital parameter, including nodal period, inclination, apogee and perigee, and (5) general information about the space object⁴⁵⁹.

g. Insurance

Any person to whom the regulations apply shall take out an insurance policy to the sum of at least \$15,000,000.00 (fifteen million) or its equivalent for damages that may be caused to a third party. Such persons shall indemnify the federal government against any liability incurred by the government in respect of any damage, or loss arising out of their space activities. However, this requirement does not apply to government space activities.

h. Transfer of Space Objects

A license is valid only for the type of space operations indicated on it, and it shall not be transferred or sold to another without a written consent of the Council⁴⁶⁰. Provided that the transfer shall take effect from the time specified in the written consent, and the license shall continue to cover the same activity⁴⁶¹, while the period for

⁴⁵⁶ Section 11 (1)

⁴⁵⁷ *Ibid*, (3)

⁴⁵⁸ *Ibid*, (4)

⁴⁵⁹ *Ibid*, (5)

⁴⁶⁰ *Ibid*, Section 8 (1)

⁴⁶¹ *Ibid*, (2, 3,4)

which it was granted shall continue to run despite the transfer⁴⁶². It is pertinent to also state that the Council has the power to revoke, vary or suspend a license⁴⁶³ where necessary.

1.8 Conclusion

1.8.1 Summary

While the UN treaties on space exploration had prohibited national appropriation of outer space including the Moon and other celestial bodies, it did not expressly prohibit commercial recovery of space resources. In order to provide regulatory certainty for the private sector consideration of investment opportunities in the new space economy, national governments in intermediate and established space economies are enacting new legislations around recovery and development of space resources. This has stimulated interests, and investment from large corporations and venture capitalist in countries with robust legal framework for commercial recovery and development of space resources.

Even though Nigerian national space law had presented another interesting addition to the growing body of national legislation handling the entry of private space activities in outer space, and the realm of space activities, not providing for mining rights will hinder it from participating in Africa's over \$10 billion worth space economy by 2025, and over \$1 trillion global space economy by 2040. This development has impeded Nigeria's capacity for accessing space resources, and underscores the need for regulatory reforms to bring Nigeria's legal framework up to speed with the current development in the new space industry. Since the objectives of the US-led Artemis Programme and the China led ILRS are not mutually exclusive, Nigeria stands the chance to advocate for synchronization of the two documents to arrive at a generally acceptable scheme of governance for space resources.

1.8.2 Findings

⁴⁶² *Ibid*, (5)

⁴⁶³ *Ibid*, (6)

Despite the progress made in implementing Nigeria's obligations under international space law treaties, some regulatory gaps and challenges had stunted the growth of its space industry. One of such challenges is the absence of rights to commercial recovery of space resources, or property rights over extractable resources from outer space. Lack of clarity about property rights constitutes a disincentive to private investment in space, and a stimulant for illegal space exploration activities.

The legal framework for space exploration in Nigeria has substantially complied with the recommendations on national legislation relevant to peaceful exploration and use of outer space. However, commercial space exploration activities have not emerged—a situation that impeded sustainable management of commercial space exploration activities, and facilitated illegal operation of space objects. By participating in the NASA-led Accords, Nigeria has tacitly supported commercial recovery of extractable resources from outer space.

This study has also shown that Nigeria's legal framework for space exploration does not align with best practices of intermediate and established space economies like the USA, Luxemburg, UAE, and Japan. Although stakeholders in the upstream sector of the space economy have the right to set up launch facilities, build space objects, launch and operate satellite systems, there are no adequate incentive given to lure investment into the sector. Consequently, corporations have continued to carryout space exploration activities illegally.

1.8.3 Recommendations

For effective participation in the new space economy, some policy and regulatory reforms in Nigeria's legal framework for space exploration are needed. Consequently, this study recommends the amendment of Regulations on Licensing and Supervision of Space Activities, 2015 to grant the rights for commercial recovery and development of space resources to duly licensed corporations who carry out space exploration activities in Nigerian territory, on Nigerian Ships, or Aircrafts.

To bring Nigeria's legal framework for space exploration up to speed with development in the global space industry, this study recommends the ratification of the Artemis Accords, and alignment of Nigeria's national space policy with the objectives of NASA led collaboration for sustainable utilisation of space resources. This will foster international cooperations in that regards.

As an active player in the global space industry with a legal framework that encouraged private sector investment in the upstream sector of the space economy, Nigeria stands a chance to strengthen its institutional capabilities to enable them implement the law and enforce sanctions on erring corporations. In addition, while participating in the global forum for deliberations on sustainable utilization of space resources, Nigeria should support the unification of the principles of the Artemis programme with that of the ILRS to enhance wider acceptability of a uniform codes for space resources governance.

References

- Abdullahi, M. H. (2020). *Exploring Space Technology for Sustainable Development and the Benefits of International Research Collaborations*. United Nations Commission on Science and Technology for Development Twenty-third Session (Virtual Meeting), Geneva, 10th-12 June, 2020.
- Agbakoba, O. (2022). *Current Space Development in Nigeria*. Lagos: Olisa Agbakoba Law (OAL), available at <https://oal.law/current-space-development-in-nigeria>, accessed on 13/05/24.
- Bilal, M. (2024). *The Advent of Astropolitical Alliances*. Space News. Available at <https://spacenews.com/advent-astropolitical-alliances/>, accessed on 26/05/24.
- China National Space Administration (CNSA), & Russia State Space Corporation (ROSCOSMOS), (2021). *International Lunar Research Station (ILRS): Guide for Participation*. Vol.1.0, June, 2021. Available at <https://www.cnsa.gov.cn/english/n6465652/n6465653/c6812150/content.html>, accessed on 19/06/24.
- Cilliers, J. et al (2023). *Toward the Utilization of Space Resources in Space: Knowledge Gaps, Open Questions, and Priorities*. Doi:10.1038/541526-023-00274-3.
- Conti, P. et all (2017). Luxembourg Space Policy. In: Schneider, E (Ed.), *Luxembourg Space Capabilities: Turning Innovation into Business*, (pp.6-7), available at <https://www.luxinnovation.lu/space>, accessed on 01/04/24.
- Costello, Tom & Gregorian, D. (2023). *Space Race 2.0: Russia, India, China and the US are*

- Heading for the Lunar South Pole.* NBC News, available at <https://www.nbcnews.com/science/space/russia-india-china-us-are-heading-lunar-south-pole-rcna100495>, accessed on 16/06/24.
- Dalton, T. R. (2010). *Developing the Final Frontier: Defining Private Property Rights on Celestial Bodies for the Benefit of All Mankind.* Cornell Law School Graduate Student Papers, p. 15.
- Dello-lacovo, M. and Saydam, S. (2023). *Humans have Big Plans for Mining in Space- But there are Many Things Holding Us Back.* *The Conversation Africa, Inc.* Available at <https://theconversation.com/humans-have-big-plans-for-mining-in-space-but-there-are-many-things-holding-us-back-181721>, accessed on 03/06/24.
- Dinkin, S. (2004). *Property Rights and Space Commercialisation.* Available at <https://www.thespacereview.com/article/141/1/>, accessed on 25/05/24.
- Froehlich A. (2018). *Space Resources Utilisation: A view from an Emerging Space Faring Nation.* In: European Space Institute (Ed), *Studies in Space Policy.* Cham, Switzerland: Springer International Publishing AG, p. 32.
- Froehlich, A. et al (2018). *National Space Legislation: A Comprehensive and Evaluative Analysis.* Vienna: European Space Policy Institute, <https://doi.org/10.1007/978-3-319-70431-9>, p.3.
- Gerald, B. S. (2015). *Space Resources Utilization: Near-term Mission and Long-term Plans for Human Exploration.* Available at <https://store.cim.org/fr/space-resources-utilization-near-term-mission-and-long-term-plans-for-human-exploration/>, accessed on 27/06/24.
- Herzfeld, H. R. and Von der Dunk, F. (2005). *Bringing Space Law into Commercial World: Property Rights Without Sovereignty.* Space, Cyber, and Telecommunication Law Programme Faculty Publication, 15. Available at <https://digitalcommons.unl.edu/spacelaw15>, accessed on 27/06/24.
- Hew, L. (2023). *Can a Country or Business Claim Ownership of the Moon, Meteorites or Even Space?* University of South Wales: Canberra. Available at <https://www.usw.edu.au/news/2023/01/can-a-country-or-a-business-claim-ownership-of-the-moon-meteorites-or-even-space?>, accessed on 27/06/24.
- Isah, Y. A. (2022). *Regulations on Licensing and Supervision of Space Activities.* available at https://central.nasrda.gov.ng/?space_id=2602, accessed on 15/05/24.
- Leotaud, V. R. (2021). *Scientists Explore the Possibility of Mining Iron, Nickle, Cobalt-rich Near-Earth-Asteroids.* Available at <https://www.mining.com/scientist-explore-the-possibility-of-mining-iron-nickle-cabalt-rich-near-earth-asteroids/>, accessed on 02/06/24.
- Listner, M. J. (2018). *A Briefing on the Legal and Geopolitical Facets of Space Resources.* In

- James, T. (Ed.). *Deep Space Commodities Exploration, Production and Trading*, <https://doi.org/10.1007/978-3-319-90303-3>.
- Livingstone, M D. (2000). *The Ethical Commercialisation of Outer Space*. Tiburon CA: Livingstone Business Solutions. Available at http://www.spacefuture.com/archive/the_ethical_commercialization_of_outer_space.shtml, accessed on 25/05/24.
- National Aeronautics and Space Administration (NASA), (2020). *Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes*. Section 10 (4), available at <https://www.nasa.gov/artemis-accords/>, accessed on 27/06/24.
- National Aeronautics and Space Administration (NASA), (2023). *In Situ Resources Utilisation*. Available at <https://www.nasa.gov/mission/in-situ-resources-utilization-isru#>, accessed on 27/06/24.
- National Aeronautics and Space Administration (NASA), (2004). *The Vision for Space Exploration*. Washington DC: 20546 NP-2004-01-334-HQ, pp.1-32. Available at www.nasa.gov/pdf/55583main_vission_space_exploration2.pdf, accessed on 8/01/2023.
- NewSpace Africa Industry Report, 2019 Edition. Available at <https://www.Africanews.space>, accessed on 07/03/21, p. 1
- Odeyemi, J. (2022). Nigeria Signs the Artemis Accords at U.S- Africa Leaders' Summit. *Daily Trust Newspaper* 14 December, 2022. Available at <https://dailytrust.com/nigeria-signs-artemis-accords-at-u-s-africa-leaders-summit>, accessed on 27/04/2024.
- Stanley, M. (2019). *Investigating in the Final Frontier: The New Space Economy*. Haver Analytics, Research Forecasts. Retrieved from <http://www.morganstanley.com/ideas/investigation-in-space> on 14th September 2020.
- Seedhouse, E. (2016) *Mars via the Moon: The Next Giant Leap*. Chichester, UK: Springer Praxis Publishing, p.59.
- Seedhouse, E. (2008). *Space X: Making Commercial Spaceflight a Reality*. New York: Springer Praxis Publishing, p.18.
- Shaheen, K. (2020). *First Mars Mission from UAE Aims to Inspire a New Generation of Space Scientist*. Available at <https://www.nationalgeographic.com/sciences/2020/07/uae-mission-inspire-new-generation-of-space-scientist>, accessed on 30/09/23.
- Spudis, P. D. (2016). *The Value of the Moon: How to Explore, Live and Prosper in Space, Using the Moon Resources*. Washington DC: Smithsonian Books.
- Taylor, D. (2024). *How Space Exploration Boosts the Global Economy*. Available at

<https://www.fastcompany.com/91036013/how-space-exploration-boosts-the-global-economy>, accessed on 11/04/24.

Tkatchova, S. (2018). *Emerging Space Markets*: Verlag GmbH Germany: Microcosm Press

& Springer, p.8.

Von der Dunk, F. G. (2017). The Second African National Space Law: The Nigerian NASRDA Act and the Draft Regulations on Licensing and Supervision. *Proceedings of the International Institute of Space Law*, Vol.59, pp547-559.

Yarlagadda, S. (2022). *Economics of the Stars: The Future of Asteroid Mining and the Global Economy*. Harvard International Review. Available at <https://hir.harvard.edu/economics-of-the-stars/>, accessed on 02/06/24.

Young, M. (2019). *Bad Idea: The Wolf Amendment (Limiting Collaboration with in Space)*. Washington DC: Center for Strategy and International Studies (CSIS) International Security Programme. Available at <https://defence360.csis.org/bad-idea-the-wolf-amendment-limiting-collaboration-with-china-in-space/>, accessed on 26/05/24.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

APPRAISING STATE GOVERNANCE OF ELECTRICITY IN NIGERIA

Alfred M. Tijah

Lecturer, Department of Public Law, Faculty of Law, Benue State University Makurdi

atijah@bsum.edu.ng , 07039161957

Abstract

Electricity is a major propeller of industrialisation and virtually all sectors of a nation's economy depend largely on electricity to thrive. Although the regulation of Nigerian Electricity Supply Industry is the shared responsibility of the Federal and State Governments by dint of paragraphs 13 and 14 of the Second schedule to the Constitution Federal Republic of Nigeria (CFRN), 1999 as amended, the Federal Government monopolised the sector and only recently in 2005 privatised management of the industry while maintaining electricity regulation with State Governments standing aloof. Recent development in the Nigerian electricity industry including the amendment of the above Constitutional provisions by the CFRN 1999 (Fifth Alteration) Act, 2023 and the enactment of Electricity Act, 2023 nudged States to assume their role in electricity governance by first crafting a legal framework harmoniously with the Electricity Act, 2023. However, while few States have attempted participation in electricity governance, a majority are standoffish. This paper adopting doctrinal research methodology in examining the extent to which the provisions of the Electricity Act has been incorporated at state level and its implications on Nigerian electricity industry found that, States reserve greater powers in electricity governance sufficient to advance or exacerbate the woes of the industry. For a viable electricity industry, State governance of electricity must transcend regulation to active investment. States must concurrently incentivise investment, develop competition, close the metering gap, advance clean energy and higher renewable energy mix rather than employ the multi-trillion-naira electricity industry for fiscal revolution that may stagnate the industry.

Keywords: Competitive Electricity Market, Energy Law, State Electricity, Renewable Energy

1.1 INTRODUCTION

Nigeria is a federation comprising of Federal, State and Local Governments. Electricity being public utility is one of the basic social amenities regulated by

government in Nigeria for the overall welfare of the population in the country.⁴⁶⁴ The Federal Government of Nigeria had for decades enjoyed monopoly over electricity generation, transmission and distribution. Electricity in the country from its first generation in 1896 and after independence was centrally controlled. The Federal Government wholly owned all electricity undertakings and in 1972 with the promulgation of the National Electricity Power Authority Decree⁴⁶⁵ unified all its electricity undertaking under the National Electric Power Authority (NEPA).⁴⁶⁶ As characteristics of many undertakings that enjoy monopoly, NEPA abused its monopoly position by failing to maintain existing equipment and installations; or invest in the expansion of electricity capacities; as well as pay any attention to electricity consumers welfare culminating in chronic power shortages and poor power quality supply rendering millions of households without access to grid electricity.⁴⁶⁷ Industries were equally compelled to generate their own energy for survival, prompting many to windup and some to relocate to other Africa countries.⁴⁶⁸ Access to grid electricity is a major challenge in the Nigeria electricity supply industry. According to the Energy Progress Report 2022, Nigeria has the lowest global access to electricity, having about ninety-two (92) million persons out of its over two-hundred (200) million population without access to electricity.⁴⁶⁹ The electricity industry has continued to deteriorate with escalating debt despite the Federal Government's injection of several billions of naira annually in payment of subsidy to buoy up the sector.⁴⁷⁰

Prior to 2023, the Nigeria Constitution listed electricity under the concurrent legislative list and empowered States in the country to regulate electricity generation,

⁴⁶⁴ Alfred M Tijah and Friday Okpanachi Ekpa, 'A Jurisprudential Examination of the Status of Successor Companies Under Nigerian Electricity Supply Industry' *Journal of Private and Property Law, Rivers State University* (2023) 20(1), 4

⁴⁶⁵ National Electricity Power Authority Decree No. 4 of 1972

⁴⁶⁶ Alfred M Tijah, 'Periscoping Competition in the Nigerian Electricity Supply Industry' *U.I Law Journal* (2023) (13) 174

⁴⁶⁷ *ibid.*

⁴⁶⁸ Victor Okolobah and Zuhaimy Ismail, 'On the Issues, Challenges and Prospects of Electricity Power Sector in Nigeria' (2013) (2) (6) *International Journal of Economy, Management and Social Sciences* 410

⁴⁶⁹ Legal Desk Nigeria, 'Subsidy Removal: Expert Warns as Nigerians Convert Power Generators from Petrol to Gas' <<https://legaldeskng.com/subsidy-removal-expert-warns-as-nigerians-convert-power-generators-from-petrol-to-gas/>> accessed 2 July, 2024.

⁴⁷⁰ Harrison Edeh., 'How States Can Improve on Access to Power, Investments with 2023 Electricity Act' (June 10, 2023) <<https://www.icirnigeria.org/how-states-can-improve-on-access-to-power-investments-with-2023-electricity-act/>> accessed 2nd June, 2024;

transmission and distribution in areas not covered by the national grid regulated by the Federal Government. The States however paid little or no attention to electricity governance and ignored the plights of electricity consumers in the country. The Federal Government of Nigeria on realising the damaging consequence of its monopoly over the electric power sector, enacted the Electric Power Sector Reform (EPSR) Act, 2005 which paved the way for the unbundling and privatisation of the power sector, allowing private investors into the electricity industry while divesting the Federal Government of its holdings in electricity generation and distribution with serious measures recently in 2024 made at divesting the Federal Government of its transmission responsibilities.

Furthermore, to stimulate States participation in electricity governance, the Federal Government enacted the Electricity Act 2023 which repealed and replaced the EPSR Act 2005 and made transitional provisions transferring regulatory responsibilities of the electricity market within a State from the Federal Government and its agencies to States and their authorities where the States have set up the necessary statutory framework and machineries to take over. The CFRN 1999 as amended was amended in 2023 by the CFRN, 1999 (Fifth Alteration) Act, 2023.⁴⁷¹ This constitutional amendment expanded the powers of States to regulate electricity even in areas covered by the national grid hitherto regulated by the Federal Government within a State.

Despite the wide constitutional powers and nudge through statutory provisions, many States in Nigeria are still unmoved to participate in electricity governance depriving electricity consumers the benefits of State regulation and participation that may bring into fruition the attempted competitive electricity market initiated by the Federal Government of Nigeria. With both the Federal and State Governments wielding constitutional powers over same issues on electricity regulation, there may arise conflicting statutory provisions and regulatory conflict.

Employing doctrinal research methodology in discussing the thesis of this paper this work is compartmentalised into four parts: The first part is the introduction, followed by conceptual framework in the second part. The third part discussed the legal framework for state participation in the Nigerian electricity supply industry and the

⁴⁷¹ No. 17 of 2023.

work is concluded in the fourth part with findings outlined and recommendations made.

2.1 CONCEPTUALISATION OF ELECTRICITY

The concept ‘electricity’ has been defined by a number of dictionaries in closely related manner. According to the Cambridge Dictionary,⁴⁷² electricity is a form of energy that can be produced in several ways and that provides power to devices that create light, heat *etcetera*.⁴⁷³ The Oxford Advanced Learner’s Dictionary⁴⁷⁴ describe electricity as a form of energy from charged elementary particles, usually supplied as electric current through cables or wires for lighting, heating, and driving machine. According to the Lexico Uk Dictionary, electricity is a form of energy resulting from the existence of charged particles (such as electrons or protons), either statically as an accumulation of charge or dynamically as a current.⁴⁷⁵ Two types of electricity are evident from the above definitions, static electricity and current electricity. Static electricity is made or caused by rubbing together two or more objects and making friction, it occurs when electrical charges build up on the surface of a material. The result of a build-up of static electricity is that objects may be attracted to each other or may even cause a spark to jump from one to the other.⁴⁷⁶

Current electricity on the other hand is the flow of electric charge across an electrical field. Current is the rate of flow of electrons. It is produced by moving electrons and it is measured in amperes. Unlike static electricity, current electricity

⁴⁷² Cambridge University Press, ‘Cambridge Dictionary’ <<https://dictionary.cambridge.org/dictionary/english/electricity>> accessed on 21 May, 2024.

⁴⁷³ *ibid*

⁴⁷⁴ AS Hornby and Others, (n83) 374.

⁴⁷⁵ Oxford, *Lexico UK Dictionary* <<https://www.lexico.com/definition/electricity>> accessed on 21 December, 2021

⁴⁷⁶ Electricity Forum, ‘Types of Electricity - Modern Methods’ <<https://www.electricityforum.com/types-electricity.html>> accessed on 21 December, 2021.

must flow through a conductor, usually copper wire.⁴⁷⁷ This paper is principally concerned with current electricity that flows in wire, which is generated in commercial quantity and supplied for the use of the general public or a specified community. Electricity in this paper means a form of energy, conducted through wire to provide power for lighting, heating, and operating machines or devices. Electricity in this regard does not just occur like lightning, it is consciously generated from different energy sources like coal, oil, biomass, nuclear energy, solar, wind and so on.

3.1 STATE GOVERNANCE OF ELECTRICITY IN NIGERIA

Nigeria is a federation consisting of the Federal, State and Local Governments.⁴⁷⁸ The country has thirty-six (36) States and the Federal Capital Territory (FCT) Abuja.⁴⁷⁹ The FCT is equally considered or administered as a state by the Federal Government in addition to overseeing the country as a whole. The powers of the above three (3) tiers of government to make laws for Nigeria are contained under section 4 of the CFRN 1999 as amended. Section 4 of the Constitution basically divide these powers into Exclusive Legislative List set out in part I of the Second Schedule to the Constitution; and Concurrent Legislative List set out in the first column of part II of the Second Schedule to the Constitution. The Federal Government of Nigeria have the exclusive powers to legislate over matters listed in the Exclusive Legislative List,⁴⁸⁰ and shares with the various States in the country powers to make laws on matters listed in the Concurrent Legislative List.⁴⁸¹ Matters pertaining to and relating to electricity generation, transmission and distribution are contained under the Concurrent Legislative List. This means that the Nigerian Constitution shares regulatory powers over the electric power

⁴⁷⁷ *ibid.*

⁴⁷⁸ CFRN 1999 as amended, ss2(2) and 3(2)

⁴⁷⁹ The thirty-six States are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara States.

⁴⁸⁰ CFRN 1999 as amended, s4(2) and (3)

⁴⁸¹ CFRN 1999 as amended, s4 (4)(a) and (7)(b)

sector between the Federal⁴⁸² and State⁴⁸³ Governments, while the Local Governments are without direct role in electricity governance.

Specifically, that the authority of the Federal Government to administer the Nigerian electricity supply industry is limited to: the establishment of electric power stations in Nigeria;⁴⁸⁴ inter-state generation and transmission of electricity; transnational generation, transmission and distribution of electricity; the promotion and establishment of a national grid system; and the right to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy. Paragraph 13 of the Concurrent Legislative List provides for these powers as follows:

13. The National Assembly may make laws for the Federation or any part thereof with respect to-
 - (a) electricity and the establishment of electric power stations;
 - (b) the generation and transmission of electricity in or to any part of the Federation and from one State to another State;
 - (c) the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation;
 - (d) the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation;
 - (e) the promotion and establishment of a national grid system; and
 - (f) the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.⁴⁸⁵

The powers of States to electricity governance in Nigeria are contained under paragraph 14 of the Concurrent Legislative list.⁴⁸⁶ Prior to the year 2023 the said paragraph 14 only empowered the various States in the country to regulate electricity generation, transmission and distribution in areas not covered by the national grid in the State since the national grid was reserved primarily under the regulatory authority of the Federal Government. In 2023 however, paragraph 14 was amended pursuant to

⁴⁸² CFRN 1999 as amended 2nd Schedule, part II, para 13.

⁴⁸³ CFRN 1999 as amended 2nd Schedule, part II, para 14.

⁴⁸⁴ with the right as to who may establish hydroelectricity squarely within the precinct of the Federal Government

⁴⁸⁵ CFRN 1999 as amended 2nd Schedule, part II, para 13.

⁴⁸⁶ CFRN 1999 as amended 2nd Schedule, part II, para 14.

the provisions of the CFRN, 1999 (Fifth Alteration) Act, 2023⁴⁸⁷ to accord States powers to legislate on electricity generation, transmission and distribution in the entire State including areas covered by the national grid. paragraph 14 of the Concurrent Legislative List provides that:

14. A House of Assembly may make laws for the State with respect to
 -
 - (a) electricity and the establishment in that State of electric power stations;
 - (b) the generation, transmission and distribution of electricity to areas within that State; and
 - (c) the establishment within that State of any authority for the promotion and management of electric power stations established by the State.⁴⁸⁸

States in Nigeria by the above constitutional provisions are empowered to govern the establishment of electric power station within the State; establish State authority for the promotion and management of State electric power stations; and regulate electricity generation, transmission and distribution in the State. In addition, States in Nigeria have the exclusive powers over all other matters under the Nigerian electricity supply industry that are not expressly mentioned under the exclusive and concurrent legislative list of the Nigerian Constitution which are considered to constitute the imaginary Residual Legislative List. This supposition finds credence in the case of *Attorney-General of Lagos State v Attorney-General of the Federation*,⁴⁸⁹ where the Supreme Court of Nigeria held that the Constitution expressly created two Legislative Lists: the Exclusive Legislative List and the Concurrent Legislative with a third list on Residual Matters which is not expressly stated in the Constitution but under the exclusive competence of the State. According to the Court:

These are matters which are neither in the Exclusive List nor in the Concurrent List. Matters included in the Exclusive List are within the exclusive domain of the National Assembly to legislate upon. See section 4(3). In addition to its power to legislate in matters in the Exclusive List exclusively the National Assembly is also empowered to legislate, though not exclusively, on matters in the concurrent Legislative List. Residual

⁴⁸⁷ No. 17 of 2023.

⁴⁸⁸ CFRN 1999 as amended 2nd Schedule, part II, para 14.

⁴⁸⁹ (2013) 16 NWLR (pt. 1380) 249 at 363 (SC)

Matters which are matters not in either Exclusive or Concurrent Lists are matters within the exclusive competence of the States to legislate upon.⁴⁹⁰

The electricity sector as can be garnered from the above constitutional provisions is principally comprised of three major aspects: electricity generation, transmission and distribution. The Federal Government of Nigeria in the exercise of its Constitutional Powers enacted several laws on all these aspects of electricity and in 2023 codified or consolidated its laws pertaining to the electricity industry by enacting the Electricity Act 2023 being the extant codex on electricity in Nigeria.⁴⁹¹ Many States in Nigeria on the other hand are without a policy on electricity not to mention a law.

While States in Nigeria continue to stand aloof on electricity governance, the provisions of the Electricity Act 2023 intrude into the matters constitutionally under the exclusive competence of States to forestall vacuum is regulation. Part VI of the Electricity Act 2023 which houses sections 63- 79 makes provisions for licensing of a person to undertake electricity generation, transmission, supply, trading and system operation in Nigeria.

On electricity generation, the Electricity Act 2023 confers on the Nigerian Electricity Regulatory Commission (NERC) the regulatory powers to grant generation licence and under Section 63 criminalises the establishment of a power station for the generation of electricity exceeding one megawatt (MW) in aggregate at a site, without obtaining a licence from the NERC. Though these provisions are made without prejudice to the powers of States to regulate the same subject matters within the State, the States cannot however make any law contrary to the provisions of the Electricity Act 2023 with regards to electricity generation. This is because, the Constitution confers on both Federal and State Governments concurrent legislative powers to regulate electricity generation⁴⁹² and the Electricity Act 2023 being a federal enactment the doctrine of legislative covering the field applies. The doctrine of covering the field

⁴⁹⁰ See also *AG Abia State v AG Federation* (2006) 16 NWLR (Pt. 1005) 265 at 380-381 paras D-C; *AG Ondo State v AG Federation* (2002) 9 NWLR (Pt. 772) 222 SC; *CIL Risk & Asset Management Ltd. v Ekiti State Government* (2020) 12 NWLR (Pt. 1738) 203 SC; *FMBN v Lagos State Government* (2010) 5 NWLR (Pt. 1188) 570 CA

⁴⁹¹ The Electricity Act 2023 repealed and re-enacted the Hydroelectric Power Producing Areas Development Commission (Establishment, Etc.) Act (HYPPADEC Act) 2010 No. 7 of 2010; Nigerian Electricity Management Service Agency (NEMSA) Act, No. 6 of 2015; and the Electric Power Sector Reform (EPSR) Act, No. 6 of 2005

⁴⁹² CFRN 1999 as amended 2nd Schedule, part II, para 13(a) and 14(a).

connotes that where both the Federal and State Governments are constitutionally empowered to enact law on a subject matter, and the Federal Government adequately enacts a law on the issue, the Federal law is considered to have covered the field and a State law cannot be introduced to conflict with the Federal law.⁴⁹³ This doctrine finds expression under section 5 of the CFRN 1999 as amended which provides that ‘if any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.’

The Electricity Act 2023 is self-defeating on the issue of covering the field. Section 2(2) of the Electricity Act 2023, consciously and expressly declares the supremacy of State laws over the Electricity Act 2023 on all aspects of electricity generation, transmission, system operation, distribution, supply, retail of electricity, State electricity market and State electricity regulatory authority.⁴⁹⁴ Section 2 of the Electricity Act 2023 therefore places State laws on electricity over and above the provisions of the Electricity Act 2023. Each State in Nigeria is therefore at liberty to make laws concerning electricity and such laws where made shall supersede the provisions of the Electricity Act 2023.

The second major aspect of the Nigerian electric sector is electricity transmission. Electricity transmission entails the supply of electric energy from a power station to an electricity distribution equipment/sub-station or from one sub-station to another sub-station.⁴⁹⁵ The Nigerian Constitution confers distinct powers with regards to electricity transmission on the Federal and State Governments. The Federal Government is restricted to regulation and establishment of inter-states and transnational transmission of electricity, while States have the powers to regulate electricity transmission within the State. The Electricity Act 2023 is fittingly crafted in this regard when it provides under section 63(7) that it shall be the responsibility of a State to establish a State Electricity Board or State Electricity Authority to provide the requisite framework for the grant of licenses and investment in electricity utilities within the State and as well as grant license for mini-grids, Independent Electricity

⁴⁹³ *FIRS v AG Lagos State & Anor* (2022) LPELR-58021 (CA) 64- 66 paras A-B; *INEC v Musa* (2003) 3 NWLR (pt. 806) 72 at 204- 205; *AG Lagos State v Eko Hotels Ltd & Anor* (2017) LPELR-43713 (SC) 25-28

⁴⁹⁴ Electricity Act 2023, s2(2)(a-e)

⁴⁹⁵ CFRN 1999 as amended, 2nd Schedule, part II, para 15

Distribution Network/Independent Electricity Distribution Network Operators (IEDN/IEDNOs) and Independent Electricity Transmission Network/Independent Electricity Transmission Network Operators (IETN/IETNOs).⁴⁹⁶ The only situations where the Federal Government or its institutions may regulate electricity transmission in a State according to the Electricity Act 2023 are where a State is yet to provide the legal and institutional framework to perform such duties; or the operation of the IEDN/IEDNOs, IETN/IETNOs or electricity generation, transmission and distribution undertaking within any State of the Federation relies on any part of the national grid for its operation.⁴⁹⁷

The third aspect of the Nigeria electricity sector is distribution. Electricity distribution is the supply of electricity from a sub-station to the ultimate consumer.⁴⁹⁸ The Electricity Act 2023 makes copious provisions for the regulation of electricity distribution and licensing of Distribution Companies.⁴⁹⁹ Section 63 (2)(b) and (7)(b) of the Electricity Act 2023 empowered NERC regulate inter-state electricity distribution. However, the Federal Government of Nigeria is not expressly authorised to regulate inter-state electricity distribution or electricity distribution in any of the 36 State in Nigeria save for transnational electricity distribution.⁵⁰⁰ This is evident under the provisions of paragraph 13(b) part II of the second schedule to the CFRN 1999 as amended which expressly authorised the Federal Government to regulate electricity generation and transmission in any State in Nigeria including inter-state generation and transmission but deliberately exclude the word ‘electricity distribution’ while conferring these powers.⁵⁰¹ This may occasion dual regulation where there exist inter-state regulation, though the Electricity Act 2023 proposes the formation of Distribution Companies along stateliness.

Though it had been argued that by dint of paragraph 13(f) part II of the second schedule to the CFRN 1999 as amended, the Federal Government have powers to regulate the distribution of electricity in Nigeria, however upon a dispassionate

⁴⁹⁶ Electricity Act 2023, s63(7)

⁴⁹⁷ *ibid.*

⁴⁹⁸ CFRN 1999 as amended, 2nd Schedule, part II, para 15

⁴⁹⁹ Electricity Act 2023, s68

⁵⁰⁰ CFRN 1999 as amended, 2nd Schedule, part II, para 13(d)

⁵⁰¹ *ibid* para 13(d)

examination of the said paragraph 13(f), it only grant the Federal Government the powers to determine who may have the right to set up an electricity supply company but does not extend to the usage, workings or operation of a distribution or supply network. The paragraph grants the Federal Government the powers to enact a law like the Companies and Allied Matters Act 2020, which regulates the right of do business in Nigeria but does not actually regulate the specific business to be done. Therefore the provisions of section 63 (2)(b) and (7)(b) of the Electricity Act 2023 which suggest that NERC as a federal institution has powers over inter-state electricity distribution and is responsible for regulating electricity distribution and electricity distribution network/operators within a State where their operations relies on any part of the national grid is unconstitutional. Distribution of electricity in Nigeria is the exclusive preserve of States except transnational electricity distribution. The Constitution does not confer on the Federal Government powers to regulate electricity distribution, not even inter-state electricity distribution as the Electricity Act 2023 appears to portray.⁵⁰²

The State Government and its agencies therefore have regulatory powers over the business of electricity distribution, the Distribution Companies (DISCOs) or Independent Electricity Distribution Network/Independent Electricity Distribution Network Operators (IEDN/IEDNOs) operating in any State in the country except such State do not have the requisite legal framework and continue to stand aloof over electricity governance. The recent constitutional amendment by the CFRN, 1999 (Fifth Alteration) Act, 2023⁵⁰³ buttresses this point by expanding the powers of the State to regulate distribution of electricity even in areas covered by the national grid under subparagraph (b) of paragraph 14 of the Concurrent Legislative List. Before 2023, the Constitution provides that States only have powers to regulate ‘generation, transmission and distribution of electricity to areas not covered by a national grid system within that State.’⁵⁰⁴ In 2023, the CFRN, 1999 (Fifth Alteration) Act, 2023 amended the above provisions by deleting the phrase ‘not covered by a national grid system’ thereby granting States powers to regulate electricity distribution in areas covered by the national grid system. The 2023 alteration can thus be said to have cured the mischief

⁵⁰² Electricity Act 2023, s63 (2)(b) and (7)(b)

⁵⁰³ No. 17 of 2023

⁵⁰⁴ CFRN 1999 as amended, 2nd Schedule, part II, para s14(d)

preventing States from governing electricity distribution in areas covered by a national grid system within a State. Therefore the provision of section 68 of the Electricity Act 2023 and other relevant sections of the law relating to licensing of Distribution Companies; the construction, expansion, operation and maintenance of distribution network; the connection of consumer to electricity supply; the installation, maintenance and reading of meters, billing and collection; electricity consumer right and obligations; the retail electricity market; and other such distribution services are deemed to apply only to Abuja and transnational electricity distribution.

The provisions of the Electricity Act 2023 clearly show that the Federal Government of Nigeria intends to abandon electricity management and regulation in Nigeria. Historically this abandonment began in 2005 with the enactment of the Electric Power Sector Reform Act 2005 which began the reform of the Nigerian electricity supply industry and ensured the unbundling and privatisation of the power sector. The unbundling of NEPA as a public utility saw the formation of eighteen (18) autonomous successor companies consisting of six (6) generation companies, one (1) transmission company and eleven (11) distribution companies.⁵⁰⁵ The Federal Government relinquished all its holdings in the seventeen (17) successor generation and distribution company to private investors between 2013 to 2014,⁵⁰⁶ and is set to privatise the entirety of the transmission company this 2024. Having virtually relinquished management of the utilities, the Federal Government has now crafted the requisite legal instrument for relinquishing electricity regulation to the States. Section 2(2) of the Electricity Act 2023 grants States superiority over electricity regulation and makes provisions for the transition of election regulation to States under section 230. Section 230 provides that where a State in Nigeria enacts a law for the establishment of a State electricity market, establish a State electricity regulatory authority and appoint a governing body together with staff of the authority, the State upon informing NERC this development and requesting NERC to transfer regulatory responsibility over to the State regulator.⁵⁰⁷ Within forty-five (45) days after receiving the notification/information NERC is

⁵⁰⁵ Alfred M Tijah, 'The Role of the Minister of Power in Nigeria Electric Power Sector Reform: A Legal Perspective' *Law Digest* (2022) (1) (29) 17

⁵⁰⁶ Alfred M Tijah, 'The Role of the Minister of Power (n42) 17

⁵⁰⁷ Electricity Act 2023, s230 (2)(a)-(c)

required to draw up plans and timelines and eventually transfer regulatory responsibilities to the State regulatory authority not later than six (6) months from the first notification/request made to NERC.⁵⁰⁸

The State is also required to notify the Successor Distribution Company with franchise over electricity distribution in the State of its legal and regulatory regime with a copy sent to the National Council on Privatisation (NCP) through the Bureau of Public Enterprises, requesting them to both ensure that the successor distribution company with franchise in the State within two months incorporate a subsidiary electricity distribution company under the Company and Allied Matters Act and transfer the assts, liabilities, employees and the relevant contractual rights and obligations of the successor company in that State.⁵⁰⁹ The State shall only become seized with regulatory powers in the State only where both the Successor Distribution Company has established a State Distribution Company and NERC has transferred regulatory responsibilities to the State regulatory authority.

Although States in Nigeria have wide powers to regulate the Nigerian electricity supply industry, many States in Nigeria however have not made appreciable efforts at electricity governance except very few States like Lagos. However, the Lagos State Electric Power Sector Reform Law 2018 is outdated being fashioned in accordance with the Electric Power Sector Reform Act 2005, now repealed and replaced by the Electricity Act 2023. The Law aims at overseeing the establishment of electric power plants, generation, transmission and distribution of electricity in areas not covered by the national grid system within Lago State.⁵¹⁰ This Law thus does not recognise the wide powers accorded State Government and the fact that State laws presently supersedes the Electricity Act 2023. The provisions of the Law are largely dependent on the regulatory authorities of Federal institutions. For instance, the Lagos State Electric Power Sector Reform Law 2018 makes provision for the establishment of Lagos State Electricity Board,⁵¹¹ however the duties of the Board are mainly liaising, collaborating, obtaining the approval of NERC, NEMSA and other relevant agencies of the Federal

⁵⁰⁸ Electricity Act 2023, s230 (3)

⁵⁰⁹ Electricity Act 2023, s230 (2)(d) and (4)

⁵¹⁰ Lagos State Electric Power Sector Law 2018 s47

⁵¹¹ Lagos State Electric Power Sector Reform Law 2018, s5

Government in performing its functions relating to electricity generation, transmission and distribution within the State.⁵¹² The Lagos State regulatory authority basically act as a liaison between the State and Federal agencies in the power sector.

4.1 IMPLICATIONS OF STATES PARTICIPATION IN ELECTRICITY GOVERNANCE

States participation in electricity governance is very strategic to the transformation of the Nigerian electricity supply industry. Presently, only twelve out of the thirty-six States have in the State electricity generation plants, though not necessarily owned by the States.⁵¹³ With the States involved in electricity regulation, they will become conscious, better understand the electricity industry and the need to establish generation plants, as well as licence private investors to generate electricity. This will not only improve the powers situation in the country but it will as well promote the development of competition in the electricity market especially competitive wholesale electricity market. In the same vein, the licensing of new Distribution Companies and Independent Electricity Distribution Network Operators to operate in areas covered by the national grid will break the monopoly position occupied by the Successor Distribution Companies and introduce competitive retail electricity market in Nigeria.

State participation in electricity governance is also geared towards incentivising innovation and promoting energy mix from renewable sources. Each State in Nigeria is naturally endowed with one or more unique natural resources exploitable for renewable energy including hydro, wind, solar and biomass. For instance, most States in the Southern part of Nigeria get flooded year in year out, thus with adequate water for hydroelectricity. Nigeria is rightly position on the equator within the sunshine belt where sunlight intensity is very high and solar radiation evenly and well distributed. Though States in Northern Nigeria experiences higher solar radiation, the Southern part is equally well positioned for such too. Generally States in Nigeria, experiences a yearly average sunlight hour and yearly average solar radiation of 6.25 h/day and 5.25kWh/day

⁵¹² Lagos State Electric Power Sector Reform Law 2018, s17

⁵¹³ Ripples Nigeria, 'Only 12 States Generate Electricity for Nigeria' <<https://www.ripplesnigeria.com/12-states-generate-electricity-nigeria/>> accessed 2nd June, 2024

respectively depending on where the State is located and this is capable of generating about $1,850 \times 10^3$ GWh of renewable solar electricity annually with a solar module laid on only one percent of the Nigeria's landmass.⁵¹⁴ Owing to the different endowments of each State in Nigeria, participation of States in electricity governance will be capable of incentivising innovation in energy generation and boosting embedded generation, co-generation, hybridised generation, and the generation renewable sources to achieve the desired energy mix in the country.

State participation in electricity governance will thus liberalise the Nigerian electricity supply industry, create a competitive wholesale and retail electricity market capable of stimulating private sector investment, incentivise innovation which may culminate in reduced prices and enhance the welfare of electricity consumer.⁵¹⁵

Experiences in State participation in electricity governance in other nations around the globe buttress its importance to the electricity industry. In the United States for instance, the powers to regulate the electricity sector like in Nigeria rest with the Federal and State Governments and in some cases Local Governments. While the US Federal Government generally regulates interstate electricity transmission and wholesale electricity, the States regulate retail electricity and the operation of distribution networks.⁵¹⁶ The State Government in most cases have pre-emptive authority over the Local Governments and thus some Local Governments are allowed to regulate siting and land use issues for transmission and generation facilities based on the peculiarities of State laws.⁵¹⁷

State participation in electricity in the United States started in the 1990s. In the early 1990s, some States in the United States through legislative measures started restructuring their electricity markets. Many of these States enacted laws that impelled utilities within their domain to divest their generation assets to create a competitive

⁵¹⁴ Abdulhameed Babatunde Owolabi and Benyoh Emmanuel Kigha Nsafen and Jong Wook Roh and Dongjun Suh and Jeung-Soo Huh, 'Validating the techno-economic and environmental sustainability of solar PV technology in Nigeria using RETScreen Experts to assess its viability' *Sustainable Energy Technologies and Assessments* (2019) (36) 1

⁵¹⁵ Alfred M Tijah, 'Periscoping Competition in the Nigerian Electricity Supply Industry' (n1) 167

⁵¹⁶ Francisco Flores-Espino and Others, *Competitive Electricity Market Regulation in the United States: A Primer* (NREL 2016) 7

⁵¹⁷ Francisco Flores-Espino and Others, *Competitive Electricity Market Regulation in the United States: A Primer* (NREL 2016) 7

electricity market.⁵¹⁸ The participation of States in electricity regulation in the United States promoted competition in the electricity markets. As at the year 2015 not fewer than fourteen (14) States in the United States have broad-based consumer access to competitive retail electricity market.⁵¹⁹ Competitive electricity market is very important to the welfare of electricity consumers.⁵²⁰ Between 1997-2015, electricity consumers in States in the United States with retail competition witnessed decline in electricity rates by 4.8 percent, while electricity consumers in States without competitive electricity market witnessed increased electricity rates by 82 percent adjusted for inflation.⁵²¹ The electricity sector restructuring in the United States which ensured competitive electricity market thus led to decreased electricity prices, better consumer welfare and stimulated innovation in renewable energy.⁵²²

Competition among the different electricity generation companies to sell electric energy to distributors or suppliers of electricity is referred to as competitive wholesale electricity⁵²³ while a market situation where many electricity suppliers/distributors exist which allows electricity consumers the choice of selecting their electricity supplier or distributor rather than being required to purchase electric energy from a particular distribution company or supplier is referred to as competitive retail electricity market.⁵²⁴ Presently, there is no competitive wholesale or retail electricity market in Nigeria. Private investment in the electricity sector is strategic to the actualisation of competition in the industry. As States are taking over electricity regulation, the law and electricity policy must be tailored towards luring private investment. Penal sanctions and enforcement agencies against energy theft and equipment vandalism must be in place to burst investor's confidence of the security of their investment. Electricity meters are sine qua non for a competitive electricity market and States must bridge the metering gap. The Federal Government for several years has struggled to keep the electricity sector afloat through subsidies and injecting funds through NBET Plc to

⁵¹⁸ Francisco Flores-Espino and Others, *ibid* 9

⁵¹⁹ Francisco Flores-Espino and Others, *ibid* 10

⁵²⁰ Alfred M Tijah, 'Periscoping Competition in the Nigerian Electricity Supply Industry' (n1) 171

⁵²¹ Constellation Energy Resources LLC, 'What are the Benefits of Competitive Energy Markets?' <<https://blog.constellation.com/2016/10/14/benefits-competitive-energy-markets/>> accessed 14 June, 2024

⁵²² Alfred M Tijah, 'Periscoping Competition in the Nigerian Electricity Supply Industry' (n1) 169

⁵²³ Alfred M Tijah, 'Periscoping Competition in the Nigerian Electricity Supply Industry' (n1) 177-178

⁵²⁴ *Ibid*, 184

guarantee payments to the generation companies running into trillions of naira. Between 2015 and 2020 an average of 200 billion naira yearly was paid by the Federal Government to subsidise electricity. In 2022 the amount rose to 600 billion naira and it is expected to go beyond 1 trillion naira in this 2024.⁵²⁵ Recently some of the Distribution Companies were taken over and managed by their debtors. This is the sector the Federal Government is tactically escaping from and is handing over to the States which may mostly likely collapse with the States unless conscious measures are employed including huge investment in the sector and support to the utility companies. And although the energy sector is a multi-trillion-naira sector, States must be careful not to increase their tax burden since the industry is at the brim of collapsing. Electricity generation, transmission and distribution is very expensive to establish and manage,⁵²⁶ there is the likelihood that the moment the Federal Government successfully relinquish regulatory responsibilities to the States, they may as well abandon the States with the burden of subsidising electricity. This may engineer chaos in the sector as not all States will be capable of paying the subsidies and the electricity prices may skyrocket to unimaginable height further worsening the economic situation in many States. caused by the removal of fuel subsidy that have left the country without stability to date.

4.1 CONCLUSION

4.1.1 Summary

The governance of electricity in Nigeria is the shared responsibility of the Federal and State Governments. This mainly involves the establishment and management as well as regulation of electricity generation, transmission and distribution. For several decades, the Federal Government of Nigeria monopolised the establishment, management and regulation of the Nigerian electricity supply industry. The industry was badly managed by Federal institution with the Federal Government injecting huge public funds to keep the industry afloat and fund the payment of subsidy to stabilise

²⁵ Adetayo Adegbemle, ‘How Sustainable is Electricity Tariff Subsidy?’ (26 Dec., 2023) <https://www.thecable.ng/how-sustainable-is-electricity-tariff-subsidy/#:~:text=Historically%2C%20the%20government%20has%20been%20paying%20electricity%20subsidy,allowed%20tariff%20that%20consumers%20are%20%20“allowed”%20to%20pay.>> accessed on 3 June, 2024

⁵²⁶ UP Onochie and HO Egbare and TO Eyakwanor, 'The Nigerian Electric Power Sector (Opportunities and Challenges)' *Journal of Multidisciplinary Engineering Science and Technology* (2015) (2) (4) 494

electricity prices as well as make it affordable to the vast majority of electricity consumers in the country.

Being unable to adequately manage the sector, the Federal Government initiated the 2005 electric power sector reforms through policy and legal framework which culminated in the Federal Government relinquishing its ownership and management of electricity generation and distribution to private investors with plans adequately in place to totally relieve itself of the management of the electricity industry by privatising the its transmission responsibilities in the Transmission Company of Nigeria in 2024. Having virtually divested itself of the management of the electricity industry, the Federal Government initiated the process to equally divest itself of the responsibility of electricity sector regulation by enacting the Electricity Act 2023. The Act intends to totally hand over the entire regulation of electricity in Nigeria to the various States by providing under section 2 of the Electricity Act 2023 to the effect that State laws on electricity shall supersede the provisions of the Act. And under section 230 the Electricity Act 2023 make transition provisions to transfer within six months the responsibility of electricity regulation to any State that applies after setting up the legal and institutional framework for electricity regulation. While the Federal Government is running away from the ownership, management and regulation of electricity Generation, transmission and distribution, virtually no State made any attempt to buy the electricity undertakings and most of the States are not ready to take over the responsibility for electricity regulation.

4.1.2 Findings

From the discussion in this paper, the following findings are made:

1. State participation in electricity governance has the propensity of liberalising the Nigerian electricity supply industry, decentralising electricity regulation, de-monopolisation of the electricity market for a competitive electricity market, stimulating private investment, incentivising innovation, promoting energy mix from renewable sources and enhance consumer protection. In spite of this, most States in Nigeria have continued to stand aloof to the ownership, management and regulation of the electricity sector.

2. The Federal Government seems to be overwhelmed by the governance of the electricity industry and have made strenuous efforts to relieve itself of the burden of the electricity sector by first divesting management of the utilities to private investors and now set to relinquish the regulation of the electricity industry to the respective States within six months of application by a State.
3. The Federal Government do not have the constitutional power to regulate electricity distribution in any of the 36 States in Nigeria except transnational distribution and regulating who may engage in electricity services. Therefore the provisions of section 63 (2)(b) and (7)(b) of the Electricity Act 2023 which suggest that NERC as a federal institution has powers over inter-state electricity distribution and is responsible for regulating electricity distribution and electricity distribution network/operators within a State where their operations relies on any part of the national grid is unconstitutional being contrary to section 4 and the paragraph 13 and 14 of the Concurrent Legislative List.
4. The Lagos State Electric Power Sector Reform Law 2018 is out of date being fashioned in accordance with the Electric Power Sector Reform Act 2005, and cannot be employed to ensure effective State participation in electricity governance.
5. The electricity sector is a potentially viable industry that may yield trillions of naira for investors however it is in the trios of death and requires hug investments and injection of funds to survive.

4.1.3 Recommendations

Flowing from the above findings, this research recommends that:

1. All States in Nigeria should participate in electricity governance to achieve a viable electricity sector. State participation must not be limited to regulation alone but must include hug investment and management of the utilities alongside private investment including public-private partnership because electricity generation, transmission and distribution are capital intensive and to achieve the desired electricity capacity in Nigeria, financial investment in the sector must be phenomenal.
2. The Federal Government must not be allowed to totally relinquish electricity governance in Nigeria to the States and electricity subsidy should not be removed until adequate electricity is generated, transmitted and reach the consumers

with the development of a viable competitive wholesale and retail electricity market.

3. Paragraph 13 of the Concurrent Legislative List of the CFRN 1999 as amended must be amended to confer on the Federation powers to govern inter-state distribution of electricity to ensure consistency of regulation.
4. Lagos State should update its law on electricity in line with the Electricity Act 2023.
5. Though State participation in electricity regulation may yield plausible effects, this cannot be achieved unless the State takes take positive steps towards its achievement. It is therefore recommended that States must transcend just regulation to active investment in the electricity sector and concurrently incentivise investment, develop competition, close the metering gap, advance clean energy and higher renewable energy mix rather than employ the multi-trillion-naira electricity industry for fiscal revolution that may stagnate the industry.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

COMMUNITY ATTITUDE TOWARD CHILD SEXUAL ABUSE AMONG RESIDENCE
IN KADUNA METROPOLIS

¹*Farida Mohammed, ²Patrick Joseph Matthias, ³Nuhu Marshal Yakusak

¹Department of Sociology, Kaduna State University, Kaduna

²Department of Sociology, Nasarawa State University, Keffi

³Department of Security Studies, Greenfield University, Kaduna

*faridamohd102@gmail.com +234-8033455277

patrickjosephmathias@gmail.com +234-8027094898

yakusak.marshall@gfu.edu.ng +234-8026740617

Abstract

The study Community Attitude toward Child Sexual Abuse among Residence in Kaduna Metropolis focused on how Community attitude interferes with prosecution of perpetrators, how supportive communities are to CSA victims and if community attitude is a risk factor of CSA. Multi-stage sampling technique was employed to reach out to the study participants from a list of sampling frame where the communities were further dispersed into streets and households. Through systematic sampling technique. A quantitative research technique was adopted using structured and semi-structured questionnaires administered in an interview form while IDIs/KIIs were adopted to complement the survey. Data were analyzed using Statistical Package for Social Science (SPSS). Descriptive and comparative analyses were used to generalize the results. The study found that victims are more damaged by social stigmatization. Offenders are rarely prosecuted or jailed due to inadequate evidence and reporting. The study recommends mass enlightenment and persuasions of all community members to disabuse their minds on blaming victims and be informed that victims have recovered from any disease in order to reduce stigmatization and labeling.

Key Words: Attitude, Child, Child Sexual Abuse, Community

Introduction

Community carries multiple layers of meaning, in Sociology, it refers to groups of individuals linked by social bonds that give rise to a collective consciousness. This shared sense of belonging becomes the backbone of a community, distinguishing it from a mere gathering of groups. This implies a population not linked geographically, culturally, ethnically might share common values, experiences, language or religion. These shared common interests foster social relations (Lukes, 2015). Thus community attitude towards Child Sexual Abuse (CSA) are critical in shaping survivors/victims' experiences, help-seeking behaviours and accessing support services to mitigate effects of the victimization.

Thus, study aims to inquire whether the prevailing attitudes and beliefs about CSA among community members contributed to the sustenance of CSA, the barriers to reporting and disclosing CSA, parents and children perceptions of CSA, and how community attitude towards victims in Kaduna metropolis can be improved to promote support, disclosure and reported promptly.

Therefore, understanding community attitude towards CSA issues is fundamental for the development of effective interventions, prevention strategies, and support services. This study will contribute to the existing literature about CSA in Nigeria, inform policies, programs aimed at protecting children from CSA and supporting victims in their recovery processes.

Prevailing Attitude Towards Victims of CSA Among Community Members

CSA is a pervasive and insidious problem that affects millions of children worldwide (WHO. 2005). In Nigeria, Kaduna inclusive, the prevalence of CSA is alarmingly, with reports indicating that one in four girls and one in ten boys experience sexual violence before the age of 18 (UNICEF, 2015). Kaduna State Police reported 201 prosecuted cases involving 218 victims and 245 perpetrators within a 5-year period in Kaduna Metropolis (Mohammed, 2018). Similarly, Sexual Assault referral Centres (SARC) also known as Salama Centres in the metropolis decried over high prevalence of CSA and reporting to

have received more than 10 cases of sexual abuse of minors in every two week, and 24 cases in one month. Majority of children never disclose their experiences, and less than 5% of children who undergo this form of violence never receive the support they need to recover, especially male children (SARC, 2017).

According to the Child's Rights Act of 2004, a child is defined as any person, both boys and girls, under the age of 18. By all standards, a child is vulnerable compared to adults and, as such, requires care and protection from harm or threat to their well-being (Laws of the Federation of Nigeria, 2004). Studies reveal that boys are less likely than girls to report sexual abuse due to fear, social stigma against homosexual behavior, or the desire to appear self-reliant, except in cases associated with severe health consequences, such as tears or leakages in their private parts, bleeding, and pain, which are often impossible to hide in small children (Haile et al., 2013; Modi and Dada, 2015).

CSA may manifest through physical and non -physical acts ranging from inappropriate touching of different areas of a child's body to molestation and rape, while non- physical acts such as making a child take part in or view pornographic materials or forced to pose naked. Other forms of CSA may also be as a result of cultural interest/practices such as child marriage and female genitalia mutilation (Bejide, 2014).

Barriers to Reporting of Child Sexual Abuse

However, CSA is seen to be on the increase partly due to community attitude of accepting superstitious beliefs that persons living with Human Immune Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS), contracted after sexually abusing minors. Others were child marriages and poverty on the part of victims and perpetrators (Kisanga, 2012; Mohammed, 2018).

This work mirrors Community Attitude Towards Victims of Child Sexual Abuse (CSA) in Kaduna Metropolis as complex issue that is also influenced by various factors, consisting cultural beliefs, religious values and social norms (Mohammed, 2018). These factors can influence how victims are perceived, treated and supported, which may result in leaving a long lasting impact on the wellbeing of victims as well as the

likelihood that, offenders of CSA may not be held accountable for the menace they have created.

Umobong (2010; Eze (2013); Ige and Fawole (2011); Kisanga (2012); Ndubueze (2016); SARC (2017); Mohammed (2018); and David et al (2018), revealed that in some communities, victims of this form of abuse are often stigmatized, blamed, and shamed by their community members, resulting to aggravated traumas and suffering of the victims. consequently, this negative attitude towards victims has been revealed in some studies as a major factor in preventing victims from seeking help and disclosing their experiences, resulting to the inaccurate quantification of the crime in form of data while, the limited researches on the subject has left this area of study with sparse literatures.

Parents' Perception Towards Child Sexual Abuse

The reports of Achunike & Kitause (2014) revealed that social stigma associated with rape in Nigeria forces victims to conceal rape and other violent sexual assault in order to save self from shame and public embarrassment. To worsen the matter, the social stigma associated with rape makes it difficult for victim and the family to expose the rapists. Sometimes these perceptions are based on sex, religion, age and myth about sexual abuse and relationship (Odu, Falana & Olotu, 2014). This concurs with the submission of (Chen, Dunne and Han, 2007), that parental response to CSA influences the child's interactions with legal and health professionals when seeking help following abuse. However, it is factual that very few studies have focused on evaluating the perceptions and practices of parents with regards to CSA in Nigeria (Ige and Fawole, 2011). Thus, they both examined parents' perceptions of CSA as well as prevention practices and responses to CSA in a densely populated urban slum community, Idikan LGA in southwest Nigeria, A systematic sampling was used on 600 houses with an average of three to four house hold per house. Out of 410 questionnaires collected, only 387 were analyzed overall 303 (78.3%) respondents had previously heard about a CSA incident and out of these, 57 (18.8%) defined CSA as sexual intercourse with a child (forced or consensual) only.

The majority (84.2%) of the respondents agreed that CSA occurred in their community and rightly perceived that hetero-sexual abuse was just as serious as homosexual abuse (78.3%). (70.3%) agreed that CSA have serious health implications even if there is no actual intercourse. Also, about 52.5% of the parents felt that females could not sexually abuse children and 45.2% of the parents agreed that boys could be sexually abused. Also 46.8% of the parents felt their children could not become victims of CSA as only wayward children could be abused. Nevertheless, 109 (28.2%) agreed that discussing sex with children is bad for them (Ige, and Fawole, 2011). This implies that there is still low awareness of other forms of sexual abuse on the part of the parents' and poor perception of what category of children that could be abused.

Scholars such as (Eze, 2013; Sika-Bright and Nnorom 2013) observed that public perceptions and attitudes concerning child sexual abuse are important, especially those of children because such perceptions can affect the reporting of sexual abuse, the prosecution of perpetrators and the provision of clinical services.

Children's Perception Towards Child Sexual Abuse

More studies have found out that most children have little or no idea about CSA and the forms it takes. Children all over the world are being subjected to horrific forms of sexual victimization by adults who are supposed to be protecting them, and in some cases, by their own parents, siblings and relatives. The effects of CSA on children are very devastating and have both short and long term consequences. A lot of CSA cases go unreported and the phenomenon is still on the increase (Sika-Bright and Nnorom, 2013).

The study by Sika-Bright and Nnorom (2013), explored the perceptions of children with the age range of 10 - 17 years old on child sexual abuse in five basic schools in Ghana metropolis. In their findings, teachers emerged as their main sources of information about CSA as (155) out of 256 selected to participate in the study expressed so, compared to thirty-six (36) respondents who reported that their parents were their sources of information. The respondents expressed diverse knowledge about child sexual abuse. On whether the respondents were aware that children may be sexually abused by family members and friends, as many as 14% had no idea.

However, 43% respondents each reported yes and no respectively. On whether it is good for anyone to ask a child to undress and expose his or her genitals, most of the respondents (81.6%) responded in the negative. However, approximately 15% felt it was good. The majority (58.6) of respondents reported that it was not good for an adult to ask them to look at pornographic pictures or films. Conversely, the category of respondents who believed it is good for adults to ask them to watch pornographic pictures or movies was substantial (41.4%). In the analysis of Sika-Bright and Nnorom, it indicates that children are more likely to watch pornographic pictures or films when asked to do so by an adult. Also, it may be because of the belief that adulthood entails wisdom and so an advice by an adult may not be considered ill will.

Monumental breakthrough in digital technology and the proliferation of DVDs, internet access as well as computer mediated communication among children may lead to child grooming, sexual socialization and exploitation of children online by child sexual abusers (Ndubueze, 2016). However, in regards to having sexual intercourse and having fingers or objects inserted to their bodies, majority was in this category estimated at (71.1%) and 81.6% respectively. On whether it is good for an adult to fondle, caress or kiss a child, 73% of the respondents were not in favour, however as many as 64 (25%) respondents were of the view that it is good to be kissed, caressed and fondled by an adult. This may be interpreted as showing affection by the respondents which, unknown to them, may lead to sexual abuse (Sika-Bright and Nnorom, 2013). This also implies that some children do not know at what point they are being abused; for example the movement from just touching a child's hands to fondling of the child.

Empirical and Theoretical Review

According to Cromer (2006), in attempting to understand the etiology of CSA, one must examine the social consciousness and whether there is a general acceptance of CSA in modern society. Again, that current societal attitudes and practices toward children and societal tolerance can provide a fertile environment for CSA. As buttressed

by Cromer, this tolerance is expressed through the denial of the existence or pervasiveness of CSA or outright denial of the harmful effects of CSA.

Studies have found that societal attitudes often perpetrate harmful myths and stigmatization of victims resulting to a conspiracy of silence and blaming. Additionally, some communities in Nigeria view CSA of victims as a private matter while victimized minors may be blamed for being abuse by their family, community members and authorities resulting to inadequate support to victims (Hanson et al, 2013; Okeke et al., 2017).

In same picture, many sexually traumatized victims seem to find it difficult to disclose the incidence or the assailant because of the need to protect their identity (Olukemi and Folakemi, 2015). According to them, this may explain the submission of White House Council on Women and Girls 2014 that, African culture still allows the pervasiveness of sexual violence to persist. They posited that inadequate and inappropriate sexuality socialization on sexual abuse prevention within the culture and families of a child may affect the disclosure of sexual violence in adulthood. This implies that community perceptions of the problem of CSA may indicate the level of understanding and willingness to act for prevention.

According to Kisanga's study, non-disclosure of the abuse was an attitude of community members due to fear of stigma and discrimination. Community perspective illustrated that children's rights were challenged by lack of agency even though, awareness about child sexual abuse was clear but there was also a lack of trust in that the healthcare and legal systems were not capable of handling such cases. Furthermore, that Myths and cultural beliefs justified abuse. In sub-Saharan Africa, harmful myths include a belief that HIV-infected adults may be cured by having sexual intercourse with a child. This myth has been reported from several countries since the 1990s as reported by Kisanga and has shown to prevail in Botswana and South Africa. This type of myth, does not only inflicts harm on innocent children and adolescents, but violates human rights, and nurtures other forms of interpersonal violence.

Parental beliefs and practices have been revealed to impede the actual occurrences of CSA by directly influencing their child's preventive knowledge and self-protection practices (Chen and Chen, Kouyoumdjian, Perry and Hansen, 2005).

Population

Kaduna metropolis, the capital of Kaduna State, covers four LGAs: Kaduna North, Kaduna South, parts of Igabi, and Chikun. The study focused on wards with the highest CSA prevalence: Kawo, Tudun Wada, Rigasa, and Sabo (Kaduna State Police Report, 2017). Using multi-stage sampling, streets and households were systematically selected, and participants included adults and children from these households. The sample size was calculated using a sample size calculator, resulting in 152 adult participants, equally divided among the four wards, and a corresponding number of child participants, totaling 304. After adjustments, 280 participants completed the study.

Kaduna metropolis, the capital of Kaduna State, spans four Local Government Areas (LGAs): Kaduna North, Kaduna South, parts of Igabi, and Chikun. The research focused on wards with the highest reported prevalence of CSA: Kawo in Kaduna North, Tudun Wada in Kaduna South, Rigasa in Igabi, and Sabo in Chikun (Kaduna State Police Report, 2017). The study employed multi-stage sampling techniques to select participants.

Initially, one ward from each LGA was purposively chosen based on the high rates of CSA. Within these wards, streets were further categorized into high-density and low-density areas. Four high-density and four low-density streets (one in each per ward) were selected using systematic sampling techniques. Households were then systematically chosen, marking every fourth house on both sides of the selected streets for inclusion.

Participants included adults aged 18 and above, as well as children aged 5-17. In each selected household, one adult (either male or female) and one child (matching the gender of the adult) were observed and surveyed. Ultimately, 280 participants (140 adults and 140 children) completed the questionnaires. For the qualitative aspect, 20 adults (both males and females) were selected using snowball sampling and Key

Informant Interviews to provide additional insights into community attitudes towards CSA in Kaduna Metropolis.

Data collection

Ethical procedures were observed prior the study. Permission was obtained from police, SARC, community leaders and participants in form of signing a consent form and voluntary cooperation during the study.

The data were from secondary and primary sources. The first, involves collecting data from agencies involved in CSA crimes such as Police Records and Sexual Abuse Referral Centre Report. The second, were primary data gathered through the use of questionnaires. Questions were adapted from similar studies conducted in the subject are. Also, unstructured interview guide was used to interview 20 participants who include 6 community leaders including (males and females), 4 law enforcement officers and 10 community adult members across the study sites on the subject matter.

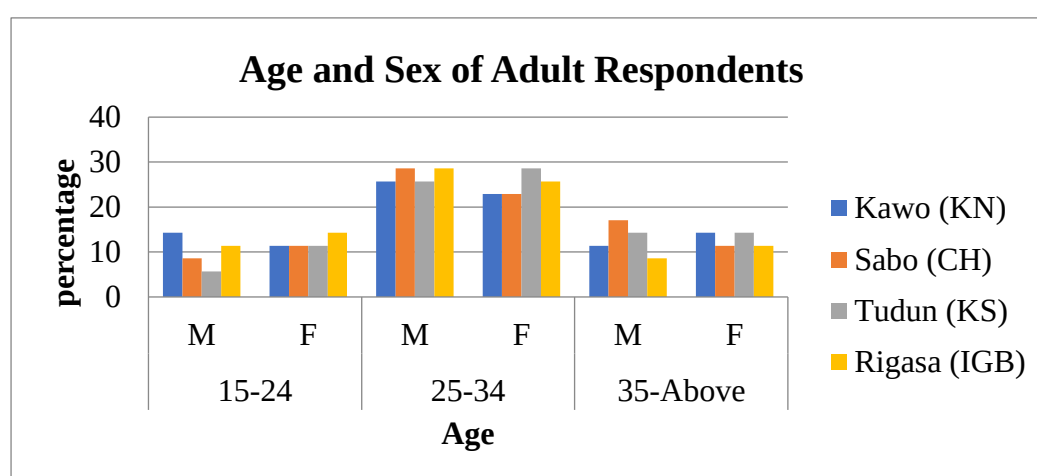
The data were processed through Statistical Package for Social Science (SPSS). The statistics were computed and described by the use of percentages (%). Also, analysis of processed statistics was represented using histograms and bar chart. This is to ensure quick and easy understanding of the treated and analyzed data. This method was deemed more appropriate considering the nature of the research which was purely exploratory and not seeking for a hypothesis. Data analyses used for the qualitative study were content analysis obtained through KIIs. Their narratives was first transcribed and translated into the language of this study. Contents of respondents that were similar were tallied and merged. It was used in the explanation of the participants' viewpoints and logical summarization of the findings.

Results

Exploring community attitude was vital to this study as it aimed at examining the role of the community and feelings/support they displayed towards their children and victims of CSA. Also, to show if there are community practices such as from culture, parents, victims, perpetrators, community leaders, neighbours, public security among

others responsible for the incessant occurrences of CSA in the Kaduna metropolis. Therefore questions that were asked bordered on how much community members have done in the enlightenment of their children through the homes, schools and how supportive they have been towards victims of CSA and their family members. It also included how much they knew about any community practice(s) that may encourage child sexual abuse.

Figure 1.1 Demographic Profiles of Respondents

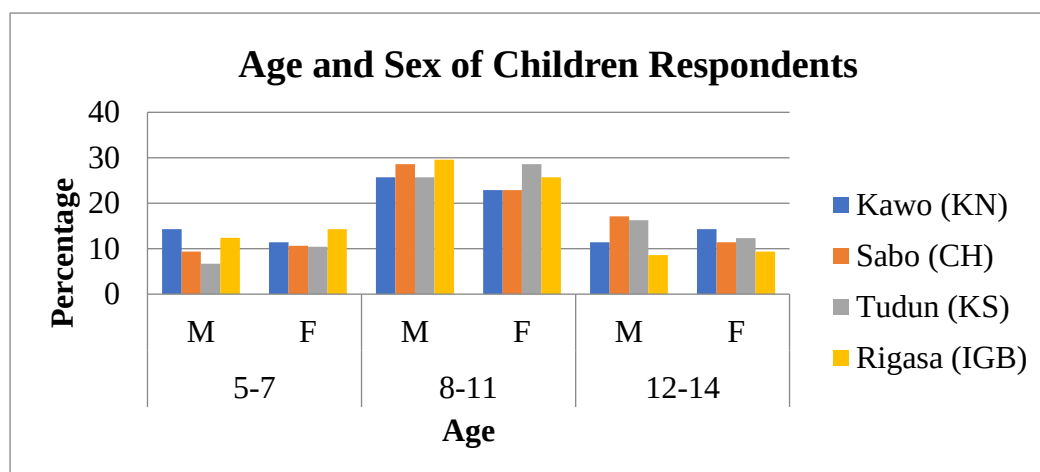


Source:

Field Survey, (2018)

Figure 1.1 shows the distribution of ages and sex of respondents. Majority in Kawo ward, majority (25.7%) of the respondents were males who were within the age bracket of 25-34 years old, while in Sabo ward 28.6% majority of male respondents were within the age range of 25-34 years old. More so, in Tudun Wada 28.6% constitutes majority of female respondents who were within the age bracket of 25-34 years old while in Rigasa ward, 28.6% constitutes male respondents who were within the age range of 25-34 years old. This information is necessary in examining what influences age has on their perception and attitudes towards CSA. Respondents within age (25-34) were more conspicuous than other age cohorts, while females in Tudun Wada responded more than other females in the other 3 wards.

Figure 1.2



Source: Field Survey, (2018)

Figure 1.2 shows the distribution of ages and sex of children respondents across the four wards. Sabo Ward 28.6% constitutes male children respondents whose ages ranged from 8-11 years old. In Kawo majority of the children respondents constitutes 25.7% whose ages were within the age bracket of 8-11 years old while in Rigasa ward, majority of the children respondents constitutes 29.6% males whose ages were within the age bracket of 8-11 years old but in Tudun Wada ward, 28.6% constitutes female children respondents whose ages were within the ranges of 8-11 years old. This presentation shows that the ages reflected the experiences of all age categories of children who have been captured in the study. Importantly, there were lower responses from children within ages (12 -14) and lowest responses from 5 -7 years old.

Table1.1: Community Attitude toward CSA in Kaduna Metropolis

S/ N	Variables	Kawo		T/Wada		Sabo		Rigasa	
		Adul t %	Childr en %	Adul t %	Childr en %	Adul t %	Childr en %	Adul t %	Childr en %
1	Parents/Guardians talked to their children about CSA.	43.8	66.1	45.6	34.2	57.1	42.9	34.5	67.4
2	Parent that guide their children by enlightening them about Sexual abuse.	62.0	67.9	87.5	74.3	65.7	86.9	65.4	68.6
3	Children who were told about CSA by their teachers.	89.6	35.7	56.4	34.5	74.3	35.7	34.5	56.7

4	Children who were told that child marriage is a form of Child Sexual Abuse.	41.7	89.0	45.3	67.4	57.1	28.6	45.6	45.6
5	Level of support by community members to victims.	56.2	91.1	90.9	8.6	65.7	8.6	68.0	2.9
6	Level of blame towards parents.	27.1	69.6	45.5	100.0	71.4	100.0	70.0	100.0

Source: Responses of adult and children participants from Field Survey, (2018)

Table 1.1 shows the responses of the respondents whether parents enlightened their children about child sexual abuse, it was gathered that 43.8% of adult respondents in Kawo ward affirmed that parents get their children enlightened about child sexual abuse while 66.1% of children respondents also subscribed to similar view. Also, in Sabo, it was observed that 57.1% of adult respondents held the view that parents enlightened their children about child sexual abuse while 42.9% of children respondents also held the same opinion. It was also discovered in Rigasa where 34.5% of adult respondents said parents get their children enlightened about child sexual abuse while, majority (67.4%) of children respondents also subscribed to the same view.

In Tudun Wada, it was also found that 45.6% of adult respondents said parents educate their children about child sexual abuse while 34.2% of children respondents also held the same view. Based on this survey, it can be deduced that children get more enlightened in Sabo and in Tudun Wada than Kawo and Rigasa. This could be attributed to the fact that those parents were more cautious about CSA.

When enquired whether teachers also get children enlightened about child sexual abuse, in Kawo ward, it was gathered that majority of adult respondents who constitutes 89.6% said children also get educated by their teachers while 35% of children respondents also subscribed to the same opinion. Similarly, it was also found that 74.3% who constitutes of adult respondents in Sabo asserted that teachers also get children educated about child sexual abuse while 35.7% of children respondents held synonymous notion. Furthermore, it was also revealed in Rigasa by 34.5% of adult respondents that teachers also get children sensitized about child sexual abuse while majority of children respondents who constitutes 56.7% of children respondents also

held the synonymous view. Majority of adult respondents in Tudun Wada who constitutes 56.4% said children also get enlightened by their teachers while 34.5% of subscribed to similar opinion. Based on this survey, it can be deduced here that majority of children get more enlightened by teachers about child sexual abuse in Kawo than other parts of Kaduna metropolis.

To know whether child marriage is a form of child sexual abuse, it was gathered that gathered by 41.7% of adult respondents in Kawo that child marriage is a form of child sexual abuse while (89%) majority of children respondents also said that child marriage is a form of child sexual abuse. Majority of adult respondents in Sabo who constitutes 57.1% held similar view that child marriage is a form child sexual abuse. So also in Rigasa 45.6% of both adult and children respondents also held synonymous assertion that child marriage is a form of child sexual abuse. While in Tudun Wada, it was unveiled that 45.3% of adult respondents held the fact that child marriage is a form of child sexual abuse and (67.4%) majority of children respondents also held synonymous assertion that child marriage is a child sexual abuse. From these findings, it implies that (89%) majority of children in Kawo view child marriage as a form of child sexual abuse than the adults in other parts of Kaduna metropolis.

As this study tries to find out the level of support practiced in the various wards under study, it found out that T/wada 90.9%, Rigasa 68% has high level of support than other wards in Kaduna metropolis. Similarly, results showed that children from Sabo, T/wada and Rigasa 100% respectively vehemently blamed parents for not doing enough to prevent CSA. This could depict why street hawkers were more sexually abused because parents were seen as decision makers of that venture and children in these community were not happy with it.

Analysis of Information from KIIs and IDIs

Aside from having comparable responses from the survey that coincides with the responses of the community members during the KIIs and IDIs, the study gathered more information on the attitude of CSA among community members. During the inquiry, it was found out that there were similar responses from all participants from

the 4 LGAs as participants emphasized with much sympathy that children who had been sexually abused encounter rejection of marriage proposals from their community due to social stigmatization and labeling which resulted to the low level reporting of CSA in the communities. This goes in line with the study of Olukemi & Folakemi, 2015, stating that in Nigeria, many sexually traumatized victims seem to find it difficult to disclose the incidence or the assailant because of the need to protect their identity. Also, the findings of Kisanga, 2012 in Tanzania displayed a similar attribute.

Community representatives during the KIIs said that affected families delay reporting due to shame and this usually results to the destruction of some important evidence that would have proven that the victims had been sexually abused thereby resulting to unfavourable justice to survivors. Specifically, participants also related that parental discretion in stopping cases of CSA at the family or at the community level i.e. in the hands of the community leaders addressed as (*maiungwa*) are very much an attitude in the various communities also, due to experienced poor and unfavourable judicial verdict and police discretion including delay in justice, offenders not sentenced in equilibrium to their offences also, bail granted to offenders by the police, delay in prosecution of cases and apparent disloyalty of trust during investigation of perpetrators.

According to community representatives, members of the community especially victims and their family members are often uncomfortable and disgusted to see an offender that is supposed to be in the corrections going about without restrictions within the same environment that he had committed a crime. Some victims are also afraid of the perpetrators especially if they are rich and influential because of the fear of hurting them in retaliation. Therefore, ejecting the perpetrators out of the community was a regular attitude among community members.

Communities in Kaduna South and Chikun LGAs community heads such as the (*Maiungwa*) and Traditional Rulers (*Sarki*) are highly involved in the prosecution of offenders and following up cases of CSA. Victims are given support medically at the sexual assault referral centres by conducting medical tests on perpetrators and victims to verify if there are any traces of sexually transmitted diseases or damage also, evidences that the victims had been abused. In Chikun LGA, participants related that victims especially the female child, are also blamed for being promiscuous and being

disobedient to their parents and guardians also, was their mode of dressing in terms of wearing clothing which reveals sensorial parts of their body and provoking the abuse. In Igabi LGA the community police such as civilian JTFs and security patrol officers are very active and do follow-ups on cases of CSA. They usually arrest the suspects and hand them over to the police and also give their testimonies in the court.

While in Kaduna North, community members are involved but only to the extent of handing the CSA issues to the police for further action. This implies that usually victims and victim's families are left to follow-up their cases with the authorities. In most cases, the offenders are given a verbal warning to desist from their awful acts after the perpetrators have begged for forgiveness or will be sent out of the community. KII with an adult female in Kawo, a 36 years old participant who is a house wife related this with so much disappointment:

I have witnessed a case of an elderly man, about 75 years old, a gateman of a primary school here in Kawo, who abused some of the pupils in that school both boys and girls. When the parents of the victims found out and reported the case to the school authority, the offender was approached, he begged for forgiveness and promised never to abuse the children again. Could you believe, all he got was just a warning to desist from the act. This is very annoying. (Frowning and talking bitterly) the gateman was not even dismissed from his job talk-less of being prosecuted. So some parents actually withdrew their child from that school.
Female KII, Kawo, 25/2/18.

When asked by the researcher why parents of the survivor's did not report to the police or charge the cases to court, the reply was:

What will come out of it? Can poor people get justice in this country? If they go to the police, they will just bail the offender after collecting some little money from him. So they have left the offender to Allah. But you see tomorrow, will he not repeat the same thing? At least the school authority would have dismissed the evil man from the job. You see, even proper justice cannot even be done at this small level.
Female KII, Kawo 25/2/18.

Consequently, the community responses from KIIs went along with the survey which revealed that communities in Kaduna South, Chikun and Igabi were more supportive than in Kaduna North Local Government Area. Another attitude of the community members according to KIIs is executing jungle justice against the perpetrators before

they are finally arrested. They stressed that when offenders are apprehended they are beaten up badly and could be worse if not for the interventions of community representatives and police. A key informant, the Hakimin of Kawo, explained that the main job of the community police i.e. (*Jaremi da Gora*) in his community is to make sure that aggrieved community members do not take laws into their hands even when it is an aggrieved situation. Likewise, the Sarki of Ungwan Boro said in an interview that lynching perpetrators out of anger was an attitude of his community but as a Leader he does not allow things like that to happen since he and his council member usually come out to rescue the offenders then, take them to the police for further action.

In addition, to be blamed are cultic herbalist, whose community members believed suggests defiling of little children as prescription for solving their client's problems and greed of worldly benefits. All KIIs participants stated that it was a senseless and wicked myth believed by some fetish people that defiling of girls/boys less than 10 years old would increase their riches and status or improve their health conditions without considering the adverse effects of their actions on the children and the society at large.

In their view point, most homosexual rapes were strictly not tagged to pleasure seeking but to rituals performed by offenders of this category. Certain CSA was perceived as ritual rape based on the age gap between the victims and perpetrators, nature of the crime especially homosexual rape and location of the crime. In view of this, there was a scenario of a 28 year old man, an artisan, who was caught and beaten up by people in a neighbourhood at T/Wada for attempted rape of a boy of 7 years old in a mosque. The interview with the perpetrator was retrieved from DITV correspondent and the perpetrator confessed this:

I did not rape the boy I called him to buy something for me, when he came back, we sat down together in the mosque then I started chatting with him, then I started to touch his laps with the intention of having sex with him then he said he was going out to ease himself but he went out and called people then everybody came after me accusing me of raping the boy without asking what happened.

Male IDI in T/Wada, 2/1/18

When asked to narrate what happened he had this to say:

it was a occultist herbalist that told me to do the following every Mondays and Thursdays; I should do 10 rakaats of prayers in the mosque, get 10 little stones, when I perform 2 rakaats that I should put one stone in my pocket, when I finish, I should rap the stones with a white handkerchief and put it in my pocket. Also, I should do same at midnight then in the morning I should do sadaka (offering) and also have homosexual sex with under aged boys in the mosque then what I am seeking for will be in abundant.

Male IDI in T/Wada, 2/1/18

A similar case happened in Rigasa, KII was conducted with the mother of an infant of 3 month old baby boy. She reluctantly disclosed these as she was still in shock and believed it was a bad omen and ritualistic:

“(crying) the perpetrator is my baby’s uncle, he is the uncle!. (talking in a lower tone of voice) How do I start? Please promise not to publicize this as it may cause a lot of discomforts. (thinking the researcher was from a radio station) Over there... (pointing to a section of the house that is occupied by the victim’s uncle) my boy was sleeping so I decided to have a bath using that time but then I forgot to take my foot scrubber so I came back to my room to fetch it. I discovered my baby was not on the bed I rushed out like a mad....then I heard the chocking of a baby from the uncle’s section. I rushed in there to be sure but to my surprise it was my baby. I caught the uncle penetrating his penis into the mouth of this baby of just 3 months old without the fear of Allah.... I rushed behind him immediately and slapped him and collected my baby..... This is a big problem. His 2 wives have left the house out of anger and shame.... (still crying).

Female in IDI, Rigasa 2/1/18.

Discussion

The finding of this study has revealed complex and ranges of deliberate discrimination of victims and community attitudes towards CSA in the four communities. It revealed the demonstration of the understanding and tolerant level of community members.

Participants emphasized that children who had been sexually abused encounter rejection of marriage proposals from their community due to social stigmatization and labeling which has resulted to the low level reporting of CSA in the communities. It is a common standard within the African culture to marry virgins or decent girls. So, community members put to question the integrity of the victims and the up bring to the victims’ immediate family. They usually ask questions of why, where did she go and

how did it happen to the victim especially when pregnancy is involved. This results to social isolation of the victims or relocation of victim's family. It important to state, that girls are more affected with stigmatization than boys because of the fore-mentioned issues.

CSA victims' Social stigmatization and discrimination of victims were found in the works of Kiansga, 2012 as a result of CSA. Social stigmatization and discrimination has been reported from several countries which included Botwana and South Africa (Kiansga, 2012). This also has its roots from cultural perspectives, community and parental attitudes. According to Odu, Falana and Olotu, 2014, in the literature, these perceptions are sometime based on sex, religion, age and myth about CSA. Some of these issues could be tagged to the explanations of the radical feminists on the experiences of females and children as a result of patriarchal norms. Many children sexually abused under the accepted traditional norms (child marriage) are stigmatized for the reason of being divorcees at an early age e.g. a girl of 15 years old being a (one to three-times) divorcee and also hawking at the motor park area or suffering or has suffered from Vaginal Vascular Fistula (VVF), while boys who were sexually abused, their manhood and masculinity were put in question.

Disclosure of CSA was difficult for victims and their family members, even though result revealed that some participant recognized the importance of reporting CSA issues and supporting victims, the only time victims disclose their experiences of CSA is when the incidence had just happened, their family's morale is high and their cases were on going. At that time they need all the help they can get because usually there is much sympathy on the victims when the incident occurs. Moreover there is high motivation and hopes on the part of the victims family for justice. But they get deflated and feel betrayed when nothing or less action is done on the part of the justice system ranging from police to the courts in many circumstances their cases never see the walls of the court premises. Therefore, such parents rather remain in silence than exposing their children without anything coming out of it.

Conclusion and recommendation

Sexual abuse comes with serious reproductive health effects which may cause deaths or long term effects as well as psychological and social consequences in the sense that the victim may become an abuser or labeled as one who will never get married in his/her own community. Community members are not encouraged to report CSA issues because of fear of stigmatization and perceived poor justice system and police discretion in punishing/dealing with offenders. This created difficulty for this study in terms of collating numerical quantification and understanding more about the manipulation of this crime because of abject silence of community members especially when it involves a male-child victim in Kaduna metropolis.

The believe that CSA is the private matter of victims and their immediate families highlights the need for increased education and awareness to intervene in order to neutralize this harmful community attitudes. This responsibility should be placed on community leaders, Non-Governmental Organisations supporting and other agencies handling and supporting CSA issues and victims. The sexual assault referral centres should embark on out-reach to interior communities to enlighten men, women and children in order to disabuse their minds that victims are not at fault and it could happen to one whether adult or child.

In conclusion, one of the key reasons for not disclosing CSA was the fear of being stigmatized and labeled. The data from the study suggests that if survivors do not disclose their conditions due to fear, there may be greater risk of re-victimization of victims and vulnerability of other minors in the community. The study thereby recommends that proper medical diagnosing and treatment should be given to victims and their health status should be made public i.e. they are cleared of any diseases. This would go a long way to reduce stigmatization/labeling of victims within their communities.

References

- Achunike, H. C. & Kitause, R. H., (2014). "Rape Epidemic in Nigeria: Cases, Causes, Consequences and Responses to the Pandemic". *International Journal of Research in Applied, Natural and Social Sciences*. (IMPACT: IJTRANS) SSN(E): 2321-8851; ISSN(P): 2347-4580. Vol. 2, Issue 1, Jan 2014, 31-44.
- Bejide, F., (2014). "Male Child Victim of Sexual Abuse in Nigeria". *Frontiers of Legal Research*, 2(1), 83-99.
<http://www.cscanada.net/index.php/flr/article/view/10.3968/5746> doi: 10.3968/5746.
- Chen, J. O. & Chen, D. G. (2005). "Awareness of Child Sexual Abuse Prevention Education among Parents of Grade3 Elementary School Pupils in Fuxin city China". *Health Education Research* 20, 540-547.
- Chen, J.; Dunne, M.P. & Han, P. (2007). Prevention of Child Sexual Abuse in China: "Knowledge, Attitudes and Communication Practices of Parents of Elementary School Children". *Child Abuse & Neglect*, 31, 747-755.
- Cromer, L. M. (2006). "Factors that Influence the Believing of Child Sexual Abuse Disclosures". A Dissertation presented to the Department of Psychology and Graduate School of the University of Oregon in Partial fulfillment of the requirements for the Degree
 June, 2006.
- Eze, U.O., (2013). "Prevention of Sexual Assault in Nigeria". *Annals of Ibadan Postgraduate Medicine*. Vol. 11 No. 2.
- Haile, R. T., Kebeta, N. D. and Kassie, G. M., (2013). "Prevalence of Sexual Abuse of Male High School Students In Addis Ababa, Ethiopia". *BMC International Health and Human Rights*.
<http://www.biomedcentral.com/1472-698X/13/24>
- Hanson, R. K., Resnick, H. S., Saunders, B. E., Kilpatrick, D. G., and Best, C. L. (2013). Factors relating to the Reporting of childhood Rape. *Child Abuse and Neglect* 37(10), 741-748.
- Ige, O. K & Fawole, O. I. (2011). "Preventing Child Sexual Abuse: Parents' Perceptions and Practices in Urban Area Nigeria". *Journal of Child Sexual Abuse*, 20:6, 695 - 707.
<http://dx.doi.org/10.1080/10538712.2011.627584>
- Kisanga, F., (2012). "Child sexual abuse in urban Tanzania: Possibilities and Barriers

for Prevention” *Department of Public Health and Clinical Medicine*, Umea University, Sweden. New Series No 1534, ISSN 0346-6612, ISBN 978-91-7459-516-1.

Laws of the Federation of Nigeria, (2004). “Child’s Rights Act”, Cap. C50, Section 277.

Lukes, S. (2015). Durkhiem, Emile (1858-1917). In *International Encyclopedia of the Social and Behavioural Sciences: Second Edition* (pp699-704. Elsevier Inc.

Modi D. E. & Dada, O. M. O. (2015). Myths and Effects of Rape on Male Victims. *American Journal of Psychology and Cognitive Science* Vol. 1, No. 1, 2015, pp.1-5. <http://www.publicscienceframework.org/journal/ajpcs>

Mohammed, F. (2018). “Knowledge, Attitude and Practices of Child Sexual Abuse Among Residents in Kaduna Metropolis”. Unpublished MSc Thesis, Department of Sociology, Kaduna State University, Kaduna.

Ndubueze, P. N. (2016). Paedophilia and Child Sexual Abuse in Digital Nigeria: “Fault line in Parenting Practices”. *Kaduna Journal of Sociology (KJS)*, Vol. 4 No. 4 ISSN:2360-7734.

Nigeria Police Report, (2017). *Crime Statistics on Child sexual Abuse in Kaduna Metropolis*, January, 2013 – June, 2017”. Criminal Investigation Department (CID), Nigeria Police HQ, Kaduna.

Odu, B., Falana, B. A. & Olotu, O. (2014). “Prevalence of Violent Sexual Assault on South West Nigeria Girls. <http://dx.doi.org/10.19044/esj.2014.v10n7p%025p>

Olukemi, A. A. & Folakemi, O. C. (2015). “Culture of Silence and Wave of Sexual Violence in Nigeria”. *AASCIT Journal of Education*. Vol. 1, No. 3, pp. 31-37.

Okoke, E. N. Anyamele, C. O. and Okoye, U. O. (2017). Knowledge, Attititude and Practices of Child Sexual Abuse among mothers in a Rural Community in Anambra State, Nigeria. *Journal of Community Medicine and Primary Health Care*, 29(1)1 – 8.

SARC (2017). Salma Sexual Abuse Referral Centre, Awan General Hospital, Kakuri Kaduna.

Sika-Bright, S. & Nnorom, C.P. (2013). The Perception of Children on Child Sexual Abuse: The Case of Children in Some Selected Schools in the Cape Coast Metropolis, Ghana. Department of Sociology & Anthropology, University of Cape Coast, Cape Coast, Ghana. *Scientific Research Journal* Vol.3, No.6, 246-252. <http://www.scirp.org/journal/aasoci>.

<http://dx.doi.org/10.4236/aasoci.2013.36033>

UNICEF, (2015). "Release of the findings of the Nigeria Violence against Children Survey" Abuja, September 10, 2015. <http://www.unicef.org/nigeria/media-8461.html>

World Health Organization, (2005). "WHO Multi-Country Study on Women's Health and Domestic Violence against Women". Version 10. : Department of Gender, Women and Health, Family and Community Health, *World Health Organization*; 2003. Revised January 26, 2005. Geneva, Switzerland.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

AN OVERVIEW OF KATSINA STATE COMMUNITY WATCH CORPS LAW

Shafiu Umar

Yusufu Bala Usman College Of Education And Legal Studies, Daura, Katsina State

shafeeukarfi@gmail.com

07062249124

Abstract

Katsina State is one of the states in Northern Nigeria adversely affected by insecurity ranging from banditry, kidnapping, cattle rustling which consumed many lives and properties of innocent citizens. This has great negative impact on socio-economic wellbeing of the inhabitants of the state in particular and the country at large. Previous administration in the state has brought divergent policies and programs aimed at tackling the menace but have not bring a lasting to it. Recently, the current administration of the State promulgated the Katsina State Community Watch Corps Law which established a security outfit controlled by the state. Since the signing into law by the Governor, people have been expressing their concerns on the activities of the Katsina State Community Watch Corps especially as it regards their mode of operation. Some look at it as an agency working without comprehensive legal framework and that is why there are many allegations of extra-judicial killings and human rights violation against them. Others opined that the corps usurps the power of police and other law enforcement agencies in the state. This paper adopted doctrinal methodology and examined the provisions of the law establishing the Katsina State Community Watch Corps and found among other things it has impacted positively in the fight against insecurity in the state. However, there are inconsistencies between the law and some provisions of the Constitution and other extent laws. The article recommends, among other things, an amendment of the law so as to conform with the provisions of the Constitution and other laws to ensure protection of human rights of citizens of the state.

Keywords: Community watch corps, Constitution, Security

INTRODUCTION

There is no doubt Katsina State has suffered a lot of security challenges that borders on banditry and banditry and kidnapping for almost a decade. Things were so bad, life was brought to a standstill as peace and security eluded several communities in over 20 of the 34 Local Government Areas in the state. From January to October 2023, for instance,

about 120 persons lost their lives and over 148 incidences of Kidnapping were recorded in the state.⁵²⁷ Previous governments both at Federal and State levels have taken steps to bring an end to the menace, but the fight seems to be far from reality. It is against this backdrop that the present administration of Governor Umaru Dikko Radda has taken a bold step to launch the Katsina State Community Watch Corps (CWC) on 10th October, 2023, first of its kind to curtail the long-existing problem of banditry in the State. Since the inception of his administration, Governor Radda has shown readiness, determination and capacity to tackle insecurity to allow residents of the state to sleep with their eyes closed. This is in line with the primary purpose of establishing a government to provide security and welfare of the people as enshrined in the constitution.⁵²⁸ Prior to the establishment of the Community Watch Corps, wide consultations and meetings with heads of security agencies in the country, civil society organizations and other relevant stakeholders were made with a view to reaching an inclusive concept of a community security outfit to complement the conventional security agents. Pursuant to this, a Law to Establish Katsina State Community Watch Corps was enacted which led to the recruitment of 1,456,000 personnel to complement the effort of other security agencies in combatting banditry and other heinous crimes.

ESTABLISHMENT OF KATSINA STATE COMMUNITY WATCH CORPS

The law established the Katsina State Community Watch Corps as an agency of Katsina State Government with capacity to sue and sued in its name⁵²⁹. The law also established a committee responsible for supervising the activities of the corps which is to be headed by Chairman and Commander of the corps who are to be appointed by the Governor upon recommendation of the Commissioner for security.⁵³⁰ The Chairman and Commander who are to hold office for a period of four (4) years⁵³¹ must be retired personnel of Federal security agency not below the rank of Colonel or its equivalent.⁵³²

⁵²⁷ Daily Trust 5th December, 2023 www.dailytrust.com. Accessed on 10/3/2024.

⁵²⁸ Section 14 Constitution of the Federal Republic of Nigeria, 1999.

⁵²⁹ Section 4 Katsina State Community Watch Corps Law, 2023 (KCWCL)

⁵³⁰ section 5 *ibid*

⁵³¹ section 7 *ibid*

⁵³² section 6 *Ibid*

The law also established the office of vice Chairman and Deputy Commander for the corps.⁵³³

The law provides the following requirements for recruiting persons into the corps;⁵³⁴

1. The person be trusted who has attained 18 years of age.
2. He must be a member of the community and must be resident therein for at least 7 years.
3. He must be nominated by his community leader(s).
4. He must undergo screening by Divisional Police Officer of his area, Department of State Services and NDLEA drug test.
5. He must satisfy any other criteria for recruitment set out by the committee.

The law did not however, provide any educational qualification to be considered as part of the requirement for recruitment. This implies that illiterate persons can be found serving in the corps and this might be the contributory factor to incessant complaints of human rights violation by the corps. Employing literate persons will hence the performance of the activities of the corps.

FUNCTIONS AND POWERS OF KATSINA STATE COMMUNITY WATCH CORPS

The law outlined the functions and powers of the Katsina State Community Watch Corps to include the followings;

1. Assist the police and other security agencies in prevention, control and detection of crime, the apprehension of offenders, the protection of lives and property and the preservation of law and order.
2. Protection of public facilities such as schools, hospitals, waterworks and other owned and private facilities from vandalism.
3. To assist other law enforcement agencies in maintaining law and order at social gatherings.

⁵³³ section 8 Ibid

⁵³⁴ section 13 ibid

4. Report information on crimes to the relevant security agencies and the ministry and share intelligence about crimes and suspicious criminal activity.
5. Establish links with other security agencies in intelligence gathering and dissemination.
6. Responding to distress calls of residents of the communities.
7. Mobilization and supervision of community development activities.
8. Liaise with Hisbah to address youth delinquencies.
9. Training of uniformed, plain cloth members and the armed squad of the corps.
10. Undertaking in a collaboration with the Police routine day and night patrol on major roads, remote areas, hinterland and forest.⁵³⁵

One of the major arguments against the Katsina State Community Watch Corps is that they exercise the duties of the Nigeria Police. From the provision of the constitution, states are not allowed to establish their own police since it is within the power of the Federal Government to establish police and any other government security agency established by law.⁵³⁶ There are a lot of individuals and groups clamoring for state police considering serious security challenges across the country. It is believed that allowing states to have their police will contribute immensely towards combating insecurity considering the people around who are very familiar with their terrain will be engaged in protecting their communities. This is because Nigeria security is too large to be centralized in one tier of government which is the Federal Government hence it will be handled effectively when it is decentralized.⁵³⁷ On the other hand, some are of the view that when states are allowed to establish their own police, they will be used as machinery of oppressing political opponents by political office holders instead of securing the state. Moreover, the states are handicapped financially to run the police considering it capital intensive required.⁵³⁸

According to the law, the corps shall have power to use arms in accordance with Firearms Act or other laws that regulate the use of firearms and has the power to use

⁵³⁵ Section 17 Ibid

⁵³⁶ Item 45, Part 1, Second Schedule, Constitution of Federal Republic of Nigeria, 1999

⁵³⁷ Adedeji, O. A (2016). State Police in Nigeria: Issues and Challenges. International Islamic University, Malaysia.

⁵³⁸ Ayorinde, A. S. and Ariguzu, O.G. (2020) Implications for State Police in Democratic Nigeria: The Opinion s of Stakeholders in Selected States of South West Nigeria. Nigerian Journal of Social Studies Vol. XXIII(2).

offensive weapons not prohibited by Firearms Act.⁵³⁹ It should be noted that legislation on arms and ammunitions are within the exclusive legislative list preserved for National Assembly.⁵⁴⁰ By this provision, state government cannot make law in relation to fire arms. The Katsina State Community Watch Corps Law having empowered the corps to bear arms could be contrary to the provisions of the Constitution.

In addition, the Firearms Act which the law strongly relied upon to bear arms cannot avail the corps. The Firearms Act only allows an individual to possess a personal firearm specified under Part II of the Schedule to the Firearms Act on license granted by the Inspector General of Police.⁵⁴¹ The corps as an organization of state government cannot be given license without knowing the particular individual that will handle the arms. By the doctrine of covering the field, the House of Assembly of a state cannot make law in which the National Assembly has already legislated on. In the circumstance where this occurs, the law made by the National Assembly shall prevail and that of the House of Assembly will be void to that inconsistency.⁵⁴² Therefore, for the Katsina State House of Assembly to make law within Exclusive Legislative List amounts to contradiction of the Supremacy of the Constitution above all other laws.⁵⁴³ The Supreme Court in the case of *AG Federation v. AG Lagos State*⁵⁴⁴ has this to say; “Therefore, apart from the National Assembly, no other legislative assembly whether state or Local Government (if any) can legally and effectively legislate on any matter listed under the Exclusive Legislative List.” See also *Osadeday v. AG Bendal State*.⁵⁴⁵

Furthermore, the law provides that the corps has the power to arrest any person suspected of having committed criminal offence and hand over to the relevant security agencies within 24 hours. It also prohibits torture, inhuman or degrading treatment shall be used on any person during arrest but, reasonable force may be applied to prevent suspect from escaping.⁵⁴⁶ However, there are a lot of allegations of extrajudicial

⁵³⁹ Section 16 Katsina State Community Watch Corps Law, 2023

⁵⁴⁰ Item 2, Part 1, Second Schedule, Constitution of Federal Republic of Nigeria, 1999

⁵⁴¹ Section 4 Firearms Act Cap. 146, LFN 1990

⁵⁴² Section 4(5) Constitution of the Federal Republic of Nigeria, 1999.

⁵⁴³ Section 1 *Ibid*

⁵⁴⁴ (2013) LPELR-20974 (SC)

⁵⁴⁵ (1991) LPELR-2781(SC)

⁵⁴⁶ *Op. Cit* note 13

killings of innocent persons and other violations of human rights by the members of community corps. People are being killed on allegation of banditry and kidnaping and subsequently it turns out to be the contrary. They do not usually handover suspects arrested to the police or relevant security agency for appropriate action. One of these allegations was the killing of one Alhaji Hamza Abdullahi Zakka, a former caretaker Chairman of Safana Local Government who was allegedly killed by the Community Watch Corps on allegation of involvement in the activities of the armed bandits⁵⁴⁷

COMMUNITY WATCH COMMITTEE

The law established the State Community Watch Committee as coordinating and supervisory body which comprises of the followings;

- (a) A chairman
- (b) State Commander of the Corps
- (c) Representative of the Katsina and Daura Emirate Councils
- (d) Special Adviser to the Governor on Security
- (e) Nigeria Police Force
- (f) Department of State Services
- (g) Nigerian Army
- (h) Nigerian Air Force
- (i) Nigerian Custom Service
- (j) Nigerian Immigration Service
- (k) Nigerian Drugs Law Enforcement Agency
- (l) Nigerian Security and Civil Defence Corps
- (m) A representative of the office of the Secretary to the Government of the state not below the rank of Director.
- (n) One representative each from ministries of Internal Security and Home Affairs, Local Government and Chieftaincy Affairs and Ministry of Justice not below the rank of director or its equivalent.
- (o) Chairmen of all Local Governments in the State.

⁵⁴⁷ Op.cit note 1

- (p) One Representative of civil society organization each of the three Senatorial Districts in the state.
- (q) Representatives of Man O, War, Nigeria Boys Scouts, National Union of Road Transport Workers, ALGON and NULGE.
- (r) Representative of women societies
- (s) Representative of youths⁵⁴⁸

The committee is empowered to receive complaint of abuse of power by any staff of the corps from the public and set up a sub-committee to investigate such complaint. It provides guidelines for the recruitment, promotion, discipline, remuneration, welfare as well as operations of the Corps. The Committee advises the Government on security matters in the state.⁵⁴⁹ However, the committee is weak in performing the said responsibility assigned. This may not be unconnected with the non-availability of some representatives mentioned as members of the committee. Members of public could not hear when the committee makes efforts to ensure strict compliance with the provisions of the law by the corps or advise the government on the security situation in the state. A replica of the State Community Watch Committee has also been established for each Local Government with similar responsibility within the Local Government Area. The committee is empowered to screen all strangers who intend to buy land or cattle or willing to reside within the community and shall submit a report accordingly. Vendors shall submit the names and particulars of all prospective buyers and tenants to the vetting committee.⁵⁵⁰ This is quite commendable and impressive as it will help in identifying criminals from initial stage to convert them appropriately. Lack of funding militates against smooth performance of the committee most especially the nature of their work is capital intensive.

MISSELINIOUS PROVISIONS

In an attempt to remove the fear of the corps to be misused by politicians, the law prohibits the corps from engaging into any political or unlawful duty or any other

⁵⁴⁸ Section 23 Katsina State Community Watch Corps, 2023

⁵⁴⁹ Section 24 *ibid*

⁵⁵⁰ Section 30 *Op Cit.* note 22

activity not related to the objectives of the agency.⁵⁵¹ Similarly, any association performing similar functions to the agency shall cease to exist within 90 days from the date of commencement of the law.⁵⁵² This provision is however, dangerous as it seeks to ban the existence organizations like the Vigilante Group of Nigeria that are duly registered as lawful organizations which are equally important in fighting insecurity and crimes in the state. This will lead to violation of right to freedom of association enshrined in the Constitution.⁵⁵³

Moreover, the law prohibits suing a staff of the corps in his personal capacity for any act or omission in performance of his duties.⁵⁵⁴ Similarly, no suit shall be commenced against the corps before expiration of 30 days written notice of intention to commence the suit by the prospective plaintiff served on the corps which states the particulars of claim, cause of action and reliefs sought.⁵⁵⁵

Moreover, the law provides that any person who obstructs a member of the corps while performing his duty commits an offence and shall be liable on conviction to a fine of not less than N10, 000 or a term of imprisonment of not more than 3 months. Also, impersonation as member of the corps attracts a fine of 20,000 Naira or a term of imprisonment of not more than 12 month or both.⁵⁵⁶

CONCLUSION

Careful study of the content of this law reveals that adequate provisions have been made to combat the security challenges bedeviling the state. The law is all inclusive as wider consultations with all relevant stakeholders were made prior to enactment of the law. The implementation of the law has impacted positively in curtailing insecurity in the state as the rate of banditry has drastically fallen with the corps recording tremendous successes in curtailing the menace. That is why many states opted to emulate Katsina State by promulgating similar law. However, the law seems be inconsistent with

⁵⁵¹ Section 33 Ibid

⁵⁵² Section 34 Ibid

⁵⁵³ Section 40 Constitution of the Federal Republic of Nigeria, 1999

⁵⁵⁴ Section 36 Katsina State Community Watch Corps Law, 2023.

⁵⁵⁵ Section 37 Ibid

⁵⁵⁶ Section 38 Ibid

provision of the Constitution since corps established is no more than establishing state police which is within the exclusive power of the Federal Government. Equally, the law has some inadequacies which need to be addressed especially as they relate to allegation of extra-judicial killings and violation of human rights by members of the Katsina State Community Watch Corps.

FINDINGS

From the discussions in the article, the following findings have been made:

1. The Katsina State Community Watch Corps Law established the corps and empowers it to perform the responsibility of the police including bearing arms, thereby creating a state police which is still subject of controversy due to provision of the constitution that empowers only the Federal Government in that regard to the exclusion of states.
2. There have been allegations of extra-judicial killings and human rights violation against the corps despite adequate provision by the law to tackle such apprehension.
3. The staff of the corps are not well informed of their duties and the extent of their limitation as well as strict adherence to the fundamental rights of citizens.
4. The law provides for cordial relationship between the corps and other security agencies in the state. However, there is no synergy between as it seems the corps works independently without much synergy with the Federal Security agencies in the state.
5. No provision is made for staff of the corps killed or injured in the cause of discharging their duties.

6. The corps does not have power to prosecute offenders as the law does not provide for that. This made it difficult to take necessary action against suspect since other security agencies are accused of releasing suspected criminals handed over to them by the corps.

RECOMMENDATIONS

1. The law should be amended to avoid performing police duties especially bearing arms or alternatively facilitate amendment of the constitution to allow creation of state police considering their greater role in tackling insecurity in the state.
2. Those staff accused of extra-judicial killing should be brought to book and punished accordingly to prevent future occurrence of similar incidences.
3. Government should organize continuous workshops and training for the corps to educate them of their powers, functions and mode of operations. This will minimize frequent complaints of violation of fundamental rights against the corps.
4. The leadership of the corps should work closely with the police in the area of operation, investigation and prosecution. It is important for them to maintain high standard of professionalism and respect rules of engagement.
5. There should be adequate provisions to cater for officers of the corps injured or lost their lives in the cause of discharging their duties. This will serve as encouragement to other officers to make more sacrifices.
6. The corps should have prosecutorial power and legal department responsible for prosecuting offenders in accordance with the law otherwise they should liaise with other security agencies that have such facilities especially the police.

REFERENCES

Abdullahi, R. (2019, June, 18). Governors Endorse State Police to Fight Criminals.

Retrieved

from <http://www.thenationonline.net> visited on 12/03/2024.

Adedeji, O. A (2016). State Police in Nigeria: Issues and Challenges. International Islamic

University, Malaysia.

Adisa R.S. and Adekunle, A.O. (2010) Farmer Herdsmen Conflicts: A Factor Analysis of Socio-

economic Conflict Variables Among Arable Crop Farmers in North Central Nigeria.

Journal of Humanity and Economics 30:1-9.

Ahmad-Gamgum, W. A. (2018). Herdsmen and Farmers Conflict in Nigeria: Another Dimension of Insecurity. *Journal of Public Administration and Social Welfare*

Research Vol.3(1) 2504-3597

Ayorinde, A. S. and Ariguzu, O.G. (2020) Implications for State Police in Democratic Nigeria:

The Opinions of Stakeholders in Selected States of South West Nigeria.

Nigerian

Journal of Social Studies Vol. XXIII(2).

Bewaji, O. & Amolegbe, W. (2015). Terrorism and Economic Development: The Nigeria Experience. *Journal of Business Education* 3(5), 36-48.

Bradley, A.W. and Ewing, K.D. (2007) Constitutional Law and Constitutionalism. Pearson

Education Limited. England

Daily Trust 5th December, 2023 www.dailytrust.com. Accessed on 10/3/2024.

Felix, B. & Mustapha, Q. (2009). Nigeria Police: Issues and Recommendations. *Journal of Social*

Work 2(4) 74-84.

Musa, S. D. et al (2014). Resource Use of Conflicts Between Farmers and Fulani Herdsmen in

Guma Local Government Area of Benue Benue State, Nigeria. *Journal of Basic and*

Applied Research International. <https://www.reaserchgate.net>. accessed on 25/3/2024.

Okeke, O.E. (2014). Conflict Between Fulani Herders and Farmers in Central and Southern Nigeria; Discourses on Proposed Establishment of Grazing Routes and Reserves. *An International Journal of Arts and Humanities*, 3(a) 66-84.

Oloyede, P.A.(2000) *Contitutional Law in Nigeria*. Evans Brothers (Nigeria) Publishers, Ibadan.

Ovuakporie, E. and Agbakwuru, J. (2016). 'Herdsmen, Farmers' Clashes: Threat to Nigeria's Existence'. Available:www.vanguardngr.com. Accessed October12, 2019.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

AN ASSESSMENT OF THE HEALTH CARE STATUS AND INDICES IN
NIGERIA; A PEEP AT THE PROBLEMS AND PROSPECTS.

^{1*}Agbo Friday Ojonugwa, ²Mary Arthur Jolasinmi, ³Grace Perpetual
Dafiel

¹Faculty of Law, Veritas University, Bwari, Abuja FCT

²Faculty of Law, Philomath University, Kuje, Abuja FCT

³Faculty of Law, Veritas University, Bwari, Abuja FCT

*kingschild4you@gmail.com, agbofr@veritas.edu.ng +234-7033963763,
maryfaithj@philomath.edu.ng, faithjolas@yahoo.com +234-8068938316,
dafielgrace904@gmail.com +234-8037008269

Abstract

Nigeria's healthcare system has deteriorated over the years due to lack of care, mismanagement, lack of funding and corruption. This paper takes a cursory look at the Health care indices in Nigeria assessing it as to the performance of same; looking at the problems as well as considering the prospects of a better Health care system. The research methodology used is that of doctrinal research. This paper finds that there are lots of challenges to the Nigeria Health care such as has been mentioned above and many more including lack of adequate education of medical personnel's, bad working environment and non implementation of right policies. Recommendations include more public/private partnerships, implementation of health schemes and adequate policies that'd lead to the return of our skilled doctors such as increment in salaries.

Keywords: Assessment, Health Care, Status, Indices, Nigeria, Peep, Problem, Prospects.

INTRODUCTION

The Nigerian health care has suffered several down-falls. Despite Nigeria's strategic position in Africa, the country is greatly underserved in the health care sphere. Health facilities (health centers, personnel, and medical equipments) are inadequate in this country, especially in rural areas. While various reforms have been put forward by the Nigerian government to address the wide ranging issues in the health care system, they are yet to be implemented at the state and local government area levels. According to the 2009 communique of the Nigerian national health conference, health care system remains weak as evidenced by lack of coordination, fragmentation of services, dearth of resources, including drug and supplies, inadequate and decaying infrastructure, inequity in resource distribution, and access to care and very deplorable quality of care. The communique further outlined the lack of clarity of roles and responsibilities among the different levels of government to have compounded the situation.⁵⁵⁷

Unarguably, problems in the health care system of any country abound to a certain extent. Although health has the potential to attract considerable political attention, the amount of attention it actually receives varies from place to place. Provision of timely information aimed at combating possible health menace among many other things is an important function of public health. Hence, inadequate tracking techniques in the public health sector can lead to huge health insecurity, and hence endanger national security, etc. For decades ago, communicable diseases outbreak was a threat not only to lives of individuals but also national security. Today it is possible to track outbreaks of diseases and step up medical treatment and preventive measures even before it spreads over a large populace. Medical and epidemiological surveillance, besides adequate health care delivery, are essential functions of public health agencies whose mandate is to protect the public from major health threats, including communicable diseases outbreak, disaster outbreak, and bioterrorism. To avoid the various threats and communication lapses to strengthen the health work force planning, management, and training which can have a positive effect on the health sector performance, one requires timely and accurate medical information from a wide range of sources.⁵⁵⁸

The Nigerian health care had suffered several infectious disease outbreaks and mass chemical poisoning for several years. Hence, there is immense need to tackle the problem. Primary health care (PHC) is the backbone of a health system. Furthermore, quality PHC initiatives have been recognized as fundamental to improving health outcomes. The strength of a country's primary care system was negatively associated with mortality in Organization for Economic Cooperation and Development countries, and PHC also has improved population health in low- and middle-income countries. The Declaration of Alma-Ata in 1978, the 1987 Bamako Initiative, and the

⁵⁵⁷ [Www.Anavara.com/blog/best hospitals in Nigeria](http://Www.Anavara.com/blog/best_hospitals_in_Nigeria). Accessed 20th May, 2024

⁵⁵⁸ n2

2006 Abuja Call all emphasized the importance of investing in PHC for health. Following the World Health Report “Health Systems: Improving Performance” in 2000, the World Health Organization's World Health Report “Primary Health Care (Now More Than Ever)” in 2008 asserted that PHC reforms can deliver equitable health services and secure the health of communities. Given that PHC is essential to strengthening health systems and achieving the Sustainable Development Goals, it is important to understand fundamental causes of underperformance of PHC systems.⁵⁵⁹

ASSESSMENT OF HEALTH CARE IN NIGERIA

Nigeria is a country with many unutilized potentials. The health sector is one aspect of the nation that suffers greatly in the nation.

The healthcare system of Nigeria is controlled by the three tiers of the government; Federal, State, and Local Government, which in turn collectively controls the tiers of the system; Primary, Secondary, and Tertiary Healthcare System.

The federal government is in charge of tertiary health services, creating the medical regulatory bodies and schemes, and investing in the other tiers of healthcare. The state government is in control of the secondary healthcare system with state-owned/general hospitals and health centers. And the local government takes care of the primary health services that include health centers under their jurisdiction and public health care such as immunizations.

Generally, healthcare in Nigeria suffers a lot of challenges and is one of the worst in the world. Among the 191 rankings of medical systems in the world by WHO, Nigeria is placed in the 156th position.⁵⁶⁰ That has so much to say about how bad the system is.

The government’s impact on her health system is abysmal. Where other countries take their time to invest in their health sector, Nigeria’s health sector has very little investment. In the country’s yearly budget, the health sector receives a minimal ration of about 5%,⁵⁶¹ and even with how small its part is, most of the funds are still embezzled. The problems of Nigeria’s healthcare system includes:

- Lack of adequate financing by the government.
- Poor infrastructures and facilities.
- Little or no health insurance is available for citizens.

The ones available are not functioning properly, because the government creates them for selfish reasons and end up misappropriating its funds. And those who can register and get the little they can, have to register with a lot of money. However, it must be noted that:

⁵⁵⁹ Wright J. *Essential Health Services. Nigeria. A critical look at the health sector in Africa* (2015)

⁵⁶⁰ World health Organisation. *The world Health report. Geneva.* (2020)

⁵⁶¹ n1

- a. Citizens pay much to get treated in government hospitals and health centers which is outrageous. Most average people prefer to self-medicate and stay away from the hospital until the situation is critical.
- b. Long waiting lines in hospitals every day. Many are left unattended to and may come consecutively for days before they are attended to, and each day comes with fresh payments.
- c. Unmotivated medical personnel and laziness to work.
- d. The brain drain of Nigeria's good medical personnel to other parts of the world, because of the lack of interest of the government in the health sector.
- e. The frequent and persistent national strikes by her health workers, due to the low salaries and lack of infrastructures.
- f. The high mortality rate due to the lack of facilities and quality healthcare.
- g. Corruption and the misappropriation of health funds by the government.

Nigeria's health sector, like all her other key factors, has failed greatly, and this is primarily as a result of her leadership. The solution to these challenges is the baseline that the government of Nigeria is the major problem and they need to have a deeper interest in investing in the sector—as much as they want to enrich themselves—and create a better and more quality health care for all.

Nigerians have embraced medical tourism because of the poor quality of health care in Nigeria. Although the poor cannot afford to travel abroad for medical treatments, the people who are privileged enough leave the country for critical health conditions, and the very rich like the politicians and socialites, leave for other countries for medical services as simple as check-ups and diagnostics.

Nigeria is placed at 142 out of 195 countries according to a Lancet report's ranking of health systems performance using healthcare access and quality as its criteria.⁵⁶² Nigeria also ranks poorly based on the World Bank's Universal Health Coverage Service Coverage Index. Although access to healthcare for all Nigerians through the basic minimum package of health services is backed by the National Health Act, the package has faced huge challenges in dissemination and implementation as several State Governments are lagging in operationalizing it at ward levels. Furthermore, there is underutilization and bypassing of the primary health care facilities, as people prefer to use the hospitals. The gate keeping function of the PHC is made redundant mainly due to ineffective linkages between the different tiers of the health system. In many cases, patients prefer to visit the secondary and the tertiary health centers, but they are more expensive and this worsens health care accessibility especially among the poor in the society.

HEALTH CARE SERVICES

⁵⁶² Macinko S. *The impact of primary health care in low and middle income countries*. Primary Healthcare around the World (2009)

Since independence in 1960, Nigeria has had a very limited scope of legal coverage for social protection besides over 90% of the Nigerian population being without health insurance coverage.[5] The Nigerian health system has been evolving over the years through health care reforms aiming to address the public health challenges confronting it.[6] This includes:

- National Health Insurance Scheme (NHIS),
- National Immunisation Coverage Scheme (NICS),
- Midwives Service Scheme (MSS)
- Nigerian Pay for Performance scheme (P4P).⁵⁶³

Even so, the inability to effectively address the country's numerous public health challenges has contributed to the persistent and high level of poverty and the weakness of the health system. *Political instability, corruption, limited institutional capacity and an unstable economy are major factors responsible for the poor development of health services in Nigeria.* Households and individuals in Nigeria bear the burden of a dysfunctional and inequitable health system – delaying or not seeking health care and having to pay out of pocket for health care services that are not affordable.

NHIS

After many attempts at implementing legislation on health insurance since 1960, NHIS, although established in 1999, was eventually launched only in 2005. The goals of the NHIS were to:

- ensure access to quality health care services,
- provide financial risk protection,
- reduce rising costs of health care services and
- ensure efficiency in health care through programmes such as the:
 - Formal Sector Social Health Insurance Programme (FSSHIP),
 - Mobile Health,
 - Voluntary Contributors Social Health Insurance Programme (VCSHIP),
 - Tertiary Institution Social Health Insurance Programme (TISHIP),
 - Community Based Social Health Insurance Programme (CBSHIP),
 - Public Primary Pupils Social Health Insurance Programme (PPPSHIP),
 - and the provision of health care services for children under 5 years, prison inmates, disabled persons, retirees and the elderly.

VULNERABLE POPULATIONS AND FREE HEALTH CARE

The NHIS was expected to provide social and financial risk protection by reducing the cost of health care and providing equitable access to basic health services. *The most vulnerable populations in Nigeria include children, pregnant women, people living with disabilities, elderly, displaced, unemployed, retirees and the sick.* Although these

⁵⁶³ n4

vulnerable groups sometime benefit from free health care services and exemption mechanisms, they largely have to pay for health care services. Free health care services and exemption mechanisms are often politically motivated, are poorly implemented, do not become fully operationalised, and sometimes only last a few years.

States such as Osun, Niger, Kaduna, Kano, Ekiti, Lagos, Ondo, Enugu and Jigawa are known to have provided some free health policies at one point or another since the return of democracy in 1999. *Free health care services and exemption mechanisms are expected to provide financial risk protection for the most vulnerable populations but evidence suggest that they are ineffective and have failed to achieve this aim.*

CHILD MORTALITY

Despite distinguishing pregnant women and children under five years as the only beneficiaries of free health policy in states like Niger, Kano and Kaduna, under five mortality rates in 2013 ranged between 100-150 per 1000 live births, similar to the national rates of countries such as Chad, Mali and Guinea Bissau. States in the northern region of Nigeria experience a much higher rate of under-five mortality (100-250 per 1000 live births) compared with those in the southern region (50-100 per 1000 live births).⁵⁶⁴

MATERNAL MORTALITY

The maternal mortality ratio for Nigeria remain quite high at 814 per 100000 live births according to 2016 World Health Statistics. Across the country, pregnant women and children under five years are generally charged fees when accessing health care services, despite the federal government's declaration of free health for pregnant women and children under five years in 2005. The Minister of Health, Professor Isaac Adewole in 2016 announced the Federal Government's plan to provide free health services to 100 million Nigerians in the next two years. Under this new health agenda, pregnant women across Nigeria are expected to enjoy free maternal and delivery services at the primary health care (PHC) level.

Free health care services and exemption mechanisms often arise as campaign promises of political actors to the electorate and fall short in meeting the health needs of the most vulnerable populations. According to Nigeria Demographic Health Survey (NDHS) in 2013, over 60% of pregnant women aged 15-49 deliver their babies at home without any antenatal care visits.⁵⁶⁵ In rural areas, this value reaches 76.9%. The situation is critical in North East and North West regions of Nigeria where over 79% of pregnant women age 15-49 deliver their babies at home. Over 60% of pregnant women in Bayelsa, Plateau and Niger deliver at home rather than a health facility.⁵⁶⁶

⁵⁶⁴ n4

⁵⁶⁵ Onwujekwe o. *inequalities in health service use and expenditures for different health conditions and providers* (2012)

⁵⁶⁶ n10

The distance of pregnant women's homes from a health facility and the cost of health care are some of the reasons for not delivering at a health facility. The cost of health care and perceived low quality of care by the public have been argued to be the reason for the poor utilisation of maternal and child health services in Nigeria. In addition, health spending in Nigeria is low and this is responsible for the over-reliance on out of pocket payments for health care services.

POOR COVERAGE

Despite its launch in 2005, NHIS covers less than 10% of the Nigerian population ⁵⁶⁷ leaving the most vulnerable populations at the mercy of health care services that are not affordable. This means the most vulnerable populations in Nigeria are not provided with social and financial risk protection. Poor people constitutes about 70% of the Nigerian population. They lack access to basic health services, which social and financial risk protection should provide, because they cannot afford it.

Community based social health insurance programme (CBSHIP) was expected to meet their health needs as well as provide social and financial risk protection to this group, which mostly reside in rural areas. As evidenced in the high rate of out of pocket payments for health care services, *poor people financially contribute more to health care than official care and funds programmes in Nigeria*. Out of pocket payments for health care services limit the poor from accessing and utilising basic health care services, hence, the low coverage of basic health services for the poor.

HEALTH CARE QUALITY

The quality of health care services delivered is poor and remains a huge source of concern. Most of the PHC facilities that are supposed to meet the health needs of the poor and rural dwellers are in a poor state due to poor budgetary allocation.

PROBLEMS ASSOCIATED WITH NIGERIA'S HEALTHCARE SYSTEM

What are The Problems Facing Healthcare Management in Nigeria? Healthcare management is a catastrophe in the country! Nigerians have to suffer from long queues, lack of medications and inexperienced doctors! And this only the beginning of a long list of struggles! What are the problems facing healthcare management in Nigeria? The role of the Nigeria's government has been narrowed to the management of Federal Medical Centres and Universities' affairs. The state government is responsible for general local hospitals and providing primary healthcare centres in Nigeria. The total cost of GDP from the healthcare sector in Nigeria is 4.6%.⁵⁶⁸ At the same time, the expenditure on GDP from the government's side is 1.5%. In the long run, it shows that Nigeria can support only basic medical services. In the history of healthcare

⁵⁶⁷ Moses A. the effect of the National Health Insurance Scheme (NHIS) on health service delivery in mission facilities. [www. Biomedcentral. Com](http://www.Biomedcentral.Com). Accessed 22 April, 2024

⁵⁶⁸ Nn4

management in Nigeria – you can find a great deal of challenges. Only at the beginning of the 2000s, Nigeria managed to develop basic healthcare needs and management. Still, the system needs improving.

The Problems associated with Health care in Nigeria includes

CORRUPTION

Corruption is the main problem in Nigeria. Unfortunately, healthcare is the third most corrupted branch of the country. Government hospitals do not pay the correct salaries to managers and doctors. Managers and doctors do not feel protected and appreciated. Doctors are responsible for so many lives in the country! Why aren't they paid enough? We can see the slightly better situation with corruption in private clinics. However, Government hospitals provide medical treatment to 90% of population. Is healthcare free in Nigeria? The answer is "No"! Nigerians pay for it from their pockets!⁵⁶⁹

BAD EDUCATION OF MEDICAL SPECIALIST

Nigerian education system can't provide high-quality specialists to manage hospital affairs. That's why Nigerians try to find better education abroad. Some young Nigerians get a bachelor degree at the UK or US universities. Still, not every Nigerian is so lucky. The management in Nigeria is different from the general theory of management. Newly graduated specialists are faced with:

Corruption,

Lack of high-class medical doctors;

Lack of medications;

Lack of tutoring; -

Lack of real experience.

Young Nigerian managers tend to make mistakes not because they are bad students, but because the real life rules are different from the theory management taught in universities.

ILL TRAINED NURSES

Nurses are also crucial for every clinic. They stay with a patient for almost 80% of the time. Still, their training is also a big problem for healthcare managers. If you think that nurses should only obey the commands of doctors, then you are wrong! They should also study medicine! Moreover, the nurses' salary in Nigeria is pretty low. However, it does not justify the way they treat patients.

LACK OF FUNDING

Government medical facilities experience the lack of financing. Rural areas don't even have enough to provide electricity for their healthcare system. What does it mean for

⁵⁶⁹ World bank. *Universal Health care Service coverage index*. (2017)

Nigerians? Even if doctors want to help – they can't do that without funding. Healthcare management has to deal with this kind of problems too.

LACK OF MEDICINES

The Federal Government of Nigeria has even confirmed the lack of medications. If you add the Nigerian corruption to this case, then you can see the full picture. Healthcare in Nigeria has to struggle with this problem and solve it. And corruption only makes it worse. According to statistics, in Nigeria primary healthcare centres do not get at least 20% of their medications every year.⁵⁷⁰ People are forced to travel from clinic to clinic to find a doctor with the right medicine. This situation creates additional lines at doctors' offices. Moreover, lack of medicines leads to death of hundreds of Nigerians every year!

LACK OF MEDICAL FACILITIES

People from rural areas have no choice besides travelling to the nearest city for medical help. It's one of the challenges of healthcare in Nigeria. Lack of facilities lead to the overpopulation of available facilities. It also leads to a situation when doctors and nurses overwork.

LACK OF TOOLS

While some clinics in big cities in Nigeria can have the modern medical equipment, other cities only have to make do with what they have. Nigerian government should also deal with the problem of bad hospital equipment. This includes cars, surgeon rooms, x-ray rooms, etc.

LACKADISICAL ATTITUDE TOWARDS HEALTH CARE

The government has over the years shown poor attitude towards health care. It is no news that top politicians and government officials travel outside the country to get their medical treatment.

This alone shows the lack of faith of the Nigerian leaders in the health care they are providing and also proves the importance of health and health care facilities.

The government, instead, spends more time and money on things that the people can 'see', such as roads. They play

on the ignorance of people by constructing roads and 'counting' the number of roads constructed as achievements. They act with the objective of being 're-elected', forgetting that people will equally appreciate an improvement in health care provision.

These and many more are some of the challenges bedevilling the Nigerian health sector.

PROSPECTS OF THE NIGERIAN HEALTH SECTOR

⁵⁷⁰ n1

All is not doom and gloom for the Health sector in Nigeria though, there is still a glimmer of hope if Nigeria puts in the right policies, work, and action towards a better health care system most especially the primary health care system and there is still something to be prospective about.

People turn to the primary health care system in their communities both to stay healthy and to get care when they fall sick. From primary health care providers they seek prevention of disease, management of chronic conditions, access to treatment of various ailments and conditions, and family planning. When the primary health care system performs well, it meets the vast majority of people's health needs, and that is essential if we are to make progress toward our nation's health goals.

We are optimistic because, first, we are pleased by early evidence that Nigeria's Primary Health Care Under One Roof (PHCUOR) policies seem to be succeeding. Instituted in 2011⁵⁷¹ to address intractable stewardship and governance problems facing Nigeria's health care delivery system, the policies were designed to facilitate better management of resources by health care managers, increase patient confidence in and utilization of services, increase efficiency and coordination of health services, and reduce fragmentation. Data from Jigawa state shows the reforms are working, with increases in immunization coverage and attended deliveries following PHCUOR implementation.

Second, Nigeria's National Health Act (NHAct), enacted in late 2014, officially recognizes Nigerians' right to health – and through the NHAct, the Basic Health Care Provision Fund provides financial resources to improve primary health care.⁵⁷² The NHAct has the potential to fuel dramatic public health improvements and rapid progress towards the attainment of Universal Health Coverage (UHC).

These two developments provide a critical policy base for primary health care system improvement efforts; however, decision-makers in our country, and around the world, often do not have the right information to understand the specific ways in which our systems are getting better or worse, and the reasons behind the trends. For example, Nigeria increased its total health expenditure per capita by 103% over 13 years, from \$102 in 2000 to \$207 in 2013.⁵⁷³ Yet the country continues to perform relatively poorly on indicators measuring the sufficiency of health system inputs, the accessibility and quality of service delivery, and equity and health outcomes. This suggests that there may be poorly understood gaps or challenges with the primary health care system.

The problem is that we don't have the right data. We need improvements to the health information system, regular and sustainable population and health-facility-based surveys, and a functioning vital statistics and civil registration system. We also need to strengthen the use of evidence-linked planning for resource allocation and utilization.

⁵⁷¹ Dodgson R.L. *Nigeria's Health governance*. Global health governance. (2002)

⁵⁷² Federal Government of Nigeria. National Health Act (2014) federal republic of Nigeria. Official gazette No 145, vol. 101

⁵⁷³ n16

And that brings us to another reason we are optimistic about the future of primary health care in Nigeria. A new partnership called the Primary Health Care Performance Initiative (PHCPI) has been formed to catalyze improvements in primary health care in low- and middle-income countries globally through better measurement and knowledge-sharing. Part of the partnership's focus is better measuring primary health care service delivery, including quality of care and the patient experiences that play a role in determining health outcomes.⁵⁷⁴

We all know that policies, infrastructure, and resources are not enough to ensure a primary health care system performs well and meets people's health needs. PHCPI is designed to give decision-makers the tools they need to understand the drivers of primary health care performance and best practices to improve their own systems. Therefore, in synergy with the ongoing Primary health care under one roof (PHCUOR) policy reforms, PHCPI will help Nigerian decision-makers identify what investments and policies deliver the best and most efficient care to meet communities' needs and improve health outcomes.

There are no easy answers when it comes to health system improvements. The PHCUOR reforms and the National Health Act are our starting point, and we need to couple them with a motivated health workforce and improvements to the National Health Management Information System. By doing so, and leveraging PHCPI's tools and resources for evidence-based decision making, we in Nigeria will be well-positioned to realize better-performing PHC systems that deliver significantly improved health outcomes.

There are also various schemes that have been set up by the government to help make for better primary health care such as the NIGERIA HEALTH INSURANCE SCHEME (NHIS) and others which have set the right foundation for a better Health Sector if the work is put in place.

The National Health Insurance Scheme Act was established in Nigeria in 2004,⁵⁷⁵ which led to the National Health Insurance Scheme organization, which aims to provide affordable health insurance to the people of Nigeria. The program provides many different programs for consumers to choose from, including programs for those in a vulnerable state who may not be able to work. This incorporates those with disabilities or young children.

These programs include the Physically Challenged Persons Social Health Insurance Program, which provides full coverage for citizens who face mental or physical challenges, preventing them from being able to work. The programs for people in a vulnerable state also include the Prison Inmates Social Health Insurance Program and the Children Under Five Social Health Insurance Program. Providing easier access to health insurance programs is a foolproof way to improve health in Nigeria.

⁵⁷⁴ Phcpi. *Strong primary healthcare saves lives in crisis and calm*. www.improvingphc.org accessed 22nd April, 2024

⁵⁷⁵ National health insurance scheme. [Www.nhis.gov.ng](http://www.nhis.gov.ng) accessed 22nd May, 2024

It goes without saying that with better food comes better health. For many third world countries, though, finding quality food that has gone through proper measures to ensure it is safe to eat proves difficult. Eating improperly prepared foods or food that has not been checked can have serious consequences on health, like food-borne diseases such as typhoid or salmonella.

According to The Guardian Nigeria, many street kiosks in the country have poor hygiene practices⁵⁷⁶, such as not ensuring their food is not contaminated, washing dishes improperly or an absence of health inspections by city officials. However, in June 2016, the Food and Agriculture Organization of the United Nations proposed the Food Safety and Quality Bill to establish grounds for higher food safety and standards, which aims to improve health in Nigeria. The National Food Safety Management Committee will be accountable for overseeing all food safety measures.

The country of Nigeria has come a long way in health improvement and is certainly showing a steady increase in health. With continued effort and practice, improving health in Nigeria will no longer be a dream for the vulnerable; it will instead become an everyday reality that comes with many benefits.

CONCLUSION

All health financing mechanisms in Nigeria are performing at suboptimal levels. Resources are not equitably allocated or efficiently used to minimize wastage. Quality of services are perceived to be substandard, and individuals and households are not protected from catastrophic health expenditure. Given current situations of major health financing mechanisms in Nigeria in terms of health systems goals of efficiency, equity, quality of care and sustainability, financial risk protection for all citizens cannot be achieved. There are needed changes that must occur in order to improve health financing and ensure that Nigeria is on the right trajectory to achieving UHC. Key stakeholders in health financing, and decision makers that drive policy formulation and implementation need to make these changes in collaboration with non-health sectors.

RECOMMENDATIONS

1. Hospitals should consider outsourcing the hospital management services to professionals who will be responsible for hospital administration activities, while doctors focus fully on healthcare delivery.
2. The government should focus on improving and implementing regulation that would encourage the return of skilled Nigerian medical doctors (up to 40percent of registered doctors currently practice abroad), improve outcomes, and ultimately support healthcare sector growth.
3. The government should strengthen the various health schemes that have been put in place and ensuring it is been diligently implemented.

⁵⁷⁶ Health care in Nigeria. Guardian newspapers. www.guardianng.com/healthcareinnigeria/2017 accessed 22nd May, 2024



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

CYBER CRIME AND CASHLESS POLICY : PROPHETIC STRATEGY IN
CURBING RISING CASES OF *GISHU* (E-FRAUD) IN NIGERIA

Akanbi Mukaila Akolade

Department of peace and religions studies, Faculty of arts, Lagos State
University

E-mail: akoladecentre@gmail.com, Phone: 08032390576

Abstract

Cashless policy and *Gishu* (E-fraud) cases in digital and electronic payment system are on the surge despite the introduction of Bank Verification Number (BVN). This cankerworm “fraud” has posed a major risk to not only the banking sector but customers who has lost confidence in banks and indeed the Nigerian economy. This ugly phenomenon had been attributed to growing army of unemployed youths by some scholars. While some contend that the major contributing factor is compromise by law enforcement agents. Others maintain that it is due to the collapse in the moral authority of social institution. The thrust of the study is to examine different cases of E-fraud in the policy and proffer prophetic strategies to curb the activities of business fraudsters. With the aid of secondary sources of information, the study contextualized the phenomenon within the frame work of Islamic orthodoxy, attempts reconciliation with opposing views. The findings of the study revealed that E-fraud has become the order of the day among the youth. The paper concludes that the scourge has a triangular axis of evil which is centred around the politicians, clergy and media in the twenty first century and the best strategy to curtail it is leadership by example as exemplified by the Prophet in the early history of Islam.

Keywords: Cashless Policy, *Gishu* (E-fraud), Banking Sector, Fraudsters, Nigerian Economy

Introduction

Prior to 2011, payment system in Nigeria was predominantly cash-based but the cashless policy, payment operation became increasingly characterized by funds transfers, ATMs and other electronic payment systems.¹ The statistical evidence provided by Central Bank of Nigeria (2012) revealed that, cash related transactions accounted for 99% of customers activities in Nigeria banks as at December 2011. It estimated the total cash transaction volume the conventional five payment channels to be 215,015,005 (two hundred and fifteen million and fifteen thousand and five) of this figure, ATM withdrawal accounted for 50.9% over the counter (OTC) withdrawal 33.72% and cheques 13.56% Point of Sales (POS) and we channels accounted respectively for 0.49% and 1.26%. the aforementioned estimation justifies the claim of the CBN that the Nigerian economy is heavily cash based and the imperative for cashless economy.² Data from CBN also showed that between January 2018 and December 2022, POS transactions at N2.4 trillion to four billion at N41 trillion.

However, as more Nigerians continue to embrace the cashless policy, fraudsters have infiltrated the system, thus, defrauding unsuspecting members of the public of their hard-earned money.³ The Association of Certified Fraud Examiners (ACFE) portrays as an international act of deception involving financial transaction for the purpose of personal gain.⁴ The impact of financial fraud is quite worrisome and alarming, affecting not only the victim directly but also the overall economy. It erodes trust in financial system, undermines investor confidence and can lead to severe financial losses for companies.⁵ Report discloses that the continent lost \$3.5 billion out of which Nigerians loss was about \$649 million.⁶ Nigeria Inter-Bank Settlement System (NIBSS) reveals that the banking sector lost N9.5 billion in seven months due to the activities of electronic fraudsters.⁷

This disheartening phenomenon had been attributed to growing army of unemployed youth by some scholars. While some contend that the major contributing factor is compromise by law enforcement agents. Others maintain that it is due to the collapse in the moral authority of social institution.

It is against this background that this study examines different cases of E-fraud in the society and proffer panacea within the Islamic frame of work and prophetic strategy to curb the status quo. In order to accomplish this goal, the study is divided into five segments which include introduction, followed by conceptual clarification, examination of cases of reported fraud in the third segment. Prophetic strategies to curb the menace of fraud and findings, recommendations coupled with conclusion are articulated.

2.0 Conceptual Clarification

Fraud in the Dictionary of Islamic terms connotes *tadlis* in Arabic word.⁸ The term *tadlis* is the root word of *dallasa* which means to cheat.⁹ Schact articulates that the Arabic term *dallasa* denotes to conceal a fault or defeat in an article of merchandise for the purchase is derived from Latin '*dolus*', the word enter into Arabic through the channel of commercial practice at an early date but it is not a technical term for fraud in the early Islamic law.¹⁰

On the other hand, some scholars contend that *tadlis* cannot be regarded as fraud as certain people have subscribed to.¹¹ According to Oxford word power, the term fraud is interpreted as *gishu* and *ihتيال*.¹²

In the context of this study, the term *gishu* is quite apposite in this study as it encapsulates the main thesis of the research which is categorically asserted by Prophet Muhammad in one of his saying thus:

On the authority of Abu Hurayrah, the prophet says:
whoever bears arms against us is not of us and whoever
deceives us is not of us.¹³

The above prophetic traditions clarify the apposite meaning of fraud is *gishu* in Arabic term. In a laymen's view fraud is any activity that is tainted with criminal intention to cheat or deceive.¹⁴

From Islamic jurisprudence, in the view of Kirk Patrick¹⁵, Adekanye¹⁶ and Sunday¹⁷ fraud is diversion of money in banking transaction through falsification of entries in accounts of customers with a view to take benefit to the excess proceed. From the Islamic jurisprudence point of view, fraud consist of two element thus: exploitation by means of trickery and inducement of the contracting party into contracting.¹⁸

2.1 Origin of Fraud in Islam

The origin of fraud in Islam is traced back to the early history of Islam when the prophet assert thus:

If a person buys a *mussarat* in ignorance of the fact that it is such, then he has the option between accepting or returning it alone with a measure of date.¹⁹

In the above prophetic tradition of a *Mussarat* is a she-goat whose teats have been tied up for some time in order to give the prospect purchaser only optimistic impression of the animals normal milk-yield. The practice is called *Tasriyyah*. It is on this precedent that law is built by analogy to cover all fraudulent acts deliberately contrived to create a false impression in the mind of other contracting party.²⁰

3.0 POS (Point of Sale) Business in Nigeria

The Central Bank of Nigeria (CNB) formally introduced the POS system in 2012 as a means of bringing financial service closer to the people through what it identifies as agent banking that is the use of the third party for the provision of banking and other financial service to the public. The agent banking initiative in Nigeria has proved to be viable tool for achievement of the financial inclusion targets set for the country.²¹

3.1 Examination of E-Fraud Cases in Nigerian Society

Bad experiences through digital payment have left a bitter taste in the mouth of victims and this negatively impact on the gains of the digital payment policy. A survey conducted by Kaspersky on digital payment in Nigeria proclaims that the impact of cyber threat targeting digital payment does not just impose a financial burden on consumers but also affects them psychologically. The survey showed that 43 percent of users reported that they have less trust in digital payment providers after losing their money.²²

To corroborate this, a customer care staffer with a new generation bank who simply wanted to be identified as Temiloluwa articulated as a result to the increasing digital payment fraud. Some unlearned customers have lost faith in the credibility of the banking system.²³

Another victim called Moreen Simpson a media consultant proclaimed thus:

I don't do online transaction that will require any ATM details.

She complains further that she hardly patronize the POS operations because of the ugly trend.²⁴ This sort of experiences has left Nigerians even more wary as banks are unhelpful in either tracking fraudulent transactions or recovering the stolen funds. Reports of sudden disappearance of funds from customers' bank account are no longer news. More worrisome is banks inability to offer explanations for this unauthorized debit. Statistics from the Nigeria Inter-Bank Settlement System Plc (NIBSS) showed that POS is the second most exploited channel by fraudsters after the mobile system with an approximate actual loss of billions as at October 2023.²⁵

It is in this regard that a banking expert Rebecca argues that Fintech Companies give out POS without adequate Know Your Customer (KYC) checks thus fuelling fraud tendencies. She argues further that before commercial banks assign a to an individual's, they ensure the place so that when any fraudulent issue erupts the victims are brought to book.²⁶

It is in this context that the International Monetary Fund (IMF) revealed that financial institution worldwide lost \$12 billion to cyber attacks in the last 20 years. The report stated that out of the \$12 billion, a whopping \$2.5 billion was lost between 2020 and the first quarter of 2024. IMF added that cyber incidents are a key operational risk that could threaten financial institution operation resilience and adversely affect overall macro financial stability.²⁷

4.0 E-Fraud within Triangular Axis of Evil

The fact that history is not just a teacher of all times for all living human being but also a permanent school that constantly reminds mankind of the lesson to learn from the various events and experiences of the past as a means of guidance toward the future.²⁸ This is why this study will examine the scourge of E-fraud under a triangular axis of evil centered around the politician, clergy and the media in the twenty-first century.

4.1 Politicians and the Practice of Fraud

Politics is a social necessity that cannot be totally avoided in any human society because of its irreplaceable role in socializing humanity. Nevertheless, the method of handling it in Nigeria has practically turned it into a paradoxical slough of a snake which has no life of its own but scares the people around it, despite its empty appearance.²⁹

Politics in the view of F. Abbas today, is a paradoxical cruised dangerously on an ocean of uncertainty. And the sailor of the ship is the stolen money desperately used by the minority, in pursuit of power to the gross disadvantage of the majority of citizens.³⁰

Leadership as far as Islam is concerned is all about service. This fact is embodied in the prophetic tradition thus: *"The leader of a people is their servant"*.³¹

The above assertion import is that one is a leader to the extent that one is able to serve and share one's own ideals with others and make them realize it. It is unfortunate that Nigeria political history is replete with money laundering, fraud, *Jahuliyyah* practices etc.

In the view of Akintola, public officers embezzle public funds without prosecution. Political godfatherism has permeated Nigeria body polity; which resulted into intimidation and sometimes assassination. Funds that are supposed to be used for national development are used for political campaigns and bribery.³² The phenomenon of corruption that Nigerian politics is fraught with is interndem with Socrates assertion thus:

Democracy must fall back because it will try to tailor everyone thieves and fraudsters will want important government functions and democracy will give it to them. And at that time, when thieves and fraudsters finally and democratically take authority because criminal and evil doers will be worse dictatorship than in the time of any monarchy or oligarchy.³³

The above assertion is the prediction of the fall of democracy articulated by socrate. He considered democracy as a government by the number that could be easily misled by demagogues leaders that manipulate people. It is in this regard that Bankole asserts thus:

Corruption is a clog in the wheel of progress in Nigeria and has incessantly frustrated the realization of mobile national goals, despite the enormous national and human resources in Nigeria.³⁴

Bankole explains further that, the award of contract by public office holders to cronies' family members, and personally held company bribery, fraud, nepotism in reconstituted promotion is a political corruption. The fraud of ghost employers in pay roll is common to many states in Nigeria. Billions of Naira are wasted to fraudsters on monthly bases and there are more than 45,000 unaccountable workers in the federal payroll alone and federal government is spending over 100 billion annually.

The most worrisome is that Nigeria have not been informed on what is being done to the perpetrators of this heinous crime.³⁵ It is this backdrop that led Igbinovia to articulate thus:

*Nigeria is a criminogenic society where crime is endemic because its people are largely lawless and undisciplined.*³⁶

Igbinovia explains further that to compound the problem it seems to have become part of the Nigerian culture to treat those who steal public funds with unbelievable levity with the worst punishment being resignation from the office with liberty to enjoy the loot. Not only is it that such criminal go unpunished, but are actually rewarded.³⁷

History reports that the EFCC arraigned a Senior Advocate of Nigerian (SAN) Mahammed Dele Belgore at the Federal Court in Lagos for alleged money laundering. He was arraigned along with a former minister of National Planning Prof. Abubakar Suleimon, before Justice Muhammed Aikawa on a five-account charge. EFCC accused them of conspiring to directly take possession of the N450 million they pleaded not guilty.³⁸

Similitude of such cases are rampant in Nigerian Society; without bringing the culprit to book.

4.2 Clergy and Fraud in Nigeria

History and phenomenon are evidence to the fact that in spite of the proliferation of churches and mosques in Nigeria, nearly all crimes known on earth are committed in the polity. Nigerians are into white collar crime, cybercrime, political, economic corruption etc.³⁹

It is disheartening that despite the acrobatic religiousity of the Christian folks and gymnastic exhibition of piety by Muslims, it is paradoxical that Pastors, Imams and Alfas are being caught in cybercrime just like member of their congregation. Citing few instances may suffice to convince us here.

4.2.1 Islamic Cleric and Fraud

Operative of the Special Fraud Unit (SFU), Ikoyi, Lagos State arrested a 34years old self acclaimed Alfa, identified as Isiaka Adeleke, he allegedly defrauded his childhood friend who came to him for prayers to expand his business.⁴⁰

Another instance is the report from the Ogun State police who has determined three Islamic clerics for allegedly extorting a man identified simply as Tola who reportedly sought special prayers from them. Hamzah Hamed, the brother of one of the clerics Sulaiman claimed that Tola who sought special prayers was allegedly involved in cybercrime and he wondered why the police did not detain him as well.⁴¹ Such cases have become the order of the day in Nigerian society.

4.2.2 Christians Clerics and Fraud

There is no gainsaying in the fact that fraudulent activities are not confined to Islamic cleric cited above but those of their Christian counterparts.

Evidence from Sahara reporters reveals that a Senior Pastor of Temple of Praise Women Fellowship Global, Surulere, popularly known as Linda Mabi Praise was sentenced to five years imprisonment over N128 million fraud. She was convicted and sentenced by Justice S.O. Solebo of the special offences court in Ikeja following her arraignment by the Economic and Financial Crimes Commission (EFCC).⁴²

A self-acclaimed Pastor David Eludi was also docked in Ajangbadi Lagos for allegedly conspiring with others to collect the sum of N352,000 from one Florence Samuel with a promise to use the funds to liberate her from family curses.⁴³

In another vein, a United Kingdom (UK) based cleric pastor Paul-Kayode Joash was remanded in the correctional facility Agodi, Ibadan for allegedly defrauding three persons of N305 million. He was arraigned on a 10-court charge bordering on obtaining

money under pretence, an offence which is punishable under criminal code of the laws of the state.⁴⁴

Similitude of these fraudulent phenomena are rampant in our society and social media.

4.3 Social Media and Fraud

Nigerians are falling victim to online fraud through social media. The 2023 online scams in Africa Report by KnowBe4 2023 noted financial scams, fake investments, cryptocurrencies and NFTS scams, brand impersonation information theft, online shopping scams and fake job offers was reported to have dominated the fraud scene.⁴⁵

In Nigeria, social media was the most used platform for scams with 32 percent. The scammers often used social engineering techniques to convince their victims, such as creating rapport or trust by making website look legitimate, sending message that appealed to emotions using social media profiles that seemed authentic.⁴⁶

Two Nigerian nationals, Charles Emeka and Obije's sister-in-law and conspirator Ijeoma Miriam have been sentenced to prison, probation and ordered to pay \$356,671 in restitution for their involvement in the theft of thousands of dollars from victim in romance fraud scheme.⁴⁷ Both of them pleaded guilty to conspiracy to commit international money laundering and defrauding victims.

It is quite disheartening the social media users compare internet fraudsters to Nigerian politicians, in defending the yahoo boys actions. They opine that yahoo boys are not the only group tarnishing Nigeria's image. Politicians of all stripes have been implicated in embezzling public magul to Ramon Olorunwa Abbas a.ka. Hushpuppi.⁴⁸

Such view in our humble opinion is nothing but justifying evil with evils. The preponderance of criminality is not a sheer coincidence but a consequence of collective (deliberate) negligence by uncaring parents, incapacitated and underfunded educational system, and ill-motivated teachers, parasitic elite and their bird-bug associates who suck the collective patrimony.

It is trite, but true to state that Nigeria's major problem is not confined to leadership but also followership.⁴⁹ A country where first class students receive N100,000 as the best, while reality show winner attracts endorsement deals and receive N45 million.⁵⁰ Such

phenomenon are contributing factors to internet fraud because we live in a materialistic world.

In a logical poetic stanza, an Arab poet once opined thus:

We all blame our time for our misdemeanors when
the misdemeanor blamed on our time is actually in
us.⁵¹

The import of the above poem is that we smear time with all types of iniquities and yet expect time, to clear us of any blame. We're time endowed with mouth to comment on us, it would have blamed us for generating all crimes.

5.1 Prophetic Strategy to Curb E-Fraud

Of the three triangular axis of evil mentioned above, the most disappointing leg is the clergy. From time immemorial, religion had stood out as the societal salt used as a preservative for all other ingredients with which to prepare delicious soup of life for the consumption of all and sundry at any stage.

But with the sudden adoption of ashes to replace salt as the main ingredient of preservation in the 21st century, deprive it of its natural value and render it totally useless to its consumers.⁵² It is in this regard Femi Abbas asserts thus:

Nigeria has dangerously become a polluted country with a suffocating smoke. Those who are responsible for this situation are the fraudster parading themselves as prophets issuing satanic statements as claim of prophethood.⁵³

The commercialization of religion has enabled private individuals to invest in building of castles, as business ventures and this has seriously diminished the value of religion in taste and in substance.

Nigeria is a criminogenic society. A society where crime is endemic because its people are largely lawless and undisciplined.⁵⁴

Nigeria present society is a similitude environment of Arabian peninsula in the early history of Islam. The following prophetic tradition reveals how the Prophet strategize in curtailing the fraudulent activities rampant in the seventh century thus:

Aishat reported the Quraish had been anxious about a woman from Bani Makzumiyyah who had committed theft and they said: who will speak to the messenger of Allah about her? Others said: who would dare to but Usamah Ibn Zaid, one beloved by the Prophet. So Usama spoke to him and the messenger of Allah: O people, those who came before you were destroyed because if a person of high status committed theft among them, they would spare him but if a person of lower committed theft, they would apply the punishment upon him. By Allah, if the daughter of Muhammad were to steal, I would have cut off her hand.⁵⁵

The above prophetic tradition is embodied in the following verses;

And (as for) the man who steals and the woman who steal, cut off their hands as a punishment for what they have earned, an exemplary punishment from Allah and Allah is Mighty. (Qur'an 5:38)

The opponent of Islam have raised objection against the penal code of Islam on theft. They label such penalties to be primitive and inhuman and not acceptable in the twenty century. Islam, as complete way of life acknowledge the fact that moral advice and training among factors in development of characters but contends that inspite of such training if an individual's is inclined towards crime he or she should be punished adequately. Coupled with the fact that Islam that lays down the heavy penalty for crimes perpetrated takes into account the circumstances under which the crime is perpetrated. For instance, a person who steals due to hunger and poverty is not liable to have his or her hand cut-off, nor is a person who has been coerced into stealing punished. There is a vivid evidence that Islamic countries such Saudi Arabia implementing such rule has less perpetration of theft and fraud than other countries who look down upon such rule.

The truth of the matter is that the roots of the multi-dimensional problems staring Nigeria on the face today are traceable mostly to the corridors of our government and the absurdity of immunity clause in Nigeria constitution. Both are obviously authorization of corruption for some rogues who are claiming to be political or religious in the country.⁵⁶

From the foregoing, we are our own problem; we know the source of what we call problems. But we inadvertently incubate such problems, Nigeria know how to proffer

solution to them but like lotus eaters in Oedipus Rex, we are so much drunk with illegalities that it has become so difficult for us to part with it. The Qur'an speaks:

Allah does not change the situation of a nation until they themselves have resolved to change it through their attitude. (Q.13:11)

5.2 Findings of the Study

In the course of our research, the following are discovered:

- i. The politicians stand out as the engine room of virtually all evils afflicting our country.
- ii. The clergies are the epitome of the dangerous chimney through which the polluting smoke of that evil oozes out to suffocate the populace spiritually in the name of God.
- iii. The social media is the platform of the megaphone for both the politicians and the so called clergies through the instrumentality of satanic propaganda.
- iv. Immunity clause in Nigeria constitution is obviously an authorization of corruption and fraud.
- v. E-fraud has become the order of the day among Nigerians youth.
- vi. Nigeria is dangerously entangled in the evils emanating from politicians, clergy and media.
- vii. Fraudsters among the politicians' clergy and social media are responsible for the status quo.
- viii. Commercialization of religion and politics is a contributing factor to increase in fraud challenge.
- ix. Nigerian politicians fail to practice rule of law.
- x. There are no practical consequences for defrauders, even when they are caught.

7.0 Conclusion and Recommendation

The paper has attempted to discuss the prophetic strategy to curb the menace of e-fraud in the modern day among Nigerian citizen from Islamic perspectives. In the course of accomplishing this goal, the paper gave a working contextual definition to some

keywords featuring in the topic. POS business, digital payment growth, cases of e-fraud, causes of fraud and cybercrime among the youth were thoroughly examined. The major contributing factors to the scourge were highlighted as a triangular axis of evil. It should be known that fraud is not peculiar to Nigeria but a scourge endemic in the global village as established by the Qur'an. The best strategy to curtail it is leadership by example. Where no citizen is above the rule of law. We have the firm belief that, if Nigeria as a nation can adopt the above prophetic strategy, the scourge of e-fraud will be curbed.

Recommendations

In the light of the aforementioned, findings, the paper recommends thus:

- i. As a watch dog of the society, journalists are expected to bridge the gap between the government and the society.
- ii. The mosque and church leaders should be of exemplary conduct practicing what they preach in order to be emulated by their followers.
- iii. Nigerian politicians should rise to the responsibility and to the challenge of personal example which are the hall marks of the leadership.
- iv. The Economic and Financial Crimes Commission (EFCC) should assist in curbing rising cases of e-fraud.
- v. Banks are urged to improve their cyber-security platforms with educating their customers on how to protect their account.
- vi. The sector's case of ethics must be strictly enforced with upgrading the bank software and hardware system.
- vii. Organizations should leverage digital forensics to prevent financial fraud and strategize on allocating their anti-fraud resources.
- viii. To effectively mitigate the risks of financial fraud, organization should embrace the capabilities of digital forensics.
- ix. To stay one step ahead of fraudsters, banking institutions should embrace and adapt to legal and ethical considerations.
- x. Organizations should employ digital data monitoring and analysis as a control measure.

Prophet Muhammad was reported to have said:

If two set of people among my followers are discipline, then, there will be righteous society. They are: Religions leaders and political leaders.⁵⁷

Notes and References

1. Adetola Bademosi, "Digital Payments: How Soaring Fraud Threatens Financial Inclusion Growth, Nigeria". *Tribune*, 15th December, 2023, 20.
2. Osazevbam, H. Osahon and Yomere, O. Gabriel, "Benefits and Challenges of Nigeria Cashless Policy", *Kuwait Chapter of Arabian Journal of Business and Management Review*, Vol. 4, 2015, 2.
3. Adetola Bademosi, "Digital Payments: How Soaring Fraud Threatens Financial Inclusion Growth, Nigeria". *Tribune*, 15th December, 2023, 20.
4. "Leveraging Digital Forensics to Mitigate the Risk of Financial Fraud, Anderson Digest", *Business Day*, Tuesday, October 3rd, 2023, 14.
5. "Leveraging Digital Forensics..." .
6. *EFCC and Cyber Criminal in Nigeria, the Nation*, Wednesday December 18, 2019, 18.

7. "Curbing Rising Cases of E-Fraud", *Daily Sun*, August 30th, 2023.
8. Deeb Al-Khudram, *Dictionary of Islamic Terms*, Riyadh, Daru Salaam, 2010, 170.
9. H. Wehr, A. *Dictionary of Modern Written Arabic* led J.M. Cowan, 3rd ed., New York, 1976, 290.
10. Schacht, *An Introduction to Islamic Law*, Oxford Press, Oxford , 1964, 9.
11. S.E. Rayner, *The Theory of Contract in Islamic Law*, Supra 204-205.
12. *Oxford Wordpower Dictionary*, China, Oxford University Press, 315.
13. M.A Al-Arabi, *Commentary on the Riyadu Salihin*, Daru Salaam, USA, Hadith 69, Muslim, 1999, 159.
14. M.I. Omotosho, *Detention and Prevention of Fraud and Forgeries in Financial Institutions*, 1992, A Paper presented for ICAN and CIBN at a National Seminar on Accounting in the Banking and Financial Institution.
15. E.M. Kirkpatrick, *Chambers Universal Learners Dictionary Spectrum Books Ltd*, Ibadan, 1985.
16. Femi Adekanye, *Fraud in Banking Transactions, the Nigerian Banker*, 1986.
17. Oriola M. Sunday, "Bank Fraud: Look at the activities of the Advance Free Fraud in Nigerian Banks", *The Nigerian Journal of Risk* 2002, Vol. 3, (1) University of Lagos, 1.
18. S.E. Rayner, *The Theory of Contracts in Islamic Law...*
19. *History of Islamic Law*, Commercial Law in the Gulf States, SUPRAP, 85.
20. Mohammed .A. Adil, *et al*, *Tadhs in Islamic Transaction*.
21. Adetola Bademosi, "Digital Payments: How Soaring Fraud Threatens Financial Inclusion Growth, Nigeria". *Tribune*, 15th December, 2023, 20.
22. Bademosi...

23. Bademosi...
24. Bademosi...
25. Bademosi...
26. Bademosi...
27. "Global Financial Institution Lost \$12.bn to Cyber Attack in 20 Years", *Tribune*, 12 April, 2024, 7.
28. "Nigerian's Triangular Axis of Evil", *The Nation*, Friday July 20, 2022, 28.
29. "Upholding Muslim Unity", *The Nation*, Friday January 19, 2024, 29.
30. "Upholding Muslim Unity...".
31. A.M. Akolade, "Jahiliyyah Between Leadership and Followership in Nigeria: Development, Conference on Islam in Nigeria", *Islamic Welfare Foundation*, 2022, Vol. 11, 8.
32. I.L. Akintola, *Corruption in Nigeria: An Islamic Cum-Eschatological Exposition in Democracy, Good Governance and Corruption in Nigeria, 1999-2005*, Lagos, Nigeria.
33. W. Olaoye, *100 Poor to Revolt Premium Times Nigeria*, January 14, 2024.
34. O. Bankole, *Anatomy of Corruption in the Nigeria Public Sector: Theoretical Perspective and Some Empirical Explanation*, 2015.
35. D. Melaye, *Jonathan Administration Most Corruption in History*, 2016.
36. P.E. Igbinovia, *The Criminal in All of US: Whose Ox Have We not Taken?* 2003, 208.
37. Igbinovia, 210.
38. E. Ikhilae and A. Omanuga, "Events Cases that Shaped Judiciary in 2017", *The Nation*, Tuesday January 2nd, 2018, 27.

39. Isiaq Akintola, *Acrobatic Religiousity and Paradoxical Criminality: Who Did This to Nigeria?* Convocation Lecture at Al-Hikmah University, Ilorin, Kwara State, 2017, 12.
40. Akintola, 13.
41. Gbenga Obioninim, "Police Arrest Three Clerics for Extortion, Family Kicks". *The Punch*, September 8, 2023, 3.
42. Sahara Reporters, *Court Jails Lagos Pastor Over N128 Million Fraud*, New York, December 30, 2021.
43. Sandra Umeh, "Pastor Eludi Docked for N352k Special Prayer Fraud", *PM News*, December 12, 2023.
44. Seye Olumide "Court Remands Cleric in Ibadan Prison Over N305m Fraud", *The Guardian*, November 13, 2023.
45. Temitayo Jaiyeola, "More Nigerians Vulnerable to Social Media Scams", *Punch*, September 17th, 2023.
46. Jaiyeola...
47. Andrew M. Lugar, *Two Nigerian Nationals Sentenced in Online Romans Fraud Conspiracy*, United States Attorney's Office District of Minesotai, September 18, 2023.
48. Suleman Lazarus, *Social Media Users Compare Internet Fraudsters to Nigerian Politicians*, February, 2nd, 2023.
49. Akanbi M., Akolade, *Jahiliyyah Between Leadership and Followership*, 2022.
50. Oludayo Tade, "Pillars of Crime in Nigeria", *The Nation* Thursday February 6, 2020, 19.
51. Femi Abbas, "To Where from Here", *The Nation*, Friday, August, 26, 2022, 30.
52. Abbas...

53. Abbas...
54. P.E. Igbinovia, *The Criminal in All of US: Whose Ox Have We Not Taken?* 208.
55. Sahih Muslim (1688) Bukhari Vol. 4, 681. (6787 *Ahadith*).
56. Femi Abbas, To Where from here, *The Nation*, Friday, August, 26, 2022, 30.
57. A.A. Al-Allory, *Miatu, Hadit, Maktabah wahab*, Agege; 1990, 2.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

ILLEGAL MINING AND ENVIRONMENTAL DEGRADATION IN NIGERIA:
CHALLENGES AND PROSPECTS OF DECENTRALIZATION

Ebunoluwa O. Popoola* Wadzi V. Aboki** Clementina C. Okeke***

Abstract

Illegal mining of solid minerals poses a threat to environmental sustainability in Nigeria on a scale and magnitude yet to be determined. Decades of neglect of the solid minerals sector, poor regulation, high demand for solid minerals and poverty have been identified as contributory factors. Pursuant to the environmental objective in section 20 of the 1999 Constitution, the legislature has incorporated environmental considerations in mining law yet these laws have not had significant impact in addressing environmental degradation from mining. It is argued that the highly centralised legal and institutional framework on mining in Nigeria needs to be addressed for section 20 to be effective. While there is some scholarship on the environmental impact of illegal mining, not much has been written on how decentralization could aid environmental protection and protect the right to a healthy environment. This paper examines the impact of illegal mining on the Nigerian environment and the nexus between over-centralization and environmental degradation. It asks: what prospects does decentralization hold for minimizing illegal mining and protecting the environment and what are the associated challenges? The paper adopts the doctrinal methodology. This involves content analysis of primary and secondary sources of law. Media reportage of illegal mining is also utilized to aid an understanding of the incidence of illegal mining in Nigeria. Ultimately this paper contributes to the discourse on creating an enabling environment for exploiting Nigeria's resources in an environmentally sustainable manner.

Keywords: illegal mining, environment, decentralization, solid minerals

Part I - Introduction

The search for alternative sources of government revenue and the increasing demand for critical minerals for renewable energy development, among other factors, have in recent times placed a spotlight on the solid minerals sector. Nigeria has over 44 valuable solid minerals types in about 500 locations across its 36 states⁵⁷⁷. These include

* PhD, Dept. of Public and Private Law, Bingham University, ebunpopoola@gmail.com

iron ore, cassiterite (tin ore), coltan, columbite, tantalite, lead and zinc, kaolin, limestone, marble, diatomite, gold, gemstones, talc, bitumen, and coal⁵⁷⁸. The mining sector in Nigeria is highly centralized with the Constitution vesting control and management of minerals exclusively in the Federal Government.⁵⁷⁹ The sector is also characterized by widespread illegal mining⁵⁸⁰ resulting in devastation of the environment, loss of revenue to the government and further fuelling insecurity and criminality. A sector that has the potential of providing critical minerals for the energy transition, generating income and aiding Nigeria's economic fortunes is rather becoming an albatross.

Solid minerals mining, by its very nature, raises questions of environmental sustainability. Mining is associated with negative impacts on the environment and correspondingly on the right of humans to a healthy environment. The environmental impacts include water pollution, air pollution, soil pollution and land degradation, noise pollution, erosion, deforestation, loss of biodiversity, among others.⁵⁸¹ These impacts are primarily felt but not limited to the immediate vicinity where drilling and extraction take place.

The need to minimise the environmental impact of mining and to ameliorate mining hazards is a major rationale for the regulation of this important sector. Regulation is done primarily via legislation and creation of relevant regulatory bodies. The Nigerian Minerals and Mining Act 2007 (NMMA 2007) - Nigeria's primary legislation on mining, the Mining and Minerals Regulations and the Environmental Impact Assessment Act, among others, incorporate several provisions that can be interpreted as incorporating environmental sustainability in solid minerals mining. These, when read alongside the section 20 constitutional environmental objective,

** PhD (in view), Dept. of International Law and Jurisprudence, Bingham University, abokiw@gmail.com

*** PhD, Private legal practitioner, prestigioustina@gmail.com, 08138200223.

⁵⁷⁷ *Nigeria's Mining and Metal Sector: Investment Promotion Brochure*. Ministry of Mines and Steel Development (MMSD) August 2016. <https://msmd.gov.ng/wp-content/uploads/2022/09/Nigeria-Ministry-of-Solid-Minerals-Investment-BrochureV11.pdf>

⁵⁷⁸ *Roadmap for the Growth and Development the Nigerian Mining Industry 2016-2025*. MMSD 2016, 23, 82-83.

⁵⁷⁹ Section 44 (3) Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999) (as amended).

⁵⁸⁰ *Ibid.*, 23.

⁵⁸¹ I.J. Nwadior (2011). Minimizing the Impact of Mining Activities for Sustainable Mined-Out Area Conservation in Nigeria. *FUTY Journal of the Environment*. 6(2), 69 -72. <http://dx.doi.org/10.4314/fje.v6i2.6>

impose the responsibility to ensure that mining is conducted in a way and manner that minimises harm to the environment.

Unregulated or poorly regulated mining renders the statutory safeguards for the environment ineffectual thereby resulting in massive environmental degradation. Illegal mining of solid minerals is insidious as it bypasses/avoids the regulation crucial to ensuring environmental sustainability. In another sense, it can be regarded as mining that is unregulated; mining that utterly disregards the environment; or mining devoid of checks and controls. This makes illegal mining many times more devastating to the environment.

The aim of this paper is to address over-centralization of solid minerals regulation and its attendant role in illegal mining and environmental degradation. The highly centralized nature of mining regulation in Nigeria, coupled with the high incidence of illegal mining and accompanying environmental degradation raises questions as to the nexus between the three. We therefore ask the following questions: What is the incidence of illegal mining in Nigeria? How does illegal mining affect the environment? What is the relationship between over-centralized regulation of the solid minerals sector and illegal mining? What prospects may decentralization hold for curbing illegal mining and what are the associated challenges of decentralization?

In addition to Part I - this introduction, the paper discusses successively in Parts II – VI, the incidence of illegal mining in Nigeria, its impact on the environment, the regulation of solid minerals mining, the role of decentralization in controlling illegal mining and the possible challenges of decentralization. Part VII concludes and proffers recommendations.

Part II – Illegal Mining and its Incidence in Nigeria

Mining is the extraction of minerals and other geological materials of economic value from deposits of the earth.⁵⁸² Illegal mining refers to mining activity that is undertaken without permission of the government, particularly in the absence of land rights, mining licences and exploration permits. Illegal mining is the extraction of

⁵⁸² F. Ahmed (2018). Environmental Issues and the Prospects of Mining in Nigeria. *Dutse Journal of Pure and Applied Sciences*. 4(2), 1.

minerals or other geological materials without following the proper procedures which includes the necessary permits, licences or regulatory approvals to participate in the activity.⁵⁸³

Nigeria's history of mining dates back to pre-colonial times, characterized by community-based traditional mining practices. Colonialism brought about mining on an industrial scale largely for export purposes. The transition to colonialism and eventual national independence prompted the enactment of new laws, regulations, and government policies, prompting a shift from artisanal small-scale mining (ASM) to large-scale mining. This shift resulted in the overlooking and marginalization of ASM.⁵⁸⁴ Mining was an important part of the Nigerian economy during the colonial era. For example, cassiterite was mined in Jos and coal in Enugu.⁵⁸⁵

In colonial times up to the early 1970s the revenues from solid minerals financed many government programs; however the discovery of crude oil and over-dependence on petro-dollars led to the neglect and decline of the solid mineral sector.⁵⁸⁶ The emphasis placed by successive governments on oil and gas exploration and production and the neglect of mining and other sectors of the economy also led to regulatory failures. Many mining sites were abandoned and not remediated. Artisanal miners, many unregulated and operating without approvals, filled the void left by the exit of large-scale miners and lax government regulation. This meant that illegal miners moved into some of the abandoned mining sites and became major players in the mining of solid minerals due to a lack of clearly defined policies, improved standards, enforcement and reforms.⁵⁸⁷

⁵⁸³ C.O. Amosun and T.A. Adeosun (2021). Curtailing Illegal Mining Operations in Nigeria. *International Journal of Physical and Human Geography* 9(1), 13-24. <https://www.eajournals.org/wp-content/uploads/Curtailing-Illegal-Mining-Operation-in-Nigeria.pdf>

⁵⁸⁴ S.A. Onekpe, et al (2023). Assessment of Mining Sector Contribution to Federal Government of Nigeria Revenue from 2012 to 2020. *International Journal of Engineering and Environmental Sciences*. 6(2) No. 2, 40-49. DOI: <https://doi.org/10.5281/zenodo.8307999>

⁵⁸⁵ *Roadmap for the Growth and Development the Nigerian Mining Industry*, MMSD 2016, 82-83.

⁵⁸⁶ Ibid.

⁵⁸⁷ (2023, May 14), Investigation: Coal Miners make a fortune while destroying livelihoods, environment in Enugu. *The Cable*. <https://www.thecable.ng/investigation-coal-miners-make-a-fortune-while-destroying-livelihoods-environment-in-enugu/>

The incidence of illegal mining is high in Nigeria with media reportage indicating its occurrence in virtually every state in the country.⁵⁸⁸ In 1999 Mogbo⁵⁸⁹ observed that in the North East Region of Nigeria, there is a considerable volume of mining work progressing on illegal basis, e.g. the mining of uranium as well as of some harmful radiation and the prevalence of vast derelict land in the village neighbourhood. In 2004, the then Minister for Solid Mineral Resources decried the extensive devastation of the environment in Niger State as a result of illegal mining of gemstone, sapphire and gold, as well as capital flight as a result.⁵⁹⁰ Research indicates a rise in the land mass

⁵⁸⁸ Illegal miners on the prowl in North East despite Ban, Daily Trust 6 Jan 2024; Etim Etim, Illegal mining in Akwa Ibom, The Cable 19 Oct 2023; 30 illegal miners arrested in Anambra, Daily Trust 12 Jan 2024; David Adenuga, 'Inside Bauchi's illegal mining hub', The Nation, April 20 2024; Largest illegal mining site discovered in Benue community New Telegraph Jan 21, 2024; NSCDC intercepts 9 truckloads of mining contents in Benue Businessday Nov 23, 2023; Two dead as illegal mining well collapses in Cross River The Cable, March 20, 2024; Owen Akenzua, Delta State Assembly moves to stop illegal mining activities, 6 June 2017; FG, Delta discover illegal miners, solid mineral sites Nov 7, 2017; W. Onwunmelu, 'Inside Ebonyi community where women and children illegally mine lead, zinc', 3 May 2022, i-79 Media Consults; Edo orders illegal miners to vacate forests, Punch Newspapers, 6 May 2024; Enahoro Iyemefokhai; Editorial, 'Tackle Illegal Miners Devastating Osun, Ekiti' Punch, 21 June 2022; FG shuts illegal mining site in Abuja, News Agency of Nigeria 30 May 2024; E. Mgbeahurike, Miners Urge Uzodinma to Check Illegal Mining in Imo, Leadership, Accessed 12 May 2024 at <https://leadership.ng/miners-urge-uzodinma-to-check-illegal-mining-in-imo/#>; How illegal miners wreak havoc on Nigeria – Investigation Vanguard February 17 2024; Kaduna Govt moves to Tackle Activities of Illegal Miners, ChannelsTV, March 19, 2017; I. Nwannah, Bandits relocating from Zamfara, Katsina to Kano gold mining camps, Daily Post 1 November, 2021; Katsina Govt Vows to Prosecute Illegal Miners, News Agency of Nigeria, 31 December 2023; Achor Abimaje and others, 'Illegal Mining Thrives Despite Ban Threat', Leadership Accessed 21 April at leadership.ng/illegal-mining-thrives-despite-ban-threat/; Nigerian govt shuts down illegal gold mine, Premium Times, 19 July 2024; EFCC arrests five for illegal mining in Kwara, recovers three truckloads of minerals Channelstv.com, March 27, 2024; Illegal Mining, Dredging: LASG Begins Crackdown, Accessed 12 July 2024 at <https://lagosstate.gov.ng/News>; Four Chinese Arrested for Illegal Mining in Nasarawa, Arise News, 28 April 2024. <http://www.arisetv/four-chinese-arrested-for-illegal-mining-in-nasarawa/>; Government Oversight absent in mining of lithium, gold in Nasarawa, Premium times, 6 April 2024; FG Seals Mining Company over Illegal Activities in Ogun, Channels TV, July 11, 2024; A.Babajide, Amotekun Nabs Illegal Gold Miners in Ondo, Daily Trust, 17 February 2022; S. Uthman, Investigation: How Illegal Mining Fuels Poverty, River Pollution, Sacred Grove Desecration in Osun, The Cable, 20 June 2022. Accessed on 14 May 2024 at <https://www.thecable.ng/investigation-how-illegal-mining-fuels-poverty-river-pollution-sacred-grove-desecration-in-osun/>; 41 Suspects arraigned in Ibadan over illegal mining, Channelstv.com; Editorial, Mining and the Harvest of Deaths, Thisday, 6 June 2024; Security operatives arrest 251 illegal miners in Zamfara Channelstv.com, May 29 2020.

⁵⁸⁹ Mogbo, T.C. (1999). An integrative approach to environmental reconstruction and politics in Nigeria. *University of Jos Journal of Environmental Science*. 3(1), 1 -7.

⁵⁹⁰ Wednesday 16th of June, 2004, (reported during NTA Network News at 9.00 p.m.). Cited in I.J. Nwadiolor, 75 op cit 5.

affected.⁵⁹¹ There is no reliable data on the number of persons arrested or currently being prosecuted for illegal mining but they are estimated to number hundreds.⁵⁹²

While there is a paucity of publicly available database on the mine locations where illegal mining is taking place, media reports reveal that foreigners, local communities of mineral-rich areas in Nigeria and non-locals are engaged in illegal mining activities in most states of the Federation.⁵⁹³ Most illegal mining is carried out in remote and difficult to access areas, areas outside or below the radar of law enforcement officials⁵⁹⁴ and characterised by lack of safety measures and health care; lack of environmental protection, and smuggling.⁵⁹⁵ Illegal mining has contributed to terrorism, criminality and insecurity⁵⁹⁶ with the link between illegal mining and terrorism being drawn at the highest level of government.⁵⁹⁷ In spite of the abundance of solid minerals in Nigeria, the mining sector is underdeveloped and contributes roughly 0.63 per cent to the Gross Domestic Product.⁵⁹⁸ Most of the profits from solid minerals mining are diverted to private pockets resulting in government suffering revenue loss.⁵⁹⁹

Forms of Illegal Mining

⁵⁹¹ E.C. Merem et al. (2017). Assessing the Ecological Effects of Mining in West Africa: The Case of Nigeria. *International Journal of Mining Engineering and Mineral Processing*, 6(1), 1-19.

doi:10.5923/j.mining.20170601.01; Dukiya, J. (2013). Environmental Implication of Illegal Mining Activities in Nigeria: A Case Study of Pandogari and Barking Ladi/Bukuru Surface Mines in Niger/Plateau States. (IOSR-JHSS, 13(5), 13-19. <http://www.iosrjournals.org/iosr-jhss/papers/Vol13-issue5/C01351319.pdf?id=3400>.

⁵⁹² At a public hearing by the House of Representatives Committee on Solid Minerals, the Nigerian Army reported that it arrested 387 suspected illegal miners in a space of about seven months. See G. C. Odekina (2022, July 12). Nigeria Loses \$9bn Yearly to Illegal Mining – Reps, *Vanguard*.

⁵⁹³ See footnote 12 citing media reports on illegal mining in 34 states.

⁵⁹⁴ Chinedu Asadu (2024, January 17). Nigeria Explosion Kills 3 and Injures 77 as Buildings Collapse, *Associated Press*.

⁵⁹⁵ A.A. Maishanu (2020, April 27). Police arrest two Chinese for ‘illegal mining’ in Zamfara, *Premium Times*; M.T. Page (2020, May 9). ‘The intersection of China’s commercial interests and Nigeria’s conflict landscape: Godfathers pressurise FG to free Chinese arrested for illegal mining. *Punch*

⁵⁹⁶ C. Bartrem et al (2022). Climate Change, Conflict and Resource Extraction: Analysis of Nigerian Artisanal Mining Communities and Ominous Global Trends. *Ann Global Health*, 88(1), 17.

ncbi.nlm.nih.gov/pmc/articles/PMC8916050; ISS (2019) Maurice Ogbonnaya, How illegal mining is driving local conflicts in Nigeria. reliefweb.int/ ; ENACT Africa (2019). Pulling at Golden webs: Combating criminal consortia in the African artisanal & small-scale gold mining and trade sector. Research Paper 08/ April.

⁵⁹⁷ S. Angbulu (2024, April 23). Tinubu blames illegal mining for terrorism funding, *Punch*.

<https://punchng.com/tinubu-blames-illegal-mining-for-terrorism-funding-2/>

⁵⁹⁸ According to the 2021 Report of the Nigeria Extractive Industries Transparency Initiative (NEITI), neiti.gov.ng/cms/nigeria-earned-193-59-billion-from-solid-minerals-in-2021-neiti/; Roadmap for the Growth and Development the Nigerian Mining Industry 2016-2025. MMSD 2016.

⁵⁹⁹ G. C. Odekina (2022, July 12). Nigeria Loses \$9bn Yearly to Illegal Mining – Reps, *Vanguard*.

Illegal mining occurs in a variety of ways. One is where the perpetrator commences and engages in mining activities in the absence of any valid lease or licences; another form involves mining by a company or person who initially possessed a valid mining lease or licence over an area but whose licence/ lease has expired or been revoked. A third form is mining carried on by persons possessing a subsisting mining lease but who extend their operations to an area(s) outside the area or coordinates covered by their lease. Still another involves a mineral titleholder who discovers another mineral(s) not specified in their lease and goes on to additionally mine the other mineral(s) not covered by the licence/lease, without notifying the relevant authority and/or obtaining the required authority to mine the additional mineral(s).⁶⁰⁰ The NMMA 2007 criminalizes illegal mining.⁶⁰¹

Some of the factors driving illegal mining include: failure of regulatory oversight to ensure conformity to operational standards); poor enforcement of mining laws by the relevant departments and agencies of government; vested interests – politicians, government officials, traditional rulers and community leaders are involved in the practice; corruption; unemployment; poverty; rising demand for solid minerals for renewable energy projects; and high commodity prices of gold and other solid minerals at international markets.⁶⁰²

The most notorious case of devastating consequences of illegal mining in recent times was recorded in Zamfara state in 2010. Illegal mining and processing of gold ore by villagers and artisanal miners was undertaken in and around housing and community areas. The unsafe mining practices adopted resulted in the release of tons of lead dust from processing of contaminated gold ore into the air.⁶⁰³ The lead dust in turn was deposited on soil surfaces, drinking water, and plants resulting in toxic levels of lead concentrations in the environment. The lead pollution crisis affected over 47 villages affecting more than 30,000 residents most of whom were children. Over 100 children

⁶⁰⁰ See for example, sections 2 and 64 NMMA 2007. The forms of illegal mining mentioned here are not exhaustive.

⁶⁰¹ Section 131 NMMA 2007 provides inter alia, “A person who ... conducts exploration or mines minerals or carries out quarrying operations otherwise than in accordance with the provisions of the Act; ... removes, possesses or disposes of any mineral contrary to the provisions of this Act, commits an offence.”

⁶⁰² C. Bartrem et al, op cit note 20. G. C. Odekina op cit note 23.

⁶⁰³ S.A. Anka et al (2020) Environmental Effect of Lead Contamination on Mining Communities in Zamfara State, Nigeria: A Review. *Journal of Biology & Today's World*, 9 (9), 1-3

were diagnosed with severe lead poisoning and 400 – 500 deaths from lead poisoning were recorded in 2010.⁶⁰⁴ This is recorded as the largest known outbreak of lead poisoning in history.⁶⁰⁵ Multiple partners, including the World Health Organisation (WHO), the Centre for Disease Control (CDC), Medecins sans Frontieres, the Federal Ministry of Environment and United Nations Environment Program (UNEP), were involved in medical intervention, environmental health and remediation measures.

Part III – Impact of Illegal Mining on the Environment

Illegal mining has devastating consequences on the environment and this is exacerbated by the fact that illegal miners pay scant regard to legal provisions on environmental protection and do not comply with them. Entities or persons operating without licences tend to ignore statutory provisions on environmental considerations and rights of host communities.⁶⁰⁶ These include the prohibition of minerals exploration in certain areas,⁶⁰⁷ prevention/control of environmental pollution,⁶⁰⁸ restoration of mines land⁶⁰⁹ and reclamation⁶¹⁰. One common characteristic of illegal mining operations is the failure to carry out Environmental Impact assessments. Illegal miners are not mindful of the environmental impacts of their activities and hence have no plans for mitigation or remediation.

Because of the uncontrolled manner in which illegal miners operate, a lot of damage is done to the land by haphazard pitting and trenching of the ground in many areas. This results in an artificial bad land topography; the land is rendered barren and unfit for agricultural purposes.⁶¹¹ For example, in parts of Oyo, Kwara, Edo, Osun and Ondo states, the search for gemstones in by illegal miners have adversely affected the

⁶⁰⁴ Medecins San Frontieres (2012). Lead poisoning crisis in Zamfara state Northern Nigeria. <https://www.msf.org/lead-poisoning-crisis-zamfara-state-northern-nigeria>; S.A. Anka and others, op cit note 27; E.C. Merem et al, op cit note 15, 5.

⁶⁰⁵ Center for Disease Control and Prevention (2016). Lead Poisoning Investigation in Northern Nigeria. <https://www.cdc.gov/one-health/php/stories/lead-poisoning.html>

⁶⁰⁶ Chapter 4 of the Nigerian Minerals and Mining Act 2007 (NMMA 2007).

⁶⁰⁷ NMMA 2007, section 98.

⁶⁰⁸ NMMA 2007, s 111 requires the holder of a mineral title to “have regard to the effect of the mining operations on the environment and take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation”.

⁶⁰⁹ NMMA 2007, s 114.

⁶¹⁰ NMMA 2007, s 115.

⁶¹¹ Aigbedion, I and Iyayi, S. E. (2007). Environmental effect of mineral exploitation in Nigeria. *International Journal of Physical Sciences* 2 (2), 33-38. <http://www.academicjournals.org/IJPS>

physical landscape.⁶¹² At present, irregular holes and heaps of rock materials characterize the areas mined by illegal miners.⁶¹³ Apart from scarring of the earth, subsequent effects of illegal mining include: erosion, gully, rock falls, landslide, heaps of waste, siltation of ponds and aquatic ecosystems, subsidence, etc. On 3rd June 2024, the Nigerian press reported the collapse of a mining site in Galadima Kogo, Shiroro LGA of Niger state. Dozens of people were reportedly trapped underground and 20 fatalities were recorded.⁶¹⁴

Water pollution is a common by-product of mining and this is likely to be more pronounced in illegal mining. This often happens to surface water and ground water in the immediate and surrounding vicinity of the mine and in the mineral-processing site(s). Nearby rivers and streams are polluted by the run-off. The water in mine ponds is contaminated with toxic trace elements. Several studies in different countries (including Nigeria) have established that mine tailings contribute a high amount of heavy metals (HMs) to the surface water and ground water in mining areas.⁶¹⁵ A study⁶¹⁶ carried out in Arufu, located in Wukari Local Government (Taraba state) in Nigeria's Benue Trough, an area with significant deposits of lead, zinc, and fluorite ores, and witnessing illegal mining activity, revealed that the water around the Arufu Lead-Zinc-Iron area is highly polluted by heavy metals traceable to on-going mining activity in the area. These heavy metals pose serious/significant risks to the environment and public health, exposing both adults and children in the region to carcinogenic and non-carcinogenic health hazards.⁶¹⁷ A similar study in Osun state revealed the presence of heavy metals like arsenic, lead, aluminium, barium in water samples taken from Osun

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ T.J. Usen (2024, June 5). Death Toll Rises To 20 In Niger Mine Collapse, 14 Still Trapped – Police <https://www.channelstv.com/2024/06/05/niger-mine-collapse-20-casualties-14-still-trapped-police/>; M.

Abubakar (2024, June 5) Dozens of gold miners trapped in Nigeria, BBC News. <https://www.bbc.com/news/articles/c3ggrrgg4rlo/>

⁶¹⁵ U. Okereafor et al (2020). Toxic metal implications on agricultural soils, plants, animals, aquatic life and human health. *International Journal of Environmental Research and Public Health* Vol. 7, 2204. doi:10.3390/ijerph17072204; G. Y. Hadzi et al (2018) Assessment of contamination and health risk of heavy metals in selected water bodies around gold mining areas in Ghana. *Journal of Health Pollution*, 5 (9), 86–99. doi:10.1007/s10661-018-6750-z.

⁶¹⁶ A.J. Adewumi and T.A. Laniyan (2023) Contamination, ecological, and human health risks of heavy metals in water from a Pb–Zn–F mining area, North Eastern Nigeria. *Journal of Water and Health*, 21 (10),1470–1488. <https://doi.org/10.2166/wh.2023.132>.

⁶¹⁷ Ibid

River. The heavy metals were significantly above the World Health Organization (WHO) limits. The pollution was traced to the activities of illegal miners in the Ilesa area.⁶¹⁸ Liquid waste from mining/mineral processing requires specialized storage. Most mineral processors dodge this responsibility by running the waste into the nearest stream, causing serious pollution and destroying aquatic life. Human beings and animals have often been affected through the food chain or directly through contaminated water.

In another recorded case of fatalities from illegal mining, this time in Niger state in the Madaka Rafi Local government in 2015, artisanal miners operated illegally around the lower stream of the River Kaduna tributary with risky techniques and little considerations for environmental hazards. Sediments from washed gems and gold on nearby streams flowing down Kawo village area contained lead. Villagers unknowingly utilized water from the stream for domestic needs and suffered deadly poisoning that resulted in many fatalities.⁶¹⁹

Illegal mining activities contribute to climate change and air pollution. The use of heavy machinery and chemicals cause the release of greenhouse gases into the atmosphere while the destruction of forests and vegetation cover by illegal mining reduces the capacity of the ecosystem to absorb carbon dioxide from the atmosphere. The mining, smelting and treatment of ores, for example sulphide ores, and the combustion of fossil fuels, emit such gases as carbon dioxide and sulphur dioxide. Quarrying pollutes the air with dust and noise. The processing of uranium zirconium, tantalite, wolframite and tin ores can pollute the air with ionizing radiation. Silica particles pollute the air in proximity to rock drilling sites, in mines and quarries.⁶²⁰ The use of elemental mercury in isolating gold particles poses significant risks to the environment, workers and communities. Mercury is a highly toxic metal that impacts the brain and kidneys and is a global pollutant distributed via the atmosphere and

⁶¹⁸ S. Uthman (2022, June 20). Investigation: How Illegal Mining Fuels Poverty, River Pollution, Sacred Grove Desecration in Osun, *The Cable*. <https://www.thecable.ng/investigation-how-illegal-mining-fuels-poverty-river-pollution-sacred-grove-desecration-in-osun>

⁶¹⁹ A.F. Ali et al (2018). Environmental Issues and the Prospects of Mining in Nigeria *Dutse Journal of Pure and Applied Sciences* 4 (2) 1.

⁶²⁰ I.J. Nwadior op cit note 5.

water.⁶²¹ Artisanal and small-scale gold mining is the largest source of global mercury pollution.⁶²²

Illegal mining has also contributed to deforestation and loss of biodiversity. There are several reports of illegal miners operating in forests such that even forest reserves are not spared.⁶²³ The destruction of forests and vegetation cover reduces the capacity of the ecosystem to absorb carbon dioxide from the atmosphere. The damage to habitats has adverse consequences for the flora and fauna that inhabit them. The noises and vibrations from blasting and drilling scare away the animals and birds that hitherto depended on those habitats.⁶²⁴ The chemicals used in mining pollute water bodies causing the death of aquatic organisms.

Noise pollution commonly occurs in the vicinity of mining operations due to the drilling and blasting of mineral bearing bedrocks. In addition to the sound of explosions, the attendant vibrations and reverberations constitute an additional burden to the environment. The fundamental right of persons in neighbouring settlements to own and acquire property is additionally affected as their houses could suffer structural damage. On January 16, 2024 in Bodija, a residential area in Ibadan, a massive and deadly explosion killed five persons⁶²⁵, injured 77 and damaged over 55 buildings and properties worth billions of naira. The noise of the explosion was heard in many parts of the city, including kilometres away. Investigations traced the blast to explosives stored in a residential building by illegal miners.⁶²⁶

Part IV - Legal Framework on Mining Regulation in Nigeria

The statutes and subsidiary legislations regulating mining sector in Nigeria include the Constitution of the Federal Republic of Nigeria 1999 as amended (1999

⁶²¹ Ibid.

⁶²² C. Bartrem op cit note 20.

⁶²³ Etim Etim (2023, Oct 19). Illegal mining in Akwa Ibom, *The Cable*.

⁶²⁴ J. Dukiya, op cit note 15, 13-18.

⁶²⁵ The final death toll from the explosion has been put at 14 persons. Bukola Oriowo (2024, March 7), Court Remands Three Suspects over Ibadan Explosion. Channels TV. <https://channelstv.com/2024/03/07/court-remands-three-suspects-over-ibadan-explosion/>

⁶²⁶ Jemilat Nasiru (2024, January 17) Oyo to Prosecute Three ‘Persons of Interest’ over Ibadan Explosion’ *The Cable*; (2024, February 7). Nigeria: Ibadan Explosion leaves scenes of devastation, BBC News. <https://www.bbc.com/news/av/world-africa-68013435>

Constitution or CFRN 1999); Nigerian Minerals and Mining Act 2007 (NMMA 2007)⁶²⁷; Nigerian Minerals and Mining Regulations 2011; Land Use Act 1978⁶²⁸; Environment Impact Assessment Act (EIA Act)⁶²⁹, Nigerian Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA (Establishment) Act))⁶³⁰, and National Environmental (Mining and Processing of Coal Ores and Industrial Minerals) Regulations 2009. The focus in this paper is the 1999 Constitution and the NMMA 2007

Section 44 (3) of the 1999 Constitution (as amended) vests the ownership and control of all minerals, mineral oils and natural gas in Nigeria in the Government of the Federation.⁶³¹ The power to regulate and develop the solid minerals sector is also within the exclusive purview of the Federal government with the National Assembly possessing the exclusive power to legislate on mines and minerals, including oil fields, oil mining, geological surveys and natural gas.⁶³²

Section 1(1) of the NMMA 2007 is closely modelled upon section 44(3) of the 1999 Constitution. It vests ownership and control of all mineral resources in the territory of Nigeria in the Government of the Federation for and on behalf of the people of Nigeria. A significant addition to the NMMA 2007 is the phrase relating to beneficial ownership, captured by - “for and on behalf of the people of Nigeria”. The Act further provides that “[All] lands in which minerals have been found in commercial quantities shall, from the commencement of this Act be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act.”⁶³³ Thus while the State Governors possess power of management and control of the land in a state⁶³⁴, the NMMA 2007 empowers the Government of the Federation to acquire all land containing minerals in

⁶²⁷ Chapter N42 LFN 2004

⁶²⁸ Chapter L5 LFN 2010.

⁶²⁹ Chapter E12 FN 2010.

⁶³⁰ Chapter N164 LFN 2010.

⁶³¹ Section 44 (3) of the 1999 Constitution states –

Notwithstanding the foregoing provisions of this section, the entire property in and control of all all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

⁶³² Item 39, Part I of the Second Schedule to the 1999 Constitution (The Exclusive Legislative List); Section 4 (2) & (3) of the 1999 Constitution.

⁶³³ Section 2 NMMA 2007.

⁶³⁴ Section 2 & 3 Land Use Act.

commercial quantities. Such acquisition shall be in accordance with the Land Use Act.⁶³⁵ The Government of the Federation further possesses power to pass on mineral resources recovered to the person by whom the mineral resources are lawfully won in accordance with the Act.⁶³⁶ The state governments have no corresponding power.

The NMMA 2007 established the Mining Cadastre Office (MCO), a statutory body with responsibility for the administration of mineral titles and the maintenance of the cadastral registers.⁶³⁷ The MCO has its headquarters in Abuja and zonal offices. The Mines Inspectorate Department (MID) and the Mines Environmental Compliance Department (MECD) are departments in the Federal Ministry of Solid Minerals.⁶³⁸ The MID is to, inter alia, exercise general supervision over all reconnaissance, exploration and mining operations to ensure compliance with the Act; and to supervise and enforce compliance by mineral titleholders with all mine health and safety regulations.⁶³⁹ The MECD is charged with, among others, monitoring and enforcing compliance by holders of mineral title with all environmental requirements and obligations made pursuant to the NMMA, its regulations and any other law.⁶⁴⁰

A Mineral Resources and Environmental Management Committee (the Committee) is established for each state of the Federation.⁶⁴¹ The Committee comprises a representative of the MECD (the Chairman), states officials from relevant ministries and agencies, officials from the Federal Ministry of Solid Minerals, a representative of the Local Government Council when matters affecting the said Local Government Area are being considered by the Committee.⁶⁴² The functions of the Committee are mostly advisory in nature.⁶⁴³ The establishment of the Committee is recognition that the state has a crucial role to play in managing environmental and social impacts of mining. A major limitation of the Committee is its inability to take decisions, the infrequency of

⁶³⁵ Section 1 (2) NMMA 2007.

⁶³⁶ NMMA 2007, section 1(3).

⁶³⁷ NMMA 2007, section 5.

⁶³⁸ NMMA 2007, section 16.

⁶³⁹ NMMA 2007, section 17.

⁶⁴⁰ NMMA 2007, Section 18.

⁶⁴¹ NMMA 2007, Section 19.

⁶⁴² NMMA 2007, Section 19 (2).

⁶⁴³ NMMA 2007, Section 19 (3).

its meetings (once every three months)⁶⁴⁴ and the balance of power which is in favour of the federal officials.⁶⁴⁵

The NMMA 2007 provides for environmental considerations which a Mining Lease holder must adhere to in its operations. It mandates the holder of a mineral title to have regard to the effect of the mining operations on the environment and take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation.⁶⁴⁶ The Act imposes environmental obligations on the title holder: to minimise, manage and mitigate any environmental impact resulting from their activities⁶⁴⁷ and to rehabilitate and reclaim the land disturbed, excavated, explored, mined or covered with tailings arising from mining operations to its natural or predetermined state.⁶⁴⁸ The NMMA also provides for submission of environmental impact assessment statement and an Environmental Protection and Rehabilitation Program to the Mines Environmental Compliance Department (The Compliance Department).⁶⁴⁹ It establishes an Environmental Protection and Rehabilitation Fund for the purpose of guaranteeing the environmental obligations and every title holder is obligated to make contributions to the fund.⁶⁵⁰

The passing of the Minerals and Metal Act 2007, Nigerian Minerals and Mining Regulations 2011, and related legislations are all attempts by the Federal Government to control illegal and unsustainable mining practices in the country. However making policies and passing legislation is not sufficient to curb illegal mining or to ensure sustainable mining. In most cases, the inability or failure of policymakers and enforcement to monitor mining activities and ensure that responsible practices are adhered to by the mining sector is the reason for unsustainable mining with adverse consequences to the environment. No amount of law-making will be able to stamp out illegal mining if extant laws are not duly enforced. Seventeen years have elapsed since

⁶⁴⁴ NMMA 2007. Section 19 (4)(a).

⁶⁴⁵ NMMA 2007. Section 19 (8 - 10).

⁶⁴⁶ NMMA 2007. Section 111

⁶⁴⁷ NMMA 2007. Section 118 (a)

⁶⁴⁸ NMMA 2007. Section 118 (b)

⁶⁴⁹ NMMA 2007. Sections 119 (i) and (ii), 120.

⁶⁵⁰ NMMA 2007. Section 121

the enactment/passage of the NMMA 2007 and illegal mining shows no signs of abating, rather media reportage suggests that it is thriving and possibly on the increase.

A major limitation of the environmental considerations and obligations provided in the NMMA 2007 is the fact that they are mostly addressed to large-scale mining. However, only about 20 per cent of mining in Nigeria is large-scale in nature. Over 80 per cent of mining is undertaken by artisanal small scale miners (ASM).⁶⁵¹ These typically do not carry out Environmental Impact Assessments or submit Environmental Protection and Rehabilitation Programs. What this means is that there is substantial non-compliance with the environmental considerations in the NMMA 2007 even by those ASM operators that have been licenced to operate. Furthermore, the Act does not adequately address the environmental impacts from ASM.

Part V- Prospects of Decentralization for Controlling Illegal Mining

Decentralization is the process by which the activities of an organisation, body or entity, particularly those regarding planning and decision making, are distributed or delegated away from a central authority and given to smaller factions within it.⁶⁵² Ozmen⁶⁵³ defines it as the transfer of responsibility and authority from higher to lower levels of government.⁶⁵⁴ It is the opposite of centralization which is the concentration of power, authority and resources in the centre. Decentralization is increasingly viewed as a viable alternative to centralization with the potential of fostering more effective management, strengthening democracy and reducing bureaucratization.⁶⁵⁵ In Nigeria, decentralization in the mining sector envisages devolution of powers of ownership and control of solid minerals from the Government of the Federation to the federating units.

One argument for decentralization is that the concentration of ownership and regulatory powers over mining is a major factor fuelling illegal mining.⁶⁵⁶ The Federal Ministry of Solid Minerals and its departments/agencies have demonstrated a lack of

⁶⁵¹ Global Rights, Artisanal and Small-scale Mining in Nigeria. accessed on 13 July 2024 at <https://www.globalrights.org/ng/governance/>

⁶⁵² Merriam Webster. <https://merriam-webster.com>

⁶⁵³ Ozmen, A. (2014). Notes to the concept of Decentralization. *European Scientific Journal*, 10(1), 415

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Thomas, H., Felix H., and Michael, P. (2003). *Artisanal and Small-Scale Mining: Challenges and Opportunities* Russell Press Ltd, Nottingham

capacity to adequately cover and monitor the entire federation.⁶⁵⁷ Nigeria possesses a land area of 923,768 square kilometres.⁶⁵⁸ The available data shows that virtually every state contains valuable solid minerals and that illegal mining is on-going in most of the 36 states and in hundreds out of the 744 local governments.⁶⁵⁹ Much of the illegal mining is carried out in remote, rugged and hard to access locations.⁶⁶⁰ The environmental damage caused is more difficult to detect and control due to the isolated and nucleated spatial distributions of the effects.⁶⁶¹ Detection of illegal mining activity is often at the village and local government level. Aggrieved locals tend to lodge their complaints with the local government and/or state government. Where the state governments are petitioned or informed they may not intervene primarily due to the states' lack of ownership and control over minerals. The states lack regulatory powers to enforce environmental laws on mining.

Secondly, decentralisation would be beneficial to the environment as it would provide the state governments with the necessary power and authority to confront/combat illegal mining, thus complementing federal efforts. Decentralisation could allow for better oversight and regulation of mining activities. State governments are closer to the grassroots; they possess deeper knowledge and understanding of the terrain, environmental concerns and needs of the communities. They are also more informed on illegal mining in their states. Local communities are more aware of illegal mining in their vicinity and tend to report such activities to the state authorities or local governments.⁶⁶² However the state governments are often handicapped lacking the necessary legal authority to confront and combat illegal mining activities. According to

⁶⁵⁷ Press Release. (2024, April 6). Government Oversight absent in mining of lithium, gold in Nasarawa. *Premium Times*

⁶⁵⁸ Yemi, K., (2017). Annual Abstract of Statistics. National Bureau of Statistics (Vol.1) <https://www.nigeriastat.gov.ng>

⁶⁵⁹ Onuegbu, C., (2024, June 22). NMGS warns against continued illegal mining activities in Nigeria. The Vanguard. <https://www.vanguardngr.com/2024/06/nmgs-warns-against-continued-illegal-mining-activities-in-nigeria/> Ministry of Foreign Affairs Head Quarters (2024) Nigerian Natural Resources <https://foreignaffairs.gov.ng/nigeria/natural-resources/>

⁶⁶⁰ Isaac, J. (2024, June 22). Geosciences Society urges FG to fund mines offices to tackle illegal mining. *The Sun*. <https://thesun.ng/geosciences-society-urges-fg-to-fund-mines-offices-to-tackle-illegal-mining/>

⁶⁶¹ Ibid.

⁶⁶² Kwatenge, G., (2012). *Environmental Impact of Mining and the Well- Being of the People in Akwatia: A Case Study in Akwatia Town, Ghana*. Uppsala.

the Chairman of the Natural Resources and Environmental Management Committee of Osun state,

The major impediment to policing and controlling the ugly trend is the federal structure that places mining on the Exclusive List thereby making it difficult for states who are closer to the miners to act fast on the activities of the illegal miners.⁶⁶³

There have been several instances in which illegal mining was ongoing in rural locations, resulting in devastation of the environment, communal violence, criminality and insecurity; yet there was no action from the federal regulatory bodies in spite of their being petitioned.⁶⁶⁴ It took the intervention of the state governors to bring the illegal mining activities under control. Several state governors have variously banned the issuance of consent letters to prospective mining investors and /or passed Executive Orders banning mining within their states in order to curb insecurity and or environmental degradation from the activities of illegal miners.⁶⁶⁵ Recently, in the wake of the Ibadan January explosion, the Governor of Oyo state narrated actions the state government had taken against illegal miners and these included the demolition of an unlawful lithium processing facility.⁶⁶⁶ The response of the Federal Government to action by the Governors has been that the states have no constitutional authority to regulate mining and have acted ultra vires their powers.⁶⁶⁷

Thirdly, decentralisation would have a preventive effect as it aids in the early detection of exploration activities. It is easier and preferable to detect and stop illegal mining at the initial stage before illegal mining activities become commonplace in a

⁶⁶³ Achor, A., Abdullahi, O., Abu, N., Joshua, D., Patrick, O. and Kabir, W. Illegal Mining Thrives Despite Ban. Threat. The Leadership. https://leadership.ng/illegal-mining-thrives-despite-ban-threat/#google_vignette

⁶⁶⁴ Labaran, A. (2023, May 16). Three Chinese Arrested for Illegal Mining in Kaduna, *Blueprint*

⁶⁶⁵ These include Kebbi, Zamfara, Taraba, Osun, Plateau, Benue, Borno, Enugu, Ebonyi, Kogi, Cross River, Niger states. Governor suspends Mining Activities Across Benue, Premium Times, 22 March 2024; E. Olafusi, Borno bans mining activities over 'fragile security situation' The Cable, 13 October 2023; S. Tunji, 'Miners Fault Ban on Mining by Governments' Punch, 9 August 2023; S. Akpan, Bauchi bans individuals, monarchs from issuing consent letters to mining investors, The Cable, 6 January 2024; Niger state Government Seeks Partnership with Nigerian Army to Execute Ban on Illegal Mining. Accessed at 17 July 2024 at nigerstate.gov.ng/niger-state-government-seeks-partnership-with-nigerian-army-to-execute-ban-on-illegal-mining/.

⁶⁶⁶ Ewepu, G. (2024 April 19). FG ready to facilitate mining licences for states. *The Vanguard* <https://www.vanguardngr.com/2024/04/fg-ready-to-facilitate-mining-licences-for-states-alake/>

⁶⁶⁷ 'Federal Govt Warns State Governments Against Interference in Mining Activities', Leadership News. Accessed on 25 May 2024 on leadership.ng/federal-govt-warns-state-governments-against-interference-in-mining-activities/; Olatunji S. (2023, October 12) 'It is Unconstitutional for States to Regulate Mining, says FG', *The Punch*

locality. With the passage of time, illegal miners could become entrenched in a community, locals are drawn into the practice and abandon agriculture and sometimes even convert agricultural land to mining sites, and insecurity may become commonplace and community leaders may get involved in illegal mining activities. State governments and local authorities by virtue of their proximity to the grassroots are better positioned to detect illegal exploration from the beginning Decentralization will provide them with authority to take preventive action thereby preventing environmental harm.

Fourthly, the high incidence of illegal mining demonstrates the limited capacity of the Mining Inspectorate and relevant departments of the Federal Ministry of Solid Minerals to detect and respond to illegal mining activities. The Ministry lacks adequate human resources and infrastructure for adequate coverage of Nigeria. Illegal mining activities typically take place in rural areas, remote places that are sometimes characterised by rugged, mountainous and difficult to access terrain,⁶⁶⁸ forested areas, among others. Mining sites may be situated in ungoverned spaces devoid of government presence. Access to some of these sites is virtually impossible except with the assistance of locals. Locals are more likely to cooperate with their local authorities and state government than the government at the centre which is regarded as being remote and peopled by 'strangers'.

Additionally the state governments, having power of control and management of land,⁶⁶⁹ and closer to the grassroots, have a higher stake than the Federal Government when it comes to protection of the land and remediation of mining sites. Mining has a far-reaching impact on land and could render land unfit for other purposes such as agriculture, forestry, housing and industry. The state governments are more at the receiving end from environmental degradation and they need to be able to push harder for the enforcement of environmental considerations in mining activities. The establishment of a Mineral Resources and Environmental Management Committee (the Committee) for each state of the Federation⁶⁷⁰ was expected to provide a mechanism

⁶⁶⁸ Oruonye, E.D., Musa, D.G., Ahmed, Y.M., (2023). Challenges of Enforcement of Government ban of illegal Mining in Taraba State, Nigeria. *Social Science and Humanities Research*, 6(1).

⁶⁶⁹ Section 2 Land Use Act 1978.

⁶⁷⁰ Section 19 NMMA 2007

for state involvement in mining regulation but media reports indicate that the Committee is not living up to expectations.⁶⁷¹

Finally, decentralisation can ensure that revenues generated from mining activities is/are distributed more equitably to benefit local communities. These would provide the state and local governments with incentives to combat illegal mining and aid in reducing grievances that fuel illegal mining. It could increase community involvement in monitoring and enforcement. Currently, the revenue allocation laws that provide for 15 per cent derivation to the states is an incentive for local chiefs abetting illegal mining and a disincentive to the states' involvement in fighting illegal mining.⁶⁷²

Part VI - Challenges of Decentralization

Decentralization comes with several challenges. A few of these challenges will be discussed. Enforcing of mining laws requires police and security services with authority to bear arms. In the 1999 Constitution however, arms, ammunition and explosives; police and other government security services established by law are both in the Exclusive Legislative List.⁶⁷³ Another part of the Constitution that would need to be amended is to allow states in Nigeria legislate on mining⁶⁷⁴ activities and take action against illegal miners. As mentioned earlier, the 1999 Constitution vests control of natural resources including mining in the federal government⁶⁷⁵.

The challenges that come with constitutional amendment are numerous. Extensive law making/enactment of new mining laws across the 36 states and ensure State policing could take a considerable and lengthy amount of time. Nigeria's Constitution has a rigorous amendment process. The 1999 Constitution makes provision for its amendment⁶⁷⁶ and provides the requirements⁶⁷⁷ and process for

⁶⁷¹ Foot note 12.

⁶⁷² Chris, J., (2024, July 26). Govt Officials, Traditional Rulers, Aiding, Abetting Illegal Mining in Nasarawa – Lawmakers. *Daily Post*. <https://dailypost.ng/2024/07/26/govt-officials-traditional-rulers-aiding-abetting-illegal-mining-in-nasarawa-lawmakers/>

⁶⁷³ Items 2 and 45 on the Exclusive Legislative List.

⁶⁷⁴ Second schedule, Item 39 on the Exclusive Legislative List.

⁶⁷⁵ Section 44(3) CFRN 1999.

⁶⁷⁶ Section 9 (1) CFRN 1999

⁶⁷⁷ Section 9 (2) CFRN 1999

purposes of amendment. The constitutional requirement and resolution of not less than two-thirds majority of all the Houses of Assembly of the 36 states makes amendments difficult to achieve. In addition, Nigeria is a country with diverse ethnic and regional groups, each with its own interests and priorities. Resistance to amendments may stem from diverse ethnic, regional groups, political interests and political will, as amendments to the Constitution may be perceived as favouring certain groups over others. Additionally, incumbent politicians who benefit from the status quo may resist amendments that could reduce their power or change the political landscape. It is no secret that the court processes in Nigeria operate at a slow speed. Proposed amendments may face legal challenges, particularly if they are seen to contravene fundamental principles of the Constitution and the judiciary may be called upon to interpret the legality of such amendments, which can delay the process and create uncertainty. Economic instability or social unrest can also impact the amendment process. This is because during economic hardship or social upheaval, the tendency to concentrate on economic and social concerns take precedence implying that there may be less political and public appetite for constitutional changes. Another possibility that may affect the constitutional amendment process is the vested interest of international organizations, foreign governments, and multinational corporations. Their influence, whether through diplomacy, economic pressure, or lobbying, can complicate the domestic process.

Secondly, some mining leases could traverse or cross state boundaries implying that decentralization will lead to the lack of consistency in mining regulations. The reason being that, since each state will have their own laws on mining, this can cause confusion for investors. The lack of consistent regulations has several implications. One of such is that there will be several rules, taxes and compliance. The investors may face unexpected legal challenges if they misinterpret or are unaware of specific local regulations. Another implication is that inconsistent mining regulations can result in regulatory uncertainty, leading to uneven playing fields as investors are left with uncertainties because of the varying regulatory environments. Another implication of inconsistent regulations is possible disputes over contract terms, performance and enforcement thus, bringing up jurisdictional issues. There is also the risk of cross-border

mining penalties that may arise. Investors are also faced with enforcing legal rights when the regulations are unclear or a conflict arises as a result of international standards. Inconsistent regulations have the tendency to increase the risk of retrospective actions when governments harmonize their laws or adjust to new standards. The implications are that investors may face legal and financial risks from retrospective regulations, leading to liabilities for actions previously deemed legal. The unpredictability of retrospective regulation can make long-term planning difficult and risky. All of these have the tendency to lead to significant legal challenges and confusion for the investors

Thirdly, solid minerals have received relatively less attention unlike oil and gas, which have been the primary focus of Nigeria's extractive industry. Decentralization efforts involve granting states greater control over their solid mineral resources. This includes giving states the authority to regulate mining activities, collect royalties, and allocate a portion of the revenues locally. Decentralization of solid minerals in Nigeria has the potential to reignite resource control agitations among oil and gas-producing communities and lead to renewed agitation for resource control by oil and gas-producing communities. This agitation stems from perceived inequities in resource allocation, environmental degradation, and socio-economic marginalization, perceived as an imbalance in how different resources are managed and distributed. Historically, oil and gas-producing communities in the Niger Delta region⁶⁷⁸ have agitated for greater control over their natural resources. These communities could demand similar decentralization for oil and gas resources, leading to renewed calls for resource control and potentially heightening tensions with the federal government.

Fourthly, manpower and staffing could pose a major challenge for some of the states as they would need to recruit staff with specialist skills in fields like geo-sciences, environmental sciences, environmental management and environmental law. Decentralization of solid mineral resource management would necessitate recruitment of a diverse range of specialists to address the multifaceted challenges associated with

⁶⁷⁸ The Movement for the Survival of the Ogoni People (MOSOP) and the Niger Delta Avengers are examples of groups that have demanded a greater share of the revenues generated from oil and gas extracted in their regions.

mining. Nigeria has a systemic problem of corruption that can impede transparency and accountability in revenue management and allocation of funds. The systemic problem also comes up in the recruitment process. Most of the time, instead of employing specialists based on qualifications, competence and experience, they are employed based on ethnic, religious, and family ties, accolades etc., thus, forcing square pegs into round holes, and thereby defeating the aim in the first place.

Fifthly, despite the significant environmental impact, there has been a historical tendency for States to overlook or inadequately address these issues. For instance, the Niger Delta has experienced severe environmental degradation due to frequent oil spills, gas flaring, and illegal oil bunkering⁶⁷⁹. Lead poisoning from artisanal gold mining activities in Zamfara State⁶⁸⁰ resulted in the deaths of over 400 children and severe health issues for thousands of others; industrial areas in Lagos, have faced significant pollution issues, including air, water, and soil contamination from factories and industrial plants⁶⁸¹ and cement factories in Ogun State have been associated with significant air pollution, particularly from cement dust⁶⁸².

One of the reasons why States have at times condoned lower environmental standards is due to economic pressures, weak regulatory frameworks, and political interests. Other reasons are that State authorities often turn a blind eye to environmental regulations to support the livelihood of these communities. Thirdly the informal nature of artisanal mining makes it challenging to regulate. Fourthly, State and federal agencies often lack the mechanisms to enforce environmental standards in informal sectors. Fifthly, companies wield significant political influence, leading to lax enforcement and accountability. Sixthly, regulatory bodies often lack the capacity and resources to enforce environmental standards effectively

Sixthly, one of the drawbacks of decentralisation is the possibility of increased boundary disputes between states. Examples are the case of oil wells claimed by Cross

⁶⁷⁹Ozogu, N. A., (2023). Effects and Causes of illegal oil bunkering in Nigeria: Case Study Niger Delta *American Journal of LR* 2(1) 6-14

⁶⁸⁰ Lead Poisoning Investigation in Northern Nigeria at a Glance. <https://www.cdc.gov.org>

⁶⁸¹ Elohor Egbane, Making Lagos a Pollution Free City: solving the threat one solution at a time <https://www.worldbank.org>

⁶⁸² Ojekunle et al, (2018). Environmental Pollution and related hazards at Agbara Industrial Area, Ogun state *Scientific Reports*, 8(6482) <https://www.nature.com>articles>

River – Akwa Ibom; Kogi vs Anambra state. Decentralization of resources could also lead to boundary disputes between States in Nigeria especially in States where large deposits of these stones are deposited or are rich in natural resources, such as oil, minerals, and fertile land. This can pose significant challenges, impacting governance, security, and socio-economic development. Many state boundaries were arbitrarily drawn during the colonial era without consideration for ethnic, cultural, or historical ties⁶⁸³. These artificial boundaries have led to disputes as communities find themselves split across state lines. Nigeria is ethnically diverse, and boundary disputes often involve ethnic groups vying for control of resources and land. These disputes can exacerbate ethnic tensions and lead to violence⁶⁸⁴. The National Boundary Commission (NBC) is responsible for resolving boundary disputes, however, many state boundaries are poorly defined or ambiguously documented, leading to different interpretations and claims. States may contest boundaries to increase their share of revenues.

Part VII - Summary, Findings and Recommendations

Mining operations can cause pollution that affects multiple states, such as water pollution or air pollution. Coordinating pollution control measures and enforcing compliance can be difficult due to corruption, limited technical expertise, and lack of resources or governmental oversight. As long as mining is centrally controlled, these constraining factors will persist. It was found that much mining of mineral resources is carried out on an illegal basis. The illegal activities lead to denial of the enjoyment of the right to a healthy environment; additionally, it violates basic human rights as illustrated in many cases where these activities have led to the deaths of many and caused some to suffer from one health challenge or the other.

In the course of writing this paper, the following findings were made:

⁶⁸³ Gbeneye, E. M., (2016). African Colonial Boundaries and Nation-building. *Journal of Humanities and Social Sciences* 8(2). See also, Adekunle, A., (1998). The Nature of African Boundaries. *African Spectrum*. 18(2) ; Tasew Gashaw, Colonial Borders in Africa: Improper Design and its impact on African Borderline Communities <https://www.wilsoncenter.org>

⁶⁸⁴ Punch Editorial Board (2022, September 28) Finding Solutions to violent boundary disputes. *The Punch* <https://www.punchng.com>finding>solution> see also Baywood, N., Tunde, F., Igbokwe, E. and Udo, E. (2020). Boundary dispute resolution and national Security, Prospects and Challenges <https://www.fig.net>papers>

1. Illegal mining is being exacerbated by the centralization of mining powers on the Federal government.
2. Seventeen years have elapsed since the enactment/passage of the NMMA 2007 and illegal mining shows no signs of abating, rather media reportage show that it is thriving and possibly on the increase.
3. A major limitation of the environmental considerations and obligations provided in the NMMA 2007 is the fact that they are mostly addressed to large-scale mining. However, only about 20 per cent of mining in Nigeria is large-scale in nature.
4. Most illegal mining is carried out in remote and difficult to access areas; areas outside or beyond the radar of the Federal Government, law enforcement officials and characterised by lack of safety measures and health care; lack of environmental protection, and smuggling.
5. The Federal Ministry of Solid Minerals and its departments/agencies have demonstrated a lack of capacity to adequately cover and monitor the entire federation. Illegal mining is on-going in most of the 36 states and in hundreds out of the 744 local governments. Much of the illegal mining is carried out in remote, rugged and hard to access locations. Detection of illegal mining activity is often at the village and local government level.

The following recommendations are made:

1. Mining should be moved to the Concurrent List. There is the possibility of compromise in which the FG regulates large and medium scale mining whilst the states regulate small-scale mining; states enact legislation with provisions especially suited for ASM with clear environmental considerations capable of being enforced against ASM.
2. Constitutional amendments so as to provide a more balanced approach to resource control. The reforms can address resource-rich and resource-poor regions so as to maintain stability. Decentralization of solid minerals can set precedent for increased autonomy in resource management and this has the potential to lead to broader federalism reforms as the shift will empower States

to take greater responsibility for their economic development and reduce the over-centralization of power.

3. Legislation should be made covering Artisanal or non-commercial mining since this is not provided for in the Nigerian Minerals and Mining Act 2007.
4. Decentralisation of mining powers between the Federal Government and State Governments, in order to enable the State governments' agencies cover the remote areas where the Federal Government agencies cannot access.
5. In addressing decentralization of resources, Nigeria must begin to be serious minded about federalism and not just pay lip service. The 1999 Constitution is couched in a way that, though it states that the system in Nigeria is federalism, the matters on the Exclusive List connote that Nigeria is more of a unitary system.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

ADDRESSING PRISON DECONGESTION IN NIGERIA THROUGH RESTORATIVE
JUSTICE AND NON- CUSTODIAL MEASURES

James Hope

Department of Public Law, Ahmadu Bello University Zaria

Email: jamhope20@gmail.com, Phone: 07032919466

Abstract

The criminal justice system consists of three main parts: Legislature (that create laws); adjudication (the courts); and corrections (jails, prisons, probation and parole). It is well known that the ultimate goal of the criminal justice system is to do justice and provide fairness to both the offender and the victim. The society is no longer concerned about the prosecution and imprisonment of the offender; rather it is providing alternative means of holding offenders accountable and responsible to the society, by making sure that the future is safe, harm is repaired and the offender is reintegrated back to the society. Thus, this paper addresses the issue of prison overcrowding in Nigeria by advocating for the use of restorative justice and noncustodial measures as alternatives to imprisonment. The dependence on imprisonment and fines by the judiciary in Nigeria has led to overcrowding in prisons, which have had serious negative effect. Restorative justice and non-custodial measures, including compensation, damages, costs, restitution, restoration, plea bargain, community service, suspended sentence, probation, and parole has serious benefits to the justice system and can help reduce prison congestion, improve the welfare of detainees, and enhance the professionalism of correctional officers. This paper using the doctrinal research methodology recommends the need for an effective institutional frame work that will aid in enhancing restorative programs and noncustodial measures in the Nigerian criminal justice system.

Keyword: Restorative Justice, Non-Custodial, Decongestion, Criminal Justice system.

1.1.Introduction

The Nigerian Correctional Service as at 27th May, 2024 indicates that, out of the total inmate population of 81,647, the total percentage of convicted prisoners is (32.9%) while those awaiting trial is (67.1%). The large number of those awaiting trial has overstretched the builtin/carrying capacity of most Nigerian correctional facilities which has an official capacity of

50, 153, resulting in overcrowding of such facilities. This overcrowding is triggered by factors such as delays in criminal trials, high rates of arrest and remand, and an increase in crime without a corresponding increase in correctional facilities. The current prison system fails to serve its intended purpose of rehabilitation and reintegration. Inmates often lack access to education, vocational training, and programs that address the underlying issues that led to their incarceration. This contributes to high recidivism rates and perpetuates the cycle of crime and incarceration.⁶⁸⁵ This can be attributed to the criminal justice administration models in place in Nigeria which largely focus on arrest, prosecution, imprisonment and even death sentence as the common punishment for crimes which is quite different from the system obtained in other developed countries.

The Nigerian legal system is patterned after the English Common Law and therefore draws its inspiration from the retributive school of thought which provides that offenders should be punished for any crime done to another or the society. Even before the introduction and promulgation of the Administration of Criminal Justice Act (ACJA) 2015, the criminal justice administration in Nigeria was being regulated by the Criminal Code (based on English Common Law) in the Western part of Nigeria and Penal Code (based on Islamic Law) in the Northern part of the country. We also have customary laws (based on the culture and customs of the people), all being in place which posed a major significant challenge to justice and decongestion in Nigeria.⁶⁸⁶ Despite the presence of the ACJA which provides and introduced some non-custodial measures, the full implementation of such measures is still relatively low across the country.

It is therefore apparent that, the more the criminal justice system focuses on ways of punishing offenders through harsh legislation, tough policing and criminal trial and incarceration, the less the time that is being devoted to finding the root causes of crimes and other ancillary issues such as crime victim needs, interest, expectations, reformation and reintegration of offenders. The over-focus on conventional criminal justice system and penal sentencing has therefore been found wanting in crime prevention, reduction, decongestion of prison and rehabilitation of offenders, hence the need to diversify by shifting attention from the conventional penal punishment.⁶⁸⁷

This paper adopts a doctrinal research method, seeks to explore the potential of restorative justice and non-custodial measures as a means to address the problem of prison congestion in Nigeria, by providing a comprehensive understanding of how restorative justice and noncustodial measures can be leveraged to decongest prisons, reduce recidivism, and promote a more humane and effective criminal justice system in Nigeria. To address these challenges, there is a pressing need to explore alternative approaches to criminal justice that prioritize rehabilitation, restoration, and reintegration over punitive measures alone.

⁶⁸⁵ World Prison Brief Data, accessed at <https://www.prisonstudies.org/country/nigeria> on the 29th June, 2024 at 12:30pm

⁶⁸⁶ Okwendi, J.S and Nwankwoala, R (2014) The Role of Restorative Justice in Contemplating the Justice System and Restoring Community Values in Nigeria, 2 (3) *Asian Journal of Humanities and Social Sciences* (AJHSS), p. 127.

⁶⁸⁷ Ogwezy M. C & et al (2016) Restorative Justice and Non-Custodial Measures: Panacea to Recidivism and Prison Congestion in Nigeria. *Nnamdi Azikiwe University Journal of International Law*, Awka p. 69

1.2. Brief Historical Background of the Nigerian Criminal Justice system

The Nigerian criminal justice system has its origins in the country's colonial past under British rule in the late 19th and early 20th centuries. Prior to colonization, Nigeria had diverse legal traditions based on Islamic law in the north and customary laws in various regions which had serious elements of both the retributive, restorative and non-custodial sanctioning measures.⁶⁸⁸ In these diverse societies, the kings and their chiefs would gather at the king's palace to resolve disputes between and among members of the community. The Societies had their own imprisonment system which were not punitive oriented but restorative, aimed at purging the criminal of the evil spirit that led to the commission of the offence⁶⁸⁹.

When the British took control, they introduced their common law system which were retributive in nature, courts, and penal codes modeled after those in England and Australia. The Criminal Code of 1904, originally applied to Northern Nigeria by colonial Governor Lord Lugard, was later extended to the entire country after unification in 1914. The British influence was strongest in the areas of policing, courts, and prisons, which were established to protect European interests and control the native population. However, the colonial authorities adapted some local customs and Islamic law into the legal system, particularly in Northern Nigeria where the British were uncertain how to handle certain offenses under Sharia law.

After Nigeria gained independence in 1960, the criminal justice system continued to evolve, but maintained its foundations in British common law and colonial-era institutions. The system today consists of federal and state courts, a Supreme Court, and prisons administered

by the Nigerian Correctional Service which still practices the dual criminal justice administration.

1.2.1. The Concept of Restorative Justice

Understanding restorative justice goes beyond the understanding of crime and conflict in the society, restorative justice sees how the society thinks about crime and at the same time responds to the crime, thereby restoring balance to the society. Restorative Justice (also sometimes called “reparative justice”) is an approach to justice that focuses on the needs of victims, offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. Victims take an active role in the process, while offenders

⁶⁸⁸ Otu, N. (1999). Colonialism and the Criminal Justice System in Nigeria. *International Journal of Comparative and Applied Criminal Justice*, 23(2), 293–306. <https://doi.org/10.1080/01924036.1999.9678646>

⁶⁸⁹ Ononye, U I (2018) An Analysis of the Concept of the Restorative Justice Under the Nigerian Criminal Justice System, *Unizik Law Journal* Vol. 14, p. 3

are encouraged to take responsibility for their actions, “to repair the harm they’ve done—by apologizing, returning stolen money, or community service.”⁶⁹⁰

Restorative Justice is a problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies⁶⁹¹.

This concept has been defined and elucidated as:

...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.⁶⁹²

Restorative justice (RJ) has become a global model in contemporary times. The idea of the concept is hinged on the need to recognise the victims of crime, the obligation placed on the offender to make amends and the concept of ‘healing’ for the victim and the community. It basically engages all parties with the aim to avoid recidivism by giving the victim a direct say in the judgement which in turn makes the offender understand the harm he has caused. In contrast to the adversarial legal process, restorative justice seeks expand legally relevant issues and strike a balance between a number of issues that include: (a) Offenders and the needs of

victims, (b) Therapeutic and retributive model of justice, (c) The need to rehabilitate the offender and duty to protect the public. Is simply applying Alternative Dispute Mechanisms in the practical settlement of issues in the society.

1.2.2. The Concept of Non-Custodial Measures

Non-custodial measures are criminal sanctions that do not involve incarceration. They are designed as alternatives to imprisonment to reduce reoffending and assist the offender's integration into society. The purpose of non-custodial measures is to provide flexibility in sentencing, avoid unnecessary use of imprisonment, and promote the offender's reintegration into society. These measures are usually carried out from the pre-trial stage where an offender is arrested and the Police or prosecuting agency consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. To the trial and sentencing stage which requires that consideration should be made regarding the rehabilitative needs of the offender, the protection of society and

⁶⁹⁰ Marty-Price, J.D. (2001) Personalizing Crime, Dispute Resolution Magazine, Fall

⁶⁹¹ Marshall, T, F. (1999) *Restorative Justice: An Overview*, London, Home Office Research and Statistics Directorate

⁶⁹² Braithwaite, J (2004) Restorative Justice and De-Professionalization’ <https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/good_society/v013/13.1braithwaite.html> accessed 21 April 2021

the interests of the victim, who should be consulted whenever appropriate. Sentencing authorities may dispose of cases by reprimand and warnings, probation, demands to carry out community service, fines, etc.⁶⁹³

The United Nations Standard Minimum Rules for Non-custodial Measures, known as the Tokyo Rules, provided the basic framework which promotes the use of alternatives to imprisonment and establish minimum safeguards for offenders. The rules seek to reduce the use of incarceration, encourage community involvement in criminal justice, and promote offender rehabilitation and reintegration. They outline principles for selecting non-custodial measures based on the nature of the offense and offender characteristics, ensuring legal safeguards and offender rights, and systematically evaluating alternative sanctions. The Tokyo Rules emphasize developing a wide range of non-custodial options at all stages of the criminal justice process to provide flexibility while avoiding unnecessary imprisonment. It is worth noting that some of the above alternatives have been implemented in other jurisdictions and they have been effective.

1.2.3. The Concept of Retributive Justice

Retributive justice is a legal concept where the criminal offender receives punishment proportional or similar to the crimes committed. This system has its origin from the Mosaic Law in the Bible, which provides for equal and proportional punishment for an act committed “an eye for an eye, a tooth for a tooth”. The retributive justice system is an institutionalized system of vengeance. The vengeance here is to the state because under the Nigerian law, as it is with other jurisdictions, crime is committed against the state, not against the victim who has suffered hurt or deprivation. Prosecution of the crime against the individual offender is usually carried out by the state through the state's prosecuting agency.⁶⁹⁴

The Nigerian criminal justice system is adversarial and offender-centered, placing greater emphasis on the guilt and punishment of the defendant rather than addressing the needs of the victim. Victims are often relegated to the role of mere witnesses for the prosecution, with their own interests and rights overlooked. The system fails to accommodate the victim as an active participant in the criminal process, instead focusing solely on the rights of the accused. At the conclusion of a criminal trial, if the defendant is convicted, they are sentenced to punishment, which is seen as the end of the pursuit of justice. However, this fails to provide any meaningful remedy or restoration for the victim, who may have suffered physical, mental, or financial harm as a result of the crime. The adversarial nature of the Nigerian criminal justice

⁶⁹³ UN General Assembly (44th sess.:1989-1990), *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* : resolution / adopted by the General Assembly, A/RES/45/110, UN General Assembly, 2 April 1991, <https://www.refworld.org/legal/resolution/unga/1991/en/33347> [accessed 30 June 2024]

⁶⁹⁴ Manty, P (2001) Personalizing Crime: Mediating Produces Restorative Justice and Offenders; (*Dispute Resolution Magazine, American Bar Association 2001*) available at <http://www.vorp.com>

system, which is designed to accommodate only the prosecution and the defendant, leaves little room for the active involvement of victims in seeking justice for themselves.⁶⁹⁵

1.2.4. Restorative Justice and Non-Custodial Measures under the Nigerian Criminal Justice System.

Restorative and non-custodial sentences or measures are those sentences a court can impose on an offender which does not involve keeping the offender in prison or any other penal facility. They include compensation, damages, costs, restitution, restoration, plea bargain, community service, suspended sentence, probation and parole.⁶⁹⁶ There are several instances of restorative justice and non-custodial measures in the laws regulating the administration of criminal justice in Nigeria.

The Nigerian Correctional Service Act 2019 established the Nigerian NonCustodial Service under part II providing for its functions, power to make regulations and guidelines and allowing for parole, probation, community service, restorative justice measures and any other non-custodial measure assigned to the Correctional Service by a court of competent jurisdiction. Moreso, The Administration of Justice Act, 2015 (ACJA) in its Section 1 provided the purpose of the Act which is to ensure efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim. The Act established the Administration of Criminal Justice Monitoring Committee saddled with the mantle of ensuring the effective and efficient application of the Act by the agencies concerned. The committee ensures that criminal matters are dealt with expeditiously, that the congestion of criminal cases in courts is drastically reduced, that prison congestion is reduced to the barest minimum and that persons awaiting trial are not detained in prison custody. The ACT encouraged other alternatives as against the use of punishment and imprisonment, with probation, plea bargain, restitution, compensation, restoration and rehabilitation.

There are various provisions in ACJA that are driven by the concept of restorative justice and no custodial measures. For example, Section 319(1) (a) ACJA order the defendant or convict to pay a sum of money as compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed. Section 321 ACJA empowered the Courts to order restitution, including returning the property to the owner or to his representative or an amount equal to the value of the property. Sections 460-466 ACJA provides for community service as an alternative to the traditional punishment of serving jail term. By awarding community service to the offender, the offender feels a sense of membership of the community.

⁶⁹⁵ Adeyemo, D.D (2021) Recognising the Rights of Victims in the Nigerian Criminal Justice System, *International Journal of Comparative Law and Legal Philosophy* 3 (3) p. 65

⁶⁹⁶ Ani, C.C. (2023). Restorative Justice and Non-Custodial Measures as Panacea for Prison Decongestion in a Covid-19 Era: Nigeria in Perspective. In: Duruigbo, E., Chibueze, R., Gozie Ogbodo, S. (eds) *International Law and Development in the Global South*. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-031-13741-9_4

By serving in his community, he is being reintegrated into the community and he is made a better person as he still retains some self-worth. Section 355 allows the victim to withdraw his complaint against the accused person even when the offence is committed against the state and lastly, the Act provided provision for plea bargain as it is aimed at reconciling the victim and the offender, while compensating the victim for the loss incurred as a result of the offence. The court in giving credence to Section 355 has this to say in the most recent case of *FRN v. Ononye*⁶⁹⁷ Per Helen Moronkeji Ogunwumiju, JCA as she then was at (Pp 5 - 12 Paras D - B) said as follows;

I think Section 355 of the Administration of Criminal Justice Act which is in pari materia with Section 191 of the Administration of Criminal Justice Law of Anambra State is more apt. It states as follows: Where a complainant at any time before the final order is made in a case, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw the complaint and shall thereupon acquit the defendant. ...Even though at the trial Court, the learned counsel for the complainant and the defence counsel did not use the particular phraseology, compounding of offence by the complainant is what has happened in this case. My Lord Augie JSC explained this whole point in *PML NIG LTD v. FRN* (2017) LPELR-43480(SC) where the difference between compounding a crime and compounding an offence was well explained. Compounding a crime is an offence which is defined as agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution (In both cases for material or financial consideration). Compounding of Offence on the other hand is an act on the part of the victim who decides to pardon the offence committed by the accused person and requests the Court to exonerate him. This does not mean the offence was not committed, it only means the victim is willing to pardon it, or has accepted some form of compensation for what she or he has suffered, so the compounding of the offence terminates the legal proceedings against the offender and he/she is entitled to an acquittal...However, I can only conclude that the primary complainant in this case has the right to compound the offence and cause a withdrawal of the charge against the accused....

The legal frameworks on restorative justice and non-custodial measures are adequately provided and capable of tackling the prison decongestion in Nigeria. There is need for complete observance and implementation of the restorative method of adjudication to free case load and reduce Awaiting Trial Prisoners and decongest the prisons in the ACJA even though a lot of the provisions are still retributive.

1.3.Benefits of the Implementation of Restorative Justice and Non- Custodial Measures in Prison decongestion in Nigeria.

The key benefits of implementing restorative justice and non-custodial measures in Nigeria's criminal justice system include:

One of the key benefits that the country will derive in implementing restorative justice and non-custodial measures is the reduction in prison overcrowding and congestion. Restorative justice and non-custodial options like community service, probation, and suspended sentences

⁶⁹⁷ (2018) LPELR-45067(CA)

can divert offenders from incarceration, easing the burden on the correctional facilities which are already over-crowded. As earlier seen from the statistic provided, great reliance on the total implementation of the restorative justice programs and the usage of the other non-custodial measures, will depopulate the number of inmates in the correctional facilities. Norway has the lowest number of prisoners as a result.⁶⁹⁸ The country of Norway today is having the lowest number of prisoners in their facilities, suggesting that the effective implementation of restorative justice programs and non-custodial measures can significantly reduce prison populations. By providing offenders with opportunities for rehabilitation and reintegration into the community, these approaches can address the root causes of crime while alleviating the strain on the criminal justice system and correctional facilities.

There is also going to be improved rehabilitation and reintegration of offenders into the society. Restorative approaches focus on addressing the root causes of crime and helping offenders take responsibility, make amends, and reintegrate into the community. This is achieved by encouraging offenders to take full responsibility for their crimes and actions and make amends, restorative justice facilitates their transition back into the community. Involving and also engaging the community members not only supports victims but also helps offenders understand the impact of their actions, fostering a sense of accountability and social responsibility.¹⁵

Moreso, greater victim satisfaction and empowerment is achieved through the Restorative justice and non-custodial measures as it gives victims a voice in the process and allows them to have a role in deciding how the harm should be addressed, leading to better outcomes for victims. Restorative justice conferences bring together offenders and victims face-to-face, leading to higher levels of victim satisfaction compared to traditional criminal justice processes. The restorative justice approaches give victims a voice in the process and allow them to actively participate in deciding how the harm should be addressed. This empowers victims and leads to better outcomes, as their needs and concerns are directly incorporated into the resolution of the case. By providing victims with a more meaningful role, restorative justice can enhance their satisfaction with the criminal justice system.⁶⁹⁹

It also reduced the rate of recidivism in the criminal justice system. Studies reveal that offenders who participate in restorative justice programs and non-custodial measures of punishment are less likely to reoffend in the future compared to offenders who go through the traditional criminal justice system. Recidivism is defined as the tendency to relapse into a habit

of criminal activity or behaviour⁷⁰⁰. Recidivism has been on the increase in Nigeria and has become a major social concern to the society, government at all levels and the world at large.

⁶⁹⁸ Ogwezzy, M. C., Adebayo, A. A., & Ogwezzy, E. C. (2016). Restorative justice and non-custodial measures: panacea to recidivism and prison congestion in Nigeria. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 7(1), 1-12. Retrieved from <https://www.ajol.info/index.php/naujilj/article/view/136240> ¹⁵ Braithwaite, J. (1998). *Restorative justice*. In M. H. Tonry (Ed.), *The handbook of crime and punishment*, Oxford University Press, pp. 323–344.

⁶⁹⁹ Strang, H., Sherman, L. W., Mayo-Wilson, E., Woods, D. J., & Ariel, B. (2013). Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: Effects on offender recidivism and victim satisfaction. A systematic review. *Campbell Systematic Reviews*, 9(1), 1-59. <https://doi.org/10.4073/csr.2013.12>

⁷⁰⁰ Black's Law Dictionary, 7thEdn., (USA: West Publishing Co., 1999), p. 1276.

Discharged prisoners find it extremely difficult to re-integrate into the society because of social and cultural factors.⁷⁰¹ Even after the release of a prisoner, the society still perceives him as a social misfit who should be avoided thereby making re-integration difficult. The social stigma associated with being label an "ex-convict" significantly hinders the reintegration of released prisoners into society. This stigma often relegates them to the status of outcasts, especially when their criminal history becomes known. Additionally, placing minor offenders alongside hardened criminals can exacerbate the issue. Frequently, these minor offenders are influenced and corrupted by their more experienced counterparts, leading them to engage in more serious crimes upon their release. Researchers have noted that traditional punishment alone does not effectively prevent re-offending. They argue that, in addition to punitive measures, there should be opportunities for offenders to compensate and empower victims of crime. This approach fosters a better understanding of the events that transpired, allowing all parties to move forward with their lives. By recognizing the impact of their actions on victims and the wider community, offenders are more likely to refrain from committing further offenses in the future.⁷⁰²

Lastly, Restorative Justice and non-custodial measures ensure a more efficient use of criminal justice resources. By diverting cases from the courts proceedings and reducing the incarceration of criminal offenders, restorative justice and non-custodial measures can help reduce the costs associated with lengthy trials and incarceration.

1.4. Challenges to the Implementation of Restorative Justice and Non- Custodial Measures in Nigeria.

The Nigerian criminal justice system faces several challenges in implementing restorative justice and non-custodial measures to decongest the correctional facilities in Nigeria, which includes the following:

1. The Nigerian Criminal justice system is focused on punishing offenders rather than addressing the needs of the victims of an offence and facilitating reconciliation. It provides limited opportunities for offenders to take responsibility and make amends for wrongful

actions committed.²⁰In a recent finding, it was submitted that the issue of victim neglect is attitudinal on the part of the Criminal Justice System who are the gate keepers and the failure of the police to collaborate with the victims. The Police decides on who enters the criminal justice process.²¹

2. Victims are denied a role in deciding how the harm they suffered should be redressed, victims should have the right to participate in the proceedings by allowing them to present their views, concerns and personal interests without prejudice to the accused and his rights

⁷⁰¹ Osayi, K. K (2013) Socio-Cultural Factors Affecting Reintegration of Discharged Prisoners in Anambra State, South-East, Nigeria, *Mediterranean Journal of Social Sciences* vol. 4 (10), p. 775

⁷⁰² Griffiths, C. T., Dandurand, Y., & Murdoch, D. (2007). The social reintegration of offenders and crime prevention. *International Centre for Criminal Law Reform and Criminal Justice Policy*. Retrieved from <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/index-en.aspx>

within the criminal justice system. The system minimizes the opportunity for offenders to repair the harm done to victims and society.²²

3. The so much emphasis of the criminal justice process on punishment of offenders leads to long, drawn-out criminal trials which will usually last for a very long period of time, as a result, it contributes to court congestion and prison overcrowding. Many awaiting trial inmates spend more time in custody than the sentence they may receive if found guilty.²³
4. There is a lack of adequate legal and policy frameworks to enable the integration of restorative justice and non-custodial measures in criminal justice administration in Nigeria. there is no comprehensive legislation regulating the use of restorative Justice programs²⁴. The current existing legislation such as the Administration of Criminal Justice Act 2015 and the Nigerian Correctional Service Act 2019 only provided some limited legitimacy and legal framework on the implementation of restorative justice and noncustodial measures without any detailed guidelines or operating procedures. The Criminal Justice (Release from Custody) (Special Provisions) Act²⁵ empowers the Chief Justice and Chief Judges of the various states to order the release of persons detained in prisons under certain circumstances, with the aim of addressing prison overcrowding and prolonged
5. The various Agencies and actors responsible for implementing restorative justice and noncustodial measures, such as magistrates, Judges, Correctional officers and police, often lack the necessary capacity and training to implement as they are under staffed, and are not well trained to carry out some of the provisions of the Administration of Criminal Justice Act.⁷⁰³ Even the Correctional officers lack the needed training and implantation directives to carry out their mandates in ensuring the observance of restorative justice and non-custodial

²⁰ Toju, A. A. T. (2022) The Nigerian criminal justice system's abuse of confessional statements: A call for judicial policy reform. Retrieved from <https://journal.ucc.edu.gh/index.php/ucclj/article/view/112>

²¹ Nwankwo, C. (2021) Nigerian criminal justice system and victims of crime neglect in Enugu urban. ResearchGate. Retrieved from

https://www.researchgate.net/publication/352546041_Nigerian_Criminal_Justice_System_and_Victims_of_Crime_Neglect_in_Enugu_Urban

²² Ibid

²³ Omachi, M. J., & Sule, A. A. (2019) The Administration of Criminal Justice Act, 2015: Pathway to A Reformed

Criminal Justice System in Nigeria. *ABUAD Law Journal*, 7(1), 130-152. <https://doi.org/10.53982/alj.2019.0701.06-j>

²⁴ Ibid

²⁵ Cap 79 Laws of the Federation of Nigeria 1990
detention issues in the criminal justice system is still having implementation challenges even from the Courts.

⁷⁰³ Omale, D. J. (2013). Restorative justice in Nigeria: Lessons from talking to Nigerian criminal justice professionals. *International Journal of Education and Research*, 1(8), pp. 1-14. Retrieved from https://www.granthaalayahpublication.org/ijetmrojms/index.php/ijetmr/article/view/10_IJETMR18_A11_556

programs despite the provisions of the Nigerian Correctional Act. Understaffing and inadequate training of personnel are significant barriers to the successful implementation of these alternative approaches in the Nigerian criminal justice system.⁷⁰⁴

6. The Nigerian Correctional Service (NCS) has initiated efforts to implement restorative and non-custodial measures in line with their mandate in Section 415 and 416 of ACJA and also the Section 37 of the Nigerian Correctional Service Act, however, there still exist challenges such as institutional buy-in, lack of resources to ensure compliance with the process, and inadequate training for correctional officers to implement the measures across the country⁷⁰⁵.
7. The failure in the part of the state actors to create or establish Restorative Justice Centers to facilitate the implementation of programs and provide a structured environment for mediation and conflict resolution. These centers can serve as hubs for training, case referrals, and community engagement.

1.5. Conclusion

Addressing prison congestion in Nigeria through restorative justice and non-custodial measures presents a viable and more effective pathway towards a more effective criminal justice system. The current reliance on punitive measures has contributed to overcrowded prisons and a cycle

of recidivism, high cost of financial burden on the prosecution and management of offenders, highlighting the urgent need for reform despite the various provisions in ACJA that are driven by the concept of restorative justice and non-custodial measures.

Implementing restorative justice practices and non-custodial measures, which focus on repairing harm and fostering accountability, alongside non-custodial options like community service, plea bargain and probation, the criminal justice system can alleviate the burden of overcrowding on correctional facilities. These approaches not only promote rehabilitation but also empower victims, allowing them to have a voice in the criminal justice process. Ultimately, integrating these measures can lead to a more humane and effective system that prioritizes restoration over punishment. By embracing restorative justice and non-custodial measures, Nigeria can move towards a more effective and equitable criminal justice system that not only addresses the issue of prison congestion but also promotes healing and reintegration for offenders and victims alike. The following findings are made:

1. The reliance on traditional punitive approach has resulted in significant overcrowding and congestion of the Nigerian Correctional facilities and a high rate of recidivism among released offenders, indicating a failure to rehabilitate.

⁷⁰⁴ Ibid

⁷⁰⁵ Ileka, J. C. (2016). Appraisal of the restorative criminal justice measures in Nigeria. *African Journal of Criminal Law and Justice*, 1(1), 1-20. Retrieved from <https://journals.ezenwaohaetorc.org/index.php/AFJCLJ/article/download/481/433> on the 23rd July, 2024.

2. Restorative justice practices is the best avenue that can effectively address the root causes of crime by engaging offenders and victims in dialogue, fostering understanding, and promoting accountability.
3. Non-custodial measures can reduce the financial burden on the states by decreasing the costs associated with lengthy trials and incarceration, allowing resources to be allocated more efficiently.

It is hereby recommended as follows:

1. The Nigerian government and legislatures should enact and enforce laws that mandate the use of restorative justice and non-custodial measures in its criminal justice system and ensure strict implementation of the restorative justice and non-custodial measures integrated into the criminal justice system.
2. Judicial officers, law enforcement officers, and correctional personnel should receive comprehensive training on restorative justice principles and non-custodial options to facilitate their effective implementation and provide better understanding.
3. Initiatives should be developed to raise public awareness about the benefits of restorative justice and non-custodial measures, encouraging community involvement in supporting rehabilitation efforts for offenders.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

LEGAL EMPOWERMENT OF THE POOR AND MARGINALIZED IN NIGERIA:
STRATEGIES FOR INCLUSIVE NATIONAL DEVELOPMENT IN NIGERIA

Yewande Fatoki, Michael Bolarinwa Gomez

Lead City University, Ibadan, Nigeria
08085840235
fatoki.yewande@lcu.edu.ng

Abstract

In Nigeria, challenges related to poverty and marginalization persist as significant impediments to accessing justice and participating fully in socio-economic development initiatives. Despite constitutional provisions and international commitments aimed at promoting equality and inclusion, vulnerable populations, including the poor, women, children, persons with disabilities, and ethnic minorities, continue to encounter systemic obstacles when seeking legal rights and remedies. However, these challenges require an approach that empowers the poor and marginalized through legal empowerment strategies. This paper explores the role of legal empowerment in fostering inclusive national development in Nigeria. It examines the socio-economic and legal obstacles faced by marginalized groups in accessing justice and participating in development processes. Furthermore, the paper analyzes existing legal empowerment initiatives and their impact on vulnerable populations. Employing a qualitative doctrinal research methodology, the paper draws on primary and secondary sources such as legislation, judicial precedents, scholarly journals, and articles. The findings of the paper indicate the critical importance of legal empowerment for the poor and marginalized in achieving inclusive national development. By considering the hindrances to justice and enhancing legal awareness and empowerment, Nigeria can create an enabling environment for all citizens to engage actively in socio-economic development initiatives. This, in turn, can contribute to poverty reduction, gender equality promotion, and the advancement of social justice.

Keywords: Marginalization, Socio-economic, Equality, Legal, National development

1. Introduction

One of the major proponent of a developed society is the equal access to justice for all and sundry, thus, the hallmark of development in a country cannot be differentiated from the availability of equitable legal empowerment for its citizenry irrespective of their socioeconomic or political status. According to Olusegun & Oyelade (2022), a nation which is high in the

promotion of legal empowerment for all its citizens tend to exhibit active political participation, reduced poverty and sustainable growth, participation in inclusiveness and accelerated productivity which result in peace, security and national development. Realistically, legal empowerment is not imaginary in nature, instead it is a composition of laws operative in a state for the advance of the right and interest of the poor, underprivileged, deprived and other marginalized groups (USAID, 2007). Thus, it is a body of principles recognized and applied by the State in administration of justice for all (Salmond, 1966). Justice is key to legal empowerment because a society that is not justice-driven by principle would be unstable, anarchic, lawless and would only be held together by force or impunity (Logan, 2017). Legal empowerment extends beyond the availability of laws and the ability to get legal representation in courts, contrarily, it evolves around the ease to access to justice, obtaining reliefs for the violation of rights, fairness and enforceability of remedies, irrespective of who is the victim or the assailant. Hence, a state is active in legal empowerment where its citizens know their rights, understand the legal process to enforce their right when it is breached, have faith in their judicial system because they know it is accountable, of good quality and justice would be served (Bamgbose 2015).

The legal empowerment of the poor and marginalized in Nigeria have been a subject of both national and global discourse, despite the availability of both international instruments and national legislation, the reality of inclusiveness and national development has been a mirage. In Nigeria, despite the presence of legal frameworks meant to protect all citizens, the poor and marginalized often struggle to access and utilize these rights effectively. The interconnection between human rights and legal empowerment of the poor is overwhelming and unquantifiable because of the shared process and outcome, through which the empowerment of the poor and marginalized can be exercise and they can claim their rights (Sengupta, 2008). Thus, where human rights are recognized by law and exercised by the poor, this have a riddle effect on their socioeconomic status and the overcoming of the inadequacies created by poverty and lack. Sengupta (2008) further stated that legal empowerment of the poor is a viable mechanism to ensure that the laws can be utilized to produce fundamental values for an equitable and social justice society, where new rights, opportunities and capacities are created for the marginalized and poor, so as to give them the capacity and power to use the law and other legal tools to escape their socioeconomic status. Ultimately, it can be inferred that legal empowerment gives voice to the poor, however, to obtain this much needed voice, the poor and marginalized need to be educated and informed, as well as represented and organized. Legal empowerment is an avenue for the poor in the communities and society to be equipped with legal tools to effectively tackle and preemptively protect themselves from climate change challenges such as flooding, erosion,

droughts, famine, sea-level rise and desertification (Martinez-Soliman, 2012). Issues like securing land rights and equitable access to land is germane to the poor and the marginalized, especially, to local women because it would produce a ripple effect dividend such as improved livelihood security, stimulated economic development and sustainable growth. Therefore, legal empowerment of the poor contribute to national development and sustainable poverty reduction. From a human rights standpoint, legal empowerment is essential not only as a developmental goal but also as a result. This enables individuals within society to assert their rights and demonstrate their ability to make claims. This is because the human rights evolves around claims of people's entitlements and the corresponding duty they owe the state. The goal is to enhance the capability of both state and non-state actors to fulfill their responsibilities under the social contract between the people and the state (Joshi, 2017). Hence, using a qualitative doctrinal research methodology, the study relies on primary and secondary sources, including legislation, judicial precedents, scholarly journals, and articles. The paper considers the socio-economic and legal barriers that marginalized groups encounter in accessing justice and engaging in development processes. Furthermore, it evaluates current legal empowerment initiatives and their effects on vulnerable populations. It also examines the international and national frameworks and instruments on the legal empowerment of the poor and marginalized in Nigeria. It considers the relationship between the inclusive national development and the legal empowerment of the poor and marginalized of a state or society and also discusses the challenges of the legal empowerment of the poor and marginalized in Nigeria. In conclusion, it recommends strategies that can be implemented to harness the legal empowerment of the poor and marginalized, in order to achieve an inclusive national development in Nigeria.

2. Vulnerable Populations in Nigeria

In Nigeria, poverty and marginalization cut across tribal lines and affect a diverse range of individuals and communities. It manifest differently on factors such as geographical location, socio-economic status, and access to resources. Poverty and marginalisation are more often than not experienced by the vulnerable populations in Nigeria some of which include:

Rural Communities: Rural areas in Nigeria often experience higher levels of poverty and limited access to essential services such as education, healthcare, and infrastructure. People living in rural communities, regardless of their tribal affiliation, are often marginalized due to inadequate government attention and investment in rural development initiatives (Okosun et al, 2023).

Ethnic Minorities and Indigenous Communities: Nigeria is home to over 250 ethnic groups, with some ethnic minorities facing discrimination, exclusion, and marginalization. These minority groups often reside in remote or resource-poor regions and may experience socio-economic

disadvantages compared to dominant ethnic groups. Also, Indigenous communities in Nigeria, such as the Ogoni, Ijaw, and Tiv, among others, face marginalization due to historical injustices, land disputes, and environmental degradation in their ancestral lands. They have limited access to resources. Also, loss of cultural heritage, and lack of recognition of their rights contribute to their socio-economic exclusion (Olusanmi, 2023).

Women and Children: Women and children, particularly those from disadvantaged backgrounds, are disproportionately affected by poverty and marginalization in Nigeria. Gender-based discrimination, limited access to education and healthcare, and cultural norms that perpetuate gender inequality contribute to the marginalization of women and children across tribal lines (Abolade, 2021).

Persons with Disabilities: These set of persons in Nigeria face significant barriers to socio-economic inclusion, including limited access to education, employment, and healthcare. Discriminatory practices and inadequate infrastructure further exacerbate their marginalization, regardless of their tribal affiliation (Aremu & Abiodun, 2023).

Urban Slum Dwellers: Urban slum dwellers, including migrants from rural areas and marginalized urban communities. They face socio-economic challenges such as inadequate housing, sanitation, and access to basic services. These communities often belong to various ethnic groups and tribes but share common experiences of poverty and marginalization in urban centers (Lopez & Flores Garcia, 2023).

3. The Concept of Legal Empowerment

Legal empowerment is an avenue for the promotion and realization of the human rights of the citizens, especially, the marginalized and vulnerable members of the society. It is a fight against discrimination and oppression, as well as, encourage national development in the governance of a state (Joshi, 2017). Nigeria like most developing states have been scored abysmally low on the availability of legal empowerment and access to justice for majority of its citizenry, hence, it is not far-fetched that it has been wallowing and grappling with poverty, secessionists movement, banditry, insurgency, decline in national development, and exhibiting attributes of a failed state, which is in contrast with the realities of most developed nations around the globe (Asiegbu, 2022). According to Aljazeera news (2020) over forty percent (40%) of its citizens below the poverty line the nexus between poverty and unavailability of legal empowerment for its teeming population cannot be denied or downplayed.

Nigeria in recent years have witnessed a growing trend of inflated poverty amidst its enormous national resources. Constructively, the significance of equitable legal empowerment cannot be overemphasized especially in a developing nation like Nigeria where institutions and

governmental bodies saddled with making, executing and implementing economic, political, social, legal policies and laws deprive and do not provide uniform opportunity and security to the vulnerable populations (Ucha, 2010). The system is screwed against an inclusive society and equitable distribution of wealth, as the legal frameworks and institutions are biased and structured to favour the mighty and wealth against the interest of the poor (Vries, 2012). Therefore, the laws and policies are purchased by the highest bidder, a far contrast from the norm in advanced climes, thus, institutions like the Police, EFCC, DSS, NSCDC and even the court which is meant to protect and enforce the rights of the poor man is made inaccessible, expensive to access, cumbersome and ambiguous. Realistically, livelihood for the poor in a developing state like Nigeria is filled and characterized with impoverishment, uncertainty, deprivation, lack, hardship, and exclusion from socio-economic, political and legal advantages. Also, most Nigerians experience difficulties in accessing legal empowerment when their human rights are trampled upon, both in civil and criminal matters, which creates room for lawlessness, impunity, deprivation of one's right to access justice and further impoverish the populace. While it is challenging to provide a universal definition for the legal empowerment of the poor, the United Nations (2018) suggests that it involves a systemic transformation that protects the poor and empowers them to utilize the law to promote their rights and interests as citizens and economic participants. Thus, legal concepts such as human right, rule of law, independence of the judiciary and equitable access to justice are contributors in the holistic term of legal empowerment of the poor and the marginalized. This is because these aforementioned concepts are required conditions for the primary objectives of the government, as well as to create a sustainable environment for the national development and growth of the state. Therefore, it can be inferred that legal empowerment of the poor is one of the necessary prerequisite for a state to provide sustainable livelihood, inclusiveness and eradicate poverty (Adeniyi, 2019). It shares a symbiotic relationship with human rights and it should be acknowledged that poverty and marginalization is a product of discrimination, disempowerment and exclusion. Judicially, the court have held that what is required is for a person or group of persons in a state to be in difficult circumstances in which maintaining a modest standard of living would be difficult (Ucha, 2010). Legal empowerment enforces human right based development by giving a voice to the poor, deprived and marginalized members of the society. It embodies the right of everyone to have access to justice, equitable due process, and remedial actions which would eliminate discrimination. It promotes active participation in the development process of all strata of the society, from the grass root to the upper echelon by engaging civil societies and community-based organizations as to build individual and group identity (Domingo & O'Neil,

2014). Also, it enhances the establishment of the rule of law; tackles the root cause of exclusion, vulnerability and marginalization; guarantees security of livelihood, shelter and property; empowers the poor and deprived to defend themselves from violation of their human rights; freedom from fear and want; prevention and protection from abuse of authority and bias (Domingo & O'Neil, 2014). All these have ripple effect on the society, as it brings about national development and economic growth, strengthens democratic governance, ensures accountability, all round sustainable growth and the attainment of internationally agreed goals, such as the Sustainable Development Goals (SDGs).

4. Institutional and Legal Frameworks on the Legal Empowerment of the Poor and Marginalized

4.1 Commission on Legal Empowerment for the Poor (CLEP)

CLEP was established in 2005 by a conglomerate of developed nations which include Egypt, Canada, Denmark, India, Finland, Norway, Sweden, United Kingdom, among others. Their primary aim evolves around promotion and protection of human rights through the law, creating rights awareness, providing human rights assistance to the poor (Garcia-Boliva, 2008). To CLEP, legal empowerment of the poor is the process of systematic change through which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their rights and interest as citizens and economic actors (Banik, 2008). They emphasized that the concept of legal empowerment is the use of legal rights, systems, reforms and services for the disadvantaged populations to alleviate their poverty, improve their participation in governmental policies, actions and services. They advocate for using legal services to improve people's legal knowledge and skills. Hence, legal empowerment offers the poor and marginalized the opportunity needed to strengthen and protect themselves against poverty and marginalisation (Capulong, 1999). However, the norm is that citizens that are oppressed would take up arms to defend and protect themselves from suppression whereas, legal empowerment would have curtailed the act of militancy and banditry that is currently experienced in some regions in Nigerian.

According to the report on Commission on Legal Empowerment of the Poor (2008) the legal aid programs is an effective mechanism of legal empowerment because it has worked effectively in some advanced climes. However, in most developing and third world nations, legal aid without the incorporation of the full component of legal empowerment will not elevate the poor, rather, it will subjugate them. Thus, the right mechanism is the legal empowerment of the poor which encompasses a framework that facilitates access to justice, rule of law, enforcement of rights and active participation in governmental policies (CLEP Report, 2008). The notion of human

rights is no longer obtainable and operative in most developing democracies like Nigeria, instead what is in practice is “individual” rights. According to CLEP, overcoming power imbalances requires empowering the poor and marginalized to enter and influence the spheres where political and socioeconomic landscapes are determined and shaped. As Professor Wiktor Osiatynski (Stone, 2017) illustrates, those in power are unlikely to voluntarily cede power and responsibility to the weak and poor unless there are demands made by them.’ But then, without these demands, human rights transform into individual privileges, serving only a limited number of people.

The legal empowerment of the poor and marginalized is far-reaching because it involves poverty alleviation which would necessitate the building of their capacities through a system of the law, skills acquisition, productive training, legal knowledge to cause and effect change. Constructively, the poor and marginalized becomes an embodiment of change, a transformation which is often sustainable and truly local based. CLEP further postulates that there should be need to enhance accountability, project monitoring, and effective performance of development projects within the rural areas because they are the most vulnerable and disadvantaged. Though, the Commission has played and advanced the course of the poor and marginalized round the globe, its bottom-up approach has been heavily criticized for been extensively dependent on the ideas of Hernando de Soto, which predominantly focuses on property rights and legal exclusion, while ignoring other legal or non-legal factors which influences poverty in the society and they are deemed inconsistent in their recommendations and assumption (Golub, 2009).

4.2 The United Nations (UN) Initiatives

There is no gainsay that poverty eradication, alleviation and inclusiveness of all classes of the society is one of the cardinal developmental objective of the United Nations. Poverty is a human rights challenge around the globe because it embodies a range of mutually and interconnected deprivations and marginalization, which is not limited to socioeconomic and political exclusion, discrimination and stigmatization (UN General Assembly, 2009). Vulnerability, exclusion and socioeconomic challenges in varying degrees are experienced by the poor and the marginalized, therefore, a human right approach towards development is fundamentally necessary to bring about empowerment. Thus, it can be deduced that poverty and marginalization are primarily a result of disempowerment and exclusion of various degree. The United Nations initiatives and interventions on the legal empowerment of the poor and marginalized have over the years been exhibited through the following:

- i. **Universal Declaration of Human Rights (UDHR):** The United Nations acknowledges the importance of legal empowerment, grounding it in the fundamental principles of human rights

expressed in the Universal Declaration of Human Rights (UDHR, 1948) and subsequent international and regional human rights conventions. This foundation starts with Article 1 of the UDHR, which provides that every human being has inherent rights vested in them. These international standards of human rights require that everyone's basic rights, assets and livelihoods should be effectively upheld and protected by the law. All human rights are interconnected and indivisible, according to the UDHR, which also states that every person's right should be accorded equally regardless of their political or economic standing and that they all need to be legally freed from marginalisation, poverty, and exclusion.

ii. **Human Right Council:** The international human rights framework provides a thorough foundation for the poor's legal empowerment. The pertinent international norms and standards that facilitate the poor's legal empowerment are continually being developed and reinforced. The Special Rapporteur on the Independence of Judges and Lawyers stated the value of free legal aid programmes in the 2008 report presented to the Human Rights Council (UN General Assembly, 2009). These programmes are typically the only sources of legal assistance available to large segments of the population, and the work of NGOs and bar associations, as well as their initiatives to bring justice to historically marginalised regions and social groups, must be supported. Since anyone living in extreme poverty is negatively impacted in every aspect of life, even the Special Rapporteur acknowledged that there are significant barriers preventing the very poor from accessing justice. It is also noted that nothing more perfectly reflects the interconnectedness and indivisibility of human rights than extreme poverty. Hence, there is a need to redouble the emancipation and the legal empowerment of the poor and the marginalized groups.

iii. **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):** Since its adoption by the UN General Assembly in 1979, CEDAW has advocated for the global recognition of the principle of equality for women and the girl child, however, there are still challenges that hinder full access to their human rights. Statutory and customary property systems that deprive women of their rights can lead to discrimination and inequality against women in accessing land, property, the job market, and inheritance. According to CEDAW, states must ensure that the principle of gender equality is practically realised by the use of law and other suitable means, and they must pursue this policy of eliminating discrimination against women without delay. Relevant to the legal empowerment of the poor are provisions related to employment, economic and social life, including family benefits, bank loans, mortgages, and other forms of financial credit. This also encompasses the situation of rural women, including access to agricultural credit and loans, equal treatment in land and

agrarian reforms, and participation in land resettlement schemes. Also, it involves equality with men before the law and the same legal capacity, including contract conclusion and property administration, as well as equality in marriage and family relations. The Committee on the Elimination of Discrimination against Women emphasizes that the right to own, manage, enjoy, and dispose of property is central to a woman's financial independence, which is crucial for earning a living in many countries. The Committee asserts that laws granting men a greater share of property or inheritance significantly hinder a woman's ability to provide for herself or her dependents.

iv. **Sustainable Development Goals (SDGs):** The SDGs, adopted by the United Nations in 2015 as part of the 2030 Agenda for Sustainable Development, consist of 17 interlinked global goals designed to address a wide range of social, economic, and environmental issues. These goals aim to eradicate poverty, reduce inequality, and promote sustainable development, thereby directly impacting the lives of vulnerable and marginalized populations (UN SDG Reports, 2023). The SDGs build on the successes and lessons learned from the Millennium Development Goals (MDGs), which were active from 2000 to 2015. Unlike the MDGs, which primarily focused on developing countries, the SDGs are universal and apply to all countries, aiming to leave no one behind (ICLEI).

4.3 The African Commission on Human and Peoples' Rights (African Charter)

The African Charter is an international human rights instrument that is intended to promote and protect human rights, basic freedom and legal empowerment within the African continent. Articles of the African Charter that focus on the legal empowerment of the poor and marginalized include Article 26 (African Charter, 1981) which obligates States Parties to ensure the independence of the judiciary and to establish and enhance appropriate national institutions responsible for promoting and protecting the rights and freedoms enshrined in the Charter.

5. National Frameworks on the Legal Empowerment of the Poor and Marginalized

In Nigeria, there are a plethora of legal frameworks that addresses and regulate the legal empowerment of all its citizens.

i. **Constitution of the Federal Republic of Nigeria, 1999 (as amended):** The constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Section 36(1) of the Nigerian Constitution (1999) guarantees every individual the right to a fair hearing within a reasonable time by an independent court or tribunal. Additionally, Section 36(6) (CFRN, 1999) ensures that individuals accused of crimes have the opportunity to defend themselves, either personally or through legal practitioners.

Furthermore, Section 42(1) (CFRN, 1999) safeguards Nigerian citizens from any form of discrimination by any law in force in Nigeria or by any executive or administrative action of the government. Chapter Two of the Constitution, which outlines the Fundamental Objectives and Directive Principles of State Policy, promotes equality of opportunity for everyone and emphasizes the importance of maintaining human dignity, health, welfare, employment, and education for its citizens without discrimination. Although Chapter Two of the Constitution (1999) is not justiciable and cannot be enforced in a court of law, its primary purpose is to ensure the security and welfare of all citizens, regardless of their socioeconomic and political status. The Constitution stipulates that financial assistance should be provided to indigent citizens to support their legal claims based on social justice, equality, and opportunity. To fulfill this obligation, the Legal Aid Act was established to assist the poor and marginalized who cannot afford legal services, ensuring that justice is accessible to everyone, not just the affluent. Section 36 guarantees the right to fair hearing and right to be defended while section 36(5) CFRN, 1999) also provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.

ii. **Legal Aid Act, (LAA) 2011:** It is imperative to establish that one of the primary institution for the administration for legal empowerment for the poor and marginalized is the Legal Aid Council. The Legal Aid Council was established on 2nd May, 1977 to provide for the grant of free legal aid in certain proceedings to persons with inadequate resources. The Act in line with international standards, provides for the establishment of legal aid, legal empowerment, and access to justice fund into which financial assistance would be made available to the Council on behalf of the indigent citizens to prosecute their claims in accordance with the Constitution. Legal aid is also available for defendants standing trial for capital offences. The Act in section 8 provides the scope of services to be rendered by the council. Section 8 (1) (LAA, 2011) provides;

The grant of legal aid, advice and access to justice shall be provided by the Council in 3 broad areas, namely, Criminal Defence Service; Advice and Assistance in Civil matters including legal representation in court; and Community Legal Services subject to merits and indigence tests for the parties.

Section 10(1) of the Act (2011) stipulates that legal aid is available only to individuals whose income is below the minimum wage. Therefore, to qualify for the legal aid scheme under this Act, an individual must demonstrate that their monthly earnings are below the statutory minimum wage.

iii. The Administration of Criminal Justice Act, 2015 (ACJA): This Act was signed into law in May 2015. The Act (2015) introduced fundamental reforms with a view to promoting efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant and the victim. It attempts to transform the criminal justice system from the retributive justice to a restorative justice system. The Act has enhanced access to justice and introduced several innovations to the administration of criminal justice in Nigeria. Notably, it has improved timely case management and expedited trials by stipulating that any objections raised should be addressed concurrently with the substantive issues, with rulings on such objections delivered at the time of judgment. The innovative means of frontloading of pleadings is also one of many advantages of the Act. Section 36 (CFRN, 1999) provides for fair hearing within a reasonable time.

iv. Fundamental Rights (Enforcement Procedures) Rules, 2009.

The Rules is the procedural aspect of law and it aids in the acceleration and implementation of Fundamental rights in Nigeria. The 2009 Enforcement Rules do not establish new rights and obligations but are guides to facilitate the interpretation and application of legal empowerment of the poor and marginalized and human rights regime by the courts in Nigeria. The first proactive step of the Enforcement Rules (2009) is the removal of the burden and cumbersome procedures established under the 1979 Enforcement Rules. It enables a less complex and flexible system of enforcing human rights by the justice system. For instance, an action can be commenced by filing an originating without the leave of court. A more elaborate objectives of the 2009 Enforcement rules is provided in Item 3 (a) of the Preamble, it provides for an extensive and purposely interpretation of both national, regional, and international human rights instruments; it provides that the court shall have the power to make consequential orders as it deem fit; it provides for enhanced access to justice for all classes of litigants, among other stated objectives. Importantly, in Order III, it provides that there shall be no limitation of action.

v. National Economic Empowerment Development Strategy (NEEDS): NEEDS attends to the challenges of underdevelopment and legal empowerment of the poor in Nigeria. The main goal is to create a business climate in Nigeria that is supportive of the underprivileged and marginalised members of society (NEEDS Report, 2005) It works to create a business-friendly environment that empowers citizens and reduces poverty. This initiative's fundamental tenet is the recognition that economic growth is primarily driven by the private sector, which also helps to create wealth and job opportunities. The Nigerian government utilizes NEEDS as a tool to help grant its citizens certain economic rights, including welfare benefits, employment,

healthcare, food, and shelter. Chapter 4 of NEEDS (2004) outlines the government's provision of essential needs, such as potable water, food, clothing, shelter, adequate nutrition, basic education, primary healthcare, productive assets, security, and protection from shocks and dangers.

6. The Nexus between Legal Empowerment and National Development

As it has been earlier stated, legal empowerment involves granting individuals and communities the legal tools and knowledge necessary to protect their rights and improve their socio-economic conditions while national development encompasses the comprehensive growth of a country in economic, social, and political dimensions. In Nigeria, legal empowerment is crucial for driving sustainable national development by promoting equity, justice, and inclusive growth.

- i. **Promotion of Social Justice and Equity:** Legal empowerment ensures that marginalized and vulnerable groups have access to justice. This promotes social justice by enabling individuals to enforce their rights and seek redress for grievances. Hence, equitable access to justice contributes to national stability and social cohesion. Also, by empowering individuals with legal knowledge and tools, discrimination based on gender, ethnicity, or socio-economic status can be reduced. This creates a more inclusive society where all citizens can contribute to national development.
- ii. **Enhancement of Economic Development:** Legal empowerment helps individuals secure property rights, which is essential for economic activities such as securing loans and investments. Clear and enforceable property rights stimulate economic development by encouraging entrepreneurship and investment. Furthermore, empowering workers with knowledge about their rights leads to fair labor practices and improved working conditions. This enhances productivity and contributes to economic growth.
- iii. **Strengthening Governance and Accountability:** Legal empowerment promotes transparency and accountability by enabling citizens to challenge corrupt practices. When citizens are aware of their legal rights and mechanisms to report corruption, governance improves, leading to more efficient and effective public service delivery. It also encourages civic participation by informing citizens about their rights and responsibilities. An informed and engaged citizenry can hold government officials accountable, leading to better governance and national development.
- iv. **Human Capital Development:** Legal empowerment initiatives often include legal literacy programs, which educate citizens about their rights and the legal system. Education is

a key driver of national development, and legal literacy enhances citizens' ability to navigate and benefit from the legal system. When individuals are empowered, they are better equipped to demand and access health and social services. This leads to improved health outcomes and social well-being which promotes human capital development.

7. Challenges of Legal Empowerment of the Poor and Marginalized in Nigeria

Some of the challenges of legal empowerment of the poor and the marginalised include:

i. **Limited Resources and Legal Aid:** For many Nigerians, the high cost of seeking justice is a huge barrier. Recognizing that justice should not be exclusive to the wealthy, legal aid schemes were established to provide free legal representation to those who cannot afford to hire an attorney. Also, the administrative costs of running a legal aid scheme is high and the government does not invest sufficient resources for the smooth and effective operations of the Council. The Legal Aid Council provides free legal services, but the poor and marginalised are often unaware of these services, their rights, or available conflict resolution options. To help them obtain legal aid and enhance access to justice, section 17 of the Legal Aid Act allows for cooperation with paralegals, law clinics, NGOs, private attorneys, and attorneys participating in the mandatory National Youth Service Corps.

ii. **Delay in the Administration of Justice**

Stating that there is excessive delay in the administration of justice in Nigeria is an obvious observation. When delays are significant, citizens are naturally discouraged from pursuing actions to enforce their basic rights. Undoubtedly, such delays not only diminish public confidence in the judicial process but also threaten the very foundation of the courts' existence (*Ifeanyi Nwachukwu & anor v Oragbunam Aniето*).

i. **Illiteracy**

Despite various development plans and programmes implemented by successive governments that emphasize the importance of education, the socioeconomic structure of the nation has unfortunately prevented the vast majority of Nigerians from accessing education. The recent deterioration of public education, particularly at the university level, has worsened this issue, making education a luxury that only the rich can afford especially through private institutions.

ii. **Corruption and Poor Governance:** Corruption remains a pervasive problem in Nigeria. It hinders development efforts and diverts resources away from poverty reduction programs. Also, weak governance, lack of transparency, and impunity for corrupt practices hinders public trust.

iii. **Inadequate Infrastructure:** Nigeria's infrastructure deficit, including poor road networks, inadequate power supply, and limited access to clean water and sanitation, constrains economic growth and perpetuates poverty. Inadequate infrastructure in rural and marginalized areas exacerbates disparities in access to basic services and opportunities for socio-economic development.

iv. **Unemployment and Underemployment:** High rates of unemployment and underemployment, particularly among youth and women, contribute to poverty and marginalization in Nigeria. Limited job opportunities, skills mismatches, and a growing informal sector characterized by low-wage prevent poverty reduction efforts.

v. **Insufficient Basic Social Services:** The lack of adequate access to quality education, healthcare, and social services increases poverty and marginalization in Nigeria. Underinvestment in social infrastructure, lack of healthcare facilities and qualified personnel, and disparities in educational attainment are also contributory factors to socio-economic disparities thereby hindering human capital development.

vi. **Population Growth and Urbanization:** Rapid population growth and urbanization exert pressure on limited resources, infrastructure, and social services. Hence, this exacerbates poverty and marginalisation in urban and semi-urban areas.

8. Conclusion

The connection between legal empowerment and national development in Nigeria is clear and significant. Legal empowerment promotes social justice, enhances economic development, strengthens governance, and contributes to human capital development. By addressing economic, geographical, and systemic barriers, and implementing strategies that enhance access to legal services, promote legal literacy, strengthen institutional support, combat corruption, and advocate for inclusive policies, Nigeria can create a more just and equitable society. This, in turn, will drive sustainable national development and ensure that all citizens can contribute to and benefit from the country's progress. This will pave the way for a more equitable, just, and prosperous nation. Legal empowerment of the poor and marginalized is a critical strategy for promoting inclusive national development in Nigeria.

9. Findings

By promoting programs that enhance identification, voice, representation, and contract security, and by reducing transaction costs and uncertainty for the poor, especially those in the informal sector, legal empowerment can help alleviate poverty. This involves defending and advancing workers' rights, as well as fostering opportunities for business and self-employment. Current legislation could be reviewed and strengthened to include a basic set of legally binding labor rights for workers in the unorganized sector. Also, policies that advance gender equality, inclusive social protection, and improved access to opportunities will benefit vulnerable populations. Moreover, for these programs to be successfully implemented, strong engagement with business groups, relevant government entities, and grassroots stakeholders is essential.

10. Recommendations

The following strategies and recommendations are hereby suggested to enhance legal empowerment for the poor and marginalised for an inclusive national development in Nigeria.

Enhance Access to Legal Services: Government funding for legal aid programs should be increased to ensure their sustainability and reach. This includes providing resources for the recruitment and training of legal aid lawyers. Partnerships between the government and non-governmental organizations to provide comprehensive legal services should also be encouraged. It is necessary to promote and incentivize pro bono work among private law firms and legal practitioners to supplement legal aid services being rendered to the vulnerable populations.

Mobile Legal Clinics: Mobile legal clinics that travel to rural and remote areas to provide on-site legal assistance should be established by the government. These clinics can offer legal advice, document drafting, and representation especially to people in rural communities. The local communities should be engaged in the planning and implementation of these mobile clinics to ensure they meet the specific needs of the populations they serve.

Promote Legal Literacy: Legal education programs that are tailored to the specific needs of different communities, considering factors such as language, literacy levels, and cultural practices should be developed. Likewise, legal literacy should be integrated into the national school curriculum to educate young people about their rights and responsibilities from an early age. Teacher should also be trained on legal literacy topics to ensure effective delivery of the curriculum.

Strengthen Institutional Support: Training programs should be provided for community paralegals who can provide basic legal assistance and guide individuals through legal processes. Adequate certification and regulatory framework should also be put in place for the paralegals to ensure quality and accountability in the services they provide.

Support for Civil Society Organizations: Provide financial support and resources to civil society organizations working on legal empowerment. This can include grants, training, and technical assistance. Create an enabling environment for NGOs by reducing bureaucratic hurdles and ensuring their activities are protected and supported by law.

Judicial Reforms: Implement measures to reduce judicial delays, such as increasing the number of judges, improving case management systems, and utilizing alternative dispute resolution mechanisms. Use of technology should be introduced to improve the efficiency of the judiciary, including electronic filing systems, virtual hearings, and online access to case information.

Strengthen Governance and Accountability: There should be transparency, accountability, and integrity in public institutions to combat corruption and improve service delivery.

Anti-Corruption Mechanisms: Anti-Corruption measures should be established within the judiciary and legal institutions to combat corruption. This includes independent watchdog bodies and regular audits. Protection laws should be enacted to protect whistleblowers. This will encourage them to report corrupt practices without fear of retaliation and corrupt individuals will be prosecuted to ensure that public resources are effectively utilized for poverty reduction programs.

Citizen Involvement: For an inclusive policy development, it should be ensured that marginalized groups are actively involved in the policy-making process. Stakeholders and community leaders also have roles to play in promoting poverty reduction and combating marginalization in Nigeria. Their involvement is essential for fostering community-driven initiatives, mobilizing resources, and advocating for inclusive development. This can be achieved through public consultations, community forums, and inclusion in advisory bodies. The impact of the policies made should be assessed to ensure they do not inadvertently harm marginalized groups and that they promote inclusivity. They should raise awareness about poverty and marginalization issues and amplify the voices of marginalized communities, lobby for their rights, and promote inclusive governance processes that prioritize their needs and concerns.

Enhance Infrastructure Development: The government needs to invest in infrastructure development, including roads, electricity, water supply, and sanitation, to stimulate economic growth and improve livelihoods. Prioritize investments in rural and marginalized areas to reduce disparities in access to basic services and promote inclusive development.

Address Conflict and Insecurity: The government should find avenue to resolve conflicts, promote peace and reconciliation, and also address the root causes of violence and insecurity. Security institutions should be strengthened and peace building initiatives should be supported.

Promote Environmental Sustainability: Implement measures to mitigate environmental degradation, protect natural resources, and promote sustainable land use practices. Strengthen environmental regulations, promote renewable energy sources, and invest in climate change adaptation and resilience-building initiatives to safeguard livelihoods and promote sustainable development.

Enhance Data Collection and Monitoring: Government should improve data collection, analysis, and monitoring systems to track progress, identify gaps, and inform evidence-based policymaking. Measures should be put in place to strengthen statistical capacities, establish monitoring and evaluation frameworks, and enhance collaboration between government agencies, research institutions, and civil society organizations to ensure data-driven decision-making and accountability.

Resource Mobilization: Community leaders should work collaboratively with stakeholders, including government agencies, civil society organizations, and development partners, to mobilize resources for poverty reduction programs. They should leverage local networks, partnerships, and fundraising efforts to secure funding, grants, and in-kind support for community-driven projects and initiatives.

Sustainable Development Initiatives: Stakeholders and community leaders should encourage and promote sustainable development practices that address the interconnected challenges of poverty, environmental degradation, and social exclusion. They should implement projects that promote renewable energy, sustainable agriculture, environmental conservation, and climate resilience, ensuring that development interventions benefit present and future generations.

Implementing these strategies and recommendations will require coordinated efforts from the government, civil society, and the private sector. Nigeria can effectively empower its poor and marginalized populations. Thus, empowerment is essential for achieving inclusive national development, fostering social justice, economic growth, and political stability.

REFERENCES

- Abolade, D. (2021) "Gender Equality and Sustainable Development in Nigeria: Issues and Challenges. Trends Economics and Management" Trend Economics and Management 37(1) 9-25 <http://dx.doi.org/10.13164/trends.2021.37.9>

- Adeniyi, A. (2019) "Increasing Legal Awareness in Nigeria for Poverty Reduction" <https://blogs.worldbank.org/en/nasikiliza/increasing-legal-awareness-in-nigeria-for-poverty-reduction>
- Aremu, S. Adewunmi, A. (2023) "Inclusion of Persons with Disabilities in Nigeria: A Pre-requisite for National Sustainable Development" Saudi Journal of Humanities and Social Sciences Vol 8(11)
- Asiegbu, M. (2022) "Crisis of Governance and Incapacity of the Nigerian State: Implications for Sustainable Development" <file:///C:/Users/hp/Downloads/3211-Article%20Text-10448-1-10-20230110.pdf>
- Bamgbose, O. (2015), "Access to Justice through Clinical Legal Education: A Way Forward for Good Governance and Development" African Human Rights Law Journal 15(2) 378-396
- Banik, D. "Rights, Legal Empowerment and Poverty: An Overview of the Issues. Rights and Legal Empowerment in Eradicating Poverty" (Ashgate Publishing Limited, London 2008) page 13.
- Capulong, R. "Lawyering for the Poor – A Social Responsibility of the Integrated Bar of the Philippine" <http://publicinterestlawcenter.org/content/position-pageapers/lawyering-poor-a-social-responsibility-integrated-bar-philippageines>
- Costantinos, B. (2010) "Policy Issue on Legal Empowerment of the Poor: Access to Justice" <file:///C:/Users/hp/Downloads/PublicPolicyissuepaperonLegalEmpowermentofthePoor-AccesstoJusticeRLVolXXINo736MMXXI.pdf>
- Domingo, P. & O'Neil, T. (2014) "The Politics of Legal Empowerment" <https://odi.cdn.ngo/media/documents/9008.pdf>
- Garcia-Bolivar, O. (2008) "The Law as a Poverty Fighting Instrument: Reflections on Law Development and Empowerment of the Poor". Brazilian International Economic and Tax Law Review http://works.bepress.com/omar_garcia_bolivar/4
- Golub, S. (2009) "The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development and Policy and Practice, Hague Journal on Rule of Law vol.1 pg. 101-116
- ICLEI "From MDGs to SDGs: What are Sustainable Development Goals" <https://www.local2030.org/library/251/From-MDGs-to-SDGs-What-are-the-Sustainable-Development-Goals.pdf>
- Joshi, A. (2017) "Legal Accountability and Social Accountability: Complementary Strategies towards Rights- Based Development in Health?" World Development Vol 99 pg 160-172
- Logan, C. "Ambitious SDG goal Confronts Challenging Realities: Access to Justice is Still elusive for many Africans" (2007) https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaper039_access_to_justice_in_africa_eng.pdf

- Lopez, E. Flores-Garcia, M. (2023) "Urbanization Informality in the Global South"
<https://www.sciencedirect.com/topics/social-sciences/slum-dwellers>
- Martinez- Soliman, M. (2012) "Justice and Development: Challenges to the Legal Empowerment of the Poor" <https://www.un.org/en/chronicle/article/justice-and-development-challenges-legal-empowerment-poor>
- NEEDS, (2004) "Meeting Everyone Needs" pg. 29 <http://www.npc.gov.ng/indexl.html>.
- Okosun, A. et al (2024) "Rural Area Infrastructural Challenges and Role of Architecture in Urban-Rural Development in Nigeria" European Journal of Sustainable Development Vol 12(4) 305-318
- Olusegun, O. & Oyelade O., "Access to Justice for Nigerian Women: A Veritable Tool to Achieving Sustainable Development" (2022) International Journal of Discrimination and the Law, Vol 22(1) 4-29
- Olusanmi, F. (2023) "political Powers and Social Inequalities: The Stake of Minority Group in Multi-Ethnic Nigeria
- Salmond, J., "Salmond on Jurisprudence" London: Sweet & Maxwell, 1966.
- Sengupta, A. (2008) "The Political Economy of Legal Empowerment of the Poor; Rights and Legal Empowerment in Eradicating Poverty", edited by Dan Banik (Ashgate Publishing Limited, London 2008) page 32
- Stone, C. (2017) "On Wiktor Osiatynski and the Limits of Human Rights"
<https://www.opensocietyfoundations.org/voices/wiktor-osiaty-ski-and-limits-human-rights>
- United Nations (2018), "A Practitioner's Toolkit on Women's Access to Justice Programming"
https://www.unodc.org/pdf/criminal_justice/WA2J_Consolidated.pdf.
- United Nations General Assembly, Legal Empowerment of the Poor and Eradication of Poverty"
<https://www.un.org/esa/socdev/documents/reports/Legal%20empowerment%20of%20the%20poor.pdf>
- United Nations,"SDG Report" <https://sdgs.un.org/goals>
- USAID, "Legal Empowerment of the Poor: From Concepts to Assessment" (2007)
https://pdf.usaid.gov/pdf_docs/PNADM500.pdf
- Vries, P. (2012) "Does wealth entirely depend on inclusive institutions and pluralist politics?"
<file:///C:/Users/hp/Downloads/3-vries.pdf>



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN EXAMINATION OF THE LEGAL PROTECTION OF MARINE ENVIRONMENT
FROM SHIP-SOURCE POLLUTION IN NIGERIA

Haruna Hassan

Department of Public and Private Law,
North-Eastern University, Gombe, Gombe State, Nigeria.

Email: haruna.hassan@neu.edu.ng or sahuda4life001@gmail.com

Phone: 08100701224, 08175728793

1.1. Introduction

Marine environment includes the oceans, seas, bays, estuaries, island, coastal areas, and the airspace above these, including the littorals.⁷⁰⁶ Marine environment includes waters of seas and estuaries, the seabed and its sub-soils and all marine wildlife and its sea and coastal habitats.⁷⁰⁷ The significance of the Marine Environment cannot be overemphasized as they are rich in biodiversity and supply natural resources, food as well as active substances for medicine. They also store energy supplies, serve as routes for transport and offer high recreational value to human beings.⁷⁰⁸ However, as important as these marine waters are, they are highly polluted by shipping activities, hence the need for legal control of any form of activity that can pollute the marine

* Haruna Hassan, LL. B., BL, LL. M., Ph. D student, department of public law, faculty of law, Ahmadu Bello University, Zaria, Kaduna State, Nigeria and a lecturer, department of Public and Private Law, North-Eastern University, Gombe, Nigeria. Email: sahuda4life001@gmail.com; +1238100701224.

⁷⁰⁶ United States Government US Army (2020). *US Department of Defence, Dictionary of Military and Associated Terms* (Independently published. <https://www.thefreedictionary.com/maritime+environment> on 22 March 2022 at 6am..

⁷⁰⁷ European Commission, (2006). *Environment Fact Sheet: Protecting and Conserving the Marine Environment*. Juniper publisher. <https://www.juniperpublishers.com> on 22 March 2022 at 5am.

⁷⁰⁸ Mukhopadhyay, Pranab, *et al.* (2020), 'Recreational Value of Coastal and Marine Ecosystems in India: A Macro Approach.' *Cognizant Communication Corporation*, 15 (1), 11-27. <https://doi.org/10.3727/154427319x157467109>. Enitan Olorunyomi, Analysis: Potentials, Challenges to Nigeria's Plan of Using Blue Economy to Tackle Poverty, Unemployment. *Premium Times*, Saturday 12 March 2022. <https://www.premiumtimes.ng.com> on 5 August 2023 at 5am. The Nigeria's marine waters are home to over 6000 species of high economic value, including crustaceans, sharks, rays, fish and marine plants and mammals.

environment.⁷⁰⁹ Ships are responsible for more than 18% of nitrogen oxides pollution⁷¹⁰ and 3% of greenhouse gas emissions.⁷¹¹ Shipping activities can pollute the waterways and oceans in various ways. For example, spillage from oil and chemical tankers and discharge of sulfur dioxide, nitrogen dioxide and carbon dioxide gasses into the atmosphere from exhaust fumes. The operation of ships' power plants often results in spills of lubricating oil, fuel oil, grease and water into bilges. Discharge of cargo residues from bulk carriers can also pollute ports, waterways and ocean.

Waste and garbage generated onboard ships contribute immensely to marine pollution and proper control and management of this waste products is critical in preventing marine pollution. Some of the waste products generated through shipping activities comprise of plastics, remains of paints, food waste, paper products, solvents and chemicals, cleaning material and rags, operational and accidental discharges, etc.⁷¹² Shipping activities contribute to climate change through emissions of black carbon, tiny black particles produced by combustion of marine fuel.

One can understand how marine pollution can affect climate condition through plastic litters from ships thrown into the marine waters. When plastic waste is dumped in the ocean, the plastic pollution breaks down into micro plastic and contributes to climate change both through direct Greenhouse Gas Emissions (GHG)⁷¹³ emissions and

⁷⁰⁹ *ibid.*

⁷¹⁰ Schrooten L., *et al*, (2009). 'Emissions of Marine Transport: An European Reference System.' *The Science of the Total Environment*, 408 (2), 313-323. DOI:10.1016/j.sitotouv.2009.07.037 on 10 August 2023 at 6am.

⁷¹¹ Kaminski, Isabella, Climate Impact of Shipping under Growing Scrutiny ahead of Key Meeting. *The Guardian*, 2023.

⁷¹² Transport and Ships (2023). European Federation for Transport and Environment, AISBL. <https://www.transport.environment.org> on 5 August 2023 at 4am.

⁷¹³ Greenhouse gases (GHGs) are gases in the earth's atmosphere that trap heat. During the day, the sun shines through the atmosphere, warming the surface of the earth. At night, the surface of the earth cools down and releases heat back into the air.⁷¹³ But some of the heat that is supposed to be released back into the air is trapped by the GHGs in the atmosphere. This cycle keeps the temperature of the earth on average of 14°C which is supposed to be lower than this. Although the earth needs GHGs for favorable climate condition, the excess of the GHGs can cause global warming by distorting the balance of the GHGs needed to maintain normal climate condition. Note that without the GHGs, temperature would drop as low as 18°C (-0.4°F) which is too cool to sustain life on earth. This means the earth needs a regulated, balanced GHGs to normalize the climate condition. However, human activities, like plastic waste dumping, have been distorting the balance of GHGs and hence, changing earth's natural GHGs effect with a dramatic increase in the release of GHGs.⁷¹³ GHGs can be reduced by switching from the use of fossil fuel such as coal, oil and gas to renewable energy such as solar and wind.⁷¹³ This and many more reasons call for marine environment protection against any form of pollution. Examples of GHGs are (a) carbon dioxide (Co2), (usually generated when fossil fuels are burnt, it increases Co2). (b) Methane which is produced naturally due to decomposition, but human activities have displaced the

indirectly by negatively affecting ocean organisms.⁷¹⁴ Plastic pollution affects climate change through the contribution of GHGs. Polluting marine environment with plastic waste will contribute to GHG emissions which will, in turn, affect climate change. The GHGs causes climate change and also having disastrous effects on the oceans.⁷¹⁵

As 99% of plastics are made from fossil feed stocks, plastic pollution is indubitably linked with climate change by moving away from fossil fuels in the energy and transportation sectors. Plastics should not be forgotten as they are tightly linked to the fossil industry. Plastics in the ocean may interfere with the ocean's capacity to absorb and sequester carbon dioxide, thus creating a pathway through which plastic pollution contributes to accelerate climate change.⁷¹⁶ When plastics are thrown from ships into the ocean, it can directly contribute, through its slow degradation process, it can increase the GHG concentrations in the atmosphere and plays a catalytic role in global warming. The plastic waste can generate GHG emissions when exposed to solar radiation both in air and water. Marine plastic pollution breaks down into micro plastics and contributes to climate change both through direct GHG emissions and indirectly by negatively affecting ocean organisms.⁷¹⁷

natural balance. Large amount of methane is released due to cattle farming, landfill wastes dumps, rice farming, etc. (c) Nitrons Oxide. This is produced through the large scale use of commercial and organic fertilizers, fossil fuel combustion, etc. (d) Water vapour. There are other GHGs made by man such as sulfur hexafluoride (SF₆); hydroflourocarbons (HFC) and perflourocarbons (PFC). These are produced through industrial processes.

⁷¹⁴ Nina Tsydemova & Pawan Patil, (2021). '6 Reasons to Blame Plastic Pollution for Climate Change', *World Bank Blogs*. Retrieved from <https://www.blogs.worldbank.org>. Accessed 5 July 2023 at 5am.

⁷¹⁵ Helen V. Ford, *et al.*, (2022). 'The Fundamental Links between Climate Change and Marine Plastic Pollution', *Science of the Total Environment*, 806 (1). Retrieved from <https://www.sciencedirect.com>. Accessed 5 July 2023 at 5am.

⁷¹⁶ Geneva Environment Network, (2023). Plastics and Climate Change. Retrieved from <https://www.genevaenvironmentnetwork.org>. Accessed 5 July 2023 6am.

⁷¹⁷ Nina Tsydenova, *op cit*.

The presence of micro-plastics in the sea surface is a serious problem that can interfere with biological processes. These processes control the flow of important gasses, like oxygen, between the sea surface and the atmosphere. Using oxygen, bacteria transform organic matter in the sea water and, in the process, produce CO₂. When there is a lot of plastic present, bacteria consume more oxygen and as such, less oxygen will be available for other life. The more the presence of bacteria on the sea surface, the less and lower the flow of oxygen from the ocean into the atmosphere. The flow CO₂ from the ocean into the ocean might slow down as well. If the ocean takes up less CO₂, the Earth could face unimaginable changes in its climate.⁷¹⁸

Regrettably, despite Federal Government's efforts in the fight against marine environmental degradation and hazards by enacting laws to establish agencies to protect the marine environment and by ratifying several relevant international Conventions, Nigeria ranks among countries with the lowest score on ships that have poor environmental indicators. For instance, Nigeria scored 0.38% on vessels fitted with ballast water treatment systems.⁷¹⁹ Nigeria recorded 0% on vessels fitted with scrubbers and on vessels complaint with tier-three regulations to reduce nitrogen-oxide emissions correspondently. With just about 4,355 vessels registered in Nigeria in 2023 out of which 6000 were tanker vessels,⁷²⁰ compared to US with about 11.77 million registered vessels⁷²¹ but still being able to control its marine pollution, but Nigeria is still not improving in

⁷¹⁸ Luisa Galgani & Steven A. Loiselle, (2020). 'How Can Plastic on the Sea Surface Affect our Climate'? *Frontiers Young Minds*, 8 (120). doi.:10.3389/frym.2020.00120. Accessed 5 July 2023 at 6am.

⁷¹⁹ Oko Ebuka, Poor Shipping Environment: Nigeria, other African Countries ranked Low by UN. *Vanguard*. Wednesday, Dec. 4, 2019. <https://www.vanguardngr.com> on 13 August 2023 at 6am.

⁷²⁰ Anozie Egole, 4,355 Vessels Registered in Nigeria-NIMASA Report. *PUNCH*. Thursday, May 25, 2023. <https://www.punchng.com> on 21 May 2024 at 5am.

⁷²¹ Statista (2023), Number of Registered Recreational Boats in the United States from 1980 to 2022. *Statista Research Department*. <https://www.statista.com>. On 21 May 2024 at 5am.

the fight against marine environmental pollution. As such, this paper aims to examine the legal protection of marine environment from ship source pollution in Nigeria.⁷²²

1.2 Nature of Marine Pollution

Generally, marine pollution is classified as point-source or non-point-source pollution. The point-source pollution occurs when there is a single, identifiable and localized source of the pollution. It means any discernible, confined and discrete conveyance, such as discharge from industrial facilities, waste water treatment plants, leaking underground storage tanks, chemical, heavy metals, pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are discharged.⁷²³

Non-point-source pollution on the other hand occurs when the pollution comes from different sources and is not easily identifiable to a specific point of origin. It originates from a wide range of activities and land uses across a landscape.⁷²⁴

Wastes and garbage generated onboard ships comprise of mostly plastics, dunnage and packing material, cleaning material and rags, paper products, food waste, remains of paints, solvents and chemical.⁷²⁵ Other pollutants are generated by ships' sound, accidents, exhaust emissions, oil spillage, discharge of oil-water and other hazardous

⁷²² *ibid.*

⁷²³ Mitchell Diane. (2001). *Health Effects of Shipping Related Air Pollutants*. Paper Presented at EPA Region 9 Conference on Marine Vessels and Air Quality. <https://www.savepassamaquoddybay.org> on 3 August 2023 at 9pm.

⁷²⁴ International Joint Commission, (1973). *The United States and Canada Second Annual Report on Great Lakes Water Qualities*. <https://www.ijc.org> on 3 August 2023 at 9pm. Non-point pollution also includes agricultural storm water discharges and return flows from irrigated agriculture, urban runoff (from roofs, hydro-electric corridors) etc.

⁷²⁵ Bikram Singh, (2021). 'Marine Pollution by Ships-Tips for Reducing and Recycling Waste at Sea', *Marine Insight* <https://www.marineinsight.com> on 16 August 2023 at 11pm.

substances. Marine pollution is the harmful effect caused by the entry into the ocean of chemicals, particles, spread of invasive organisms, etc. many particles combine chemically in a manner highly depletive of oxygen, causing estuaries to become anoxic.⁷²⁶ Marine pollution can also be in the form of oil spillage such as leaking of oil from tankers, or spillage as a result of accident of oil tankers or big hauler ships.⁷²⁷

1.3 Sources of Pollution from Ships/Vessels

There are many sources of marine pollution but this paper seeks to discuss the few major sources of marine pollution in Nigeria.

1.3.1 Ballast water discharge from ships

Water is used as ballast to stabilize vessels at sea. Although ballast water is important for safe and efficient modern shipping operations, it may pose serious problems resulting into ecological, economic and health related problems due to the multitude of marine species carried in the ballast water of ships. These include bacteria, microbes, small invertebrates, eggs, cysts and larvae of various species. The transferred species may survive to establish a reproductive population in the host environment, becoming invasive, out-competing native species and multiplying into pest population. Discharged ballast water could contain pathogens and moreover be a travel medium for invasive species which may reproduce rapidly under the new environmental conditions and become ecological pests.⁷²⁸

⁷²⁶ Jyoti Verma, (2020). *Marine Pollution, Sources, Effect and Management*. Society of Biological Sciences and Rural Development, 270-275. <https://www.researchgate.net> on 13 August 2023 at 6am.

⁷²⁷ Dike Remigius, (2021). 'Effect of Marine Pollution on Coastal Environment in Nigerian Seaports.' *International Academic Journal of Law*, 2 (3), 30-39. <https://arconsortium.org/journal-info/iajl> on 13 August 2023 at 6am.

⁷²⁸ Onwuegbuchunam, *op cit*.

1.3.2 Discharge of solid, toxic, hazardous waste and other garbage from ships

Garbage and other hazardous wastes which are non-oil pollutants are normally dumped into the sea and river from the ships especially when there is no enforcement. Such solid, hazardous wastes or harmful substances⁷²⁹ dumped into the sea from the ships include glass, paper, cardboard, aluminum and steel cans, and the worst, plastics. These solid wastes, either hazardous or not when dumped into the sea or river may become marine debris and can eventually pose a serious threat to marine environment⁷³⁰

1.3.3 Discharge of waste water from ships

Onboard vessels, there are usually two types of water, namely; grey water and black water. Grey water is water that has been used in the kitchen, showers, sinks and laundry. This include water containing dissolved or un-dissolved by-products such as fat and oil, food scraps, household chemicals, soap, detergent rich in phosphate, nitrate and micro biological pathogens (e.g. bacteria and viruses). Black water is sewage water from toilets and medical facilities, which can contain highly harmful bacteria, pathogens, viruses, intestinal parasites and harmful nutrients. If either of waste water is discharged into marine environment from ships, it can damage ecosystems and the entire biodiversity and create algae blooms and pose significant human health risks.⁷³¹

1.3.4 Discharge of oily-water from ships

⁷²⁹ Harmful substance means any substance that if introduced into the sea, is liable to create hazards to human health, liable to harm living resources and marine life, liable to damage amenities or liable to interfere with other legitimate uses of the marine environment.

⁷³⁰ Umo, *op cit*.

⁷³¹ Liovd, P.J. (2010). *Environmental Protection in South Africa*. <https://www.saimm.co.za> on 4 August 2023 at 9pm.

The spills of lubricating oil, fuel oil, grease and water into bilge⁷³² often result from the operation of ships' power plants. The resulting emulsified water and oil, if pumped into the sea or river when oily-water separator is not fitted or if fitted and is faulty becomes a source of marine pollution from ships. The cleaning process of crude oil tanks of vessels contributes to marine pollution because oily-water from the cleaning process contains detergent, solid matters, rusty scales from corrosion which are discharged overboard.⁷³³ Bilge water is a mixture of water, oily fluids, lubricants, cleaning fluids and other similar waste that accumulate in the lowest part of a vessel from a variety of different sources including the main auxiliary engines, boilers, evaporators and related auxiliary systems, equipment and related components and other mechanisms and operational sources found throughout the machinery spaces of a vessel.⁷³⁴

1.3.5 Tanker accidents

Most commonly associated with ship pollution are oil spills. Oil tankers, chemical and gas carriers are prone to sea risk such as collision, grounding, explosion or fire. The exploration, exploitation and transportation of oil, gas and their derivatives are resulted in a number of catastrophic accidents on sea. While less frequent than the pollution that occurs from daily operations of ships, oil spills resulting from tanker accidents have devastating effects on marine environment.⁷³⁵

1.3.6 Spillage during terminal loading

⁷³² Bilge is the area where water from various operational sources in the ship collects.

⁷³³ Nitonye Samson (2014). *Marine Operations: Course notes*. Rivers State University of Science and Technology, Port-Harcourt, Nigeria.

⁷³⁴ Onwuegbuchunam, *op cit.*

⁷³⁵ Umo Iduk, *op cit.*

The malfunctioning of pumps and valves, rupture of pipe or operational errors can cause oil spillage during loading and discharge of crude oil at offshore oil terminals. Operational spills may also take place when a ship is loading bunker oil or lubricating oil for its engines. A hose can break spilling into the ship's tanks, the tanks could overflow.⁷³⁶

1.3.7 Anti-fouling paints

The new Anti-Fouling Convention adopted in 2001 and came into force in 2008 defines anti-fouling systems as a coating, paint, surface treatment, surface or device that is used on a ship to control or prevent attachment of unwanted organisms. Anti-fouling⁷³⁷ paints are used to coat the bottoms of ships to prevent sea life such as algae and mollusks to get attached to the hull thereby slowing down the motion of the ship and increasing fuel consumption. To avoid fuel consumption, ships use anti-fouling systems which are confirmed to have negative marine environmental effects. The term fouling describes the growth of marine plants and animals on structures such as ships in the sea.⁷³⁸

Anti-fouling functions by slowly releasing a poison into the laminar seawater surrounding of the ship. The soluble poison is toxic to marine organisms. Leaching from the anti-fouling paints used to prevent the build-up of marine-organisms, algae or plants (known as bio-fouling) on ships' hull can have negative effects for marine habitats

⁷³⁶ *ibid.*

⁷³⁷ Marine fouling occurs when organisms attach themselves to underwater objects like boats, ships, rope, pipes and building structures and once attached, it is difficult to remove leading to operational downtime, increased energy use and damage.

⁷³⁸ Brendan Fitzs and Treror Parry (2009). Marine Fouling, BEVALDIA. In Shreir, L. (Ed), *Paint and Coating Failures and Defects, Corrosion*. <https://www.mpigroup.com/uk> on 8 August 2023 at 1pm.

and is a source of pollution. Anti-fouling paints may contain biocides (chemical substances or micro-organisms) that are harmful to the marine environment.⁷³⁹

1.3.8 Sound/Noise pollution from ships

The noise produced by ships can travel long distance and marine species that may rely on sound for their orientation, communication and feeding can be harmed by this sound pollution. The Convention on the Conservation of Migratory Species has identified ocean noise as a potential threat to marine life.⁷⁴⁰

1.3.9 Marine machinery exhaust

Shipping accounts for nearly 3% of global greenhouse gas (GHG) emissions. Ships' emissions of exhaust are considered to be a significant source of air pollution of marine environment. Sulfur in the air creates acid rain which can seriously damage crops and even buildings. Sulfur can cause respiratory problems and even increase the risk of a heart attack when inhaled by human beings. It has been discovered that outboard motor exhaust water can exhibit a toxic effect in sufficiently high concentrations to fathead minnows and bluegills, taints the flesh of various fish and may affect the reproduction of fish.⁷⁴¹ Exhaust gas from shipping is a growing source of greenhouse gas emissions that may contribute to climate change and ocean acidification.⁷⁴² Ship board

⁷³⁹ European Maritime Safety Agency (EMSA) (2023). *European Maritime Transport Environmental Report*. <https://www.emsa.europa.eu> on 8 August 2023 at 1pm; Lisa S. and Shruti R. (2013) Full Extent of Heavy Metal Contamination in Exxon Oil Spill Still Unknown. <https://www.insidechimatenews.org/news/20130715/full.extent-heavy-metal-contamination-exxon-oil-spill-still-unknown> on 4 August 2023 at 9am. Some anti-fouling compounds such as copper, can bio-accumulate in areas of high shipping activity, leading to indirect impacts on marine wildlife further up the food chain.

⁷⁴⁰ Environmental Impact of Shipping, *op cit*.

⁷⁴¹ Thomas P. Jackivicz & Lawrence N. Kuzminski, (1973) 'The Effects of the Interaction of Outboard Motors with the Aquatic Environment-A Review.' *Environmental Research*, 4 (6), 436-454. <https://www.sciencedirect.com> on 6 April 2024 at 4am.

⁷⁴² Ta-Kang Liu, (2022) 'The Relationship between Ships and Marine Environment.' <https://www.mdpi.com> on 6 April 2024 at 4am.

incinerators also burn large volumes of garbage, plastics and other wastes, producing ash that must be disposed of. Incinerators on ships may release toxic and hazardous emissions as well. When tanks are vent during loading, bunker fuel can emit Volatile Organic Compound (VOC).⁷⁴³

1.4 Legal Control of Ship/Vessel-Source Pollution

Shipping is a very sensitive international business that must be controlled effectively by any nation to ensure the safety of lives and properties onboard vessels by maintaining pollution-free marine environment.⁷⁴⁴ The threat of ship-source pollution resulting from oil spills and other toxic and hazardous garbage will be alarming if there is no sufficient and strong legal framework to combat it. The frequent occurrences of ship-source pollution might have a catastrophic effect on the marine environment and the entire public health security of the country if the legal regime is non-existence or is weak.

International Convention for the Prevention of Pollution from Ships (MARPOL) was developed through International Maritime Organisation (IMO) to control ship-source pollution.⁷⁴⁵ The IMO deals with marine safety and security as well as the prevention of marine pollution at sea. Under MARPOL, ships must conform to specific standards⁷⁴⁶ regarding the stowing, handling, shipping and transferring of pollutant cargoes as well

⁷⁴³ *ibid.*

⁷⁴⁴ Samuel C. Dike and Godwin Gininwa, (2019). 'An Appraisal of the Nigerian Legislation and Institutions Governing Maritime Environment', *African Journal of International Energy and Environmental Law*, 3 (3), 173-188.

⁷⁴⁵ US Environmental Protection Agency (2023). MARPOL Annex VI and the Act to Prevent Pollution from Ships (APPS). <https://www.epa.gov>. on 21 May 2024 at 6am.

⁷⁴⁶ Annex VI of MARPOL establishes limits on nitrogen oxides (NOx) emissions and requires the ships to use fuel with lower sulfur content, protecting people's health and the environment by reducing ozone-producing pollution. Also, chapter 3 of Annex VI gives the details about sludge tanks, fuel oil tanks, their capacities, piping arrangement overboard as well as the standard flange requirements to connect to reception facilities all in its bid to prevent oil pollution from ships.

as standards for the discharge of ship generated operational wastes.⁷⁴⁷ MARPOL consist of 6 separate Annexes which set out regulations covering the various sources of ship-generated pollution. Annexes I and II are mandatory for all signatory nations to MARPOL, while annexes III to VI are optional.⁷⁴⁸

The US passed the Act to Prevent Pollution from Ships (APPS) in 1980 which applies to US commercial vessels operating in US waters or parts of US jurisdiction.⁷⁴⁹ APPS makes it a crime to knowingly violate any of the provisions of MARPOL from Annexes I to VI.⁷⁵⁰ The United States Coast Guard and the US Environmental Protection Agency are the main enforcers of MARPOL and APPS with the US. The APPS includes whistleblower provisions to help combat illegal pollution and empower and incentivize workers to expose any known information about pollution from ships.⁷⁵¹

In Nigeria, the Nigerian Maritime Administration and Safety Agency (NIMASA) Act, 2007 was enacted to implement the MARPOL provisions to ensure marine pollution free environment in Nigeria.⁷⁵² The NIMASA, 2007 does not have provision for whistleblower as contained under the APPS of US. NIMASA is the only body in Nigeria that has its functions majorly to protect marine environment from pollution since one

⁷⁴⁷ Annex V of MARPOL sets out the standards to prevent discharge of ship generated operational wastes by providing that all vessels greater than 12m in length, placards are to be displayed in the working language of the ship. If the ships operate in international waters, the placards must also be in English, French or Spanish. The vessel must also have a written garbage management plan if the vessel is certified to carry more than 15 passengers or is greater than 400 gross tonnage in size. It must have detailed procedures for collection, storage, processing and disposal of garbage. The same vessels are also required to carry garbage record book which gives sufficient details about incineration or discharge of garbage such as the time, position, garbage type and amount. See MARPOL Overview for Beginners-15 min. Summary (2023). <https://www.nautilusshipping.com> on 19 May 2024 at 9pm.

⁷⁴⁸ Riviera Newsletters (2008), 'MARPOL 73/78 has a Proven Record of Achievement.' <https://www.rivieramm.com>. On 21 May 2024 at 6am.

⁷⁴⁹ National Whistle-blower Centre. The Act to Prevent Pollution from Ships. <https://www.whistleblower.org>. On 26 April 2024 at 6am.

⁷⁵⁰ Statute: 33 U.S.C. 1908(a). The penalty for violation of the provisions of MARPOL is imprisonment of not more than 10 years and/or fines as set forth in 18 U.S.C. 3571.

⁷⁵¹ National Whistle-blower Centre, *op cit*.

⁷⁵² Sections 44 to 45 of NIMASA 2007.

of its functions is to ensure the implementation of MARPOL. Though the Act prohibits the carriage of harmful substances by ships, it only provides for penalty of imprisonment not exceeding 2 years.⁷⁵³

1.4.1 Nigerian legal framework for control of ship/vessel-source pollution

Though the major legal framework for control of ship-source pollution is the United Nations Convention on the Law of the Sea (UNCLOS), 1982 and Nigeria has over the years, attempted to control ship-source pollution through the instrumentality of the law in line with the provisions of the UNCLOS, 1982. Since the UNCLOS maintains the spirit of non-interference with State sovereignty as such Nigeria became a signatory to the Convention since it is the State's responsibility under the UNCLOS to measure its own impact of its environment. The importance of prevention and control of ship-source pollution is very central to UNCLOS and other domestic laws in Nigeria. Legal control of ship-source pollution is crucial to safeguarding the health of the oceans and many species, including humans that depend on them.

There is need to legally protect the marine environment considering its value to mankind and the whole biodiversity.⁷⁵⁴In its bid to control ship-source pollution therefore, Nigeria has signed and ratified several other international Conventions as well as enacted several local laws, but it has not domesticated a good number of other relevant Conventions.⁷⁵⁵

⁷⁵³ *ibid.*

⁷⁵⁴ UNEP, (2016). The Marine Environment is an Essential Component of the Global Life-support System. <https://www.unep.org> on 5 August 2023 at 4am.

⁷⁵⁵ For example, Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (London Convention), 1972; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties; International Convention on Standards of Training Certification and Watch-keeping for Fishing Vessel Personnel 1995, Hong Kong International Convention for Safe and Environmentally Sound

1.4.1.1 Nigerian Maritime Administration and Safety Agency (NIMASA) Act⁷⁵⁶ and other legal and institutional frameworks were set on motion by Nigerian government in its bid to tackle the effect of ship-source pollution. Nigeria ratified and domesticated few of the relevant Conventions of International Maritime Organisation (IMO) to enable it control and manage pollution caused by shipping activities in its marine environment.

One of the objectives of NIMASA is that it seeks to control marine pollution by regulating and promoting maritime safety, security, marine pollution and marine labour. The Act in section 3 seeks to protect marine environment from ship-source pollution by establishing an agency responsible for overseeing the activities of ships on all Nigerian waters with the view to ensuring that the marine environment is safe and pollution free. The agency is the primary regulatory body for maritime activities in Nigeria and shall be responsible for the execution of the provisions of the Act, the Merchant Shipping Act and the amendments and all other federal legislation on marine labour, safety and security.⁷⁵⁷ The Act seeks to control marine pollution by ships in sections 44 and 45 by providing for regulations on marine pollution; prohibitions on carriage, shipment and jettisoning of harmful substances respectively. The agency is empowered by the Act to make regulations in relation to dumping of ship and shore generated waste in Nigerian waters and removal of wrecks which constitutes a threat to marine environment.⁷⁵⁸

Recycling of Ship, 2009. These are Conventions that have taken into consideration the realities of the modern days shipping activities.

⁷⁵⁶ Cap 224, LFN 1990

⁷⁵⁷ Sections 1 and 2 of the Mineral and Mining Act, 2007

⁷⁵⁸ Section 44 (1) (a) (b) of NIMASA Act, 2007.

The main function of NIMASA is to implement the NIMASA Act, 2007⁷⁵⁹ by ensuring that all ships are safe for every activity on the Nigerian waters. The agency is empowered to make regulations on marine pollution relating to ship generated wastes in Nigerian waters.⁷⁶⁰ To this end, the agency carried out some management activities such as clean-up of the identified marine litter host pots in Nigeria's coastal States of Cross River, Rivers, Delta, Ondo and Lagos; supervision of the engaged 120 marine litter Marshalls and pre-cleanup of marine litter in Ogoyoro Snake Island.⁷⁶¹ The agency protects the marine environment by collaborating with other relevant agencies to ensure the effective control of marine pollution. Thus, the agency has sought partnership with the Ministry of Agriculture to curb illegal, unreported and unregulated (IUU) fishing activities capable of polluting the Nigeria marine environment.⁷⁶²

Though the Act prohibits the carriage of harmful substances by ships in order to prevent marine pollution by discharge of harmful substances into the Nigerian waters, it only provides for penalty of seizure of ships, fine not exceeding One Million Naira (N1,000,000) only or imprisonment not exceeding 12 months.⁷⁶³ Also the Act prescribed a penalty of imprisonment not exceeding 2 years or to fine not exceeding the amount as may be determined by the Agency. The pecuniary penalty is proper as it gives the agency the power to fix the amount payable as penalty taking into consideration the changing nature of marine pollution and the dynamic economic realities. But the term of 2 years' maximum imprisonment is not enough as it gives any corrupt judge the power to

⁷⁵⁹ Section 22 of NIMASA Act, 2007.

⁷⁶⁰ Section 44 of NIMASA Act, 2007.

⁷⁶¹ Amaka Anagor, *op cit*.

⁷⁶² Osagie Edward (2021) 'NIMASA Moves against Illegal Fishing.' <https://www.nimasa.gov.ng> on 19 May 2024 at 10pm.

⁷⁶³ Section 58 (1) of NIMASA Act, 2007.

exercise his discretion unreasonably. These pecuniary penalties are not adequate given the serious negative effects of marine pollution to mankind and cannot deter future polluters of the marine environment.

1.4.1.2 National Oil Spill Detection and Response Agency (Establishment) Act 2007⁷⁶⁴ was enacted to establish the National Oil Spill Detection Agency (NOSDRA) with the aim to detect oil spills and respond to it in order to prevent pollution of the environment, especially the marine environment. The agency is to identify high-risk areas as well as priority areas for pollution and clean-up.⁷⁶⁵ In order to protect the marine environment from oil spills from ships or any source, the Act gives the agency the power to strengthen the national capacity and regional action to prevent, control, combat and mitigate marine pollution by promoting technical co-operation between Nigeria and member States of the West African sub-region.⁷⁶⁶

However, the Act provides for the penalties of Five Hundred Thousand Naira (N500,000) and a fine of One Million Naira (N1,000,000) for failure to report oil spill occurrence to the agency and for failure to clean-up the impacted site respectively.⁷⁶⁷ The intention of the law makers is to deter people from failing to protect the environment by failure to clean-up an oil polluted environment. These penalties are inadequate in the present economic realities considering the high cost of clean-up of oil polluted environment. For instance, it was estimated that the environmental clean-up of coastal environment of Bayelsa State would cost Twelve Billion USD

⁷⁶⁴ Cap 157, LFN, 2006.

⁷⁶⁵ Section 5 of National Oil Spill Detection and Response Agency (Establishment) Act, 2007.

⁷⁶⁶ Section 23 of NOSDRA Act, 2007.

⁷⁶⁷ Section 5 (2) of National Oil Spill Detection and Response Agency Act, 2007.

(\$12,000,000,000).⁷⁶⁸ The British Petroleum (BP) estimated about \$2.65 billion as the cost of clean-up of Gulf of Mexico oil spill.⁷⁶⁹ So, imagine if a company engaged in oil activities fails to clean-up the oil polluted environment, it will only be required to pay a fine of N1,000,000, but the government will spend billions of Naira to clean-up the polluted environment. The Act should have provided for the penalty of total clean-up of the polluted environment by the polluter and payment of damages for victims of the pollution. This can be achieved by full implementation of Polluter Pays Principle⁷⁷⁰ (PPP) without any compromise. The NOSDRA Act does not provide for Trust Fund like under the US Oil Pollution Act, 1990 for prompt response to oil spill incidences. Because of this gap, if oil spill occurs in Nigeria and the polluter does not respond to clean-up the polluted environment, it will remain unattended to for long time for lack of prompt response fund with NOSDRA.⁷⁷¹

1.4.1.3 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007⁷⁷² is another Act that provides for the general protection of environment in Nigeria. The Act establishes the National Environmental Standards and Regulations Enforcement Agency (NESREA) with one of its functions to make regulations for the protection and enhancement of coastal zones, among other things.

⁷⁶⁸ Redaction Africanews and AFP (2023) Clean-up of Oil-Polluted Nigerian State Would Cost \$12 bn: report. <https://www.africanews.com>. On 20 May 2024 at 2pm.

⁷⁶⁹ NEWS WIRES (2010) 'Clean-Up Bill Hits 2.65 Billion Dollars.' <https://www.france24.com> on 20 May 2024 at 2pm.

⁷⁷⁰ The polluter pays principle is enacted to make the party responsible for producing pollution responsible for paying for the damage done to the environment. This means that polluters bear the costs of their pollution including the cost of measures taken to prevent, control and remedy pollution and the costs it imposes on society. By applying this principle, polluters are encouraged to avoid environmental damage and are held responsible for the pollution that they cause.

⁷⁷¹ Tony Agums Francis (2022) 'Comparative Appraisal of the Legal and Institutional Frameworks of National Oil Spill Detection and Response Agency.' <https://www.researchgate.net> on 20 May 2024 at 2pm.

⁷⁷² Cap N164 LFN, 2010.

It prohibits the discharge of any hazardous substances⁷⁷³ into the waters of Nigeria, but section 27 (2) provides for the punishment for discharge of such hazardous substances the fine of not more than N1,000,000 or imprisonment for a term not more than 5 years. This penalty is not severe as to deter any potential polluter from polluting the Nigerian marine environment.

Unfortunately, even the NESREA (Amendment) Act, 2018 which aims to amend some sections and to increase the penalty provided under the NESREA, ACT, 2007 is not up to date as to adequately control marine pollution in Nigeria. The Amendment Act now makes the punishment for the violations of the Act to be a fine not less than Two Hundred Thousand Naira (N200,000) only or imprisonment not less than 2 years. This is commendable, but the minimum punishment should have been increased to be determined by the nature and gravity of the discharge of hazardous substance into the marine environment. Another limitation of the NESREA (Amendment) Act, 2018 is that it does not amend section 27 of the NESREA which prohibits the discharge of harmful substances into the Nigerian waters either from ships or any other source and provides for maximum of One Million Naira (N1,000,000) fine and maximum of 5 years' imprisonment for individual who discharges harmful substance into Nigerian waters. Considering the harmful effect of marine pollution on the entire ecosystems, the punishments provided by the laws in Nigeria are not commensurate to the devastating effects of marine pollution.

1.4.1.4 Merchant Shipping (Ship Generated Marine Waste Reception Facilities) Regulations, 2012⁷⁷⁴ were made based on international commitment to control ship-

⁷⁷³ Section 27(1) of National Environmental Standards and Regulations Enforcement Agency Act, 2007

⁷⁷⁴ Volume 99, B569, S.I. 33 of 2012

source pollution. The objective of the regulations is to ensure cleaner ocean and preserve local marine resources in Nigeria. The regulations are meant to provide for a framework for waste reception facilities⁷⁷⁵ for all types of ship generated waste and ensure statutory backing and regulatory oversight for the Nigerian Ports Authority in providing shore based reception facilities.⁷⁷⁶ The regulations cover for reception of waste generated across various offshore installations is another objective of these regulations. The regulations are timely as it will reduce ship pollution by discharge of garbage onboard ships.

1.4.1.5 Merchant Shipping (Ballast Water Management) Regulations, 2012.⁷⁷⁷ Relevant agencies in Nigeria saddled with the responsibility of regulating shipping activities have developed a ballast water⁷⁷⁸ monitoring programme but yet, ballast water pollution still persists. The Nigerian Merchant Shipping (Ballast Water Management) Regulations 2012 is a good adaptation of IMO International Convention for the Control and Management of Ship's Ballast Water and sediments aimed at reducing the risk of spreading harmful aquatic organisms and pathogens released with ballast water.⁷⁷⁹

Prior to the promulgation of the Nigerian Merchant Shipping (Ballast Water Management) Regulations, 2012, there were no ballast water guidelines in Nigeria. Usually, ballast water is pumped into ballast tanks when a ship has delivered cargo and

⁷⁷⁵ Reception facilities refer to any fixed, floating or mobile facility capable of receiving MARPOL residues/waste from ships.

⁷⁷⁶ Regulation (R) 1 (1) & (2).

⁷⁷⁷ Volume 99, B333, S.I. 24 of 2012

⁷⁷⁸ Ballast water is fresh or saltwater held in the ballast tanks and cargo holds of ships. It is used to provide stability and maneuverability during voyage when ships are not carrying cargo, not carrying heavy enough cargo, or when more stability is required due to rough seas. Ballast water may also be used to add weight so that a ship sinks low enough to pass under bridges and other structures.

⁷⁷⁹ Adesola Ojesanmi, *et al.*, (2016). 'Preliminary Review of Ballast Water Legal Framework and Processes in Nigeria', *Journal of Environmental Science, Toxicology and Food Technology*, 10 (2), 46-51.
DOI:10.9790/2402-10214651 on 9 August 2023 at 12noon.

is departing with less or no cargo. Ballast water is then transported and released at the next port-of-call where the ship picks up more cargo. Ships from various ports of call discharged ballast water without any form of restraint from regulatory agencies.⁷⁸⁰ As such, the Nigerian terminal waters and the marine biodiversity have come under severe threats as a result of ballast water discharge from ships. The release of ballast water may introduce non-native organisms into the port of discharge. The regulations protect the marine environment by providing for standards and guidelines for the proper management of ballast water by ship owners and officials in such a manner that it will not pollute the marine environment.⁷⁸¹

1.4.1.6 Oil in Navigable Waters Act, 1968.⁷⁸² A body of water is navigable if it is deep, calm and wide enough for ships/vessels to pass safely. Most of the times, ships traversing the navigable waters discharge oil into the sea either as a result of operational discharge or accidental discharge. Oil discharged into the sea by ships traversing the navigable waters of Nigeria can seriously pollute the marine environment.

To prevent the discharge of oil by ships into the navigable waters of Nigeria, the Oil in Navigable Waters Act (ONWA) 1968 was enacted. The aim of the Act is the implementation of the terms and provisions of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 to 1962 and to make provisions for such prevention in the navigable waters of Nigeria. In order to prevent pollution of marine environment by ships or vessel transporting oil/crude oil on Nigerian navigable waters, the Act restricts, controls and where necessary prohibits the discharge or escape of oil

⁷⁸⁰ *ibid.*

⁷⁸¹ Regulations 9, 10 & 16 of Merchant Shipping (Ballast Water Management) Regulation, 2012.

⁷⁸² C337 LFN, 1990 as amended 2004

from ships into navigable waters of Nigeria.⁷⁸³ Though, specifically talking about oil pollution, the Act is meant to control ship-source pollution by discharge of oil into navigable waters. It does so by providing that it is mandatory for every ship/vessel navigating the navigable waters of Nigeria to install oil discharge prevention equipment for the purpose of preventing or reducing discharge of oil and any mixture containing oil into the sea.⁷⁸⁴ The Act gives the minister of transportation to specify and describe the type of equipment every ship in Nigeria must install. This flexibility of the law is commendable as it will allow for regular review of the regulations to tally with the ever changing society and the changing nature of marine pollution. In line with this, the regulations made pursuant to the Act provides that every Nigerian ship of eighty (80) tons gross tonnage or over which uses her bunker fuel tanks for the carriage of ballast water shall be fitted with an oily-water separator.⁷⁸⁵ The regulations also provide for polluter pays principle which impose on the polluter the responsibility of compensating the victims of pollution, while at the same time, the polluter bears the cost of controlling the pollution. The regulation provides that any oil accidentally spilt on deck or on the quarry or jetty shall be immediately cleaned-up and disposed of into the large tank or bunkers or ashore. The polluter bears the cost of the clean-up.⁷⁸⁶

The Act is an appropriate tool for control of ship-source pollution by oil discharge, but it does not provide for prevention of other types of ship-source pollution such as the emission of exhaust from ships which can contribute to climate change. The Act

⁷⁸³ Section 1 of Oil in Navigable Waters Act, 1968.

⁷⁸⁴ Section 5 (1) of Oil in Navigable Waters Act, 1968.

⁷⁸⁵ Regulation 2 of Oil in Navigable Waters Act.

⁷⁸⁶ Regulation 5 of Oil in Navigable Waters Act.

should have made it mandatory for ships or at least, certain categories of ships to use renewable energy instead of fossil fuel.

Another gap found in the Act is in respect of its penal provisions. For example, penalty for contravening section 5, which makes it mandatory for all ships to install equipment that can prevent discharge of oil into the waters is just a fine not exceeding two thousand naira (N2,000).⁷⁸⁷ It is opined that the fine not exceeding two thousand naira (N2,000) is mild and light compared to the consequences of discharging oil into the navigable waters of Nigeria.⁷⁸⁸ The penalty cannot deter any potential polluter from intentionally discharging oil into the Nigerian navigable waters since the maximum penalty payable is just two thousand naira (N2,000) only.

The Act in itself does not provide for any damages to be paid for the people directly affected by the discharge of oil and not provision for seizure or revocation of license of any ship that discharges oil into navigable waters of Nigeria. However, this problem has been solved by the decision of the Supreme Court in the case of *Center for Oil Pollution Watch v. NNPC*⁷⁸⁹ where the court extended the frontiers of the concept of locus standi in environmental matters by stating that an individual or community whether or not affected by pollution, can institute an action to claim damages and enforce the clean-up of the polluted environment on the polluter. The court further declared in the case of *Gbemre v Shell Petroleum Development Corporation & Others*⁷⁹⁰ that the right to life

⁷⁸⁷ Section 6 of Oil in Navigable Waters Act, 1968.

⁷⁸⁸ Oluibukun Gbenga Ajayi, *et al.*, (2014) 'Towards the Mitigation and Possible Amelioration of Coastal Pollution in Nigeria-A Review of Legal Act (Oil in Navigable Waters Act, Cap 337 LFN, 1990. ' *International Journal of Advanced Scientific and Technical Research* ' 4 (1) 591-604. <https://www.rpublication.com> on 17 May 2024 at 10pm.

⁷⁸⁹ (2019) 5 NWLR (Pt. 1666) 518; *Ikechukwu Okpara & Others v. Shell Petroleum Development Company of Nigeria Limited & 5 Others*, Suit No. FHC/PH/CS/518/2005 (Unreported).

⁷⁹⁰ (2005) 6 AHRLR 152 (Nigeria).

and dignity of human person provided in sections 33 (1) and 34 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended and re-affirmed by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,⁷⁹¹ inevitably includes the rights to a clean, poison free, pollution free and healthy environment. On the strength of these decisions, the victims of marine pollution can enforce their right to pollution free environment the same way as their fundamental rights under sections 33 (1) and 34 (1) of the 1999 Constitutions of the Federal Republic of Nigeria.

1.4.1.7 Merchant Shipping (Prevention of Pollution by Garbage) Regulations, 2012⁷⁹² were made to control indiscriminate disposal of waste or garbage into marine environment by ships. The Regulations are to give effect to the International Convention for the Prevention of Pollution by Garbage from Ships. They are to prohibit the disposal of garbage in the marine environment and set out operational requirements for garbage management onboard ships.⁷⁹³ The Regulations prohibit the disposal of plastics from ships or any installation outside special areas provide for such disposal. Every Ship owner is required to provide onboard ship garbage management plan which shall provide written procedures for collecting, storing, processing and disposing of garbage, including the use of equipment on board and designate a person in-charge of carrying out the plan in accordance with the guidelines developed by the IMO.⁷⁹⁴

To ensure compliance and adequate supervision, the regulations required every ship or installation to carry a garbage records book, whether as part of the ship's official

⁷⁹¹ Cap A9, Volume 1, Laws of the Federation of Nigeria (LFN), 2004.

⁷⁹² Volume 99, B513, S.I. 31

⁷⁹³ Regulation 1. 2012

⁷⁹⁴ Regulation 10, 2012

logbook or otherwise. The officer in-charge of discharge operation or incineration shall make and sign an entry in the garbage records book in respect of the discharge or completed incineration on the date of the discharge or incineration in question.⁷⁹⁵ The entries in the records book shall include the date and time the discharge or incineration occurred and the position of the ship at the time of the discharge or incineration. The description of and the estimated amount of the garbage discharged or incinerated shall also be recorded in the records book. All these are for effective monitoring and inspection purposes. This record will assist the appropriate authority to assess whether or not a particular ship complies with marine pollution control regulations and guidelines.

Deviating from other older regulations and laws that did not provide for severer penalties for marine pollution, the 2012 Regulations provide reasonable penalties for marine polluters. The regulations empower the inspector of the records book to detain any ship where he has reason to believe that the owner, manager, demise charterer or master of a ship has committed an offence under the regulations.⁷⁹⁶ Any breach of the requirements of the regulations (other than regulations 3, 4, 5 or 6) shall attract a fine of not less than NGN10, 000,000 (Ten Million Naira).⁷⁹⁷ This penalty is relatively adequate to control marine pollution by shipping activities and ensure optimum management of wastes and garbage from ships.

It is worthy to note that Nigeria has not lived up to its obligations both under the domestic legislation and the relevant provisions of international instruments especially

⁷⁹⁵ Regulation 11, 2012

⁷⁹⁶ Regulation 14, 2012

⁷⁹⁷ Regulation 15, 2012.

the UNCLOS and MARPOL to prevent the pollution of the marine environment by ships/vessels. On the contrary, Nigerian security agents sometimes set fire to oil-laden vessels on Nigerian waters and the high sea thereby polluting the marine environment by oil discharged into the waters from the destroyed vessels.⁷⁹⁸ Despite the enactment of laws and regulations, the implementation of MARPOL in Nigeria has not been encouraging especially as there are no or few recorded cases of offenders who have been prosecuted to conviction and sentence by the Nigerian courts.⁷⁹⁹ One of the cases relating to environmental matters in Nigeria, which is not based on the provisions of MARPOL, is the case of *Center for Oil Pollution Watch v. NNPC*,⁸⁰⁰ where the Supreme Court held, inter alia, that public spirited individuals and organizations can bring an action in court against relevant public authorities and private entities to demand their compliance with the relevant laws and to ensure the remediation, restoration and protection of the environment.

1.4.2. International legal framework for control of ship/vessel-source pollution in Nigeria

To tackle pollution at sea and preserve marine resources, the International Maritime Organisation (IMO), saddled with the responsibility of regulating shipping activities globally, has developed series of conventions relating to prevention of marine pollution that must be followed by maritime nations in order to ensure sea navigation of ships and vessels and the security of cargoes on international and local waters. These

⁷⁹⁸ This practice is still subsisting in Nigeria despite the fact that the Armed Forces Act makes it a criminal offence for a person subject to the Act to willfully or maliciously set fire to a vessel as has been done in many cases by Nigerian security agents especially the Nigerian Navy. See Section 111 of Armed Forces Act, Cap A20, LFN 2004.

⁷⁹⁹ Rafiq, *op cit*.

⁸⁰⁰ (2018) 5 NWLR (pt. 1666) 518.

conventions include the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973;⁸⁰¹ the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (London Convention), 1972⁸⁰²; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties; International Convention on Standards of Training Certification and Watch-keeping for Fishing Vessel Personnel 1995, Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ship, 2009, the United Nations Convention on the Law of the Sea (UNCLOS), 1982⁸⁰³, among others. With the support of many other regional, national and global institutions, the UNCLOS, 1982 makes provisions concerning protection of marine environment against ship-source pollution.⁸⁰⁴

It is important to note that among the six sources of marine pollution addressed by the UNCLOS, ship/vessel-source is the most significant one as it can subsume the other sources of marine pollution.⁸⁰⁵ For instance, Ocean dumping and pollution through the atmosphere can be caused by the activities of ships on the sea or ocean. The UNCLOS lays down the fundamental obligation of all States to protect and preserve the marine environment. It urges all States to cooperate on a global and regional basis in formulating rules and standards and otherwise take measures for the purpose of protecting and preserving the marine environment. Coastal States are empowered by the UNCLOS to enforce their national standards and anti-pollution measures within

⁸⁰¹ This Convention was incorporated into Nigerian laws by the International Convention for the Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act, 2007.

⁸⁰² International Maritime Organization (IMO) 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, adopted 29 December, 1972.

⁸⁰³ Third United Nations Conference on the Law of the Sea (UNCLOS III), 1973 and 1982.

⁸⁰⁴ Abdulrazaq, *op cit.*; Part XII of the UNCLOS, 1982.

⁸⁰⁵ Articles 207-212, UNCLOS 1982. Other sources are land-based and coastal activities; continental-shelf drilling; potential seabed mining; ocean dumping; and pollution from or through the atmosphere.

their territorial Sea.⁸⁰⁶ UNCLOS grants all Coastal States the jurisdiction for the protection and preservation of the marine environment of its Exclusive Economic Zone (EEZ). This jurisdiction allows the Coastal States to control, prevent and reduce marine pollution from dumping (especially from ships), land-based sources or seabed activities subject to national jurisdiction or from or through the atmosphere. All Coastal States should take all necessary measures to prevent, reduce and control pollution of the environment from any source including ship-source pollution.⁸⁰⁷

In cases of marine pollution from foreign vessels, Coastal States can exercise jurisdiction only for the enforcement of laws and regulations adopted in accordance with the UNCLOS or for generally accepted international rules and standards. Under the UNCLOS, States are prohibited from transferring directly or indirectly, damage or hazards from one area to another or to transform one type of pollution into another.⁸⁰⁸

In the same vein, the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973⁸⁰⁹ and the 1954 International Convention for the Prevention of Pollution of the Sea by Oil generally prohibits all forms of non-accidental pollution from ships and the discharge of oil by ships.⁸¹⁰ Other important Conventions preventing the pollution of the marine environment by ships are the Rio Declaration of 1992⁸¹¹ and the International Convention on the Control of Harmful Anti-Fouling Systems on Ships

⁸⁰⁶ Articles 213-222, UNCLOS 1982.

⁸⁰⁷ Articles 194 (1); Article 194 (3)(b), UNCLOS 1982. The measures to be taken shall include, inter alia, those designed to minimize pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges and regulating the design, construction, equipment, operation and manning of vessels.

⁸⁰⁸ Articles 192, 194, 195, 197 & 199, UNCLOS, 1982. These provisions control trans-boundary pollution by shipping activities.

⁸⁰⁹ IMO International Conference on Marine Pollution (London, 8 October-2 November 1973).

⁸¹⁰ Article III of International Convention for the Protection of Pollution of the Sea by Oil (OILPOL) 1954.

⁸¹¹ Produced at the Earth Summit of 1992, held at Rio Janeiro, Brazil.

adopted in 2001.⁸¹² Under the terms of the new Anti-fouling Convention,⁸¹³ parties to the Convention are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag as well as ships not entitled to fly their flag but which operate under their authority and all ships that enter a port, shipyard or offshore terminal of a party.⁸¹⁴

The International Convention for the Prevention of Pollution from Ships (MARPOL), 1973⁸¹⁵ is the main international convention covering prevention of pollution of the marine environment by ships from operational and accidental causes. The Convention includes regulations aimed at preventing and minimizing pollution from ships-both accidental and pollution from routine operations and currently includes 6 technical annexes. The annexes cover regulations for the prevention of pollution by oil; regulations for the control of pollution by noxious liquid substances in bulk; prevention of pollution by harmful substances carried by sea in packaged form; prevention of pollution by sewage from ships; prevention of pollution by garbage from ships and prevention of air pollution from ships.⁸¹⁶

The main objective of MARPOL Convention is to limit ship-source pollution by restricting operational pollution and reducing the possibility of accidental pollution. To

⁸¹² International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001, London, 5 October 2001.

⁸¹³ Article 4 of International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001.

⁸¹⁴ Liu, *op cit*.

⁸¹⁵ IMO International Conference on Marine Pollution (London, 8 October-2 November 1973). Under the MARPOL Convention, the IMO is an agency used at international level for the regulation of shipping and maritime activities. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented. See Tiwalade Aderoju, (2022). 'Legal Framework for Maritime Law in Nigeria', *International Bar Association*. <https://www.ibanet.org> on 8 August 2023 at 4am; Omo-Eboh, (2013). 'Maritime Reforms: The Interface between International Law and Nigerian Law', *International Journal of Legislative Drafting and Law Reform*, 1 (2), 175-205.

⁸¹⁶ IMO, (2019). International Convention for the Prevention of Pollution from Ships (MARPOL). <https://www.imo.org> on 8 August 2023 at 1pm.

achieve this, the Convention specifies standards for stowing, handling, shipping and transferring pollutant cargoes as well as standards for discharge of ship generated operational wastes.⁸¹⁷ For example, MARPOL annex IV contains regulations regarding the discharge of sewage into the ships' equipment and systems for the control of sewage discharge, the provision for facilities at ports and terminals for the receptions of sewage and the requirements for surveillance and certification. It require ships to be equipped with either a sewage treatment plant, a sewage comminuting and disinfecting system or sewage holding tank.⁸¹⁸ Annex v of the Convention regulates the disposal of garbage from ships and requires ships to keep a garbage management plan on board.⁸¹⁹ It also provides that discharge of plastics into the marine environment is banned no matter where the ship is functioning in the ocean.⁸²⁰ Ships must have the necessary tools to gather and store wastes, especially plastic wastes and must employ technical techniques to reduce the quantity of wastes they produced on board.⁸²¹

International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 is an important Convention to control ship-source pollution. Under this Convention, ships are required to carry a shipboard oil pollution emergency plan with a view to preventing ship-source pollution of the marine environment.⁸²² Ships are required to report incidents of pollution to coastal authorities and the Convention details of actions that are to be taken.⁸²³ This is a measure meant to deal with oil

⁸¹⁷ *ibid.*

⁸¹⁸ Onwuegbuchum, *op cit.*

⁸¹⁹ Nazar H. Phulpoto, Asif Khan, *et al.* (2023) 'Addressing Marine Pollution: An Analysis of MARPOL 73/78 Regulations and Global Implementation Effort,' *Journal of Social Sciences Review*, 3 (1), 572-589. DOI: 10.54183/jssr.v3i1.193

⁸²⁰ Annex v of the MARPOL Convention.

⁸²¹ *ibid.*

⁸²² Article 3 (1) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

⁸²³ Article 3 (1) (b) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

pollution incidents which includes preparedness, response and cooperation among countries to effectively manage and mitigate the impact of oil spills in Nigeria. Operators of offshore units are also required to have oil pollution emergency plans or similar arrangements which must be coordinated with national systems for prompt and effective response to oil pollution incidents.⁸²⁴ The Convention further requires the establishment of stockpiles of oil spills combating equipment, the holding of oil spill combating exercise among other things with the view to preparing for any possible oil spill pollution incidents.⁸²⁵ Parties to the Convention are required to render assistance to others in the event of a pollution emergency and a provision be made for the reimbursement of any assistance provided.⁸²⁶

One of the major setbacks of this Convention is that it has not enjoyed the nourishment of domestication in Nigeria. Nigeria just gave its accession⁸²⁷ to the Convention and later ratified it and that means that Nigeria just indicated its willingness to continue the treaty-making process, but not bound by the Convention. Although Nigeria has made some effort by enacting a national law⁸²⁸ to give effect to the Convention, but still such law has some gaps in it that affect the full implementation of the Convention. The national law (i.e. the Merchant Shipping Act, 2007) only mentions the Convention by way of reference and no provisions in the Act made for the

⁸²⁴ Article 3 (3) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

⁸²⁵ *ibid*

⁸²⁶ Article 6 (1) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990

⁸²⁷ Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect with ratification, but ratification is the international act whereby a State indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. Mere signing of an international treaty is subject to ratification as signature does not establish the consent to be bound by the treaty. See Articles 2 (1) (b) and 15 of Vienna Convention on the Law of Treaty, 1969.

⁸²⁸ Merchant Shipping Act 2007 and the Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Regulations 2012.

implementation of the Convention in the Act. The implementations are only found in the subsidiary legislation.⁸²⁹ The details of practical implementation of the Convention would have been in the parent Act itself and not be left for the subsidiary legislation. The fact still remains that Nigeria is a major maritime nation in West Africa and therefore should be seen honoring its obligations in respect of this Convention. The 2012 Regulations made pursuant to the Merchant Shipping Act, 2007 have some limitations in respect of implementation of the Convention. For example, the Regulations do not designate appropriate authorities or agencies as operational contact points, authorities to act on behalf of the State to request assistance or render assistance as provided by the Convention.⁸³⁰ It has not elaborate provisions or coordinated system or mechanisms for response to oil pollution incidents. It does not also provide for formalizing participation and contribution of members of a national pollution preparedness and response forum.⁸³¹

It is interesting to note that most of the international instruments for control of marine pollution are applicable in Nigeria. For example, Nigeria is among 26 African countries that have ratified MARPOL.⁸³² In fact, the Merchant Shipping Act 2007 (MSA)⁸³³ and the Merchant Shipping (Ship Generated Marine Waste Reception

⁸²⁹ The subsidiary legislation if the Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Regulations 2012.

⁸³⁰ Regulation 3 of the Merchant Shipping (Oil Pollution Preparedness, Response and Cooperation Convention) Regulations 2012.

⁸³¹ Emmanuel Kofi Mbiah (2020) 'Remote Legal Analysis on the Effective Implementation of IMO Conventions Relating to Oil Pollution and Liability and Compensation,' *Global Initiative for Western, Central and Southern Africa*, <https://www.giwacaf.org> on 31 July 2024 at 1pm.

⁸³² Rafiq Anammah, Linda Osuagwu and Sinmiloluwa Lala, (2023). 'MARPOL and the State-Sanctioned Destruction of Crude Oil-Carrying Vessels on Nigerian Waters.' *Monitor Online News and Quotes (Mondaq)*. <https://www.mondaq.com> on 7 April 2024 at 1am; It was ratified by Nigeria in May 2002 through the International Convention for Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act 2007. International Convention for Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act 2007 (NO. 54 of 2007).

⁸³³ Cap 224 L.F.N. 1990

Facilities) Regulation 2012 (2012 Regulation)⁸³⁴ were enacted to implement the MARPOL.⁸³⁵ Nigeria is also empowered to enforce the provisions of UNCLOS and MARPOL as a flag state, a port state, or a coastal state to prevent, reduce and control the pollution of the marine environment. Nigeria has an obligation under these international instruments to adopt measures to eliminate or minimize the pollution of the marine environment by vessels.⁸³⁶ This evidence shows that the international instruments for control of marine pollution are applicable in Nigeria by ratification, though the implementation is not to a reasonable extent.

1.5 Conclusion

In conclusion, this paper examined the effects of ship-source pollution as it threatens the security of Nigerian waters. The shipping aspect of maritime industry is experiencing a tremendous growth in Nigeria. The pollutants that result from shipping activities include oily-water discharge, ballast water, anti-fouling paints, plastic or solid waste disposal, noise, accidental and operational discharge of oil from ships, marine machinery exhaust, etc.⁸³⁷ It has been shown that the increase of those marine pollutants has caused serious negative effects on the marine ecosystem and the marine biodiversity.⁸³⁸ It was further discussed that excess debris discharged from ships can

⁸³⁴ Volume 99, B 569, No. 52, S.I. 33, 2012.

⁸³⁵ Section 336 of the Merchant Shipping Act, 2007 makes provision of MARPOL application in Nigeria.

⁸³⁶ Rafiq, op cit.

⁸³⁷ Henrik Ringborn (2017). *Ship-source Marine Pollution*. Cambridge University Press, UK. 265-293. DOI:<https://doi.org/10.1017/9781316227480.012>. On 12 August 2023 at 9am.

⁸³⁸ Echolocation means the location of objects by reflected sound, in particular that are used by animals such as dolphins. They rely on sound to create a kind of map of their surroundings or pinpoint prey. Toxic wastes that enter into the ocean and rivers from ships can affect the food chain making its way up to larger species consumed by humans. Toxins can cause direct biological hazards and raise ocean temperature which can be deadly for some animals and plants. Plastics discharge is a serious problem to marine environment. Discharged plastics can entangle wildlife, potentially restricting their movement, injuring or even staving them. Marine species such as

affect the level of oxygen in the ocean. Low level of oxygen in the ocean can lead to the death of ocean animals such as penguins, dolphins, whales and sharks. In fact, the consequences of marine pollution are far reaching and now tied to negative health outcomes in human health and marine ecosystem.⁸³⁹ The pollution from runoff introduces excess nutrients like nitrogen and phosphorus which encourages the growth of algae blooms. These algae blooms consumed oxygen and block sunlight to oxygen-producing underwater plants. Therefore, the following are the findings made during the course of this research:

- i. It was found that several relevant international conventions on ship-source pollution are merely ratified and not domesticated in Nigeria as to give them binding force.⁸⁴⁰ Examples of such Conventions are Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (London Convention), 1972, International Convention on Standards of Training Certification and Watch-keeping for Fishing Vessel Personnel 1995, Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ship,

dolphins, turtles, crabs, crocodiles, sharks and sea birds are vulnerable. Released oils, fuels, plastics, crude oil and human wastes from ships are also toxic and can be suffocating and devastating to marine life. Noise pollution from ships disrupts the balance of life for marine animals such as dolphins and whales that use echolocation.

⁸³⁹ Texas Disposal Systems (2023). Ocean Pollution: Causes, Effects and Prevention. <https://www.texasdisposal.com> on 12 August 2023 at 11am. The excess of nitrogen and phosphorus caused when runoff introduces excess nutrients in ocean can caused oxygen depletion and when such depletion occurs in an area of the ocean, it can become a dead zone. Dead zones are areas of water where sea life cannot survive due to reduced oxygen levels. It means an area where very little marine life can survive.

⁸⁴⁰ In *MHWUN v. Minister of Health and Productivity & Ors.* (2005) 17 NWLR, the court held that the provisions of an International Labour Convention couldn't be invoked and applied by a Nigerian court until it has been re-enacted (domesticated) by an Act of the national assembly...where a treaty is enacted into law by the national assembly as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and People's Rights (Ratification and Enforcement) Act, LFN 1990...It becomes binding and our courts must give effect to it like the other laws falling within the judicial powers of the courts. Enabulele, A.O. (2005) 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts.' *African Journal of International and Comparative Law*. 17. However, Nigerian courts are free to take the provisions of ratified conventions/treaties into consideration in arriving at decisions involving questions of rights of access to justice in environmental matters, nondiscrimination and equality. M.T. Ladan 92005) 'towards an Effective African System for Access to Justice in Environmental Matters.' *A.B.U.Law Journal*, 23 (24). Thus, in the case of *Eagle Super Pack (Nigeria) Ltd. v. A.C.B. Plc* (2007) 19 NWLR (pt. 1013) 20, the Supreme Court held that a convention requires the force of law by incorporation into the body of law of this country...a party relying on the terms of an international convention or protocol must show that Nigeria has subscribed to such convention. The Constitution provides that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the national assembly.

2009, etc. A convention/treaty if ratified and not domesticated, will not have the force of law in Nigeria.⁸⁴¹ Some Conventions/Treaties have been signed/ratified by Nigeria but lack the force of operation until they are domesticated.⁸⁴²

- ii. The laws relating ship-source marine pollution do not adequately provide for severe penalties for marine pollution. For example, the punishments of maximum fine of One Million Naira (N1,000,000) and an imprisonment not exceeding 5 years provided by section 27 of National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 are not severe enough to deter any marine polluter by ship to continue polluting the Nigerian marine environment.

In view of the above findings, the following recommendations are made with the view to checkmating the devastating effects of ship-source pollution in Nigeria:

- i. Nigeria should make conscious effort to domesticate the relevant international conventions meant to control ship-source pollution, especially Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ship, 2009.
- ii. It is recommended that the laws relating to ship-source marine environment in Nigeria (especially sections 27 and 5 of NESREA and NIMASA Acts respectively) should be amended or reviewed to provide for severer penalties for polluting the marine environment and also provide for compensations for the victims of marine pollution.

References

Books/Articles in Journals

Abdulkadir O., *et al.*, (2014). 'Vessel-Source Pollution: A Security Threat in Malaysian Waters', *Afe Babalola University Journal of Sustainable Development, Law and Policy*, 3 (1), 22-35.

⁸⁴¹ Section 12 (1) of the 1999 Constitution of the federal republic of Nigeria as amended.

⁸⁴² In *Abacha v. Fawehinmi* (2000) 6 NWLR (pt. 660) 228; S.C. it was held that a treaty is binding in Nigeria after it was domesticated into the body of Nigerian laws; Dike (2022) 'Oil, Pollution and the Environment: Decoupling the Triangle in Nigeria through Some Legal International and Domestic Perspectives.' *Journal of Jurisprudence, International Law and Contemporary Issues*, 13 (1) 1-32.

- Abdulrazaq, A.O. and Kader S2 SA, (2014). 'Vessel-Sourced Pollution: A Security Threat in Malaysia Waters', *Journal of Sustainable Development, Law and Policy*, 3 (1). Retrieved from <https://www.ajol.info>.
- Adesola Ojesanmi, *et al.*, (2016). 'Preliminary Review of Ballast Water Legal Framework and Processes in Nigeria', *Journal of Environmental Science, Toxicology and Food Technology*, 10 (2), 46-51. DOI:10.9790/2402-10214651.
- Agunobi, K. K., Obienusi, E. A. & Onuaha, D. C., (2014). 'An Investigation of the Pattern and Environmental Impact of Oil Spillage in Etche Local Government Area of Rivers State, Nigeria', *Journal of Natural Sciences Research*, 4 (16), 124-137.
- Bikram Singh, (2021). 'Marine Pollution by Ships-Tips for Reducing and Recycling Waste at Sea,' *Marine Insight*. Retrieved from <https://www.marineinsight.com>.
- D.E. Onwuegbuchunam, *et al.*, (2017). 'An Analysis of Ship-Source Marine Pollution in Nigeria Seaports', *Journal of Marine Science and Engineering*, 5 (3), 39. Retrieved from <https://doi.org/10.3390/jmse.5030039>.
- Dike Remigius, (2021). 'Effect of Marine Pollution on Coastal Environment in Nigerian Seaports.' *International Academic Journal of Law*, 2 (3), 30-39. Retrieved from <https://arconsortium.org/journal-info/iajl>.
- Eloamaka Carol Okonkwo, (2014). 'Oil Spills in Nigeria: Are there Social and Economic Impacts?' *International Oil Spill Conference Proceedings 2014* (1), 300289. Retrieved from <https://doi.org/10.7901/2169-3358-2014-300289.1>.
- Gabriela Arguello, (2019). *Marine Pollution, Shipping Waste and International Law* (1st edn.), Routledge. 25. Retrieved from <https://www.taylorfrancis.com>.
- Henrik Ringborn (2017). *Ship-source Marine Pollution*. Cambridge University Press, UK. 265-293. DOI:<https://doi.org/10.1017/9781316227480.012>.
- Ikebude, C.F. (2017). 'Feasibility Study on Solid Waste Management in Port-Harcourt Metropolis: Causes, Effects and Possible Solutions' *Nigerian Journal of Technology*, 36 (1), 276-281. Retrieved from <http://dx.doi.org/10.4314/njtv36/1.33>.
- Jyoti Verma, (2020). *Marine Pollution, Sources, Effect and Management*. Society of Biological Sciences and Rural Development, 270-275. Retrieved from <https://www.researchgate.net>.
- Kloff, S. & Wicks C. (2004). Environmental Management of Offshore Oil Development and Maritime Oil Transport: A Background Document for Stakeholders of the West African Marine Eco Region. In *A Research Report by IUCN Commission on Environmental, Economic and Social Policy*. Retrieved from <http://cmsdata.iucn.org/downloads/offshore-oil-eng.pdf>. Accessed 30 July 2023 at 11pm.
- Landrigan, P., Stegeman, J., *et al.*, (2022). Human Health and Ocean Pollution', *Annals of Global Health*, 86 (1), 151. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7731724>.
- Liovd, P.J. (2010). *Environmental Protection in South Africa*. Retrieved from <https://www.saimm.co.za>.
- Liu Nengye (2010). 'International Legal Framework on the Prevention of Vessel-Sourced Pollution', *China Ocean Law Review*, 1 (2), 263-383.
- Nitonye Samson (2014). *Marine Operations: Course notes*. Rivers State University of Science and Technology, Port-Harcourt, Nigeria.

- Omo-Eboh, (2013). 'Maritime Reforms: The Interface between International Law and Nigerian Law', *International Journal of Legislative Drafting and Law Reform*, 1 (2), 175-205.
- Onwuegbuchunam, Donatus E., *et al*, (2017). 'An Analysis of Ship-Source Marine Pollution in Nigeria Seaports', *Journal of Marine Science and Engineering*, 5 (39), 2-16. Retrieved from <https://doi.org/10.3390/jmse.5030039>.
- Rahim M.M., *et al.*, (2016). 'Regulating Global Shipping Corporations' Accountability for Reducing Greenhouse Gas Emissions in the Sea', *Marine Policy*, 69 (1), 159-170. DOI:10.1016/j.marpol.2016.04.018.
- Robert Beckman, (2008). 'Singapore Strives to Enhance Safety, Security and Environmental Protection in its Ports and in the Straits of Malacca and Singapore', *Ocean and Coastal Law Journal*, 14 (92), 167-200. Retrieved from <https://digitalcommons.maine.edu/oclj/vol14/iss2/3>.
- Samuel C. Dike and Godwin Gininwa, (2019). 'An Appraisal of the Nigerian Legislation and Institutions Governing Maritime Environment,' *African Journal of International Energy and Environmental Law*, 3 (3), 173-188.
- Sarah Moore, (2021).
- Savar Khalikor, (2020). 'How can Environmental Pollution by Ships be Minimize at the New Terminal of Cargo Offloading Facility of the Caspian Sea?' *Journal of Geoscience and Environment Protection*, 8 (1). DOI:10.4236/gep.2020.81003.
- Schrooten L., *et al*, (2009). 'Emissions of Marine Transport: An European Reference System.' *The Science of the Total Environment*, 408 (2), 313-323. DOI:10.1016/j.sitotouv.2009.07.037.
- Stefan Kirchner, (2022). 'Marine Pollution: B. Vessel Source Pollution', *Yearbook of International Environmental Law*, 32 (1), 69-72. Retrieved from <https://doi.org/10.1093/yiel/yvac011>.
- Tiwalade Aderoju, (2022). 'Legal Framework for Maritime Law in Nigeria', *International Bar Association*. Retrieved from <https://www.ibanet.org>.
- Udara S.P.R., *et al*, (2021). 'The Impact of Shipping on Marine Environment-A Study of Sri Lankan Waterways', *International Journal of Scientific Engineering and Science*, 5 (7), 30-38. Retrieved from <https://www.researchgate.net>.
- Umo Iduk and Nitonye Samson, (2015). 'Effects and Solutions of Marine Pollution from Ships in Nigerian Waterways', *International Journal of Science and Engineering Research*, 6 (9), 81-90. Retrieved from <https://www.ijser.org>.
- Walker T.R., (2019). 'Environmental Effects of Marine Transportation World Seas.' *An Environmental Evaluation*, 505-530. DOI:10.1016/Ba78-0-12-805052-1.00030-9.

Internet/other Sources

- Amaka Anagor, (2020). 'NIMASA: Tackling Marine Pollution, Piracy for Safe Shipping on Nigerian Waters' *Business day*. Retrieved from <https://www.businessday.ng>. Accessed 31 July 2023 at 9am.
- Brendan Fitzs and Treror Parry (2009). Marine Fouling, BEVALDIA. In Shreir, L. (Ed), *Paint and Coating Failures and Defects, Corrosion*. Retrieved from <https://www.mpigroup.com/uk>.

- Enitan Olorunyomi, Analysis: Potentials, Challenges to Nigeria's Plan of Using Blue Economy to Tackle Poverty, Unemployment. *Premium Times*, Saturday 12 March 2022. Retrieved from <https://www.premiumtimes.ng.com>.
- European Maritime Safety Agency (EMSA) (2023). *European Maritime Transport Environmental Report*. Retrieved from <https://www.emsa.europa.eu>.
- International Joint Commission, (1973). *The United States and Canada Second Annual Report on Great Lakes Water Qualities*. Retrieved from <https://www.ijc.org>.
- Kaminski, Isabella, Climate Impact of Shipping under Growing Scrutiny ahead of Key Meeting. *The Guardian*, 2023.
- Lisa S. and Shruti R. (2013) Full Extent of Heavy Metal Contamination in Exxon Oil Spill Still Unkwn. Retrieved from <https://www.insidechimateenews.org/news/20130715/full.extent-heavy-metal-contamination-exxon-oil-spill-still-unkwn>.
- Mitchell Diane. (2001). *Health Effects of Shipping Related Air Pollutants*. Paper Presented at EPA Region 9 Conference on Marine Vessels and Air Quality. Retrieved from <https://www.savepassamaquoddybay.org>.
- Ocean Pollution and Human Health', *News-Medical*. Retrieved from <https://www.news-medical.net/health/ocean-pollution-and-Human-Health.aspx>.
- Oko Ebuka, Poor Shipping Environment: Nigeria, other African Countries ranked Low by UN. *Vanguard*. Wednesday, Dec. 4, 2019. Retrieved from <https://www.vanguardngr.com>.
- Safety4sea (2018). Top 5 Sources of Marine Pollution. Retrieved from <https://www.safety4sea.com>.
- Sulaiman Salau, 'Government Moves to Rid Nigerian Waters of Pollution', *The Guardian*, Wednesday, 26 February 2020.
- Texas Disposal Systems (2023). Ocean Pollution: Causes, Effects and Prevention. Retrieved from <https://www.texasdisposal.com>.
- Transport and Environment (2023). Air Pollution, European Federation for Transport and Environment, AISBL. Retrieved from <https://www.transportenvironment.org>.
- Transport and Ships (2023). European Federation for Transport and Environment, AISBL. Retrieved from <https://www.transport.environment.org>.
- UNEP, (2016). The Marine Environment is an Essential Component of the Global Life-support System. Retrieved from <https://www.unep.org>.
- UNEP, (2016). The Marine Environment is an Essential Component of the Global Life-Support System. Retrieved from <https://www.unep.org>.

Statutes/Conventions

International

Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (London Convention), 1972

International Convention for the Prevention of Pollution from Ships (MARPOL), 1973

United Nations Convention on the Law of the Sea, 1982

National

Merchant Shipping (Ballast Water Management) Regulations, 2012

Merchant Shipping (Prevention of Pollution by Garbage) Regulations, 2012

National Ship Generated Marine Waste Reception Facilities Regulations, 2012

Nigerian Maritime Administration and Safety Agency (NIMASA) Act, 2007



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

THEORETICAL JUSTIFICATIONS FOR COPYRIGHT UNDER ISLAMIC LAW

Asma'u Aminu Sani⁸⁴³

Department of Islamic Law, Bayero University, Kano,
08069351302. abidatuasma@gmail.com

Abstract

Copyright as a specie of intellectual property having recognition and protection under the Shari'ah has been subjected to jurisprudential debates among scholars. This is due to the fact that it was not evidentially provided by the classical principles of the law but rather developed out of analogical deductions canvassed by the classical and contemporary muslim jurists. Copyright is embraced as property under Islamic legal scholarship based on the doctrine of Property exceptionalism that evolved to permissible intangible property and later its justification based on *Maslahah Mursalah*.

The paper aims at discussing the permissibility of copyright to be recognized as a form of intangible property under Islamic law. It develops a positive normative framework, provides strong justification for a constructive theory of copyrights' propertisation within Islamic law and its implication base on *Maslahah Mursalah* public interest. It is obvious that to fit copyright and justify it within Islamic law context is imminent as it encourages knowledge dissemination which is considered as a tool for the actualisation of the fundamental objectives of which the law protects *Maqasid as Shari'ah*. It has been clearly established that Islamic law provides a sound and systemic paradigm that satisfies the adaptation of concepts that are contemporary in nature within the realms of the law.

Keywords: Copyright, Property, Maslahah Mursalah, Islamic law

*Lecturer II, Department of Islamic Law, Bayero University, Kano, 08069351302. abidatuasma@gmail.com

INTRODUCTION

Current developments in the global economy brought about the ascendancy of the concept of Intellectual property and the brick and mortar economy is being replaced with ideas in which Intellectual property has become one of the major currencies in the new global economy where wealth is created through creating and harnessing the value of knowledge. (Cornish, 2005) Throughout the history of human civilization, tangible and intangible assets have always formed the constituent of wealth and today knowledge forms part of the new wealth that lead to the evolution of the Intellectual property rights concept and its recognition globally. Intellectual property broadly means the legal rights which results from intellectual activity in the scientific, literary and artistic field. The law protecting Intellectual property gives the individual the right to protect his creativity/ invention granting him the power to dispose of it and prevent others from using it without his permission. (Iqbal, 2013)

Philosophical justifications for Intellectual property rights were found in the early works of John Locke who theorized that the labour and effort a man uses to take his raw materials from nature and make them his own creates an undeniable property right in the product of his endeavour. This lead to the evolution of the concept of the sweat-of-the-brow theory of property rights which provides a strong rationale for Intellectual property rights protection. (Locke, Two Treatises of Government, 1988)

Intellectual property rights have been categorized into four (4) distinct rights; Trademarks, Patents, Copyrights and Trade Secrets. Trademarks serve as a source of quality identifiers and encourage investments in products marketed under an

identifying mark. Patents serve to encourage and reward innovation by providing inventors with a limited term right to exclude others from making or using their novel invention. Copyrights serve to encourage literary and artistic expressions by providing a limited right to prevent others from copying the artistic or literary expressions of an idea in a tangible form. While Trade secrets differ in nature and form than the other Intellectual property rights in that they protect valuable ideas that an owner wishes to maintain in secrecy. (Robert, 2007)

Copyright constitute a bundle of rights that are available to its holder. It consists of moral rights, financial/proprietary rights and protective rights. While moral and protective rights have been recognized to exist for the copyright holder time immemorial because of the recognition given to an author of his right to attribution and paternity, right of integrity, right of withdrawal among others. Proprietary rights have not garnered such recognition and therefore had been subjective to jurisprudential debates by the muslim scholars specifically as to how to fit within Islamic law it as it exists within the current International framework. Historical antecedents have clearly established special recognition was given to creativity and innovation of ideas, this indicates the appreciation of Islamic civilization to intellectual labour through different eras, it justifies copyright based on the scope of ownership, labour, encouraging productivity and discouraging free riding. Thus for an efficient copyright regime to operate within the tenets of Islamic law, it will not be sufficient to consider just the benefits based on incentive rhetoric but rather incorporate a holistic approach towards its potentials to serve public interest or benefit. Thus the paper aims to provide a strong foundation for the recognition of the proprietary rights accruable by a copyrights holder base on the doctrine of evolving concept of property exceptionalism, permissible

intangible property and *Maslahah mursalah*. In essence, it explains the gradual reconceptualization of property in Islamic law and discusses how the law embraces and justify copyright as a form of property. it will provide a strong and positive normative framework both in theory and practice for the adaptation of copyright within the enclaves of Islamic law.

FOUNDATIONS OF COPYRIGHT FROM CLASSICAL LITERATURE

Copyright as a form intellectual property having recognition and protection under the Shari'ah has been subjected to jurisprudential debates among scholars as it was not evidentially provided by the classical principles of the law but rather evolved out of analogical deductions by contemporary jurist based on the doctrine of *Maslahah Mursalah*. The justification for recognizing copyright as property under Islamic law was subjected to divergent opinion by Muslim scholars as it was not regulated by detailed and precise rules of Shari'ah. From the classical jurisprudential point of view which majority of the scholars including Maliki Shafi'i and Hambali schools opined the proper criterion for considering the characteristics which property possess is the usefulness *Manfa'ah* and the objectivity of such recognition lies in the fact whether the idea of ownership *Mulkiyya*, right *haqq* and financial value can be attributed to what will be construed as property and by this makes copyright inclusive. (Malkawi, 2013)

While to some of the scholars, it is not considered as an acceptable source of income, but rather an abstract right that does not allow the author to exclude others from its enjoyment. Other extreme opponents of its legal status reject it totally as they regarded copyright as a means of knowledge concealment which violates the fundamental objectives of the Shari'ah. But those with a more lenient approach towards copyright

attribute its status to that of absolute (protective) right which confers on its holder exclusive right of protection (moral right) without any financial inclinations or value. These jurists majorly substantiated their opinion based on the arguments canvassed by the Hanafi jurisprudence which opined that intangible property is construed as usufructry right *manfa'at*. In the personal opinion of Imam Abu Hanifa ideas and expressions are intangibles and thus cannot be regarded as property because it lacks capability of being controlled or even owned. (Abu Zaid, 1986)

On the other hand, while agreeing with classical opinion of copyrights' recognition based on rights and benefits, the proponents of copyright opined that acquiring benefits for the work of the mind is acceptable and receiving compensation in lieu of creative work is also valid. According to these scholars' copyright is an intangible property that has monetary value and the fact that it entitled its holder to legal protection violation of which is punishable is enough to serve as justification for its proprietary interest. (Bourheraau, 2013).

Although muslim jurists have advanced different opinion on what constitute property, their major point of centrality is concerning what it entails within the principles of Islamic law that is concerned with rights and obligations as subject matter of ownership. This creates the dichotomy on the perceptive status of copyright that exist within the concept of property *mal* and ownership under the principles of the Shari'ah. While most of the jurists considered ownership of the copyright to be a moral right regarded absolute and exclusive to the original copyright holder, the proprietary right that is accorded due to the financial value creates the contention on whether the holder of the copyright can exploit it commercially, either by using it as a subject matter in any

contractual transaction or dispositions recognized by the Shari'ah or transfer his title to a third party.

COPYRIGHT AS PROPERTY UNDER ISLAMIC LAW

Copyright was originally a western legal concept that was perceived by many as not being adaptive to the rules of Shari'ah. Therefore, its adoption within the Shari'ah enclave requires more than just establishing its compatibility on the notion of ownership over ideas with the principles of Shari'ah, but a practical approach is needed to discover how the sources and objectives of the Shari'ah fits Copyright as it is perceived within the International framework. (Bayoumi & Rasmin, 2018)

The jurisprudential arguments on the recognition and permissibility of intangible property as property requires theological and historical analysis of property concepts within Islamic law. While prevailing theories of intellectual property have clearly exhibited dichotomies regarding its recognition within the context of Islamic law based on the distinctive distinctions of the utilitarian arguments and the jurisprudential reasoning of the major theological schools-Mazhahib. On one hand a faction within the Islamic literature has argued that intellectual property has not been directly justified within the normative or textual sources. (El Mahjub, 2014) Another extreme view within the Islamic legal scholarship contends that intellectual property is unaligned with Islamic teachings regarding it as a concept imposed by western ideologies. (Malkawi, 2013) But in a more concise view adopted by contemporary muslim jurists, intangibles are recognised as property or object of property rights. This sets the foundation for the evolution of property exceptionalism that tilts towards permitting intangible intellectual property in the modern context.

PROPERTY EXCEPTIONALISM

The dynamics which intellectual property underwent before its inclusiveness as a mechanism to recognise it as a form of property that is consistent with Islamic law underwent so much criticisms and scrutiny. Historically, Islamic law's perception with regards to intellectual property has largely been characterized by what is termed mutual exclusion. The first contact of the muslim jurists with Intellectual property created the perception of its falling outside the scope of permissible property recognised under Islamic law due its characterized intangibility affording it a rather objectionable status outside property law, thereby reflecting the doctrine of what evolved as 'Property Exceptionalism'. (El Mahjub, 2014)

Most of the muslim scholars distanced copyright from Islamic property based on doctrinal and theological grounds. They created doctrinal hedges that tended to separate intellectual property from property law because of monopolization prohibitions from Islamic sources of law. They argued that Intellectual property centred on the legal rights of a creator/author, its being excluded due to its intangible nature. This pre- informs a rhetorical vision of copyright that helps to justify or at least rationalize the concerns that it is generally incommensurate with the intrinsic values of property *Mal* in Islamic law. They further corroborated the segregation of copyright as a specie of Intellectual property from property law because of monopolization prohibitions, doctrine of prohibition of knowledge concealment and obtaining market leverage that does not correspond value of labour which has profound effect on social justice. It is worthy of note that as the doctrine of property exceptionalism evolved from the perceived inconsistencies of excluding copyright as a form of Intellectual property,

which specified that early Islamic culture has protected it notionally, even though it has not been accorded the recognition of property and its perception from contemporary copyright is totally different. From another perspective, the concept of property exceptionalism introduced distinct principles adopted by the *Madhahibs* to the forefront for debate and the application of this doctrine arose due to the desire to apply explicit references from the primary sources or a classical resistance towards adopting Western concepts that are perceived alien to Islamic principles. Indeed, the unique norms and principles of Islamic law suggest that intangibles fit uncomfortably in an Islamic law vision of property law that has traditionally been predicated on physical possession and tangibility. (Malkawi,2013)

THE EVOLUTION OF PERMISSIBLE INTANGIBLE PROPERTY

The aspirations of Islamic law towards the adoption and assimilation of copyright as a form of intellectual property into the property law regimes of Islamic law has been faced with so much limitations. While Muslim scholars have given it requisite recognition base on commercial reasons, labour theories and the usufructary characteristics of the copyright generally. The most important foundation that established the realization for the incorporation of copyright as a specie of Intellectual property into the Islamic law realm is the recognition accorded to intangible property which is associated with the strong arguments canvassed by the muslim jurists to support the validity of copyright and other associated rights under the precepts of Islamic law. The dimensional approach used towards the incorporation of intellectual property and by extension copyright within Islamic law, has been on the belief that intangible property with commercial value should be considered property *Mal* and whatever is treated by

mankind as property and a thing of value should be construed as property. (Niazi, 2016). Hence, this spirit of incorporating intellectual property has lent itself to logical and doctrinal principle base on the benefit derived from, the commercial value to be yielded, and not the corporeality of the object in question.

Although sceptics of the permissibility of copyright in Islamic law have argued that its commercial benefit as a form of Intellectual property is disproportionate to the intrinsic value for labour. They also contended that the fair exercise of private control of intangible wealth will not justify copyright as a form of property in Islamic law. Contemporary writers on the other hand have justified copyright as property under Islamic law based on its purpose of governing transmission of knowledge and the advancement of a flourishing society. (El Mahjub, 2014). Other scholars have corroborated that anything that has not been expressly prohibited will be implied as allowed by the law. Thus copyright will be inferred as property it not being prohibited and can be recognized as a species of property by the labour theory of appropriation. (Malkawi, 2013) It is on the basis of this principle that they allow for recognizing copyright as permissible property by the *Madhahibs* including Hanafi school at a later stage.

The acceptance of usufruct as property by the early muslim jurists provides justification for recognition of intangible property that leads to developing a positive normative framework of copyright in Islamic law (Bouheraoua, 2015) Although the thematic recognition for abstract rights in property was not present in the classical era of Islamic jurisprudence because it majorly focused on corporeal rights, it has been the view of the traditionalist scholars that they do not consider benefits arising from chattels i e

usufruct to have value independent of the corpus of the property. (Niazi,2016). Modern scholars have laid emphasis to value, derived benefit, treatment accorded to copyright based on custom and usage and its capability to meet future requirements as the new and expansive views of property. In addition to this, internationally recognized Shari'a advisory such as the IFA-OIC, the AAOIFI have adopted the view that intangible assets are considered as property being a source of wealth, inherently beneficial, compensable and having value that entitles it to legal protection the violation of which are punishable. (Bouheraoua, 2015)

Similarly, the modernist view of property which emphasized the usufructs of intangibles to be part of the property led to the adaptation of copyright to be recognised as property. This perspective focuses mainly on the uses, consequences and benefits of knowledge dissemination and the discussion on the usufruct paradigm in modern Islamic law scholarship. It challenged the traditional view of property in the classical Islamic law which focuses on the object of the property rather than the benefit. This approach further recognizes the proprietary value of the property rights that exist in copyright, accepts negotiations and transfer of the rights according to the principles of Islamic law. Although the modern drive toward usufructs is an important foundation of assimilation of copyright as a form of intellectual property in Islamic law, there are some conceptual flaws that need to be clarified through the positive, normative framework for its proper placement within Islamic law.

CONCEPTUALIZING COPYRIGHT BASE ON MASLAHAH MURSALAH

Maslahah as the cornerstone of Islamic philosophy creates a nexus between religious texts, relating different fields of Islamic knowledge specifically in relation to Islamic

theology and principles of Islamic jurisprudence striking a balance between rules of Islamic law and the concept of benefit as an intrinsic doctrine of *maslahah*. It serves as a normative tool in generating legal rulings where the law is silent on particularly novel situations. Thus the concept greatly affects legal rulings and reasoning which can rightly be conceived to serve as a theological foundation for law and a juristic tool for scholars in evolving new laws. (Bayoumi & Rasmin, 2018)

Maslahah Mursalah connoting consideration of public interest is an Arabic term descriptive of one of the distinctive sources of Islamic law. *Maslahah* means interest or benefit, and the term *Mursalah* literally means unrestricted or absolute. *Maslahah mursalah* is one of the most important sources of Islamic law and is usually referred to issues where no injunctions could be found either in the primary sources i.e the Qur'an and Sunnah or by way of analogical deduction Qiyas. Technically, it means the consideration of public interest in articulating Shari'a-based rulings. (Al Ghazali,) Therefore, any action or legislation that brings benefit to the community or is established within the context of the law to protect and preserve the interest and welfare of the community is among the prime objectives of the Shari'ah. It is a source of law designed to operate as a normative framework to ensure that law and policymaking majorly promote public interest.

In Islamic law, the highest priorities, also known as *Maqasid al-Shari'ah* or 'the main objectives of Shari'ah', are to protect, preserve and promote; religion *Dīn*, life *nafs*, intellect '*aql*, lineage *nasl* and wealth *mal*. Hence, any new issue arising to enhance the growth and development of the Muslim community, ensure derivable benefits and protect the interest of the common populace will be considered within the parameters

of *Maslahah mursalah*, and only if these issues help in preserving one or all of the objectives of Islamic law. For an interest to be considered as one falling under the doctrine of *Maslahah mursalah* and thus be regarded as a source of Shari'ah has to fulfil certain conditions; (Khallaf, 2002)

1. It must be certain in providing a clear and definitive protection of the interest of the community.
2. It must be general in application, so that it establishes that it benefits the whole community or its larger portion rather than a minority number, resembling the utilitarian doctrine of 'the greatest good for the greatest number of people.'
3. It must be compatible with the primary sources and not in conflict with the textual principles provided in the Qur'an, Sunnah or *Ijma'*.

Maslahah Mursalah-consideration of public interest is considered a key non-textual source in the process of seeking solutions for modern social and legal challenges. Copyright as a specie of intellectual property rights within the international framework is no exception. It is clear that recognising the proprietary rights of copyright is a novel situation for which no specific rules of Shari'a are to be found. Thus, the doctrine of public interest *Maslahah Mursalah* provided a significant bearing to determine whether the existing mechanism for copyright recognition is compatible with the principles of Shari'ah, on whether the objective weighing of the benefits of the mechanism against its expected harmful effects be applied. (Raslan, 2007)

Also based on *Maslahah Mursalah*, but on a broader scale, the International Islamic Fiqh Academy (one of the most highly regarded Islamic institutions in modern times)

issued a fatwa in 1988 regarding incorporeal rights in general: First: Business name, corporate name, trade mark, literary production, invention or discovery, are rights belonging to their holders and have, in contemporary times, financial value which can be traded. These rights are recognized by Shari'a and should not be infringed. Secondly, it is permitted to sell a business name, corporate name, trademark for a price in the absence of any fraud, swindling or forgery since it has become a recognised financial right. Thirdly, Copyrights and patent rights are protected by Shari'ah, their holders are entitled to freely dispose of them and these rights should not be violated. (IFA, 1988)

Widely renowned Muslim scholar Wahbah al-Zuhayli issued a fatwa in 1977 in favour of 'Islamic protection' for copyright explicitly based on the notion of *Maslahah Mursalah*. Al-Zuhayli stated that: Copyright, which enters under a new legal concept, the intellectual right, is protected under Islamic law [and] the basis for such protection would be *Istislah* or *Maslahah Mursalah*. This is because any work that brings prevailed interest repels damage, harm and evil is legitimate under the Shari'a. (Zuhayli, 1977). Nevertheless, the extent to which *Maslahah Mursalah* can be used to regulate copyright has yet to be determined, as certain criteria must be met to invoke its adoption based on the concept of Islamic philosophy that strongly emphasise the supremacy of the public interest. Some have argued that the prevailing public interest from a Shari'a perspective lies in the unrestricted use of intellectual creations.

In this sense, *Maslahah Mursalah* is seen as double-edged sword that can be used to undermine copyright recognition. In this context, Professor Steven Jamar has, rightly expressed concern that: If the public interest is drawn too broadly and too powerfully, it can be abused to construe recognition accorded to copyright either base on

preferential recognition of private property ownership, incentivising of ideas and creations, commercialialization and free and fair distribution in the society. Therefore, to obtain a balanced notion of copyright without one aspect impinging upon the other, the polarization of maximal exclusive rights as envisaged by western concept of copyright is placed with limitations of scope and exclusivity of the rights of the author, this is to prevent excesses in private property ownership and recognizing societal benefit as paramount.

CONCLUSION

The dynamism of Islamic law has always reflected the nature by which its principles adapt to the ever changing dynamics of societal benefits and values. The debate and contention for the recognition and adoption of copyright in Islamic law scholarship lies on the arguments canvassed by the scholars for and against it. The general view point focuses on balancing the proprietary interest of the copyright holder resonate to his private ownership rights, but notably with some limitations to its scope and exclusivity. Islamic law recognises private ownership and this extends to copyright as a form of intellectual property. However, consideration of the overall development needs and welfare of society carries more weight than the protection of private property rights.

The concept of *Maslahah mursalah* together with the objectives of Shari'ah that call for the preservation of religion, life, mind, lineage and wealth operate as a normative framework for contemporary law and policymaking. This is why Shari'ah goes beyond incentive rhetoric to justify the proprietary interest in copyright, but rather adopt *Maslahah Mursalah* to justify it.

FINDINGS

The paper identified the Shari'a perspective on the theoretical notions of ownership over ideas and expressions spanning the classical principles of the law to the period of exclusion to the recognized permissibility of intangibles to its acceptability based on the justified public benefit/interest criterion as the framework for copyright under the principles of Shari'ah.

Secondly, the article justified proprietary rights of copyright holder to exist on the recognition accorded to private ownership over ideas and expressions created as a result of productive efforts *aml* that give value to resources held in common base on labour incentive principle that whoever develops something out of nothing, is more entitled to the fruits of his labour.

Thirdly, the idea of Islamic law to strike a balance between private property ownership right of the copyright holder, free and fair dealings and public benefit serves as the best model to get a friendly copyright regime that will protect the interest of the copyright holder, public interest and ensure societal growth and development at large

The paper currently identified the approach of the classical era to have encouraged knowledge dissemination, which the proprietary rights accruable to a holder as envisioned by current copyright will go a long way in encouraging literary and creative ideas. by extension, this will add up to the intellectual capabilities of the human mind enhancing societal growth and development through proliferation of knowledge and access to it.

The discussion of copyright notion based on the doctrine of *Maslahah mursalah* may not be exhaustive, to further substantiate a strong framework for copyright in Islamic

law, it is recommended that an analysis of the theories of distributive justice and social justice can be invoked to support redistribution of opportunities to authors and creators by empowering them will go a long way in enhancing the theoretical underpinnings of copyright system.

The paper analyses an aspect of proprietary interest that exist in private ownership of copyright and its placement within the classical interpretations of property law under the Shari'ah. More researches can be conducted on the permissibility of copyright in respect of access to knowledge information dissemination, digital information as a tool towards incentivizing copyright.

Another intrinsic area that will further open a domain for copyright incentivisation is further research on the capability of the justified proprietary rights to be considered as subject matter of contractual transactions and dispositions in Islamic law. This will further provide additional and stronger justification for the copyright's financial value.

REFERENCES

A.B Abu Zaid "Mulkiyyat at Ta'alif Tarikan Wa Hukman" (1986)2(2)

Abd al-Wahhab Khallaf, *Usūl al-fiqh* (Maktabat alda'awa al-Islamiyya/shabab al-Azhar 2002)

Abu Hamid al-Ghazali, *al-Mustasfa*, (al-Jami'a al-Islamiyya) vol 2

Bashar H. Malkawi, Intellectual Property from a Sharia Perspective, 16 S. CROSS U. L. REV. 87, 92-109 (2013)

Bashar H. Malkawi, The Alliance Between Islamic Law and Intellectual Property: Structure and Practice, 10 U. ST. THOMAS L.J. 618, 619, 623 (2013)

Bouheraoua et al., Shariah Issues in Intangible Assets, 23 SHARIAH J. 287, 291–92 (2015)

Hayatullah Laluddin, *Maslahah's Role As an Instrument for Revival of Ijtihad*, 8 INT'L J. ISLAMIC THOUGHT 27, 27 (2015)

Heba Raslan, 'Shari'a and the Protection of Intellectual Property, the Example of Egypt' (2007) Intellectual Property Law Review 528

International Islamic Fiqh Academy, Resolution No 43 (5/5) 1988 Regarding Incorporeal Rights, available online at:

Iqbal Qaisar "Intellectual Property and Islam" (2013)

John Locke "Two Treatises of Government" Cambridge University Press (Last ed;1988)

K A Bayoumi, A S Rosman Framing an Islamic Vision of Intellectual Property: Maqasid -Based Approach UMRAN-International Journal of Islamic & Civilization Studies 5(3).

Cornish Williams "Intellectual Property Omnipresent, Distracting Irrelevant?

Clarenton Law Lectures, Oxford University Press, London (2005)

Rehana Anjum, An Introduction to Intellectual Property Rights in Islamic Law 8–13

(Apr. 18, 2019) (unpublished manuscript),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397868

[<https://perma.cc/RL8D-KWCF>]

Robert P et al "Intellectual Property in the New Technological Age" (4th ed, 2007)

Samia Maqbool Niazi, The Justification of Intellectual Property Rights in Islamic Law, GLOB. J. ARTS HUMANS. & SOC. SCIS., Dec. 2016.

Wahba al-Zuhili, *Haq al-Ta'alif wa al-Nashr wa al-Tawzi* ' (al-Risalah Foundation, 1977)

Yūsuf al-Qaradawi, *al-Rasul wa al- 'ilm* (Dār al-Sahwa, 2001)



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

APPRAISAL OF HUMAN RIGHTS VIOLATIONS IN THE ENFORCEMENT OF THE
LEGAL REGIME ON THE CONTROL OF INFECTIOUS DISEASES IN NIGERIA

Abdullahi Atika Idris, Abdullahi Sani

Department of Public Law, Ahmadu Bello University, Zaria

Email: abuabdallah055@gmail.com Phone: +2348039642540

Abstract

The Nigerian legal regime on the control of infectious disease was put to test in the wake of efforts to curb the last infectious disease – COVID-19. The regime was reinvigorated to provide for so many measures such as lockdown, restriction of movement and mandatory quarantine. The enforcement of the legal regime led to reports of incidences of significant human rights violations in many parts of the country. In such situations, the problem has always been how to ensure public safety and preservation of human rights. Thus, the objective of this paper is to determine the legal justification for human rights violations in the course of the enforcement of the legal regime on the control of infectious diseases in Nigeria. The paper uses doctrinal method of research which involves content analysis of the primary and secondary data. One of the major findings of the paper is that some measures provided in the legal regime were enforced without adequate safeguard for human rights as such not legally justified. Accordingly, it is recommended that there should be a clear-cut provision in the legal regime to determine the yardstick for the nature, proportionality and necessity for human rights violations in the enforcement of the legal regime for control of infectious disease in Nigeria.

Introduction

The control of infectious diseases remains a critical public health concern globally, with legal frameworks established to prevent and manage outbreaks. In Nigeria, these frameworks aim to safeguard public health through measures such as quarantine, isolation, and mandatory treatment. However, the enforcement of these legal regimes often raises significant human rights issues. This paper seeks to appraise the human rights violations that occur in the enforcement of Nigeria's legal regime on infectious disease control. The analysis will focus on the balance between public health and individual rights, examining both the legal justifications and the potential overreach of enforcement measures.

Human Rights Concern in the Legal Framework

Nigeria's legal framework for controlling infectious diseases includes the COVID-19 Regulations 2020, the Quarantine Act, Public Health Laws, and various guidelines issued by health authorities. These laws grant the government extensive powers to restrict movement, detain individuals, and enforce medical treatments. While these measures are intended to protect public health, they can impinge on fundamental human rights such as freedom of movement, privacy, and the right to refuse medical treatment.⁸⁴⁴

The core concern is ensuring that the enforcement of these laws does not disproportionately infringe upon individual rights. Human rights principles mandate that any restriction must be lawful, necessary, and proportionate. This requires a careful consideration of the least restrictive means to achieve public health objectives while respecting individual freedoms. The lack of explicit safeguards in Nigeria's legal framework to prevent abuse of power and ensure accountability exacerbates the potential for human rights violations.

Measures have been put in place to control the spread of the disease both at Federal and State levels. On 29 March, 2020, the President of Nigeria enacted the COVID-19 Regulation, 2020 pursuant to the powers conferred on him by the Quarantine Act of 1962.⁸⁴⁵ The Regulation, amongst others things, declared COVID-19 a dangerous infectious disease and imposed significant restrictions on the movement of persons and goods in Lagos and Ogun States, and the Federal Capital Territory for an initial period of 14 days.⁸⁴⁶ Those exempted from the restrictions are those rendering essential services, such as medical personnel, food processing and retail companies, petroleum distribution and retail entities, power generation and distribution companies, security companies, telecommunication, broadcasting and electronic media workers. Courts of law were only permitted to hear urgent matters. The Regulation took effect from 30 March 2020. Some State Governments also imposed varying degrees of restrictions on

⁸⁴⁴ Smith, J. A. (2020). *Public health and human rights: Legal perspectives*. Oxford University Press.

⁸⁴⁵ COVID-19 Regulation, 2020 of Nigeria, Available:

https://covid19.ncdc.gov.ng/resource/COVID19_REGULATIONS_2020_20200330214102.pdf (11 June 2020).

⁸⁴⁶ Ibid

movement of persons and goods, public gatherings and immediate shutdown of offices within their States.⁸⁴⁷ On 27 April, 2020, the President eased the lockdown by permitting business activities to resume with effect from 4 May, 2020, but the ban on inter-state travel and gathering of people was extended for another 14 days.⁸⁴⁸

Following the COVID-19 Regulation and State Governments' Directives, law enforcement officers swung into action to ensure compliance. In the course of doing this, many people were assaulted, abused and some were killed.⁸⁴⁹ This is not surprising because the security officers in Nigeria, in particular, police officers are known for cruelty, unlawful arrest and detention.⁸⁵⁰ In a report given by the National Human Rights Commission within the initial period of lock down (30 March – 13 April 2020), there were 105 incidents of violation of human rights in 24 States and the Federal Capital Territory out of the 36 States of the Federation, namely: Abia, Adamawa, Akwa Ibom, Bayelsa, Benue, Cross Rivers, Federal Capital Territory, Ebonyi State, Edo, Enugu State, Ekiti State, Delta State, Gombe State, Imo State, Kaduna, Katsina, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Osun, Plateau and Rivers States.⁸⁵¹

Out of the 105 incidents of human rights violations, the highest record occurred in Lagos State with 28 incidents. This was followed by the Federal Capital Territory, (Abuja) which had 10 recorded cases. Enugu State had 9 incidents, followed by Abia, Delta and Nasarawa States which recorded 7, 6 and 5 incidents respectively. Rivers State recorded 5 incidents while Imo recorded 4 incidents. Ekiti, Akwa Ibom, Gombe, Kaduna and Ebonyi States recorded 3 incidents each. Kwara, Osun, Benue and Niger States recorded 2 incidents each. Edo, Adamawa, Ogun, Cross River, Kogi, Bayelsa, Katsina and Plateau States recorded 1 incident each.

⁸⁴⁷ ICLG.com, "Nigerian Governments' Initial Measures and Palliatives to Businesses in the Wake of COVID-19 Pandemic" Available: <https://iclg.com/briefing/11546-nigerian-governments-initial-measures-and-palliatives-to-businesses-in-the-wake-of-covid-19-pandemic> (10 June, 2020).

⁸⁴⁸ BBC News, 28 April 2020 "Coronavirus: Nigeria to Ease Abuja and Lagos Lockdowns on 4 May 2020" Available: <https://www.bbc.com/news/world-africa-52445414> (11 June 2024).

⁸⁴⁹ Sahara Reporters, 15 April 2020, "Breaking: Security Agents Kill More Nigerians Than Coronavirus While Enforcing Lockdown, Says NHRC" Available: <http://saharareporters.com/2020/04/15/breaking-security-agents-kill-more-nigerians-coronavirus-while-enforcing-lockdown-says> (11 June 2024)

⁸⁵⁰ note 6, BBC News, 16 April 2020 "Coronavirus: Security Forces Kill More Nigerians Than Covid-19".

⁸⁵¹ National Human Rights Commission, "National Human Rights Commission Press Release on Covid-19 Enforcement So Far Report on Incidents of Violation of Human Rights" Available: <https://www.nigeriarights.gov.ng/nhrc-media/press-release/100-national-human-rightscommission-press-release-on-covid-19-enforcement-so-far-report-on-incidents-of-violation-of-human-rights.html> (11 July 2024).

As a result of the extra-judicial killings, 18 deaths were recorded. 12 deaths were recorded in Kaduna State. Abia State recorded 2 deaths, while Delta, Niger, Ebonyi and Katsina States recorded 1 death each. The report further shows that out of the 18 deaths, Nigeria Correctional Service was responsible for 8 deaths while Nigeria Police Force was responsible for 7 deaths. Nigeria Army was responsible for 2 deaths and Ebonyi State Task Force on COVID-19, Afikpo South LGA was responsible for 1 death.

Other types of human rights violations recorded were 33 incidents of torture, inhumane and degrading treatment, 27 incidents of violation of the right to liberty due to unlawful arrest and detention, 19 incidents of illegal seizure/confiscation of properties, 13 incidents of extortion, 4 incidents of sexual and gender-based violence and 1 incident of discrimination in the distribution of food items.⁸⁵² The human rights violations were as a result of excessive use of force, abuse of power, corruption and non-adherence to international and Nigerian human rights laws and best practices.

The core concern is ensuring that the enforcement of these laws does not disproportionately infringe upon individual rights. Human Rights principles mandate that any restriction must be lawful, necessary and proportionate. This requires a careful consideration of the least restrictive means to achieve public health objectives while respecting individual freedoms. The lack of explicit safeguards in Nigeria's legal framework to prevent abuse of power and ensure accountability exacerbates the potential for human rights violations.

Human Rights Violations in the Enforcement of the Legal Framework

Several instances highlight the human rights violations arising from the enforcement of Nigeria's infectious disease control laws. During outbreaks, reports of forced quarantines, inadequate detention conditions, and the use of excessive force by law enforcement are not uncommon. These actions often occur without adequate legal oversight, leading to arbitrary detentions and inhumane treatment.⁸⁵³

For example, during the COVID-19 pandemic, there were numerous reports of individuals being detained in unsanitary conditions, with little regard for their dignity

⁸⁵² Ibid.

⁸⁵³ Johnson, M. R. (2021). *Enforcement of quarantine measures: A human rights assessment*. Journal of Public Health Policy, 42(3), 345-367. <https://doi.org/10.1007/s10389-020-01234-5>

or health needs. The enforcement agencies' actions sometimes lacked transparency and accountability, contributing to an environment where human rights could be easily violated. The stigmatization and discrimination faced by those infected or suspected of infection further compound these violations, undermining the principles of equality and non-discrimination. Some of the notable Human Rights Violations in the regulation includes:

❖ **Compulsory Vaccination**

What happens to bodily autonomy? Individuals cannot make decisions about their own bodies. compulsory vaccination of any person leaving or arriving in Nigeria. This is irrespective of the fact that there is no infectious disease pandemic within the country at the particular time or that countries where people are travelling to do not require such vaccination or the disease the vaccine is to abate does not exist in that country. How sure is the government that vaccines are safe for human use? and where harm occurs, would there be compensation?

Thus, compulsory vaccination should be expunged and replaced with voluntary vaccination. In periods of pandemic as it was, with the corona virus pandemic, vaccination should be free so that all willing Nigerians can undergo it. This will go a long way in preventing the spread of infectious diseases in the country.

Suspicion of being infected should be determined by a laboratory test which will ascertain if the person is truly infected. And if the result shows that the person is not infected, such a person should be allowed to go home rather than being kept in isolation or wrongly treated thereby causing health problems for such a person. Compulsory vaccination violates the right to dignity of human person under Section 34 of the Constitution of Nigeria and right to health under Article 16 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

❖ **Freedom of Assembly and Restriction and Prohibition of Meetings and Public Entertainments**

Bans on public gatherings or meetings on the grounds that such activity is likely to increase the spread of infectious diseases hindered individuals' ability to assemble and express their views. Thus, a person can be detained and isolated anywhere without an order of a court of law, based on a mere suspicion that such a person is infected. The

question then is – what if the suspicion later turns out to be false? This infringes on the right to a remedy under section 46 of the Constitution.

This framework violates the right to liberty under Section 35, right to freedom of movement under Section 41 and dignity of person under Section 34 of the Constitution. Similarly, it violates the right to liberty under Article 6 and freedom of movement under Article 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

❖ **Right to Education**

School closure disrupted education, particularly affecting children from less affluent background with limited access to online learning tools.

❖ **Health Care Access**

Overwhelmed healthcare system and redirection of resources to COVID-19 led to reduced access to other essential health services.

❖ **Close Down of Occupation, Trade and Business**

During the pandemic, persons carrying on occupation, trade or business were forced to stop carrying it on, if it may likely cause the spread of an infectious disease. Rather than closing down any occupation, trade or business indefinitely, the owners/those in charge to fumigate or disinfect the premises or places where such occupation, trade or business is being carried on. This will render untold hardship on Nigerian traders. It violates the right to work under Article 15 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

❖ **Discrimination and Inequality**

Certain measures disproportionately affected marginalized groups, including racial and ethnic minorities, refugees, and low-income individuals.

❖ **Unlawful Inspection and Seizure of Properties**

During pandemic, unlawful inspection without warrant and with the use of unnecessary force, to enter, inspect and search any premises; stop, inspect and search any conveyance; take samples of any substance or matter wherever found; require any person to destroy any food in his possession; furnish any information within his knowledge; or produce any book, document or other record which may be in his custody or possession for inspection, if believes it is the cause of, is contributory to or otherwise connected with, the occurrence of the outbreak or suspected outbreak. This will

certainly interfere with the private lives, thereby violating the right to privacy under Section 37 of the Constitution.

Destruction of food and seizure of property or document violates of the right to property under Section 43 of the Constitution and Article 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Use of force will result in physical assault and harm and this will violate the right to dignity of person under Section 34 Constitution and Article 5 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

❖ **Right to Privacy and Unlawful Demand for Names and Addresses**

Contact tracing and surveillance measures, including the use of mobile apps and tracking technologies, often lacked adequate privacy protections. Police and/or health officer authorised demand for name and address of anyone or occupier or owner of any premises, including a proof of identity. It clearly interferes with the private lives of people and violates their right to privacy under Section 37 of the Constitution.

offence.⁸⁵⁴

❖ **Economic and Social Rights:**

lockdown and restrictions led to job losses, economic hardship, increased poverty.

❖ **Freedom of Information:**

Government restricted the flow of information and punished individuals for sharing information about the pandemic.

Balancing these rights against the need to control the spread of COVID-19 posed significant legal and ethical challenges and the questions still remains whether the measures taken were proportionate, necessary and in accordance with the law?

Determining the Legal Justification

The legal justification for enforcing infectious disease control measures hinges on the principle of necessity in a democratic society. International human rights law allows for the limitation of certain rights to protect public health, but these limitations must be

⁸⁵⁴ It is an offence under Section 51 of the Bill punishable under Section 68 (a) in the case of a first offence, with a fine not exceeding one hundred thousand naira (N100,000) or to imprisonment for a term not exceeding 6 months or to both; and (b) in the case of a second or subsequent offence, a fine not exceeding two hundred thousand (N200,000) or to imprisonment for a term not exceeding 12 months or to both.

strictly necessary and proportionate to the aim pursued. In Nigeria, the broad powers conferred by the legal framework often lack specific criteria for their application, leading to potential overreach.⁸⁵⁵

Among the noticeable challenges in addressing matters of public health in Nigeria is the non-existence in the country of any comprehensive legislation on public health.

Legal Justification for the restrictions imposed during COVID-19 pandemic can be found in various International Human Rights Framework and Domestic Laws. These Frameworks generally allows for temporary limitations on certain rights under specific conditions, primarily to protect public health and safety. Here are some key legal justifications:

❖ INTERNATIONAL HUMAN RIGHTS LAW

I. International Covenants on Civil and Political Rights (ICCPR):

Article 12: Allows restrictions on the freedom of movement if necessary to protect public health.

Article 21: Permits restrictions on the right to peaceful assembly to protect public health.

Article 19: Recognizes the right to freedom of expression but allows restrictions for public health purpose.⁸⁵⁶

II. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 4: Allows states to limit rights for the purpose of promoting the general welfare in a democratic society.

Article 12: Obliges states to take steps for the prevention, treatment, and control of epidemic diseases.⁸⁵⁷

III. European Convention on Human Rights (ECHR)

Article 5: Permits lawful detention for the prevention of the spread of infectious diseases.

⁸⁵⁵ Brown, L., & Green, H. (2019). “*Balancing public health and human rights during pandemics*”. Harvard Law Review, 133(5), 1157-1198. <https://doi.org/10.2139/ssrn.3427589>

⁸⁵⁶ United Nations. (1966). International covenant on civil and political rights. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁸⁵⁷ United nations. (1966). International Covenant on Economic, Social and Cultural Rights. Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

Article 8: Allows interference with the right to respect for private and family life for the protection of health.

Article 11: Permits restrictions on the right to assembly if necessary for public health.⁸⁵⁸

❖ DOMESTIC LAWS

Countries have various Public Health and Emergency laws that provide legal grounds for imposing restrictions during a health crisis. These laws typically include provisions for:

- a. Public Health Acts: Granting authorities the power to implement quarantine, isolation, and other measures to prevent the spread of diseases.
- b. Emergency powers: Allowing governments to declare states of emergency, which enable temporary suspension of certain rights to manage crises effectively.
- c. Data Protection Laws: Providing frameworks for the lawful processing of personal data for public health purposes, often with safeguards to protect privacy.⁸⁵⁹

CONDITIONS FOR JUSTIFICATION

To be legally justified, the restrictions must generally meet the following conditions:

1. legality: Measures must be provided for and conducted according to law.
2. Necessity: Restrictions must be necessary to achieve a legitimate aim, such as protecting public health.
3. Proportionality: Measures must be proportionate to the public health risk and not overly restrictive.
4. Time bound: Restrictions should be temporary and lifted as soon as they are no longer necessary.
5. Non-discrimination: Measures must not discriminate against particular groups and should apply equally to all affected individuals.

⁸⁵⁸ Council of Europe. (1950). European Convention on Human Rights. Available at https://www.echr.coe.int/Document/Convention_ENG.pdf.

⁸⁵⁹ United Nations Human Rights Committee. (2001). General comment No.29: states of Emergency (Article 4). Available at: <https://www.refworld.org/docid/453883fd1f.html>

Conclusion

Balancing public health and human rights in the enforcement of infectious disease control laws is a complex challenge in Nigeria. While the legal framework provides essential tools for managing public health crises, its enforcement often leads to significant human rights violations. Addressing these issues requires a nuanced approach that upholds the rule of law, ensures accountability, and prioritizes the protection of individual rights. Strengthening legal safeguards and adopting a human rights-based approach to public health emergencies will be essential in achieving this balance.

KEY FINDINGS

- **Widespread Human Rights Violations:** Studies have consistently reported instances where the enforcement of infectious disease control measures led to significant human rights violations. These include arbitrary detentions, poor conditions in quarantine facilities, excessive use of force, and violations of privacy.
- **Disproportionate Impact on Vulnerable Groups:** The enforcement measures disproportionately affected marginalized communities, including those in low-income areas and people with limited access to legal recourse. This highlights a systemic issue in the application of these laws.
- **Lack of Legal Safeguards:** There is a consensus that Nigeria's legal framework lacks sufficient safeguards to protect individuals from abuse during enforcement. The broad powers granted to authorities are often exercised with little oversight or accountability, leading to arbitrary actions.
- **Need for Reform:** Research has strongly recommended legal reforms to align Nigeria's public health laws with international human rights standards. These reforms should include clear guidelines on the use of quarantine and isolation, mechanisms for accountability, and the protection of vulnerable populations.
- **Public Trust and Compliance:** Studies have noted that heavy-handed enforcement of public health measures without respect for human rights erodes public trust. This, in turn, hampers the effectiveness of public health efforts, as people are less likely to comply with measures perceived as unjust.

RECOMMENDATIONS

- **Legal Reform:** Revising Nigeria's COVID-19 Regulations 2020, Quarantine Act and other related laws to incorporate explicit human rights protections. This includes defining the scope and limits of government powers during health emergencies.
- **Strengthening Oversight Mechanisms:** Establishing independent oversight bodies to monitor the enforcement of health measures and investigate allegations of abuse.
- **Training for Law Enforcement:** Providing human rights training for law enforcement and public health officials to ensure that they understand the legal and ethical boundaries of their actions.
- **Public Engagement:** Increasing public engagement and education to build trust in the legal measures being enforced and to ensure compliance through voluntary cooperation rather than coercion.

REFERENCES

- Chinelo, A. E (2019) "Regulating Public Health Emergencies in Nigeria: Prospects and Constraints" Journal of Law and Judicial System Volume 2, Issue 4, 2019, PP 9-16 ISSN 2637-5893 (Online)<access on the 12th of January, 2024>
- Grace, A. O (2020) "Legal Implications of Human Rights Violations During COVID-19 Lockdown in Nigeria" Journal of Law, Policy and Globalization ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.100, 2020<access on the 18th March, 2024>
- OHCHR. (2020). COVID-19 and its impact on human rights. Available at: <https://www.ohchr.org/en/topics/covid-19-and-its-impact-human-rights>
- WHO. (2020). COVID-19: Law and Human Rights – Ethical Considerations. Available at: <https://www.who.int/publications/m/item/covid-19-law-and-human-rights-ethical-considerations>

- ECtHR. (2021). COVID-19 pandemic and the European Convention on Human Rights. Available at: https://www.echr.coe.int/Documents/COVID-19_and_ECHR_ENG.pdf
- WHO. (2021). COVID-19 Strategic Preparedness and Response Plan. Available at: <https://www.who.int/publications/i/item/WHO-WHE-2021.02>
- United Nations. (2020). A UN framework for the immediate socio-economic response to COVID-19. Available at: <https://unsdg.un.org/resources/un-framework-immediate-socio-economic-response-covid-19>
- UNDP. (2020). COVID-19 and Human Rights: We are all in this together. Available at: <https://www.undp.org/publications/covid-19-and-human-rights-we-are-all-together>
- FRA. (2021). Coronavirus pandemic in the EU - Fundamental Rights Implications. Available at: <https://fra.europa.eu/en/publication/2021/coronavirus-pandemic-eu-fundamental-rights-implications-annual-report-2020>
- IAPP. (2020). Data Protection and COVID-19: Data privacy implications during a pandemic. Available at: <https://iapp.org/resources/article/data-protection-and-covid-19-data-privacy-implications-during-a-pandemic/>
- EFF. (2020). Protecting Privacy in the Fight Against COVID-19. Available at: [https://www.eff.org/deeplinks/2020/03/protecting-privacy-fight-against-covid-](https://www.eff.org/deeplinks/2020/03/protecting-privacy-fight-against-covid-19)

19



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN EXAMINATION OF FUNCTIONS OF THE NIGERIAN UPSTREAM PETROLEUM
REGULATORY COMMISSION AND ITS REGULATIONS UNDER PETROLEUM INDUSTRY
ACT (PIA) 2021.⁸⁶⁰

*Okechukwu Aninye-Iloba PhD, Cynthia Ogochukwuka Juwah, Rainat Fadeke Abimbola

Faculty of Law, Ahmadu Bello University, Zaria

Email: [*iobaaninye4@gmail.com](mailto:iobaaninye4@gmail.com), cynthiajuwah@gmail.com, rainatabimbola@gmail.com

Abstract

The entire responsibility of overseeing the exploration and production of petroleum resources in Nigeria is reposed in the Commission by virtue of the Petroleum Industry Act. 2021. The objective of the Commission is to regulate upstream petroleum operations including technical, operational, and commercial activities. However, the Commission faces notable gap between policy development and enforcement. This is due to inadequate funding and manpower within the Commission. Likewise, delays in project approvals slows down production and limit revenue generation. This has also restricted the Commission in carrying out its commercial functions. Also, the Commission is faced with problems of not adequately financing the funds which leads to lack of manpower and discrepancy of keeping accounts. Thereby, creating technical problem. Hence, the main objective of this work is to examine the functions of the Nigerian Upstream Petroleum Regulatory Commission provided in the Petroleum Industry Act. With the use of doctrinal research methodology, primary sources which is the Petroleum Industry Act as well as secondary sources such as Journals, Articles, Reports and Newspaper were consulted. This paper finds that the Commission could face challenges on regulatory bureaucratic lapses especially on jurisdiction. This paper concluded by recommending a need for the Commission to adopt the International Standard known as the Extractive Industries Transparency Initiative

***Okechukwu Aninye ILOBA PhD**, Associate Professor (Reader) (Petroleum Law) Ahmadu Bello University Zaria, Kaduna State.

⁸⁶⁰****Cynthia Ogochukwuka, JUWAH**, MPhil Ahmadu Bello University Zaria, Kaduna State, LL.M University of Aberdeen United Kingdom, BL, LLB(Hons) University of Benin, Edo State.

*****Rainat Fadeke ABIMBOLA**, LL.M Ahmadu Bello University Zaria, Kaduna State, BL, LLB (Hons) Olabisi Onabanjo University, Ago Iwoye, Ogun State.

and also domesticated to be known as the Nigeria Extractive Industries Transparency Initiative Act 2007 (NEITI). This Initiative was an International Standard which Nigeria joined in 2004.

KEYWORDS: Transparency, Accountability, Sustainability, Petroleum Industry Act, NEITI Act, Upstream

1.1 Introduction:

On 16th August, 2021, The Petroleum Industry Act (PIA) 2021 was enacted by the former President of Nigeria, Muhammad Buhari.⁸⁶¹ The Act is to provide legal, governance, regulating, and fiscal framework for the Nigerian Petroleum Industry. The legislation ensures for development of host communities, where companies operate, and other related matters that affect the petroleum industry in Nigeria.⁸⁶²

The Petroleum Industry Act 2021 established the Nigeria Upstream Petroleum Regulatory Commission (the Commission), which was formerly the Department of Petroleum Resources(DPR) to be the regulatory body responsible for overseeing the exploration and production of petroleum resources.⁸⁶³ The Commission plays a crucial role in the management and regulation of the upstream petroleum sector in Nigeria.⁸⁶⁴ It also ensures the offshore operations which are mainly in the upstream sector, are conducted efficiently, transparently, and in compliance with established regulations.⁸⁶⁵ The Commission shall also have the power to acquire, hold and dispose of property, sue and be sued in its name.⁸⁶⁶ It is body corporate with perpetual succession and a common seal,⁸⁶⁷ as well to be responsible for technical and commercial regulations for upstream operations.⁸⁶⁸

The upstream sector being a significant contribution to Nigeria's economy, requires regulatory oversight to maximize resource utilisation and attract foreign investments.⁸⁶⁹

⁸⁶¹ Nigerian Upstream petroleum Regulatory Commission. (2004). Retrieved from www.nuprc.gov.ng. Assessed on 8/3/2024

⁸⁶² *Chapter 1 Part 1 Section 2 Petroleum Industry Act 2021*

⁸⁶³ *Section 4 ibid*

⁸⁶⁴ *Section 4 ibid.*

⁸⁶⁵ *Section 6(b) ibid*

⁸⁶⁶ *Section 4(2) ibid*

⁸⁶⁷ *Section 4(1) ibid*

⁸⁶⁸ *Section 4(3) ibid*

⁸⁶⁹ *Section 6(c) Petroleum Industry Act 2021, Adeniran A.(2022) The impact of Regulatory bodies in Nigeria's Petroleum Sector, Journal of Energy Studies, 15(3) p. 123-145*

According to Okechukwu⁸⁷⁰ says that the Commission's role is crucial in shaping the operational landscape of Nigeria's oil and gas industry. The Commission's mandate includes ensuring compliance with all laws and regulations governing Upstream petroleum operations, promoting healthy, safe, effective and sustainable infrastructural development of Nigeria's petroleum resources.⁸⁷¹ Another of its objectives is to ensure stability and growth of the upstream sector. This is by promoting enabling environment for investment in the upstream petroleum operations.⁸⁷² The Commission determines, administers, ensures the implementation, maintenance of technical standards, codes, practices and specifications applicable to upstream operations pursuant to good international practices.⁸⁷³

According to Okon⁸⁷⁴ the establishment of the Nigeria Upstream Petroleum Regulatory Commission marks a significant shift in Nigeria's approach to managing its petroleum resources. Prior to the formation of Nigeria Upstream Petroleum Regulatory Commission, the regulatory oversight was smeared by inefficiencies and challenges in the sector.⁸⁷⁵ The Commission's objective as outlined in the Petroleum Industry Act 2021 includes fostering a conducive environment for investment in upstream petroleum resource, that are developed in a sustainable manner, protecting the environment and communities affected by these operations.⁸⁷⁶

This paper will mainly be on doctrinal method of research. This will be the use of primary sources which is merely legislation and sources from authors got from journals, based on the focus of this paper. It will also focus on regulatory functions of the Commission which are the commercial and technical functions. The paper will also address its competency under the Petroleum Industry Act 2021 to regulate for upstream petroleum activities in Nigeria. It will emphasis on the Commission's functions in regulating the upstream petroleum activities like decommissioning of offshore installations and how transparent it is in handling procedures within upstream operations like inspections and certification validation of vessels used for offshore activities.

⁸⁷⁰ Okechukwu E. (2023) Regulatory frameworks in the Nigerian Oil industry: An overview, *Nigerian Journal of Petroleum Studies* 10(1) p. 67- 89.

⁸⁷¹ Section 6(d) *op cit*.

⁸⁷² Section 6(h) *ibid*

⁸⁷³ Section 6(f) *ibid*

⁸⁷⁴ Okon U. (2022) *Reforming Nigeria's petroleum sector: the establishment of the NUPRC* , African Energy Review, 8(1) p.45-60

⁸⁷⁵ *Ibid*

⁸⁷⁶ Section 6(h) Petroleum Industry Act 2021, Adewumi T, (2023) *the role of the Nigeria Upstream Petroleum Regulatory Commission in the Oil and gas sector*, Energy Policy Journal, (12)2 p. 98-115

1.1 Statement of the problem.

Under the Petroleum Industry Act 2021, the Commission is a sole regulator that regulates upstream petroleum operations. One of the key functions of Nigeria Upstream Petroleum Regulatory Commission is to establish and enforce standards for upstream petroleum operations. This includes developing guidelines for exploration, drilling, production, and decommissioning activities. Decommissioning is a planned activity at the end of life of facilities that have regulatory license aimed at removing them from regulatory control and thus, releasing the site for other uses.⁸⁷⁷ This is normally done by dismantling part of the lifecycle of the infrastructure or facilities so that the site can be used for other purposes.⁸⁷⁸ It could be complete removal of unused infrastructure so that will not interfere with navigation, fishing rights, or conservation of living resources of sea.⁸⁷⁹ It can also include disposal or reuse of platform, structure of equipment, pipelines and wells.⁸⁸⁰

The Nigeria Upstream Petroleum Regulatory Commission is tasked with one of its important technical functions which is to monitoring compliance with these standards, conducting investigations, and imposing penalties for non-compliance.⁸⁸¹ Centralizing these regulatory functions, the Commission aims to enhance the efficiency and effectiveness of Nigeria's upstream sector.⁸⁸² The Commission also has the commercial functions to approve or review any development plan. This is done in order to award or suspended licences.⁸⁸³

However, the Commission faces some challenges between making policy, development and enforcement of it functions. This has been linked to inadequate funding and manpower within the Commission. Also, the Commission in carrying out its commercial functions faces delays in project approvals as a result of so much interference by government which slows down production, thereby, limiting revenue generation. Also, the Commission is faced with problems of not adequately financing the funds which leads to lack of manpower and discrepancy of keeping accounts. This also leads to creating technical problem, lack of transparency, accountability and sustainability within the upstream sector.

⁸⁷⁷ Ole C., Okpara I.(2023), Decommissioning and Petroleum Industry Act 2021, *Association of Environmental Lawyers of Nigeria. Journal of environment and natural resources law* ISSN 15976637 Vol. 11 Issue 1 p. 102.

⁸⁷⁸ Ibid

⁸⁷⁹ Article 5 paragraph 5 Geneva Convention. (1958)

⁸⁸⁰ The Convention of the continental shelf (Geneva Convention) 1958.

⁸⁸¹ Section 7(d) Petroleum Industry Act 2021

⁸⁸² Section 6(e)I ibid

⁸⁸³ Section 8(a) ibid

The Transparency international, defines transparency as “shedding light on rules, plans, processes and actions. It is knowing why, how, what, and how much? When transparency is woven into fabric of public life, corruption, waste and mismanagement are less likely to happen, and governments are held accountable.”⁸⁸⁴ This is to also say from this definition that could also be “transparency in governance or business” that allows openness and clarity with which organisation operate, making information accessible to stakeholders and the public.

According to Bovens, defines accountability as a relationship between an actor and a forum in which the actor has an obligation to explain to explain and to justify his or her conduct, the forum can pose questions, pass judgement and the actor may face consequences.⁸⁸⁵ Accountability can be defined as holding individuals and organizations responsible or liable for their actions, particularly regarding their obligations to stakeholders or host communities where they operate.

According to the World Commission on environment and development, Sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸⁸⁶ Therefore, Sustainable development can be defined as a comprehensive concept that aims to balance everything as regards to economic, environmental conservation, and ensures social equity.

In line with the above statement of problem, the paper addresses the following:

- a) Whether the Commission is competent enough with its functions to regulate upstream petroleum activities under Petroleum Industry Act 2021.
- b) Whether the Commission is adequate enough with its functions to solve deterioration of infrastructure used for upstream operations.
- c) Whether the Commission ensures enforcement procedures within upstream activities are transparent enough for upstream petroleum operations under the Petroleum Industry Act 2021.

⁸⁸⁴ Transparency International (2023), *What is transparency?* Retrieved from <https://www.transparency.org/en/what-is-transparency>. Assessed on 7 march 2024

⁸⁸⁵ Bovens M. (2007) , Analysing and assessing accountability: A conceptual framework, *European Law Journal*, 13(4) 447-468, doi:10.1111/J.1468-0386.2007.00378x/

⁸⁸⁶ World Commission on Environment and. Development (1987), *our common future*, Oxford University Press.

This paper aim to examine the functions and regulations of the Nigerian upstream petroleum regulatory commission and under Petroleum Industry Act (PIA) 2021. With the following objectives:

- a) To determine if the Commission can ensure proper regulation of upstream petroleum operations.
- b) To examine Commission responsibility in promoting transparency and accountability for a sustainable upstream infrastructure.
- c) To check whether the proper enforcement mechanisms are in place within the upstream petroleum operations.

1.2 Functions of the Nigeria Upstream Petroleum Regulatory Commission for Upstream Petroleum activities in Nigeria.

The Nigeria Upstream Petroleum Regulatory Commission is expected to play regulatory roles of both commercial and technical, taking over from the now defunct Department of Petroleum Resources.⁸⁸⁷ Section 7 of the Act involves the technical functions which includes regulatory oversight requiring licenses, leases, and permit holders to finish and publish specified information relating to upstream petroleum operations.⁸⁸⁸ Another key technical regulatory function is carrying out enquired tests, audits, of investigations and take steps to monitor the activities of licenses, leases, or permit holders.⁸⁸⁹ Also the Commission has the technical function to supervise, ensure accurate calibration and certification of equipment for metering upstream operations pursuant to applicable laws.⁸⁹⁰

The Commission issue permits and other authorisations related with upstream license or lease. This could include design, construction, and operation of facilities for upstream petroleum operations.⁸⁹¹ The Commission approves field development plans for upstream petroleum operations as well as monitor execution.⁸⁹² The Commission establishes code of conduct for licenses, leases or permit holders in in relations to upstream petroleum operations.⁸⁹³ It monitors the financial viability of licenses, leases or permit holders with respect

⁸⁸⁷ Section 4(3) *ibid*

⁸⁸⁸ Section 7(k) *ibid*

⁸⁸⁹ Section 7(g) *ibid*

⁸⁹⁰ Section 7(l) *ibid*

⁸⁹¹ Section 7(o) *ibid*

⁸⁹² Section 7(v) *ibid*

⁸⁹³ Section 7(x) *ibid*

to upstream petroleum operations.⁸⁹⁴ The Commission also performs technical evaluation and assessments regarding submissions made to it, by licensee, leasee, or permit holders involved upstream petroleum operations.⁸⁹⁵ The Commission establishes special laboratories to provide data storages, testing quality assurance and certifications for upstream petroleum operations.⁸⁹⁶

Although, the Commission is responsible for licensing and monitoring, its effectiveness has been questioned due to issues such as bureaucratic delays and insufficient transparency.⁸⁹⁷ The process of obtaining licenses can be disrupted by long delays or time frames that could discourage potential investors. This also slows down project planning or execution. The governing board of Commission has members appointed by the President subject to confirmation by the senate except for appointment of ex-officio members. These are members that are expertise in particular field and necessary for the Commission.⁸⁹⁸ The Commission's member known as a Commissioner, shall have the term of five years and can be reappointment for additional five years.⁸⁹⁹ A person appointed to the Commission must have 15 years post qualification in petroleum or other relevant sector of the economy and will hold appointment of five years term. The person can be appointed for a further of five years.⁹⁰⁰ The governing board of Commission is responsible for the policy and general administration of the Commission.⁹⁰¹ Appointment as members into the board can result to allegations of corruption and favouritism because of the way members are appointed or reappointed.⁹⁰²

The Nigeria Upstream Petroleum Regulatory Commission has its technical functions to regulate and formulate policies in related to the upstream petroleum operations.⁹⁰³ This includes undertaking evaluation of national reserves and developing policies for prudent management practices.⁹⁰⁴ This is to promote technological innovation⁹⁰⁵ and sustainable resource management by ensuring data storage, testing for quality assurance during

⁸⁹⁴ Section 7(y) *ibid*

⁸⁹⁵ Section 7(q) *ibid*

⁸⁹⁶ Section 7(p) *ibid*

⁸⁹⁷ Akinpelu Y. (2022) Challenges in the implementation of Nigeria's petroleum regulatory framework, *Nigerian Journal of Petroleum studies*, 29(1) P. 45-60

⁸⁹⁸ Section 11(3) *op cit*.

⁸⁹⁹ Section 11(5) *ibid*

⁹⁰⁰ Section 11(4) *ibid*

⁹⁰¹ Section 11(3) *ibid*

⁹⁰² Onyekachi E. (2021) *Transparency issues in the Nigerian Upstream petroleum regulatory framework*, *Journal of African governance* 14(3) p. 233-250.

⁹⁰³ Section 7(i) *op.cit*

⁹⁰⁴ *Ibid*

⁹⁰⁵ Section 7(p) *ibid*

investigation⁹⁰⁶ or giving technical evaluation relating to upstream petroleum operations.⁹⁰⁷ The Commission reviews and approves field development plan relating to the upstream petroleum operations before execution of any offshore activities.⁹⁰⁸ However, the Commission faces notable gap between policy development and enforcement. This is due to inadequate funding and manpower within the Commission.⁹⁰⁹ The Commission fund managed by the Commission, is used for all its expenditure.⁹¹⁰ The sources of the Commission fund is from money appropriated by the National Assembly for the Commission⁹¹¹ Also the source is got from fees charged by the Commission for services rendered. ⁹¹² Also cost of collection⁹¹³ and income derived from grants, gifts, aids, and royalties.⁹¹⁴ The Commission fund shall be applied to meet approved budgetary obligation of the Commission.⁹¹⁵ The fund is used to meet administrative and operational costs of the Commission.⁹¹⁶ Another source is to pay salaries, wages, fees or other allowances and other retirement benefits payable for employees of the Commission.⁹¹⁷ The Commission must collaborate with government agencies, industry stakeholders, and international organizations to develop policy that will align with global standards and best practices.⁹¹⁸

However, the Commission is faced with problems of not adequately financing the funds. This inadequacy of the fund will definitely bring about lack of manpower and discrepancy of keeping accounts.⁹¹⁹ The enforcement mechanisms used by the Commission's technical functions includes inspection, audits, are essential for maintaining industry standards. This means the Commission is expected to carry out regular inspection, audit and compliance checks.⁹²⁰ Violations of these regulatory requirements can result to sanctions, fines and in severe cases revocation of licenses.⁹²¹ This is to maintain a high standard to ensure

⁹⁰⁶ Ibid

⁹⁰⁷ Section 7(q) *ibid*

⁹⁰⁸ Section 7(v) *ibid*

⁹⁰⁹ Ekpo I. (2023) Resource constraints and enforcement challenges in Nigeria's petroleum sector, *African Energy Review*, 11(2) , p. 78- 93

⁹¹⁰ Section 24(2) *op.cit*

⁹¹¹ Section 24(2) (a) *ibid*

⁹¹² Section 24(2) (b) *ibid*

⁹¹³ Section 24(2)(c) *ibid*

⁹¹⁴ Section 24(2)(d) *ibid*

⁹¹⁵ Section 24(3) (a) *ibid*

⁹¹⁶ Section 24(3)(b) *ibid*

⁹¹⁷ Section 24(3) (c) *ibid*

⁹¹⁸ Section 7(a), (b) , (I), (q) *ibid*

⁹¹⁹ Ekpo I. (2023) Resource constraints and enforcement challenges in Nigeria's petroleum sector, *African Energy Review*, 11(2) , p. 78- 93.

⁹²⁰ Section 7(g) *op cit*.

⁹²¹ Section 26(3) *ibid*

health and environmental standards in the upstream petroleum sector. However, the Commission will face operational and logistical challenges that would hamper effective enforcement and cause limited resources that could affect finances and human capital. There will be lack of funding that could reduce consistency, and not allow for regular inspection of upstream petroleum equipment.⁹²²

The commercial functions of the Commission relates to the influence on market operations, economic growth and competitiveness within Nigeria's upstream petroleum operations.⁹²³ In relations to market operations, the Commission plays a crucial role in shaping dynamics of the upstream petroleum market. This is done by regulating the entry and exit of operators.⁹²⁴ It also oversees pricing regulations for petroleum products, that reflects the market situations while safeguarding the interests of producers and consumers.⁹²⁵ The Commission is faced with unpredictable regulatory environment with constant changes in policies and uncertainty for investors.⁹²⁶ In respect of economy growth, the Commission's commercial activities are geared towards maximizing the economy benefits of Nigeria's petroleum resources.⁹²⁷ The Commission implement policies that attracts investment and boost production levels and enhance revenue generation.⁹²⁸

This efforts of the Commission contribute significantly to national economy, and providing a substantial source of income and employment opportunities.⁹²⁹ However, the Commission is faced with delays in project approvals that could slow down production and limit revenue generation.⁹³⁰ The Commission's commercial function also includes maintaining the competitiveness of Nigeria's upstream sector.⁹³¹ The Commission also has a commercial function to review and approve field development plan for the upstream petroleum operations. This is to create an enabling environment and bring about

⁹²² Akinpelu Y. (2022) challenges in the implementation of Nigeria's petroleum regulatory framework: *Nigerian Journal of Petroleum studies*, 29(1) p.45-60

⁹²³ Section 8 op cit.

⁹²⁴ Section 8(d) ibid

⁹²⁵ Section 8(c) ibid, Adedoyin A. (2021) regulatory frameworks in Nigerian petroleum sector: *Journal of energy law* 45 (2), p.123-140

⁹²⁶ Akinpelu Y. (2022) challenges in the implementation of Nigeria's petroleum regulatory frame work, *Nigeria journal of petroleum studies*, 29 (1) p.45-60

⁹²⁷ Section 8 (c), (d) Petroleum Industry Act 2021

⁹²⁸ Section 8 (c), (d) ibid

⁹²⁹ Nwokeji G. U. (2021) The political economy of Nigeria's petroleum sector, *energy policy journal*, 32(4), p.567-580

⁹³⁰ Ibid

⁹³¹ Section 8 (a) op cit

investment.⁹³² The Commission is faced with complex regulatory landscape that could hinder foreign investment and cripple local industry growth.⁹³³ This is in regards allocating petroleum production quotas for the purpose of curtailing exports of petroleum and issues arising during integrated upstream and midstream operations.⁹³⁴

One of the upstream petroleum operations that the Commission exercises its functions is on decommissioning of offshore installations to enable sustainable development. Decommissioning is the process of partial removal or total removal of disused offshore installations from the seabird of the ocean where drilling occurred.⁹³⁵ The Petroleum industry Act 2021 makes provision for maintenance and management of the decommissioning and abandonment fund. The provision provides for each licensee, leasee, or permit holder to set up the fund.⁹³⁶ It will be held by a financial institution but affiliated to the Commission.⁹³⁷ The fund will be accessible to the Commission under an escrow agreement.⁹³⁸ The fund will be exclusive for paying the decommissioning and abandonment costs.⁹³⁹ Where the licensee or leasee fails in discharging their obligations, the fund will be accessible to the Commission and the decommissioning will be carried out by the third party.⁹⁴⁰ The licensee or leasee is required to submit a decommissioning and abandonment plan.⁹⁴¹

The decommissioning and abandonment plan will indicate the yearly amount that will be of reasonable estimate. This is applicable for decommissioning and abandonment costs to be projected on nominal basis.⁹⁴² The reasonable estimate shall be calculated by the Commission and renewable every ten years after the first submission.⁹⁴³ However, the Commission is allowed the technical and commercial function for reviewing and approving the field development plan, but it could find difficult to review and approve, along with the Commission indicating adequate estimate of costs especially on decommissioning. Under the

⁹³² Section 8 (a) *ibid*

⁹³³ Section 8 (c), (d) *ibid*

⁹³⁴ *Ibid*

⁹³⁵ Ayode M. A. (2011) Environmental Risk and Decommissioning of Offshore oil Platforms in Nigeria, Nigerian Institute of Advanced Legal Studies, *Journal of Environmental Law*, Vol 1 p.22

⁹³⁶ Section 233 Petroleum Industry Act 2021, Rule 19 Nigeria Upstream Petroleum Decommissioning and Abandonment 2023

⁹³⁷ Section 233 (2) *ibid*.

⁹³⁸ *Ibid*

⁹³⁹ *Ibid*

⁹⁴⁰ Section 233 (5) *Ibid*

⁹⁴¹ *Ibid*, Rule 3 Nigeria Upstream Petroleum Decommissioning and Abandonment Regulations 2023

⁹⁴² *Ibid*

⁹⁴³ Section 233 (7) *ibid*, Rule 8 Nigeria Upstream Petroleum Decommissioning and Abandonment Regulations 2023

Petroleum Industry Act 2021, does not specify how the Commission will have access to the fund and how a third party will take over the responsibility of discharging decommissioning obligations, when the leasee or licensee fails to do so.

There are technical approaches to decommissioning which could be dismantling of a disused offshore rig which could be costly or difficult than the original installation process. In Africa, there are over 480 installations and decommissioning cost is estimated at over \$40 billion dollars to remove the structure.⁹⁴⁴ In Nigeria, there are over 170 structures with cost implications. One of such installations that needs removal is the Floating Production Storage, and Offloading (FPSO). These are custom built or converted vessels that are typically ship shaped and stored crude oil on tanks. Crude oil is extracted from production wells and transported to the FPSO. ⁹⁴⁵

Over time, these FPSO are not well maintained or have been overlooked for inspection. Recent incidences of the Trinity Spirit FPSO that caught fire along the Nigerian sea border, left some of its crew injured and dead,⁹⁴⁶ and the capsizing of Majestic during drilling activities near Ovhor, Delta State, is evident of a need to remove aged Installations for sustainability within offshore petroleum operations.⁹⁴⁷ Options to carry out this decommissioning are based on complete removal, which is to have the whole structure removed, partial removal, which entails removal of the upper portion of the structure for safe navigation. Another option brought up is toppling. This is to sever its legs above the mud line after which, it falls over the seabed. It is suggested that the installation can be left in place at the end of production or be partially removed.⁹⁴⁸ The platforms or installations can be refurbished and relocated to another oil and gas production facility.⁹⁴⁹ If disposal is to be carried out, it is important to know what is best,

⁹⁴⁴ Adewale O., Ajomo M.A., Ivbijara A.F. (1994) *Environmental Impact Assessment/ Environmental Audit Report in Nigeria*, Nigerian Institute of Legal Studies Conference series.p.151.

⁹⁴⁵ Ayoade M. A. (2011) Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria. Nigerian Institute of Advanced Legal Studies, *Journal of Environmental Law*, vol 1 p.23

⁹⁴⁶ Reed E.D. (2022) *Concerns mount on trinity Spirit Oil leak, missing workers* , retrieved from <https://www.energy.voice.com> accessed on 7th of March 2024,

⁹⁴⁷ Payne Julia, Owolabi Tife. (2022) Exploded Nigerian Oil Storage vessel was old and badly maintained” sources retrieved from www.reuters.com accessed on 7th March 2024, The Maritime Executive, One killed in Rig capsizing in Nigeria retrieved from www.maritime.executive.com accessed from 7th March 2024.

⁹⁴⁸ Ayoade M. A. (2011) Op.Cit. p.25

⁹⁴⁹ Ibid, p.25

whether to deep sea dispose, or whether to do a shallow disposal or simply recover the installation.⁹⁵⁰

Another option is the regulatory approach to sustainable infrastructure of offshore petroleum operations. This is where the government uses regulation as an interventional tool to detail out the steps in every aspect of risk governance in the petroleum sector.⁹⁵¹ It is a good foundation for risk governance regulation but it has in most cases, been proven to be inadequate.⁹⁵² This is because prescriptive rules do not give room for innovative responses. For instance, a factor that escalated the severity of the damages occasioned by the Piper Alpha accident in the United Kingdom is the slow compliance with the emergence response. Under the Petroleum Act 2021, the incidences on FPSO Trinity and Majestic are because of the slow response to compliance and unwillingness of oil companies to comply to these regulatory prescriptions. The oil companies are unwilling to comply towards checks for clearance, maintenance and even inspection of these installations. This brings about the deterioration of the offshore installations if not checked or monitored. The Nigeria Petroleum Industry Act 2021, on its part may end up not solving or being able to regulate for sustainable offshore installations if not checked.

1.3 Challenges faced by the Nigeria Upstream Petroleum Regulatory Commission as an Institution regulating upstream petroleum activities.

The Commission is faced with challenges of operating as an investigative unit. It could face inability to properly investigate, monitor or give clearance or certification to vessels or equipment used during upstream petroleum operations. This is due to some companies operating within the sector, with unwillingness to disclose vital information or to comply with regulations. This brings about deterioration of such vessels or equipment. For instance, the Trinity Spirit FPSO's fire incident and capsizing of Majestic was due to negligence of its owners to allow proper investigation or clearance checks by the Commission.⁹⁵³

⁹⁵⁰ Ibid p. 26

⁹⁵¹ Glickman R.L.(2010) *Regulatory Blowout: How Failures Made the Bp Disaster Possible and how the system can be fixed to avoid a recurrence*, Gwu law faculty Publications and other works, Paper 608, retrieved from http://scholarship.law.gwu.edu/facultyoflaw_publications/698 accessed on 7th March 2024.

⁹⁵² Paterson J. (2011) *Health and Safety at Work Offshore in Uk Oil and Gas: Current Practice and Emerging trends*, Second Edition, Dundee Publishing Press p. 187.

⁹⁵³ Section 7(g), Section 7 (i), Section 27 Petroleum Industry Act 2021, Reed E.D.(2022), *Concerns mount on trinity Spirit Oil leak, missing workers*, retrieved from <https://www.energyvoice.com> accessed on 7th of March 2024.

The Commission could face challenges on revenue generation. This is because of likely lack of transparency and accountability in procedures while keeping account within upstream petroleum operations.⁹⁵⁴ For instance, in issuing production quotas for curtailing exports of Petroleum in conjunction with NNPC Limited could create issues with the Commission when it comes to accountability. This is especially with NNPC Limited in most times, of its inability to give accounts of remittance.

In 2023, President Bola Tinubu set up an inter-agency Committee to resolve the lingering conflict between NNPC Limited and the Federation Account (FAAC).⁹⁵⁵ The Committee was set up to investigate NNPC Limited's failure to remit funds into the Federation Account.⁹⁵⁶ The NNPC Limited was accused of the inability to pay 2.1 trillion naira into the Federation Account.⁹⁵⁷ NNPC Limited claimed that Federal Government owed it N4.2 trillion in subsidy payment, power and other sundry charges.⁹⁵⁸ Members of the interagency Committee also known as the debt reconciliation Committee included the Nigeria Upstream Petroleum Regulatory Commission, the Federal Inland Revenue Service, Office of Accountant general of the Federation and the FAAC post-mortem subcommittee.⁹⁵⁹ The Committee was tasked to resolve the concerns over the failure of remittance and debts owed by the Federal Government.⁹⁶⁰ This could prove as conflict of interest especially when there is non-disclosure of information among the members of the Committee, and this hinders discharging functions especially on the part of the Commission.

The Commission could face challenges on regulatory and bureaucratic lapses especially on jurisdiction. It has the commercial and technical functions to review and approve field development plans for upstream petroleum operations as well as monitor its execution.⁹⁶¹ This is unlike where the Commission is in charge of integrated operations where there is joint use of utility used exclusively for the upstream and midstream operations.⁹⁶² This could create conflict of interest especially in collecting revenue, keeping accounts, and cause discrepancy as the

⁹⁵⁴ Section 7 (w), Section 8 (c) Petroleum Industry Act, 2021

⁹⁵⁵ Aduloju.B. (2023 June 22) *Sources; Tinubu sets up Committee to resolve NNPC, FAAC row over 2.1 trillion naira*. Petrobarometer, Cable Newspaper Limited. <https://www.thecable.ng/sources-tinubu-sets-up-committee-to-resolve-nnp-rmaf-row-over-n2-1trn-faac-remittances/>

⁹⁵⁶ Ibid

⁹⁵⁷ Ibid

⁹⁵⁸ Ibid

⁹⁵⁹ Ibid

⁹⁶⁰ Ibid

⁹⁶¹ Section 7 (v), Section 8 (a) Petroleum Industry Act 2021

⁹⁶² Section 8 (d) ibid

Commission is a sole regulator of the upstream sector and cannot keep account of activities in the midstream sector.⁹⁶³ This midstream sector involves processing, transportation, storage and logistics while the upstream sector is mainly on oil exploration and production. Based on that, the Commission will be faced with the difficulty of keeping accounts and generating revenue especially within the midstream sector where it does not have jurisdiction.⁹⁶⁴

The Commission has no clear enforcement mechanisms. The Commission is also expected to maintain decommissioning and abandonment fund and the Commission fund.⁹⁶⁵ For example, the Commission is expected to remit money it receives from royalty and rents in to the Federation Account.⁹⁶⁶ The Act also states that any excess remaining in fund is to be transferred in to the consolidated revenue fund. ⁹⁶⁷ of any excess remaining in the fund to be transferred to the consolidated revenue fund. The Act does not make provisions or guidelines on how the Commission is to enforce these provisions stated, without any irregularities.⁹⁶⁸ In terms of decommissioning and abandonment fund, the Commission has no clear enforcement strategy on how to calculate the adequate estimate of amount to be paid as contribution by the parties in to the fund.⁹⁶⁹

Another Commission's commercial function is that it develops cost studies and bench mark for evaluation within the upstream sector.⁹⁷⁰ This is regarding any specific issue within the petroleum industry. It could be the field size, reservoir depth, location of operations, technology applied, production methods, and petroleum quality. It will require advanced technology to collect data for cost studies and evaluation benchmarks. Skilled personnels in data analysis are required to be able to ensure adequate studies and evaluations. This is because the Act merely stipulated the decommissioning costs to be of nominal value at reasonable estimate but does not specify the exact numeric value to collect or calculate to determine the decommissioning costs for the financial obligations on parties to adequately contribute towards the offshore activity (i.e. decommissioning). This would make it difficult for the Commission to

⁹⁶³ Ovieme.I.E.(2023) *The roles of the Nigerian Upstream Petroleum Regulatory Commission under the Petroleum Industry Act*. Achievers University Law Journal, vol 3 issue p. 115.

⁹⁶⁴ Ibid

⁹⁶⁵ Section 233, Section 24 Petroleum Industry Act 2021.

⁹⁶⁶ Section 24 (4) Petroleum Industry Act 2021.

⁹⁶⁷Section 24 (5) Ibid

⁹⁶⁸ Ibid

⁹⁶⁹ Section 233 Petroleum Industry Act 2021

⁹⁷⁰ Section 8(b) Petroleum Industry Act 2021

give a proper estimate as to what parties are to place within the decommissioning and abandonment fund.⁹⁷¹

There would therefore, be lack of accountability and transparency with the Commission especially as regards to long time lines in application procedures when granting of licenses, permits and leases and this could cause delays in executing projects like decommissioning of offshore installations.⁹⁷²

1.4 The way forward

To correct this, there is need for the Commission to adopt the International Standard known as the Extractive Industries Transparency Initiative and also domesticated to be known as the Nigeria Extractive Industries Transparency Initiative (NEITI). The Act introduced the National Stakeholders Workshop group, comprising of representatives of civil societies, labour union and each geopolitical zones, that could make suggestions, formulate policies for Extractive Industries like the oil and gas Industry to open reporting, auditing and revenue collection.⁹⁷³

This Initiative was an International Standard which the Country joined in 2004.⁹⁷⁴ It only established the International Secretariat in 2006,⁹⁷⁵ and the Legislation, domesticated in Nigeria as *Nigeria Extractive Industries Transparency Initiative 2007*(NEITI) which became a Legislation to ensure transparency and accountability in the payments made by the Extractive Industry like Companies in the Oil and Gas Sector.⁹⁷⁶ The Act will ensure good reporting and disclosure of Financial Statements reports or of Principal Officers in the Sector.⁹⁷⁷ The Act is also aimed to set up ensuring transparency, accountability⁹⁷⁸ and management of investment.⁹⁷⁹

⁹⁷¹ Akenbor C., Obutor T. I. (2022) *Decommissioning costs in Oil and Gas Operations in Nigeria: theoretical reflection*, *Nigerian Academy of Management Journal* vol 17, No 2

⁹⁷² Rule 14 (2) Nigeria Upstream Petroleum Decommissioning and Abandonment Regulations 2023.

⁹⁷³ Section 5 (1) NEITI Act 2007

⁹⁷⁴ Kerem Oge.(2016), *Transparent Autocracies: The Extractive Industries Transparency Initiative (EITI) and Civil society in Authoritarian States*. Extractive Industry Transparency Initiative Society p. 9

⁹⁷⁵ *Ibid*

⁹⁷⁶ Akenbor C., Obutor T. I.(2022) *Decommissioning costs in Oil and Gas Operations in Nigeria: theoretical reflection*, *Nigerian Academy of Management Journal* vol 17, No 2

⁹⁷⁷ Section 3(a) Nigeria Extractive Industries Transparency Initiative Act 2007

⁹⁷⁸ Section 1(3) *ibid*

⁹⁷⁹ Section 3 *ibid*

The NEITI became an autonomous self-accounting body that reports to the President and the National Assembly.⁹⁸⁰ It is a body corporate with perpetual succession and a common seal.⁹⁸¹ It can sue and be sued in its corporate name.⁹⁸² It can acquire, hold and dispose movable and immovable properties.⁹⁸³ Among the primary objectives of the NEITI is to ensure transparency in payments made by all extractive industry Companies to the Federal Government and any other statutory recipients.⁹⁸⁴ The NEITI is to monitor and ensure accountability in revenue receipts to Federal Government from Extractive Industry Companies.⁹⁸⁵ The body also eliminates all forms of corrupt practices in the determination of payments, receipts, and posting of revenue accruing to the Federal Government from the Extractive Industry Companies.⁹⁸⁶ The NEITI ensures transparency and accountability by government in the application of resources from payments received from Extractive Industry Companies.⁹⁸⁷ The body is to conform to the principles of the International Standard known as the Extractive Industries Transparency Initiative.⁹⁸⁸ One of its main functions is to develop a framework for transparency and accountability in the reporting and disclosure by all the Extractive Industry Companies, like the Oil and Gas Companies, of revenue due to or to be paid to Federal Government.⁹⁸⁹ The body ensures that reports of records and information are published especially on matters of revenue received by the Federal Government from the Extractive Industry Companies.⁹⁹⁰

With the establishment of the National Stakeholders Workshop Group if enforced, serves as a monitoring unit to ensure that as a governing body of the NEITI, it would formulate policies, programmes and strategies for the effective implementation of the NEITI, and therefore brings about the much needed accountability and transparency within the Petroleum Upstream Sector⁹⁹¹ The body gives penalty of not less than Thirty Million Naira for rendering false statements or if there is underpayment or non-payment of revenue by the Extractive

⁹⁸⁰ Section 1(2)(a) *ibid*

⁹⁸¹ Section 1(2)(b) *ibid*

⁹⁸² Section 1(2)(c)(i) *ibid*

⁹⁸³ Section 1(2)(c)(ii) *ibid*

⁹⁸⁴ Section 2(a) *ibid*

⁹⁸⁵ Section 2(b) *ibid*

⁹⁸⁶ Section 2(c) *ibid*

⁹⁸⁷ Section 2(d) *ibid*

⁹⁸⁸ Section 2(e) *ibid*

⁹⁸⁹ Section 3(a) *ibid*

⁹⁹⁰ Section 3(h) *ibid*

⁹⁹¹ Section 5(2) *ibid*

Industry Company to Federal Government.⁹⁹² A director⁹⁹³ or government official⁹⁹⁴ that renders false statement of account or fails to give account resulting to underpayment or non-payment of revenue meant to be paid to Federal Government would have committed an offence and is liable to a conviction of not less than two years imprisonment or fine of five million naira.

1.5 Conclusion:

1.5.1 Summary:

The dissolving of Department of Petroleum Resources (DPR) brought about the establishment of the Nigeria Upstream Petroleum Regulatory Commission (Commission). The regulatory body is meant to reduce the burden of the DPR especially in regulating the upstream sector. However, the Commission is bound to fail if it is not allowed to exercise its functions with stricter enforcement mechanisms. Proper recommendations from the extractive industries transparency initiative through national stakeholders workshop group should be given to the Commission on steps to enforce for proper accountability and transparency to foster sustainable development in offshore infrastructure. This is in regards upstream petroleum operations in Nigeria.

1.5.2 Research Findings:

The research findings are as follows:

- a) The Commission is not adequate enough in properly carrying out investigations, monitoring, and enquiries that leads to neglect or poor inspections of offshore installations.
- b) The Commission with its functions could face conflict of interest challenges over proper remittance in the means of revenue generation and ensuring accountability.

⁹⁹² Section 16(3) *ibid*

⁹⁹³ Section 16(5) *ibid*

⁹⁹⁴ Section 16(6) *ibid*

c) There are inadequate enforcement mechanisms to assist the Commission regarding its regulations and the provisions of the Petroleum Industry Act 2021. This is especially in regards ensuring management of the Commission, Frontier, decommissioning and abandonment funds under the Act. There is no stricter implementation to enable the Commission to arrest or sanction defaulting Parties within the Upstream Sector.

1.5.3. Recommendations

Having discussed the Nigerian Upstream Petroleum Regulatory Commission, the following are recommendations for its better effectiveness :

(a) The Commission can be adequate enough but it needs to ensure that it is not having conflict of interest with other agencies so it does not contravene the Provision of that Act. The Commission based on the Act plays a more investigative role than being a regulator as stipulated under section 27 of the Act. There is need to allow the Commission to play the investigative role while there is need for an enforcement task force to be carved within the Act to have clearer ways to carry out sanctions on defaulting Parties within the Upstream sector. This conforms with the international standard to sustainability within the Upstream sector.

(b) There is need for the Commission with its functions to exercise strict transparency to curb deterioration within the upstream sector. This can be done by introducing international standard which was domesticated as legislation known as the Nigerian Industries Transparency Initiative Act 2007(NEITI) allows invitation for National Stakeholders Workshop Group like civil societies, public and private organizations, to participate in checkmating the appointment process of the governing board of the Commission, to prevent abuse, and make proper recommendations on having better accountability and transparency, within the Commission and ways to curb deterioration of offshore installations within the upstream sector.

(c) The Commission should have competence to create better enforcement mechanisms. This can be done by implementation of the International Standard known as the Extractive Transparency Initiative as domesticated as a legislation known as the Nigerian Extractive Industries Transparency Act 2007 (NEITI). The National Stakeholders Workshop Group, under the Act could formulate guidelines and checkpoints to ensuring sustainable infrastructure within the upstream sector and reduce deterioration. For instance, introducing and enforcing the necessary penalties on defaulting Companies or Officers within the upstream sector.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

PUBLIC PARTICIPATION AND COMMUNITY RIGHTS TO SHARING OF MINERAL
RESOURCE REVENUE IN NIGERIA

Aisha Ahmed Rufa'i

Faculty of Law, Bayero University Kano

aarufai.ilj@buk.edu.ng, aysharufai@yahoo.com , +2348037052845

Abstract

This article examines the crucial relationship between community rights and public participation in the context of sharing mineral resource revenue in Nigeria. It analyses the legal and policy frameworks that govern the management of mineral resources and examines how well they are utilized to guarantee that host communities receive an equitable share of the revenue. The paper emphasizes the necessity of strengthening community engagement procedures and legal frameworks in order to promote accountability, transparency and sustainable development. The paper aims to contribute to the discourse on resource management and social justice in Nigeria by promoting a more inclusive approach to mineral resource revenue sharing and providing policy recommendations to promote equitable development and community empowerment. By combining the use of policy analysis and reviewing secondary data sources, the paper identifies the primary challenges to public involvement and equitable distribution of mineral revenue. The findings indicate that even with a multitude of policies designed to promote inclusive governance, there are significant disparities in practice that result in host communities to be marginalised. The paper recommends that, for local communities to meaningfully participate in decision-making processes regarding revenue derived from mineral resources, there is the need for providing them with resources and education on how they can actively participate and arrive at decisions that will be of benefit to them.

Keywords: community rights, public participation, mineral resource revenue.

Introduction

Mineral resources are in abundance in developing and developed countries. These resources have contributed immensely to the national wealth of many nations, whether developing or developed. Mining of these mineral resources has gone on for thousands of years, played a key role in the development of humanity and is a major asset to the economy of many countries (Azcue, 1999). It is an economic activity that contributes to the development of nations that are endowed with mineral resources, of which Nigeria is not an exception.

Nigeria, which has an abundance of mineral resources, experiences challenges in the equitable distribution of revenue derived from these resources. Despite the nation's abundance of mineral resources, local communities, particularly those residing in areas where these resources are found, agitate over inequitable distribution of revenue and non-participation in decisions that directly affect them.

The notion of public participation in mineral resource governance is becoming more widely acknowledged as a crucial component in guaranteeing transparency, accountability and equitable distribution of revenue. An opportunity should be given to impacted communities so that they can express their concerns, have an impact on decision-making and have their rights protected. In order to address long-standing grievances and promote inclusive development, Nigeria must prioritize increasing public participation and guaranteeing community rights to mineral resource revenue.

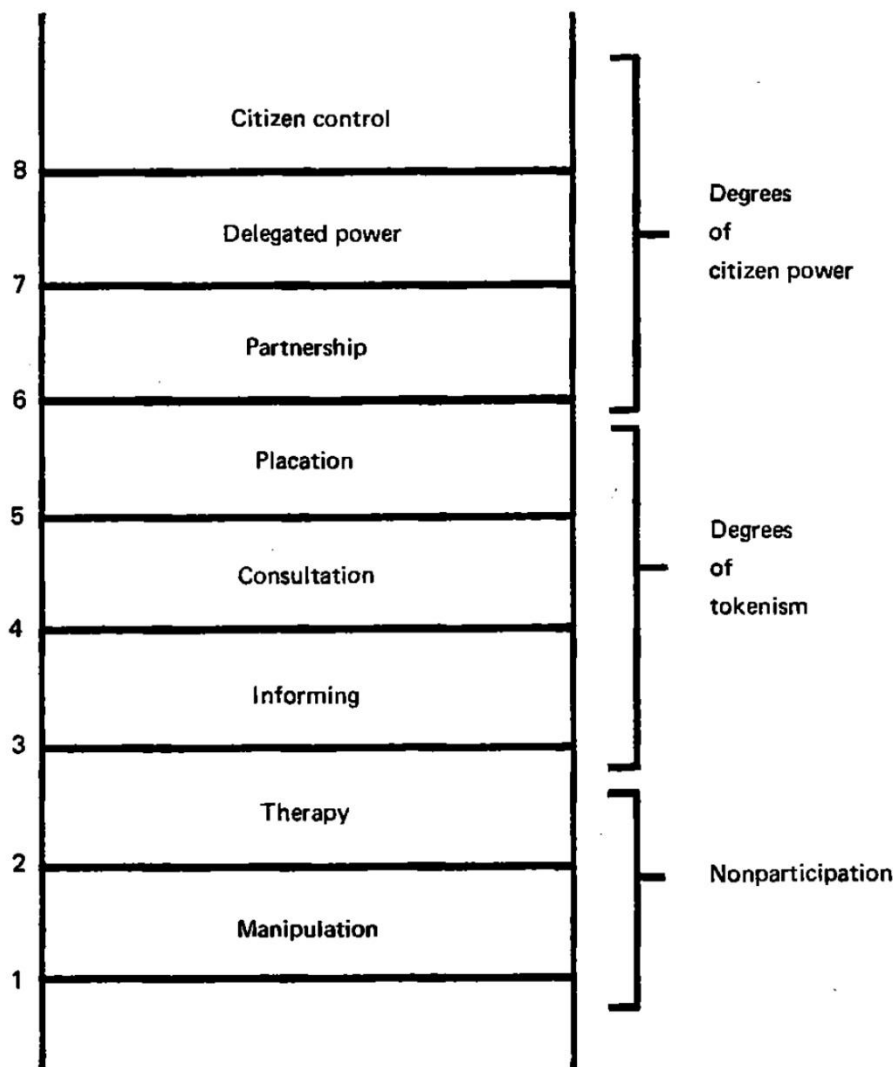
The objective of this paper is to examine the dynamics of public participation in Nigeria's governance of its mineral resources and the means by which communities can claim their rightful share of mineral resource revenue. It offers insights into how Nigeria can use public participation to promote more equitable and sustainable management of its mineral resources, thereby promoting stability and prosperity within the country.

The paper adopts a doctrinal methodology. This involves an organized analysis of statutes, legal literature and legal principles in order to fully understand the legal framework that governs community rights and public participation in the distribution of revenue from mineral resources in Nigeria. The paper will rely on primary and secondary legal sources. The primary sources include the 1999 Constitution of the Federal Republic of Nigeria, The Nigerian Minerals and Mining Act (NMMA) 2007 and the Petroleum Industry Act (PIA) 2021. The secondary sources are mainly journal articles.

Public Participation of Host Communities in the Revenue Sharing of Mineral Resources

Public Participation has been defined as the sum total of all citizens and communities that deliberately take part in a goal-oriented activity (Babooa, 2008). According to Carreira et.al., Public participation is one of the major mainstays of democracy, and it inevitably influences the goals of public policy (Carreira and Vanconcelos, 2016). Thomas (1995) defines public participation as a process of involving all organized and unorganized groups of citizens or citizen representatives on a particular issue.

It can also be defined as the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future (Arnstein, 1969). In her theory entitled 'Ladder of Citizen Participation', Arnstein postulates that participation in decision making processes, can be categorized into eight rungs namely: manipulation, therapy, informing, consultation, placation, partnership, delegated power and citizen control (Arnstein 1969). The eight rungs of the ladder are divided into three groups: Nonparticipation (Manipulation and Therapy), Tokenism (Informing, Consultation and Placation) and Citizen Power (Partnership, Delegated Power and Citizen Control). Every rung represents a different degree of citizen participation and influence in decision-making processes.



Arnstein (1969) placed manipulation and therapy at the bottom of the ladder as they are the lowest level of participation. She classified these two as non-participation because they substitute genuine participation (Arnstein, 1969). The real objective of manipulation and therapy is not to enable people to participate in planning or conducting programmes but to enable power holders to educate the participants (Chikova and Chilunjika, 2021). Under the guise of participation, citizens only rubberstamp issues that are presented to them Mohammadi, Ahmad, Emby, Norazizan and Soroush, 2011). Citizens are placed on advisory committees or boards solely to 'educate' them or persuade them to support decisions already made by those in power. In terms of therapy, 'citizens are engaged in numerous activities behind the façade of participation, but experts subject the citizens to clinical group therapy as if they need therapy, to cure them rather than fix the problems at hand' (Arnstein, 1965).

The three rungs namely: informing, consultation and placation constitute the tokenism category (Chikova and Chilunjika, 2021). Under the informing rung, those in power inform citizens of their rights, responsibilities and knowledge regarding the policy issues at hand (Chikova and Chilunjika, 2021). This rung involves giving the public information but not allowing them any real voice in the decisions. As put forward by Lane (2018), 'consultation has for many years been the dominant approach used by government agencies to gather advice from the public about draft proposals'. Citizens are asked for their opinions and feedback through surveys, public meetings or hearings, but there is no assurance that their input will be used in the decision-making process. This step allows citizens to voice their opinions but does not necessarily result in any change or influence. In support of this, Spotswood (2016) argues that 'consultation is the most important first step toward legitimate citizen participation'. However, Arnstein (1969) noted that in this level, citizens lack the power to ensure that their views are heeded by those in power. She further notes that when their participation is restricted to these levels, there are no follow ups and no muscle hence there is less or no assurance of changing the status quo (Chikova and Chilunjika, 2021). Rung five, placation is an advanced level of tokenism where citizens begin to have some degree of influence. Arnstein 1969). Citizens are allowed to advise or plan, but the power holders retain the right to judge the legitimacy or feasibility of the advice. This step involves placing a few hand-picked members on boards to appease them.

The last stage is the citizen power which comprises of three rungs namely partnerships, delegation and citizen control (Chikova and Chilunjika, 2021). Partnerships enable the citizens to negotiate and engage in tradeoffs with power holders (Chikova and Chilunjika, 2021). At this

stage, both the citizens and power holders agree to share planning and decision making responsibilities through various structures, such as joint policy boards, planning committees, and other mechanisms of shared authority (Chikova and Chilunjika, 2021). Under delegation of power, citizens hold a significant amount of decision-making power and can ensure that their opinions and decisions are implemented. They have authority to make decisions and have a dominant influence over outcomes (Chikova and Chilunjika, 2021). Finally, under citizen control, Arnstein (1969) is of the idea that, 'the citizens will actually have managerial and policy control and can set conditions under which government can alter programmes'. They govern a program or institution and have full decision-making authority.

The Arnstein ladder emphasizes the significance of moving beyond tokenistic approaches to genuine power-sharing and citizen participation. It is a crucial tool for assessing the degree of citizen participation and the power dynamics at play in public decision-making processes. The developing world constantly embraces public participation as an omnipotent mechanism of developing grassroots capacity towards community development, poverty eradication and wealth creation. Applying this lens to the mineral resource sector, public participation is indispensable in addressing the concerns of the mining communities that revolve around community share ownership, equitable distribution of revenue, local content development, shared infrastructure, employment for locals and environmental management etc (Chikova and Chilunjika, 2021). There is growing attention to strengthening the processes of participation by enabling the communities to exercise their voices through inclusion, consultation and/or mobilization, designed to inform and to influence policies and institutions (Chikova and Chilunjika, 2021). Community participation in the management and use of mineral revenue at the local level has the potential to speed up the process of community empowerment and lead to increased pressure on the federal government for better management of mineral revenue and greater transparency and accountability in its management (Mabena and Moyo, 2014).

Arnstein's Ladder of Citizen Participation and Nigeria's revenue sharing from mineral resources can be understood, in part, through using the framework of citizen empowerment and involvement in decision-making processes. This is particularly relevant in situations where resource extraction has a substantial negative impact on the environment, the economy and society. In Nigeria, the community's involvement in the management and sharing of revenue derived from mineral resources often falls under the lower rungs of Arnstein's Ladder. The

rights of communities to participate in decisions concerning the development of mineral resources under their land are minimal (Omorogbe, 2002). Many communities experience tokenism and manipulation, with few having actual say in decisions that impact their lives. Nonetheless, there are campaigns and initiatives to increase community involvement and create more equitable revenue-sharing structures. Progressing from nonparticipation and tokenism to partnership and citizen control requires purposeful efforts to decentralise decision-making authority and ensure that local communities have a say in the distribution of revenue and resources.

Nigeria's Legal Instruments Governing Mineral Resources and Public Participation

Nigeria's mineral resource sector is governed by the 1999 Nigerian Constitution (as amended), the Petroleum Industry Act (PIA), the Nigerian Minerals and Mining Act (NMMA), among others. These instruments are designed to manage resource extraction, ensure transparency, regulate the distribution of revenues and ensure the public participation of host communities regarding mineral resource revenue.

a. The 1999 Constitution of the Federal Republic of Nigeria

The Federal Republic of Nigeria's 1999 Constitution establishes the framework for governance, encompassing aspects related to public participation and revenue sharing from mineral resources. The constitution does not, however, contain any clear provisions pertaining to community rights to revenue sharing from mineral resources or public participation. Rather, these principles are incorporated into more general provisions as well as other relevant legislations and policies. Section 14(2)(a) of the Constitution emphasizes the value of incorporating the public in governance processes, which can be understood to include public participation in decisions pertaining to the management of mineral resources.

Section 16(1) outlines the economic goals of the government, which encompass utilizing Nigeria's resources to foster national prosperity and an effective, dynamic and independent economy. It implies that the state ought to distribute revenue fairly among its citizens and manage resources in a way that benefits all of them.

Section 162 deals with the Federation Account and revenue distribution. Section 162(1) establishes the Federation Account, into which all revenues collected by the government of the federation, including from mineral resources, are paid. The National Assembly is required by Section 162(2) to determine the formula for allocating these revenues to the federal, state and local governments. The derivation principle, which is also mentioned in the section, mandates that the states from which natural resources are derived, receive at least 13% of their revenue.

Although there are no provisions in the constitution devoted to communities, they receive revenue from local governments. Local governments in Nigeria are a critical tier of government that play a role in the administration and development of communities within the country. The local government is the closest government structure to the people and communities and it is responsible for providing certain basic services, infrastructure and local governance. The bulk of their revenue comes from the state government through the State Joint Local Government Account (SJLGA).

b. The Nigerian Minerals and Mining Act (NMMA) 2007

The principal law that governs the mining sector is the Nigerian Minerals and Mining Act (NMMA) 2007 and the Minerals and Mining Regulations of 2011. The NMMA is the principal legislation that regulates all aspects of exploration and exploitation of solid minerals, while the Minerals and Mining Regulations provide the guidelines for operations in the solid minerals sector (La Fleche, 2015). Although the Act's main objective is to regulate mining operations, it also includes measures that address community rights with regards to mineral resources.

The Act acknowledges the value of community participation in mining operations. One way to support the growth and participation of host communities, is to create Community Development Agreements (CDA), which specify how the local communities will benefit from mining operations. Mining companies are required to negotiate and sign CDAs with host communities. These agreements are meant to ensure that communities benefit from mining activities through infrastructure development, employment opportunities and social services. Section 116 of the Act states that CDAs must be incorporated into mining corporations' operations. These agreements lay out benefits, compensation and community development programs as tools for encouraging collaboration between mining companies and impacted communities. The section further stressed that the CDAs should contain undertakings, with respect to the social and economic contributions the project will make towards the

sustainability of the community in terms of educational scholarships, apprenticeship, technical training and employment opportunities for indigenes/HC, providing financial and other forms of contributory supports for infrastructural developments and maintenance of community services like roads, water, power supply, support for small scale/ micro enterprises, agricultural product marketing, methods and procedures for socio-economic and environmental management as well as local governance enhancement (Akinleye 2023). Section 116 of the Act went further to establish that CDAs shall be a binding agreement between parties involved and subject to review every 5 years.

In this light, CDA is a legally binding or negotiated agreement that addresses various matters on social, economic, cultural and environmental communities' development existing between the licensee/lessee and the HCs (Akinleye 2023). In the process of engaging CDA, Host Communities are provided with many opportunities to be able to identify and manage their interests and expectations on the mining projects and how the projects will contribute positively to their social and economic growths and help to maximize the well-being of the present generation without compromising that of the future generations (Akinleye 2023). More importantly, CDA will provide the HC the access to realise their rights and benefits from the minerals resources located on their lands as not to be side-lined or neglected from the developmental benefits (Akinleye 2023).

As CDA, is considered as a tool for development, the effective participation of the people is highly necessary because of their meaningfully contributions from their knowledge towards their immediate needs and interests for total implementation (Hill, Lilly White and Simon 2010). To achieve this, Section 117 of the Act stipulates that CDAs should specify the appropriate consultative and monitoring frameworks between the licensee/lessee and the HC and other means by which the community may participate in the areas of planning, management, monitoring and implementation of the activities spelt out in the agreement (Obinna 2017). The Act goes on further to state that in case there is any failure between the HC and the lessee/licensee, in the course of the agreement to reach any conclusion after several attempts and before the title holder commences work, the matter should be referred to the Minister for resolution (Akper 2017). Once an agreement is reached, it becomes legally binding on both parties and must be totally enforced subject to review every five years. By so doing, the human rights standards/ principles are well guided, viewing the HC as proper rights-holders while establishing the fulfilment of peoples' rights to Social Community Development as an obligation

of the duty-bearers, and not treated as an act of charity (Human Rights Principles are based on the word PANEL: Participation, Accountability, Legality, Empowerment and Non-discrimination with the aim of promoting values of equality, justice, and freedom in the society). In this manner, the licensee/lessee is strongly held up as the duty bearer saddled with the responsibilities of protecting and developing the environments of the HC (Akinleye 2023). If the duty bearer fails in the long run in any of its obligations, the HC has every right to seek justice by challenging and holding defaulters liable for non-implementation of CDAs (Akinleye 2023).

c. The Petroleum Industry Act (PIA) 2021

In 2021, on the 16th of August, the Nigerian oil and gas industry underwent a significant transformation owing to the enactment of the Petroleum Industry Act (PIA). The Act seeks to promote transparency, attract investment and ensure that the nation's petroleum resources benefit all of its citizens equally, particularly the host communities. It was enacted in order to bring reforms to the oil and gas sector and address the grievances of the host communities that are directly impacted by exploration and exploitation activities. The PIA 2021 has been portrayed as Nigeria's saviour from economic woes and the crippling oil and gas industry (Okediya 2021).

The PIA seeks to provide funds for the development of host communities. It introduces the Petroleum Host Community Development (PHCD) under Section 234 of the Act. The Host Community Development Trust (HCDDT) was introduced by the Act to aid in the development of the economic and social infrastructure of communities in the petroleum-producing areas. Section 239(3) of the Act states that the objectives of the trust include: to finance and execute projects for the benefit and sustainable development of host communities, undertake infrastructural development of the host communities within the scope of the funds available, invest part of the available fund for and on behalf of the host communities, etc. The HCDDT seeks to formally create a binding Memorandum of Understanding (MoU) and to legalise the traditional Corporate Social Responsibility (CSR) obligation between the international oil companies on the one hand and the host communities on the other hand (Oyenrami, and Dube).

In addressing the challenge of mismanagement of funds by host communities, the Act directs the operator to set up a Board of Trustees who shall manage the host communities trust fund for the benefits of the host communities (Amadi and Ayoola, 2020). The members of the Board

of Trustees of the HCDT are appointed by the settlor from the host communities and other parts of the oil bearing state; the Board is to carry out its functions in line with the direction of the settlor (Oyenrami, and Dube, 2021). The Board, comprising representatives from the host communities, is in charge of overseeing the trust. The communities will be able to decide how the funds are used thanks to this structure. Sections 24(e), 247(1) and 248(a – g) of the Act empowers the Board to appoint a Management Committee which shall be saddled with the day-to-day running of the functions, programmes and plans of the HCDT on an ad-hoc basis. The oil company is required to pay 3% of its annual operating expenses to the host community (Amadi and Ayoola, 2020). The Board is expected to create a Fund into which the 3% annual expense fund is paid for the execution of projects, programmes and activities of the HCDT in each of the host communities involved (Oyenrami, and Dube, 2021). From the 3% contributed to the communities, 75% of it must go into infrastructure and projects within the communities, 20% of it will serve as a reserve fund and 5% will be used for running the trust by the Board of Trustees (Amadi and Ayoola, 2020). The 3% of the operating expense by an oil company is quite reasonable for both investors and the host communities as the host communities will get paid whether or not an oil company makes profits and it's an affordable fee for oil companies such that it attracts more investments (Amadi and Ayoola, 2020).

The PIA of 2021 is a big step forward in resolving issues regarding community rights and public participation in Nigeria's petroleum sector. It provides a framework for better environmental management and a more equitable distribution of the revenue derived from mineral resources. Its implementation and continuing interaction with all parties involved will be critical to its success.

Despite these and other legal instruments, there are still primary challenges to public involvement and equitable distribution of mineral revenue in Nigeria. These include:

- a. Mineral revenue is often regulated by central governments, which limits local communities' benefits. Inequitable resource distribution and the exclusion of local voices are two consequences of this centralization.
- b. Mineral resource-dependent economies have a tendency to overlook other industries, which limits local communities' options for sustainable growth and economic diversification.

- c. In the absence of adequate compensation or relocation plans, extractive activities may result in the uprooting of communities, disrupting social structures and livelihoods.
- d. Inequitable distribution of mineral revenue can worsen already-existing social injustices, such as those involving gender, ethnicity, and class, and further marginalize those who are most vulnerable.
- e. Legal frameworks that are insufficient or poorly implemented may be unable to ensure equitable revenue distribution and safeguard community rights.
- f. Local communities may lack the resources, technical knowledge or other necessary tools to engage in decision-making processes and effectively advocate for their rights.

SUMMARY OF CONCLUSIONS:

A crucial component of mineral resource revenue sharing and management is the ‘trickling down’ of revenue to communities in areas that produce mineral resources. Nigeria, a country with abundant mineral resources and considerable oil and mineral reserves, has struggled to ensure that the communities located close to resource extraction sites reap the financial benefits that come from exploitation of resources. Nigeria has put in place a number of revenue-sharing measures to address the concerns of communities who are directly impacted by resource extraction. These include the 13% derivation principle and Community Development Funds which have been established by mining and oil companies to finance local government projects and Corporate Social Responsibility (CSR) programs.

The distribution as well as utilization of these funds require effective community participation in decision-making. Local communities should be engaged in identifying the requirements and priorities for development. When allocating and utilizing revenue, it is essential to ensure accountability and openness. Revenue sharing arrangements must be regularly monitored and evaluated in order to determine whether the intended benefits are actually reaching the impacted groups and producing the expected results.

Despite these arrangements, it has proven difficult to guarantee that communities benefit from resource extraction in a way that is adequate. The successful implementation of revenue sharing systems has been hindered by problems with governance, insufficient infrastructure and corruption. To guarantee that host communities benefit from the revenue derived from the exploitation of mineral resources, ongoing initiatives to enhance transparency, accountability and community participation are crucial.

The main finding of the research is that there is generally little public participation in Nigeria's mineral resource industry. Even though there are in existence, provisions pertaining to community consultation and involvement in decision-making processes, these are frequently inadequately implemented. Public hearings and Community Development Agreements are examples of mechanisms that are meant to give local voices a platform, but in reality, they are often misused or implemented improperly. The impacted communities feel excluded and are generally dissatisfied as a result.

Public participation and community rights continue to face a number of challenges. A large number of community members are unaware of their rights, which leaves them open to exploitation and inadequate compensation. Lack of enforcement of legal frameworks is frequently responsible for the gaps that exist between legal provisions and practical application. Mistrust and conflict are frequently caused by the unclear distribution and allocation of mining revenue to local communities.

Community participation in the governance and general decision-making process surrounding the mineral resources found in their areas has been and continues to be minimal, despite the availability of public platforms on which the public can participate. In order to improve public participation and guarantee equitable distribution of revenue from mineral resources, it is recommended that:

- a. Laws should be implemented and enforced in order to guarantee community rights to participation and revenue sharing.
- b. Accountability and equitable distribution of mineral resource revenues can be greatly improved by fostering transparency in revenue management and decision-making procedures through initiatives like the Nigeria Extractive Industries Transparency Initiative (NEITI), which requires the disclosure of information about mineral resource management, including revenue and contracts.
- c. public hearing meetings should be held in accessible venues where the affected communities can easily attend.
- d. the government should improve the level of public participation by taking into consideration, the views of the people rather than only listening and not taking any action.
- e. the ability of local communities to meaningfully participate in decision-making processes can be increased by providing them with resources and education on mining

issues so as to improve their quality of participation in the various policy platforms on which issues that relate to mineral resources governance are made.

- f. strict measures should be enforced, in order to guarantee that revenue intended for community development are utilized properly and efficiently.

REFERENCES

Akinleye, O. T. ((2023). Realization of Rights of Host Community under Nigerian Mineral and Mining Act 2007 to Foster Sustainable Community Development. NAUJILJ 14(1).

Akper, P. (2017). A Legal Analysis of Community Development Agreements as a Tool for Enhancing Social Licence to Operate for Mining Companies in Nigeria. The Gravitas Review of Business & Property Law 8(1).

Alokolaro, O. and Akande, A. (2015). Nigeria. In La Fleche, E. R. (ed.), The Mining Law Review (pp 189-200). Law Business Research.

Amadi, A. H., Ola, V. D. & Ayoola, J. O. (2020). Review of Nigeria's Petroleum Industry Bill (PIB). European Journal of Engineering Research and Science, 5(9).

Arnstein, S. R. (1969). A Ladder of Citizen Participation. Journal of the American Planning Association, 35(4), 216-224.

Azcue, J. M. (ed). (1999). Environmental Impacts of Mining Activities: Emphasis on Mitigation and Remedial Measures. Springer-Verlag Berlin Heidelberg.

Babooa, S. A. (2008). Public Participation in the Making and Implementation of Policy in Mauritius with Reference to Port Louis Local Government. University of South Africa.

Carreira, V., Machado, J. R. and Vanconcelos, L. (2016). Engaging Citizen Participation - A Result of Trusting Governmental Institutions and Politicians in the Portuguese Democracy. *Journal of Social Sciences*, 5 (40).

Chikova, R. and Chilunjika, A. (2021). Public Participation and the Governance of Mineral Resources in Zimbabwe. *International Journal of Law and Public Policy*. 3 (1), 11-18.

Constitution of the Federal Republic of Nigeria, 1999.

Hill, C. Lilly White, S. and Simon, M. (2010). *Guide to Free, Prior and Informed Consent*. Oxfam Australia.

Lane, M. B. (2015). Public Participation in Planning: An Intellectual History. *Australian Geographer* 36(3), 283-299. <https://doi.org/10.1080/00049180500325694>.

Mabena C. and Moyo, F. (2014). Community Share Ownership Trust Scheme and Empowerment: The Case of Gwanda Rural District Matabeleland South Province in Zimbabwe. *Journal of Humanities and Social Science*. 19(1), 72-85.

Mohammadi, S. H., Ahmad, N., Emby, Z., Norazizan, S. and Soroush, A. (2011). Relationship Between Citizen's Perception and Level of Participation in Local Government. *International Proceedings of Economics Development & Research*. 5(2).
Nigerian Minerals and Mining Act (NMMA) 2007.

Obinna, D. (2017, March 24) Legal Regime for Community Development Agreements under the Mineral and Mining Act 2007. *Business Day* < <https://businessday.ng/analysis/article/legal-regime-community-development-agreement-minerals-mining-act-2007-1/> > accessed 25 June 2022.

Okediya, P. O. (2021). Petroleum Industry Saviour: A Terse Breakdown of the Petroleum Industry Act. <https://ssrn.com/abstract=3908752> or <http://dx.doi.org/10.2139/ssrn.3908752>.

Omorogbe, Y., (2002). The Legal Framework for Public Participation in Decision-Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless.

In Zillman, D., Lucas, A. and Pring, G.(eds). Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources. (pp. 549-587). Oxford University Press.

Oyenrami, S. & Dube, L. (2021). The Petroleum Industry Bill and the Nigerian economy: A Review. *International Journal of Current Research in the Humanities*, 25.

Spotswood, F. (ed.) (2016). *Beyond Behaviour Change: Key Issues, Interdisciplinary Approaches and Future Directions*. Policy Press University of Bristol.

Thomas, J. C. (1995). *Public Participation in Public Decisions: New Skills and Strategies for Public Managers*. California: Jossey-Bass.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

CLINICAL LEGAL EDUCATION: AN AVENUE FOR EXPLORING LEGAL ACUMEN
AND ACQUIRING LEGAL SKILLS IN NIGERIA

Abubakar Suleiman* and Musa Yahaya**

Abstract

Clinical Legal Education (CLE) as an educational initiative is designed to allow Faculties of law and the Nigerian Law School to meet emerging practice-based needs that the traditional legal education framework did not address adequately. CLE is an experiential learning process of teaching law that was introduced to produce lawyers with community consciousness, ethical skills, and competence to handle legal issues by the global best practice. The paper shows how CLE becomes an avenue for exploring the legal acumen of law students and assisting them in acquiring the legal skills needed to be relevant as legal practitioners while obtaining their degrees. The choice of this paper is burnout of the recent debate on many social media platforms and the physical world on the superiority of skills over degree(s) and vice versa. The discussion is also extended to the legal profession, living non-lawyers with an avenue to cast aspersions on the entire legal profession due to the quality of law graduates and new wigs (young lawyers) produced every year from the universities and law school, and the underutilization of the CLE methodologies, which are more of skills-based! We examined the extent to which law students through constant application of CLE Methodologies can effectively explore their legal acumen and assist them to acquire legal skills needed to practice law. The research used doctrinal, empirical, and teleological methodologies; relaying personal experiences as a clinician. The findings include ethical implications, resistance from law students due to over-population in the classroom, time management, and workload. The research recommended the incorporation of the CLE curriculum in law courses taught at the university, mandatory collaboration with judges/lawyers for assessment to balance the academic and practical demands of law courses, and time management skills.

Keywords: *Exploring, Clinical Legal Education, Legal Education, Legal Acumen and Legal Skills.*

1.0 Introduction

Lack of adequate skills training in the university(s) and law school has been a pet complaint of members of the bar and bench in recent years. Law students have been seen to lack essential skills required immediately after graduation and upon being called to the bar, particularly when faced with clients' cases in court. Various distinguished lawyers and academics had written on the level of preparedness of law graduates to

practice in the profession and the majority view was not very encouraging. The most recent is the debate on many social media platforms and the physical world on the superiority of skills over degree(s) and vice versa. The discussion is an offshoot of the erudite contribution of Isah Ali Ibrahim, PhD (Pantami) in his book titled “Skills Rather than Just Degrees”. While some contributors viewed the process of acquiring degrees as useless if there are no skills learned in the process that will make the graduate(s) relevant to society, other contributors argued that there are skills in every degree and the title of the book is an attempt to demean degrees and nothing more. The discussion is also extended to the legal profession, living non-lawyers with an avenue to cast aspersions on the entire legal profession due to the quality of law graduates and new wigs produced every year from the universities and law school, and the underutilization of the CLE methodologies, which is theoretical and more of skills-based!⁹⁹⁵ This paper will answer the following questions, to wit:

- a. Are the CLE methodologies endowed with practical skills that give law students the experience to excel in legal practice?
- b. What are the factors hindering the full implementation or utilization of the CLE approach in training law students?
- c. Are there ethical issues that might affect the training of law students while adopting the CLE approach?

The objectives of this paper are to examine the extent to which law students through constant application of CLE Methodologies can effectively explore their legal acumen and assist them to acquire other legal skills needed to practice law. It will further show how the CLE is embedded with methodologies and skills required to train law students. Alas!, it is either the students refused to learn or those saddled with the responsibility to teach the students the skills are not ready to adjust from the old-fashioned methods of teaching or lack the technical knowhow to appreciate the existence of the CLE methods due to strict reliance on materials/handouts. The research used doctrinal,

⁹⁹⁵ A Facebook user, **Wali**, posted on his Facebook page thus “You might have graduated as a Teacher, Engineer, Doctor, Lawyer, Accountant etc., but still need the practical skills to gain more experience in order to excel in your profession.” <https://www.facebook.com/share/P/gfRQ7p8ysCFLVPt/?mibe>. Had he checked on the curriculum of law, more particularly the CLE curriculum, he would have removed the lawyers from his trolling, because he would have been well informed that the lawyers' training is a fusion of theories and skills.

empirical, and teleological methodologies; relaying the personal experiences of the authors as clinicians, data, and our communication with other clinicians and/or their coordinators.

2.0 Conceptual Clarifications

The conceptual origins of CLE can be traced to the United States where some law schools offered community law clinics.⁹⁹⁶ In England and Wales, law clinics began to develop in the early 1970s. Clinics were set up at the University of Kent, Warwick by offering advice to students. The Kent Clinic, however, was designed to operate as a full-fledged legal practice.⁹⁹⁷ The introduction of CLE in Nigeria is due to the active efforts of the Network of University Legal Aid Institutions (NULAI)⁹⁹⁸. CLE is an important aspect of the law school curriculum in Nigeria minding the roles of the clinics to the students, faculties, university, and the community. The role of law clinics amongst others in Nigeria is ensuring that the faculties of law, the University, and the Nigerian Law School give back to the host community legal and beneficial community services.⁹⁹⁹ We shall consider the meaning of Clinical Legal Education and its approach to teaching, legal acumen, and Legal ethics below.

2.1 Meaning of Clinical Legal Education and its approach to teaching

CLE is a form of informative and experiential education aimed at reforming the theoretical system of legal education by developing a realistic and pragmatic system that is capable of breeding professionally competent, socially conscious, and ethical lawyers who will work for society. The realistic and pragmatic method includes presentations by students, simulation (role play or drama), live client interviews, video and film clips, debate, group discussion, reflective reports, brainstorming, mock trials, use of hand-outs or manuals, lectures, etc. which are being carried out in the classroom or law

⁹⁹⁶ Kerrigan, K. and Murray, V., (2011). *'A Student Guide to Clinical Legal Education and Pro Bono'* Palgrave Macmillan, 7.

⁹⁹⁷ Ibid 9

⁹⁹⁸ Network of University Legal Aid Institutions, (2015) 'The Development of Clinical Legal Education' available at < <http://www.nulai.org/index.php/blog/83-cle>> accessed 17 July 2024

⁹⁹⁹ Ibid.

clinic/legal clinic which might be either the university-based, law school-based or community-based clinic.¹⁰⁰⁰

The CLE approach to teaching incorporates knowledge, skills and values (including ethics) and possesses the following characteristics:

- i. It should have objectives and outcomes.
- ii. It should have content.
- iii. It should have a schedule.
- iv. It should state methodologies for delivery.
- v. It must contain an assessment/evaluation component.¹⁰⁰¹

For the effective transfer of knowledge to students, law teachers are enjoined to develop lesson plans with defined schedules, and clear learning objectives with outcomes and activities.¹⁰⁰² In preparing a lesson plan, the teacher must identify clear outcomes and set out the scope of what is to be taught, consider the teaching methods, format and activities to be used for teaching, feedback and evaluation. The outcomes of lessons are what the students should know at the end of each lesson therefore it should integrate knowledge, skills and values to match the objectives of the lesson. The inclusion of outcomes in the lesson plans ensures that both teachers and students have the necessary guidelines as to what the lesson seeks to achieve.¹⁰⁰³ A good lesson plan must possess the following elements:

- i. Topic
- ii. Outcomes
- iii. Content
- iv. Methodology/Activities

¹⁰⁰⁰ Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 25. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024.

¹⁰⁰¹ Yusuf, M.D. (2018). *An Examination of Clinical Legal Education and the Roles of University Based Legal Clinics in Promoting Access to Justice: A Case Study of Ahmadu Bello University Law Clinic*, (Unpublished LLM Dissertation). Ahmadu Bello University, Zaria, p. 43

¹⁰⁰² Ibid. p. 43.

¹⁰⁰³ Ibid. pp. 94-95

v. Resources

vi. Evaluation/assessment¹⁰⁰⁴

2.2 Meaning of Legal Acumen

The term legal acumen¹⁰⁰⁵ is not strictly defined in any lexicon. It is only the meaning of the word legal or acumen separately that is defined in the dictionaries. However, some authors try to give descriptive connotative meanings of the terms, which we considered in this paper.

Collins Dictionary's acumen in law is “the ability to make good judgments and quick decisions.”¹⁰⁰⁶ It is synonymous with discernment, perception, penetration, and insight, insight means a power to see, which is not obvious to the average mind.¹⁰⁰⁷ In another vein, the *Trustworthy group* defines legal acumen in the following words “...legal meaning could simply be knowledge of the law, including the ability to make reasoned decisions and express them clearly.”¹⁰⁰⁸ Legal acumen gives the student a special skill to distinguish himself by applying the law to issues before him, without hesitation. It is the ivy of all the skills a lawyer requires to be relevant globally. It is more of a soft skill required of a professional. This requires a deep understanding of the thought processes and activities that constitute legal acumen. An example of the type of learning outcome that might develop legal acumen is found in CLE's former supervisory representative course. This is to develop the ability to be reflexive about and learn from one's lawyering and its application and importance to CLE's students is relayed.

2.3 Meaning of Legal Skills

Legal skills are the special ability and proficiency; esp., the practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them appropriately, with readiness and dexterity. Skill is generally considered more than mere competence. It is a special competence that is not a part of

¹⁰⁰⁴ Ibid. p. 95.

¹⁰⁰⁵ The term legal acumen is different from the term *legal acumen doctrine*, which is a principle in law that allows equity to be invoked to remove a defect or invalidity in a claim to land that cannot be discovered without legal expertise. See: <https://www.lsd.law/define/legal-acumen-doctrine#:~:text=The%20legal%20acumen%20doctrine%20is%20a%20principle%20in%20law%20that,be%20discovered%20without%20legal%20expertise>. Accessed on 22/06/2024

¹⁰⁰⁶ <https://www.collinsdictionary.com/> Accessed on 20/6/2024.

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ <https://trustadvisorygroup.com/22/10/11/definition-of-legal-acumen/>. Accessed on 22/06/2024

the reasonable person's ordinary equipment, but that results from aptitude cultivated through special training and experience.¹⁰⁰⁹

3.0 Exploring Legal Acumen and Acquiring Legal Skills through Clinical Legal Education in Nigeria

The CLE activities are operating on some major components to wit; experiential learning opportunities, supervised client representation, reflection or feedback, and classroom integration, among others. The clinic serves as the service and laboratory component of CLE. In the faculties/Law School clinics, students render diverse services to the poor in their host communities, free of charge. In clinics, students deal with human beings and not with cases or some abstract situations as in the traditional method; and in the process, they acquire critical lawyering skills needed for practice, in addition to an appreciation of the value of professional responsibility. We shall discuss some of these components and their impacts on the education of law students in Nigeria.

3.1 Experiential learning opportunities through the Clinics

This is one of the CLE components that gives the student opportunities to learn by doing. The clinical activities are a pictorial representation of what lawyers do in practice. However many proponents of CLE state that to get the most out of the learning experience there should also be feedback, reflection, and application of new skills and ideas. Students solve societal problems, engage in different activities that will enlighten the public, and lots more.

In Nigeria, the Street Law Project, Freedom of Information Act Project, Stop Torture Project debate, group discussion, reflective reports, brainstorming, and mock trials enhanced the students' experience of the law. In other jurisdictions, there are various developmental projects, which include service learning, community engagement, and work-integrated learning that all adopt experiential learning as their pedagogical base.¹⁰¹⁰ Even with the invention of the CLE curriculum, the improvement in legal education might seem not to be wholly successful but the few students who pass

¹⁰⁰⁹ Garner, B. A. (2009) Black's Law Dictionary, 9th Edition, Thompson Reuters, p. 1514.

¹⁰¹⁰ Noone, M.A. (2012) Time to rework the brand 'Clinical Legal Education', *International Journal of Clinical Legal Education*, issue 19, P. 349.

through the Law clinic's experimental teachings have possessed some skills necessary in serving the society upon their admission to the Bar. We shall relay how this component is used by student(s) working in the clinic to explore their legal acumen and also acquire other legal skills in their training.

Ahmadu Bello University (A.B.U) Law Clinic participated in the Justice for All (J4A) Project. The project exposed more than 80 A.B.U Law Students to various professional skills and in the same vein used the students to provide access to justice for pre-trial detainees. These improved the students' ability to make good judgments and make good decisions to improve the lives of others in need of justice while acquiring skills that will earn them the LL.B degree in Nigeria. Naphtali Esq., one-time, Deputy Clinic Head of A.B.U. Law Clinic, when she was a student has this to say about her experiential learning opportunity, thus:

...Our judges are been used by some scrupulous elements in the security agencies to add to the plight of Nigerians and such has given room to those bad elements to enjoy forum shopping. In the Zaria prisons, (sic) we met a lady there and her crime was her refusal to accept a police officer who asked her out. The police officer framed an illogical and baseless charge against her and took her to "his judge" who was many kilometers away from his station and the next place she found herself was a prison. She was not allowed to say anything in court let alone defend herself. This is the Nigeria we are in today. I would not (sic) have believed it if someone had told me that things like these were happening in our courts and prisons. However, because of the Pre-trial Detainees Project, I had a first-hand experience. Hoping to contribute a lot to humanity and yes, I am glad I have started by being part of this project.¹⁰¹¹

¹⁰¹¹ Naphtali, B. A. (2018, December, 05) as cited in Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 91. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024.

The above clinician appreciate the meaning of the concept, of injustice through her first-hand experience in the project, which gave her the zeal to pledge her allegiance to the course of justice and humanity. This approach to training law students, though impactful, is time-consuming and stressful. These call for the reason some lecturers and students dislike the activities of the CLE modules of training the future generation of lawyers. With experiential learning opportunities, students see the practical application of legal theories.

The National Client Interviewing and Counselling Skills Competition (NCCC), a project of NULAI-Nigeria is one of the projects that exposed students to problem-solving skills, where the students are confronted with real legal issues that need legal solutions. The project explores the students' understanding of the law and improves their legal skills in client interviewing and counselling. The students are assessed by judges and/or legal practitioners based on eleven criteria, which include; (1) Establishing an effective professional relationship, (2) Obtaining information, (3) Learning the client's goals, expectations and needs, (4) Problem analysis, (5) Legal analysis and giving advice, (6) Developing reasoned courses of action (options), (7) Assisting the client to make an informed choice, (8) Effectively concluding the interview, (9) Teamwork, (10) Ethical and moral issues, and (11) Post interview reflection period.¹⁰¹²

3.2 Supervised client representation

The clinicians who are the major actors of the CLE activities, being students-centered as opposed to the lecturers-centered are strictly monitored by their lecturers to carry out the activities or projects attached to them. One primary goal of CLE is to teach practice skills and professional responsibility to law students by having them generally represent real clients under the watchful eye of professors who supervise the students' work.¹⁰¹³ In a law clinic, a law student is expected to demonstrate the ability to function like a lawyer, being a pictorial representation of the same, after going through the academic component of the program and incrementally learning from experience, while

¹⁰¹² Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 106. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024.

¹⁰¹³ Rekosh, E., et al (Eds.). (2001). *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists*, PILI/Columbia Law School, New York, p. 258.

carrying out simulated and real-life lawyering activities and services under the supervision of qualified lawyers.¹⁰¹⁴

In Nigeria, clinicians' representation of clients is strictly limited to what non-lawyers can do in court like deposing to affidavit, interviewing the client, drafting letters, motion for perusal, etc. They are not allowed to represent the client(s) in court proceedings as the Legal Practitioners Act (LPA)¹⁰¹⁵ prohibits a non-lawyer from practising law and the Rules of Professional Conduct for Legal Practitioners (RPC)¹⁰¹⁶ makes it professional misconduct for a lawyer to aid a non-lawyer to practice law, and some students are tempted to impersonate. Only the lawyers who are the supervisors/coordinators are to sign court processes and also represent the clients in court. Chukkol¹⁰¹⁷, a clinician, once observed the role of supervision thus; "Thanks to our (ABU Law Clinic) indefatigable coordinators. They have been working tirelessly with us. Their (sic) lives are exemplary. They are not only working for humanity, they guide we (sic) students on the practical aspect of the law."¹⁰¹⁸ The students also get the opportunity to develop their oral advocacy skills by seeing their supervisor(s) presenting arguments before a judge.

Supervision influenced the psyche of the clinicians to act in conformity with the rules of the profession. It gives them the knowledge of their boundaries/limitations, thereby increasing their legal acumen to function effectively when eventually they become real lawyers.

3.3 Reflection/Feedback

Reflection or feedback is a very vital component of CLE. It allows the clinicians to have careful thought and consideration of the activities involved and at times the clinicians impliedly criticize the activities themselves or those they are acting for in the process of carrying out the activities. While enrolled in the Clinic, students first engage in

¹⁰¹⁴ Sakowicz, A., (2005). The Organizational and Legal Form of Legal Clinics. In: Lomowski, D. (ed.), *The Legal Clinic: the Idea, Organization, Methodology*. Wydawnictwo C.H. Beck, Warsaw, Poland, p. 10.

¹⁰¹⁵ Cap. L11, Laws of Federation of Nigeria, 2004. See section 22 (1) (b) LPA

¹⁰¹⁶ 2023. See Rules 3 RPC

¹⁰¹⁷ He is a past clinician and two-term Director of Litigation of the A.B.U. Law Clinic and currently working with one of the leading law firms in Nigeria as a legal practitioner.

¹⁰¹⁸ Chukkol, O.G. (2018, May, 30) as cited in Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 91. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024.

reflection with the guidance of a supervisor, but a key aspect of reflective practice is the development of the habit of self-reflection without external prompting. The hope is that students not only appreciate the value of reflective learning but also develop the habit of engaging in the reflective process on their own, such that by the time they leave the clinic, students are ready and willing to incorporate reflective practice in their work without direction from a supervisor.¹⁰¹⁹ The further hope is that students will carry the reflective practice with them throughout their legal careers, using it as a tool to drive their own continued learning and growth as professionals. This is often called “learning to learn,” and is a goal of many clinical programs.¹⁰²⁰ It is just an evaluation process to know where the students get it right and to improve on their activities where there are lapses. They are sometimes asked to write a reflective essay; a skill lawyers in actual practice use to review legal issues, cases, and memos.¹⁰²¹ However, the number of students in the classroom to be engaged in this process is too many¹⁰²² and the time apportion for each class at most is 2 hours. This allows many of the students not to participate in the activities.

3.4 Classroom integration

One of the most vital components of the CLE methodologies is classroom integration, which some authors refer to as the seminar or tutorial program, where students are taught the substantive¹⁰²³ and procedural laws¹⁰²⁴. Stuckey opined “...we have to teach things students should have learned before enrolling in client representation courses such as the rules of evidence and professional conduct and basic lessons about lawyering skills.”¹⁰²⁵ CLE approach seeks to enhance the learning process through action, verbalization of thoughts, and an active engagement with ideas through consultation, discussion, and feedback involving peers and supervisors. It is arguably a superior pedagogy as it attempts to integrate all the processes of learning in a holistic

¹⁰¹⁹ Kenneth, R. K., (1989), *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, Maryland Law Review. Vol. 40. p. 284. Available at <http://digitalcommons.law.umaryland.edu/mirvol40/iss2/5> accessed on 20/10/2017.

¹⁰²⁰ Ibid.

¹⁰²¹ Abubakar. S. (2023). *Op.cit.* p. 91.

¹⁰²² In a single level, you can find a class with more than 400 students attending a lectures.

¹⁰²³ This includes; Law of contract, torts, equity and trust, jurisprudence, etc.

¹⁰²⁴ This includes; law of evidence, civil and criminal procedures etc.

¹⁰²⁵ Stuckey, R. *et al.* (2007). *Best Practices for Legal Education, University Publications*, University of South Carolina. p. 139

approach.¹⁰²⁶ At this stage we shall present data that represent this approach to teaching law using the sampling population of 1,755 respondents from the Faculty of Law, A.B.U Zaria comprising academic staff and students (from 100 to 500 Level) in the Faculty, using the multi-stage sampling technique, 10% of the entire respondents are utilized.¹⁰²⁷

Table 1: Distribution of Respondents on Their Perception of the Best Methodology for Teaching Law

In the study of law, what is the best mode of teaching?	Frequency	Percent	Valid Percent	Cumulative Percent
THEORY	11	6.3	6.3	6.3
PRACTICAL	21	11.9	11.9	18.2
BOTH 1 AND 2	144	81.8	81.8	100.0
Total	176	100.0	100.0	

Note: Adapted from “Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 117. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024.

From the table above, the 144 respondents representing (81.8%) of the population size are of the view that law is best taught if practice and theory are used together. Only 11.9% and 6.3% are of the view that practice and theory should be the independent methods of teaching law. This is in line with the objectives of CLE, which requires Law degree programs to be student-centred by exhibiting theoretical knowledge into practice as opposed to the full theory taught in the classroom today.¹⁰²⁸ It is our firm view that a law student who wants to avoid signing a covenant with poverty when he eventually becomes a lawyer must be ready to combine his knowledge of the law with the practical skills that make the law work. This will make him relevant to society in

¹⁰²⁶ Vawda, Y. (June, 2003), *Clinical Law: Educating/Training Law Students*, First All-Africa Clinical Legal Education Colloquium, Durban, South Africa. p. 1

¹⁰²⁷ Taherdoost, H. (2016) as cited in Abubakar, S., (2023), An Examination of the Role of Clinical Legal Education in Promoting Legal Practice in Nigeria, Ahmadu Bello University, p. 113. Retrieved at [www.https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89](https://kubanni.abu.edu.ng/items/67df4b8d-6e2a-4d5c-bb89). Accessed on 1/7/2024

¹⁰²⁸ Ibid. p. 117

general and also help him to remain relevant in the profession in particular. Below is reproduced data on the best methodology for teaching law.

The classroom integration clearly shows that the knowledge of the law is as important as the skills in the process of training law students. The skills must be blended with the theories to provide the required result of producing competent, ethical, and community-conscious lawyers. The CLE is taught in a manner that is capable of breeding future lawyers who are equipped with the combination of legal skills and degrees in the processes of their training. CLE program is a call for skills and degrees, not a call for the latter without the former or the former without the latter.

4.0 Conclusion

In this paper, we have discussed how CLE gives students an avenue to explore their legal acumen while acquiring legal skills that will assist them in being professionally competent, ethical, and community-conscious. The paper also debunked the assertion that lawyers' training lacks skills, as the CLE programs are loaded with skills for law students while acquiring their LL.B degrees in Nigeria. Any law student who actively participated and passed through the CLE activities will only have the Law School and his call to the bar to contend with and not the skills required to practice law. The findings of this paper include;

1. Ethical implication

The activities of law students through the CLE programs give the students the feeling that they are already lawyers and at times they will be tempted to practice the law when supervisors do not closely monitor them.

2. Resistance from law students due to over-population in the classroom

In a classroom of 400 students, one can hardly involve all the students in the CLE activities. This makes the students use their population as a shield to prevent them from participating in the activities, thereby resisting the empirical knowledge of the law the tutor(s) are trying to impact on them.

3. Time management and workload

The CLE program is somehow cumbersome. It is time-consuming due to the workload attached to the activities as students are engaged in different

methodologies of teaching that impact the requisites of knowledge expected in the training. Clinicians engage in presentations, simulation (role play or drama), live client interviews, debate, group discussion, writing of reflective reports, community outreach/street law, brainstorming, mock and moot trials, and other forms of pragmatic methodologies.

Given the above findings, this paper recommends the following:

1. The incorporation of CLE curriculum in law courses taught at the university

This might sound too difficult, however, it is trite that ‘nothing good, comes easily’, it is doable. This will allow the legal profession in Nigeria to produce the best lawyers needed to practice law by the global best practice. Despite the cumbersome nature of the CLE methodologies, the few students who participated in the CLE programs are more refined than others who did not participate in the program. The ethics of the legal profession is seriously reckoned with and it form part and parcel of the CLE curriculum. Students learn to work by the rules, once they are closely monitored during their CLE activities.

2. Mandatory collaboration with judges/lawyers for assessment to balance academic and practical demands of law courses

When stakeholders in the profession like judges and lawyers are invited or incorporated into the assessment of law students’ activities especially on the practical aspect, it will balance the academic and practical demands of law students. This will force the students to concentrate on their activities knowing fully well that the assessors are not their usual tutor(s) in school.

3. Time management skills

Dealing with an overpopulated class requires some good time management skills, such as goal setting for the students, multitasking activities for the students, setting time limits, and grouping the students among others will assist in managing the limited time for the courses to be taught per day, week, months or session.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LAW, RELIGION AND THE FAMILY: (KHUL'I) WOMEN'S RIGHT OF REDEMPTION
UNDER ISLAMIC FAMILY LAW AS A TOOL FOR THE PROTECTION OF HUMAN
DIGNITY.

^{1*}Muhammad Kamal Jibrin, ²Habila Isa Barau, ³Kabiru Idris Zakariya

¹Public Law Department, Faculty of Law, Sa'adu Zungur University, Bauchi, Bauchi

State ²Private and Business Law Department, Faculty of Law, Sa'adu Zungur
University, Bauchi, Bauchi State

³School of Legal Studies, A. D Rufa'i College for Education, Legal and General Studies,
Misau, Bauchi State, Nigeria

*mkjibrin@basug.edu.ng +234-8032987578, habilaisabarau@basug.edu.ng,
kabiruidrisz87@gmail.com

Abstract:

Muslim women's ability to exercise their right of redemption (Khul'i) under Islamic Law in Northern State has allowed many of them to free themselves from marriages they loathe due to possibly alleged domestic violence or some other reasons that they have to justify such exercise of right. The consequence of their action has however increased the number of divorcees in the society with devastating consequences on children, the women themselves and the society. The situation has continued to generate debate among scholars with some faulting the interpretation of the right of redemption adopted by the Sharia Courts in the state. This paper applied a non-doctrinal research methodology to analyse the approaches of Sharia Courts in northern Nigeria in their interpretation of Muslim women's right of redemption under Islamic Law focusing however on Bauchi, Gombe, Kano and Jigawa states. Specifically, the paper analyses the following questions: How have the Sharia Courts in northern Nigeria defined Muslim women's right of redemption under Islamic Family Law? What interpretative technique have they adopted? What reason[s] account for the application of such interpretative technique? What is the consequence of their interpretation to women, children and the society? The paper found among many other things that first, Sharia Courts in northern Nigeria relied on one juristic view under Islamic Law in their interpretation of women's right of redemption. Second, reliance of the courts on a lone juristic view under Islamic Law is inimical to positive development of the life of women, children and the society at large. Another finding of this paper is that the women right of redemption has not been enacted in to law by many states in the north including Gombe, Jigawa and Kano states. Bauchi state, has been the only exception that enacted rules to regulate matter concerning Khul'i. On the basis of these findings, the paper concluded that unless Sharia Courts in northern Nigeria embraces more expansive juristic views under Islamic Law in their interpretation of women's right to right of redemption under Islamic Law, there may not be end to the suffering of women and children in the society. In the end, the paper's recommendation is that Sharia Courts in

northern Nigeria should adopt out-sourcing technique in their interpretation of the right of redemption for greater protection for women, children and the society.

Key words: *Family Law, Women's Right of Redemption, Religion, Society and Human Dignity*

1.1 ction

This paper analytically examined the relationship between law, religion and the family, particularly the women's right of redemption under Islamic Family law as a tool for the protection of human dignity. The exercise of this right has significantly enable women in the Northern Nigeria to free themselves from marriages tie they loathe due to possibly alleged domestic violence or some other reasons that they have to justify to warrant exercise of such right. Khul'i (right of redemption) is a right accorded to a wife to get a divorce from her husband from the bond of marriage either by a mutual consent of both parties and their representatives or initiating a divorce proceeding in a court.¹⁰²⁹

Generally speaking, divorce occurred owed to any ground and in any kind, has the capability of collapsing the household in which both parties have peace, tranquility and causes the disstabilization of children.¹⁰³⁰ Possibly, both parties get divorce volitionally, but they bore grievance and evolve the sense of despair. Dissolution of marriage is among the spouse downfalls of life and affects the children by psychological distress and its menacing impacts remain throughout life. The miseries caused by divorce are not repairable in many cases. Divorcement makes the both boys and girls pessimist to marriage, educates people of the society with complexes, as it develops retaliation and deliver nervous people to the society.¹⁰³¹

Although Khul'i is not something that is considered as impermissible act; however, the desire of women toward seeking divorce in this contemporary period has become worrisome due to the fact that same has always been used as tools or an instrument for the destruction of a family and the societal well being by many women. The consequence of their action has however increased the number of divorcees in the society with devastating consequences on children, the women themselves and the society at large. The high rate of divorce in our

1029 Danjuma, I. and Jimeta, U.S.A, (2018) Khul'i (Right of Redemption) under Sharia Courts Rules of Bauchi State, Nigeria, 2013: Issues and Challenges Volume 4 Issue 1 Hasanuddin Law Review Page 32

1030 Roozpeikar, M., (2017) Divorce and the Islamic Sharia. Journal of Exploratory Studies in Law and Management, Vol. 4, Issue 1, Page 25-28

1031 Ibid

contemporary societies particularly Bauchi, Gombe, Jigawa and Kano States have for certain given upward jostle to immorality and motives a dissenting impact on the society, which consists of Juvenile delinquency, prostitution by means of using puerility and begging in the street and other unwanted places within the society.¹⁰³²

Evidently, women are being divorced recklessly and the left without means of livelihood or dignity, women are now raking in statistics in negative and untoward spheres, hitherto thought to be exclusive domains of young boys and men. Involvement around drugs, violence, supply of sophisticated weapons to bandit, kidnapping, human trafficking, informants of bandit and cattle rustling are all over news headlines with picture of differently prudent looking women being paraded as offender of which majority are divorcees.¹⁰³³ Hence, for the auspicious future of these divorce women it is time for the religious and cultural bodies to extend their hands on these devastating issues for societal well being.

Therefore, it is of important to finding out the rational for the prevalence of the divorce cases particularly khul'i in the society with view to protect the human dignity in the women and the vulnerability of the children in the society.¹⁰³⁴ This is because the situation has continued to generate debate among scholars with some faulting the interpretation of the right of redemption adopted by the Sharia Courts in the states. The Shari'a Courts in northern Nigeria relied on one juristic view under Islamic Law in their interpretation of women's right of redemption; such, reliance of the courts on a lone juristic view under Islamic Law is inimical to positive development of the life of women, children and the society at large.

Although the women right of redemption has been hail as a golden rules of Islamic principles and procedure as highlighted in the prophetic tradition, in the popular case of wife of Thabit bn Qays when his wife lost interest in him and wanted the prophet to dissolve their marriage by way of khul'i. The principle of law heavily relied upon by all Shari'a courts in the northern

1032 Abubakar, N,K, (2008) An assessment of Talaq and Its Consequences in Islamic Law: A case study of Kano State. available at bazeuniversity.edu.ng. Accessed online

1033 Yakubu U, (2019), Deciphering the high rate of divorce in Nigeria (Premium Times 1 March) acceseds online on 3rd July, 2024

1034 ibid

states in dissolving numerous marriage even where the wife did not give any reason to the effect.¹⁰³⁵ Notably, women right of redemption has not been enacted in to law by many states in the north including Gombe, Jigawa and Kano states.¹⁰³⁶ Bauchi state, has been the exception that enacted rules to regulate matter concerning Khul'i. For instance Order 21 (1) and (2) of the Shari'a Courts Rules 2013 of Bauchi State provides the right of redemption to the women by returning the dowry to the husband for the purpose of getting separation from the marriage-tie.

The attitude of the Sharia Courts in granting khul'i rampantly have since outlive it purpose and usefulness; this is because the reason for obtaining divorce (khul'i) has been defeated and it is the society that suffered consequences the most. Therefore, where the usefulness of court decision is defeated, the court has the power to revisit same to give effect to it. It is within this background the paper seek to analytically examined and evaluated the women right of redemption in law and religious perspective as well as societal moral view.

Therefore, this paper explore the legal framework of women right of redemption on the basis of lone juristic view; while there are numerous juristic views that could be relied upon by the courts with the regards to interpreting the women right of redemption within the Shari'a principles through the Qur'anic verses, Hadith and the opinion of the Islamic Scholars on khul'i. This paper applied a non-doctrinal research methodology to analyse the approaches of Sharia Courts in northern Nigeria in their interpretation of Muslim women's right of redemption under Islamic Law focusing however on Bauchi, Gombe, Kano and Jigawa states.

It is hoped that the findings of this paper will be helpful in addressing the identified legal and societal problems. Thus, the paper begins with the discussion on the meaning and nature of khul'i; thereafter, examines the laws relating to the right of redemption and why Shari'a courts adopt lone juristic view in granting same and finally proffers some recommendations that would in turn cure the injuries or damages done to the societal moral well being.

1035 Sule Vs. Sule (2017) 5 SQLR (Pt. II) Page 339 at 342 R.3. see also Figh As-Sunnah by Assayid Assabiq Vol. II Page 253

1036 See Jigawa State Shari'a Court (civil Procedure) Rules 2012, Kano State Shari'a Courts Law 2000, KanoState shari'a Courts (amendment) laws 2019, Kano State Shari'a court (civil procedure) Rules 2021 and Gombe State Area courts Law 2020

2.1 Conceptual and Theoretical Framework

Although divorce is not an encouraged act in Islam, a Muslim couple can obtain a divorce if good relationship between the spouses become unbearable and impracticable. Consequently marriage is premised on the fact that it constitutes a contract, and as such, the contract must be able to function properly. However, the contract will not function properly when it becomes humanly impossible. In such circumstances divorce (repudiation) finds application within the Islamic context.¹⁰³⁷

2.1.2 Meaning of Khul'i (Women Right of Redemption)

The word Khul'i is derived from the Arabic word Khala'a al-Thaub meaning releasing or removing a cloth from the body, due to the fact a woman is regarded as a cloth or dress to a man as stated in the holy Qur'an. The Holy Qur'an provides that: "They are your dress and you are their dress."¹⁰³⁸ The technical meaning of khul'i, it is used for marital 'extraction', and is the act of accepting compensation from the wife in exchange for her release from the marital tie. Ibn Hajar defines it as 'separation of the husband from his wife for money consideration to be given to the husband.

According to Ibn Rushd, 'the terms khul'i refer to a transaction in which wife pays compensation for obtaining her divorce.¹⁰³⁹ Ibn Human define Khul' as "ending or terminating the union of marriage in exchange for a financial settlement by the wife with the word of Khul."¹⁰⁴⁰ In other word the term khul'i is a procedure through which a woman can divorce her husband in Islam by returning the dower (Mahr) or something else that she received from her husband, as agreed by the spouses or khadi's (court) decree.¹⁰⁴¹ Based on traditional Fiqh, and referenced in the Qur'an and Hadith, khul'i allows a woman to initiate a divorce.

1037 Booley A, (2014) Law Democracy and Development; Divorce and the Law of Khul: A type of no Fault divorce found within an Islamic Legal Framework Vol.18 available at <http://dx.doi.org/10.4314/idd.v18i1.3>

1038 The Holy Qur'an 2:182 and see also Ibrahim A, and Ardo A.H (2023) Khul'i as Mechanism to Preventing Murder of Husband In Nigeria Journal of Islamic and Education Studies Vol. 2 No. 4 Page 194

1039 Ibid

1040 Nasir, J. J. (2009). The Status of women Under Islamic Law and Modern Islamic Legislation. Brill. Page 129

1041 Danjuma, I. and Jimeta, U.S.A, (2018) Khul'i (Right of Redemption) under Sharia Courts Rules of Bauchi State, Nigeria, 2013: Issues and Challenges Volume 4 Issue 1 Hasanuddin Law Review Page 32

Further more, khul'i refers to circumstances where a wife initiates the divorce proceeding and it is in form of a recompense given to a husband by his wife who requests for separation or divorce.¹⁰⁴² As soon as the husband accepts to divorce, his wife will return some money or dowry, the divorce is known as Talaq. Divorce by khul'i is made by means of proper words spoken or written by the couples or their representatives on the understanding that the wife offers a compensation to the husband in order to release her from the marital rights.¹⁰⁴³ That is, it means compromise by a husband his marital rights over his wife for an exchange from her a compensation either in kind or cash to release her from the bond of marriage.¹⁰⁴⁴

However, in the wordings of some Islamic jurist the unwillingness of a wife to perform or fulfill her conjugal duties, wishes to be divorced from the bond of marriage by her husband, she can do so by forfeiting her dowry if unpaid or recompense her husband with the dowry or property if the dowry was paid and such is called khul'i.¹⁰⁴⁵ Although, the Islamic jurists give different definitions of khul'i, Imam Malik is of the view that khul'i is a divorce by given something in return. Similarly, Imam Shafi'i defines it as a separation sought with something in return and with the pronouncement of the word khul'i or divorce. While Imam Hannafi defines khul'i as the termination of the contractual relationship between the spouses with the utterance of the word khul'i or something similar to it. Imam Hanbal is of the view that, khul'i is a separation of the husband in lieu of some consideration realized by him.¹⁰⁴⁶

2.2.2 The Concept of Human Dignity in Islam (Karamah al-insan)

The women's right as human have always been safeguarded unconditionally, in Islam this perfectly embodied in the Quranic concept of "Karamah al-insan", (Human Dignity) as an antidote to religious Violence. Human dignity concept has transform an instructive Islamic principle that regulates all human relationships, be it between

1042 Ciroma, A. (2009). Al-Khul;' The Woman's Choice. Available online at <http://al-aminciroma.blogspot.my/2009/10/al-khul-womans-choice.html> Retrieved 17th July, 2024

1043 Umar Sulaiman Abbo Jimeta et al. (2017). Khul'i (Right of Redemption) under Sharia Courts Rules 2013 Bauchi State

1044 Ajijola, A.A.D. (1989) Introduction to Islamic Law. New Delhi: International Islamic Publishers, Page 171

1045 Abdu M. O. A. (1978) Islam as a Religion (Faith and Duties) Nigeria: Islamic Publications Bureau, Lagos, Page 43

1046 Ibrahim A, and Ardo A.H (2023) Khul'i as Mechanism to Preventing Murder of Husband In Nigeria Journal of Islamic and Education Studies Vol. 2 No. 4 Page 195

Muslims or otherwise.¹⁰⁴⁷ The concept of Human dignity will serve as a robust antidote to social and religious dynamical system especially to women in these factious period. This right has been properly extended to the exercise of the right of redemption.

The perfect rights of women toward protecting human dignity has been provided in the Qur'an¹⁰⁴⁸, for instance, all Muslim women are prohibited from un-chasteful act and therefore her mode of appearance must also be protected. In the same verse men were further worn to desist from committing adultery, fornication or any promiscuous act with or without the consent of the women.¹⁰⁴⁹ To this effect women dignity is treated with a very high humane under Islam

It is obvious that, in the Islamic religion women have the right to seek divorce by way of khul'i, if she becomes apprehensive that she is not in harmony with husband; the law requires her to redeem herself from the marriage tie by give up whole or some part or equivalent to the dower.¹⁰⁵⁰ This is because the dignity of women in Islam is a fundamental principle of the religion. The Qur'an and the sunnah gave women many rights and responsibilities, including right of redemption as equal to right to choose their husband. Islam is the religion that values women and gives them many right and responsibilities. Women in Islam are respected and valued members of every society, and they have the chance to reach their full potential.¹⁰⁵¹

2.2.1 Historical background of Women Right of Redemption

The origin of Khul'i as a means of separation of the couples from the bond of marriage upon the payment of money or refund either in kind or cash by the wife which may be equivalent to the dowry or more or lesser than the dowry found its root to the Qur'anic revelation and Hadith of prophet Muhammad (S.A.W). The fundamental principle with

1047 Ali B. M, (2022) Delineating the Concept of Human Dignity in Qur'an: Karamah al-insan as an antidote to Religious Conflict and Violence. *Advances in Social Science Research Journal* Vol. 9 (1) Page 220-235

1048 Qur'an 17:32, See also Danladi, K.M, (2022) *Introduction to Jurisprudence and Legal Theory* 1st Edition, Enifab Print Media Zaria, Kaduna State Page 489

1049 Danladi, K.M, (2022) *Introduction to Jurisprudence and Legal Theory: Women and Childred Rights Under Islamic Law* 1st Edition Enifab Print Media Zaria, Kaduna State Page 479 -489

1050 See the case of *Wapanda Vs. Wapanda* (2014) 2 SQLR (Pt. III) R.10 Page 393

1051 Mohammed, (2023) *The Dignity of Women in Islam* (mohammed-Ph.d.medium.com) accessed online on 12th July, 2024

respect to Khul'i is justified in the following verse of the Holy Qur'an, in which Allah says:

“And it is not lawful for you (men) to take back (from your wives) any of your Mahr (dowry given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah. Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul'i (divorce)”¹⁰⁵²

Likewise, it is uncontested facts by majority of the Islamic jurist of Fiqh that, during the lifetime of the Holy Prophet Muhammad (S.A.W), He ordered a wife to pay her husband what the husband gave her as a dowry. This is reported in the following hadith:

“The wife of Thaabit ibn Qays ibn Shammaas (may Allaah be pleased with him) came to the Prophet (peace and blessings of Allah be upon him) and said, “O Messenger of Allah, I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of kufr after becoming a Muslim.”¹⁰⁵³

Therefore, divorce by khul'i is made by means of proper words spoken or written by the couples or their representatives on the understanding that the wife offers a compensation to the husband in order to release her from the marital rights.¹⁰⁵⁴ That is, it means compromise by a husband his marital rights over his wife for an exchange from her a compensation either in kind or cash to release her from the bond of marriage.¹⁰⁵⁵ It is worth noting that, under classical Shari'a divorce instituted at the request of the woman is not altogether foreign to Islam, although it does cause some difficulty.¹⁰⁵⁶ This difficulty “should not be overstated”, since one of the basic principles found within Islam is that a marriage which is not functioning properly should be terminated to avoid further trauma.¹⁰⁵⁷

3.1 Mode of Dissolution of Marriage by Khul'i

¹⁰⁵² QS. Al-Baqarah 2:229

¹⁰⁵³ Narrated by al-Bukhari, 5273

¹⁰⁵⁴ Ibrahim, A. (1972). Islamic Law in Malaya. Singapore: Malaysian Sociological Research Institute Ltd, Page 210.

¹⁰⁵⁵ Ajjola, A.A.D. (1989). Introduction to Islamic Law. New Delhi: International Islamic Publishers, Page 171

¹⁰⁵⁶ Alidadi K (2005-2006) “The Western judicial answer to Islamic talaq: Peeking through the gate of conflict of laws” 5UCLA Journal of Islamic and Near Eastern Law 3 at Page 22.

¹⁰⁵⁷ Alidadi (2005-2006) at Page749.

It is clear from the Islamic point of view that dissolution of marriage through the process of khul'i generally can arise under two circumstances:

a. When both the husband and the wife mutually decide a separation. This happens where there is mutual consent from the spouses to separate. The husband can divorce the wife with no difficulty subject to such terms if any as may be agreed upon between them. However, if it is the wife who wants khul'i and the husband agrees to dissolve the marriage on certain conditions agreed upon between the spouses, there shall arise no difficulty. The spouses may not even have make recourse to a court of law.¹⁰⁵⁸

b. When it is only the wife who wants to get a release from the marriage tie and the husband may appears to be unwilling to khul'i and insists on the subsistence of the marriage-tie in spite of the wife's resentment to it, in this situation it is only the wife who is desirous of the termination of the marriage. Therefore, generally, the establishes the law that a wife cannot dissolve her marriage under khul'i by herself. She has to get it done either through the agreement of the husband or through the judicial process.¹⁰⁵⁹

The Court of Appeal of Nigeria, in the celebrated case of *Husaina v. Tsiriko*¹⁰⁶⁰ has found and held that "There are two forms of divorce based on mutual consent. These are Khul' and Musawa. The latter is dissolution of marriage on the basis of the mutual release of the spouses from any outstanding financial commitment arising from the marriage relation. This is less common among the Nigerian Muslims. Other form is khul'i is derived from khul' al-Thaub releasing or removing the dress from the body. Khul' is explained as one of the ways in which dissolution of marriage talaq can take place."¹⁰⁶¹

Accordingly, the wife could ask for a faskh, which falls under the banner of a judicial divorce (tafriq). This type of divorce is used to indicate the formal judicial rescission of

1058 Wapanda Vs. Wapanda (2014) 2 SQLR (Pt. III) Page 385 at 393 R.11

1059 Usman Vs. Usman (2003) 11 NWLR (Pt. 830) Page 109 at 129-130

1060 (1991)1 NWLR(Pt. 167) Page 356 at 364

1061 Michika, A.A, (2020) Guide to Advocates: An English Language Translation and Commentary on Tuhfatul Hukkam. Zusalat Company, Kaduna, Kaduna- Nigeria. Page 239-240

the marriage.¹⁰⁶² It has been argued that this is the only way that the wife can obtain a divorce without the husband's consent and involvement. There is consensus amongst the various schools of thought although they differ as to the grounds of repudiation and the procedure which has to be followed. In addition to the above mentioned, a wife may divorce her husband by way of khul'i. This type of divorce is at the behest of the wife. The difference between a khul'i and a faskh divorce is that for the former no grounds are required for the dissolution of the marriage, while for the latter the wife will have to rely on one of the grounds provided for.¹⁰⁶³

3.2 The Law of Khul'i and Its Effect

The Khul'i is derived from Khul'-al-Thuab¹⁰⁶⁴ and makes provision for divorce at the instance of the wife.¹⁰⁶⁵ Khul'i thus creates the means through which the wife can seek release from the bonds of the marriage relationship.¹⁰⁶⁶ The following verses in the Qur'an are associated with the notion of a khul'i divorce: "Permitted to you, on the night of the Fast, is the approach to your wives. They are your garments and ye are their garments. Allah knoweth the what ye used to do secretly among yourselves."¹⁰⁶⁷

Moreover, "If a wife fears cruelty or desertion on the husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."¹⁰⁶⁸ The divorce by khul'i is also to be found in the second primary source of Muslim personal law (Shari'a), based on the sunnah of Muhammad. Muslim scholars, such as Doi and Nadvi, cite a hadith that is found in Sunan al-Baihaqi as an expressed authority on khul'i:

"A woman came to the Prophet and said: 'I hate my husband and like to separate from him'. The Prophet asked: 'Would you return the

1062 Rautenbach C, Bekker JC & Goolam NMI(2010) "Religious legal systems: Law of persons" in Rautenbach C, Bekker JC & Goolam NMI Introduction to legal pluralism 3 ed. Page 245 at 307.

1063 Booley A,(2014) Law Democracy and Development; Divorce and the Law of Khul: A type of no Fault divorce found within an Islamic Legal Framework Vol. 18 Page 50 available at <http://dx.doi.org/10.4314/idd.v18i1.3>

1064 Literally meaning "to take off one's dress" and thus referring to a metaphoric description of the spouses serving as garments to one another.

1065 Doi, A.I, (1984) "Talaq: Divorce in Shari'ah' Page 192

1066 Ibid

1067 Yusuf, A.A, (1938) "Chapter IV, verse 19" The Holy Quran: Text, translation and commentary "Chapter II" at Page 73-74.

1068 Yusuf (1938) "Chapter IV" at Page 221-222. See also, in particular, verse 128 of Sura IV

orchard that he gave you as dower?’ She replied: ‘Yes, even more than that.’ The Prophet said: ‘You should not return more than that.’¹⁰⁶⁹

Therefore, although a khul'i divorce can be initiated at the instance of the wife, the husband's consent is required. It is, however, the duty of the court or khadi (normally a judge) to grant the divorce.¹⁰⁷⁰ There are a number of disadvantages when a wife seeks a divorce by way of khul'i. One such disadvantage is that when the marriage is dissolved by this method, not only is the marriage dissolved, but the husband's duty to pay a deferred mahr also evaporates.¹⁰⁷¹ Mahr means "reward" or "nuptial gift" (also referred to as dower, sadaqa or faridah).¹⁰⁷² Pearl rightly points out that the mahr is an effect or consequence of the marriage contract and not the price paid by the husband in acquiring certain rights which accrue to him upon marriage.¹⁰⁷³

Another interpretation of the payment of mahr is that it is a sum paid to the wife as a sign of respect.¹⁰⁷⁴ Mahr can be divided into two kinds, namely, prompt and deferred. Prompt mahr, as the name suggests, must be paid on the conclusion of the marriage.¹⁰⁷⁵ Deferred Mahr is normally paid upon the dissolution of the marriage by death or divorce or upon other terms to which the parties have agreed.¹⁰⁷⁶

Consequently, The consideration for khul'i has to be anything lawful i.e. whatever is lawful to be accepted as dowry then it should also be a lawful consideration for khul'i and the consideration has to be specified by the spouses.¹⁰⁷⁷ The time for the payment of the consideration has to be specified either immediately or at an agreed time, and where no period has been fixed, then it has to be paid immediately when the khul'i is

1069 Nadvi (1989) "Muslim Personal Law" at 62. See also Doi (1989) at 97. The term hadith refers to the contents of the sunnah which have been put forward in a series of reports. See, in particular, Warren (2008) at Page 2

1070 Booley A, (2014), Law Democracy and Development; Divorce and the Law of Khul: A type of no Fault divorce found within an Islamic Legal Framework Vol.18 Page 51

1071 Ibid

1072 Ibid

1073 Booley A,(2014), Law Democracy and Development; Divorce and the Law of Khul: A type of no Fault divorce found within an Islamic Legal Framework Vol.18 Page 51

1074 Ibid

1075 Ibid

1076 Ibid

1077 Ibrahim, A. (1972), Islamic Law in Malaya. Singapore: Malaysian Sociological Research Institute Ltd, Page 260-261.

pronounced.¹⁰⁷⁸ According to Hannafi school of thought, as a general rule, the amount to be paid by the wife as consideration should not exceed the amount of the wife's dowry or property given by the husband.¹⁰⁷⁹ And where the consideration exceeded the dowry, it is valid but disapproved. They based their argument on the hadith where the wife of the Thabit met the Holy prophet for khul'i. The wife of habit told the Holy Prophet that she is willing to give more than what she received from her husband while the Holy Prophet said "*No, not more than that.*"¹⁰⁸⁰

Nevertheless, the Hannafi School holds the view that if a husband divorces his wife by way of khul'i, and the marriage has not been consummated, the dowry has been paid, then the wife has to return the full dowry.¹⁰⁸¹ Notwithstanding, if it has not been paid, then the husband's liability to pay has ceased. While under Maliki school of thought, if the marriage has not been consummated and the spouses have agreed on certain consideration, the wife has to pay the agreed consideration and the right to her dowry shall be extinguished, meaning that she is not entitled to get anything from the dowry.¹⁰⁸²

Conversely, Imam Shafi'i is of the opinion that, where the marriage has not been consummated and the spouses have agreed on specified sum, then the wife is entitled to half of her dowry and if not yet paid, the husband has to pay her half of the dowry.¹⁰⁸³ However, Imam Hanbali is of the view that the right to dower is not lost as a result of Khul'i and the husband is liable to pay if it has not been paid. Other rights like maintenance during Iddah is not lost on the pronouncement of khul'i because it arises only after the divorce or Khul'i has been pronounced, unless it is part of the agreement during the khul'i.

However, If a woman seeks khul'i during her last illness, it is considered valid by all schools. But they differ where she pays as consideration more than a third of her wealth

1078 Ibrahim, A. (1972). Op.Cit., Page 262

1079 Ibid

1080 "Op.Cit., Page 263

1081 "Op.Cit., Page 267

1082 Ibid Page 268

1083 Ibid

or more than the husband's share to be inherited from her on assumption of her death during the 'iddah. As said above, they inherit from each other in this situation. The Shafi'i schools state: If she seeks khul'i for mahr al-mithl, it is valid and the consideration is payable from her undivided legacy. But if it exceeds mahr al-mithl, the excess will be deducted from one-third of her legacy.¹⁰⁸⁴

4.1 The Role of the Shari'a Courts

The Shari'a courts and judges varies across schools. When petition for khul'i is taken to the Shari'a courts, a judge is permitted to substitute the husband and nullify the marriage. This process of judicial dissolution is also usually referred to as faskh, which commonly occurs when the husband refuses to consent to the wife's decision to divorce.¹⁰⁸⁵ Almost all Northern States in Nigeria, including, Bauchi, Gombe, Jigawa and Kano states, makes rules to regulate all the proceedings before Shari'a Courts be it civil or criminal matter.

Although, the women right of redemption has been hail as a golden rules of Islamic principles and procedure as highlighted in the prophetic tradition, in the popular case of wife of Thabit bn Qays when his wife lost interest in him and wanted the prophet to dissolve their marriage by way of khul'i. Notably, women right of redemption has not been enacted in to law by many states in the north including Gombe, Jigawa and Kano states.¹⁰⁸⁶ Bauchi state, has been the only exception the enacted the law to regulate matter concerning Khul'i. For instance Order 21 (1) and (2) of the Shari'a Courts Rules 2013 of Bauchi State provides the right of redemption to the wife by returning the dowry to the husband for the purpose of get separation from the marriage tie. For instance Order 21 (1) and (2) of the Shari'a Courts Rules 2013 of Bauchi State provides the right of redemption to the wife by returning the dowry to the husband for the purpose of get separation from the marriage tie. Order 21 provides as follows:

1084 Muhammad, J. M, (2020). Al-Khul (Farq al-Zawaj. Digital Islamic Library. See also Ibrahim A, and Ardo A.H (2023) Khul'i as Mechanism to Preventing Murder of Husband In Nigeria Journal of Islamic and Education Studies Vol. 2 No. 4 Page 198

1085 Judith E. T. (2008). Women, Family and Gender in Islamic Law. Cambridge University Press. Page. 97-99

1086 See Jigawa state Shari'a Court (civil Procedure) Rules 2012, Kano State Shari'a Courts Law 2000, Kano state shari'a Courts (amendment) laws 2019, Kano State Shari'a court (civil procedure) Rules 2021 and Gombe State Area courts Law 2020

a) “A wife can redeem herself from the bond of marriage by:-

- i. Returning the full dowry or
- ii. Maintenance of pregnancy or
- iii. Maintenance of self during *Iddah* period or
- iv. Maintenance of her child

b) If a wife opts for redemption by maintenance of her child and the child died, the father will not be entitled to anything for the remaining period of the maintenance. From the wordings of Order 21, Rule 1, there are 4 ways upon which a wife can redeem herself from marriage. Firstly, by returning the dowry, a husband can relieve his wife from the bond of marriage by way of redemption (*khul'i*) after she paid him back his full dowry given to her at the time of contracting the marriage. Secondly, she may also redeem her herself from the bond of marriage, if she agrees to maintain her pregnancy up to the time that she will deliver. Thirdly, is by way of maintaining herself during *Iddah* period. Her maintenance during pregnancy and *Iddah* period include feeding, shelter, medication and other daily needs. That is to say, she will not request anything from the husband for her maintenance.”¹⁰⁸⁷

However, by the interpretation of the position of the law under Order 21 of the Shari’a Courts Rules, 2013 it has slight inconsistency with the decision of the court in the case of ***Kande Inusa v. Inusa Manga***,¹⁰⁸⁸ where the court held that once the issue of *khul'i* has been presented before the court, the consideration demanded by the husband before divorcing his wife becomes a matter of arrangement and negotiation between the husband and the wife. The Islamic scholars, jurists and academicians at a validation meeting held in Dutse, Jigawa State, Nigeria resolved that *Khul'i* will be limited to dowry paid by the husband, but where the husband paid the dowry above the normal amount prescribed by Shari’a, then it is for the judge to decide what is affordable and reasonable for the wife to pay.¹⁰⁸⁹

4.2 The Societal Implication of *Khul'i*

¹⁰⁸⁷ Bauchi State Shari’a Courts (civil procedure) Rules 2013

¹⁰⁸⁸ (2013) SQLR (PART IV), Ratio 5. See also Danjuma, I. and Jimeta, U.S.A, (2018) “Op.cit” at Page 37

¹⁰⁸⁹ Danjuma, I. and Jimeta, U.S.A, (2018) “Op.cit” at Page 38

Generally, divorce occurred owed to any ground and in any kind, has the capability of collapsing the household in which both parties have peace, tranquility and causes the disstabilization of children.¹⁰⁹⁰ Possibly, both parties get divorce volitionally, but they bore grievance and evolve the sense of despair. Dissolution of marriage is among the spouse downfalls of life and affects the children by psychological distress and its menacing impacts remain throughout life. The miseries caused by divorce are not repairable in many cases. Divorcement makes the both boys and girls pessimist to marriage, educates people of the society with complexes, as it develops retaliation and deliver nervous people to the society.¹⁰⁹¹

The principle of law in Thabit bn Qays has always been the lone authority heavily relied upon by all Shari'a courts in the northern states in dissolving numerous marriage, even in the situation where the wife did not give any reason to that effect.¹⁰⁹² Apparently, the dissolution of marriage through the process of khul'i does not require the Khadi to compel the wife to explain her reasons for so requesting. This is because the prophet did not inquire into the reasons why the two wives of Sufyan wanted to free themselves for the marriage-tie.¹⁰⁹³ However, the attitude of the Shari'a Courts in granting khul'i rampantly in the present or contemporary society is worrisome, atrocious and call for concern.

The desire of women toward seeking divorce in such manner in this contemporary period has become worrisome due to the fact that same has always been used as tools or an instrument for the destruction of a family and societal well being. The consequence of their action has however increased the number of divorcees in the society with devastating consequences on children, the women themselves and the society at large. The high rate of divorce in our contemporary societies particularly Bauchi, Gombe, Jigawa and Kano States, which have for certain given upward jostle to immorality and motives a dissenting impact

1090 Roozpeikar, M., (2017) Divorce and the Islamic Sharia. *Journal of Exploratory Studies in Law and Management*, Vol. 4, Issue 1, Page 25-28

1091 Ibid

1092 Sule v. Sule (2017) 5 SQLR (Pt. II) Page 339 at 342 R.3. See also Figh as-sunnah by Assayid Assabiq Vol. II Page 253

1093 Wapanda Vs. Wapanda (2014) 2 SQLR (Pt. III) Page 385 at 393 R.11

on the society consists of Juvenile delinquency, prostitution by means of using puerility and begging in the street and other unwanted places within the society.¹⁰⁹⁴

Evidently, women are being divorced recklessly and left without means of livelihood or dignity, women are now raking in statistics in negative and untoward spheres, hitherto thought to be exclusive domains of young boys and men. Involvement around drugs, violence, supply of sophisticated weapons to bandit, kidnapping, human trafficking, informants of bandit and cattle rustling are all over news headlines with picture of differently prudent looking women being paraded as offender of which majority are divorcees.¹⁰⁹⁵ Hence, for the auspicious future of these divorce women it is time for the religious and cultural bodies to extend their hands on these devastating issues for the well being of society.

The rampant occurrence of the divorce in Northern Nigeria is found to have socio-economic and political effect in the society. The contemporary women have now developed the practice of seeking khul'i through judicial process with view of returning back to their former husband that divorced them thrice.¹⁰⁹⁶ While some divorcees engaged in the act of prostitution after getting khul'i whereof operating from their parent houses or rented an apartment within society for such purposes. It has been discovered that statistically about 80% percent of the female actresses in the Hausa Film industry are divorcees of which 40% percent got their marriage dissolved through judicial process particularly khul'i and this has been one of the problems bedeviling the society in its entirety.

Therefore, most of the the Shari'a courts decisions with regards to khul'i have since outlived its purpose and usefulness; this is because the reason for obtaining divorce (khul'i) has been defeated and it is the society that suffered consequences the most. Therefore, the law is trite that where the usefulness of court decision is defeated, the court has the power to revisit same to give effect to it. Hence, for the auspicious future of these divorce women it is time

1094 Abubakar, N,K, (2008) An assessment of Talaq and Its Consequences in Islamic Law: A case study of Kano State. available at bazeuniversity.edu.ng

1095 Yakubu U, (2019), Deciphering the high rate of divorce in Nigeria (Premium Times 1 March) accessed online on 3rd July, 2024

1096 Unreported cases from area and shari'a courts of Gombe and Bauchi states

for the religious and cultural bodies to extend their hands on these devastating issues for the well being of society.

5.1 Summary, Conclusion and Recommendations

Summarily, this paper explore the legal framework of women right of redemption on the basis of lone juristic view; while there are numerous juristic views that could be relied upon by the courts with the regards to interpreting the women right of redemption within the Shari'a principles through the Qur'anic verses, Hadith and the opinion of the Islamic Scholars on khul'i. The paper equally examined the relationship between law, religion and the family, particular the women's right of redemption under Islamic Family law as a tool for the protection of human dignity focusing on Bauchi, Gombe, Kano and Jigawa State. The mode of dissolution of marriage, The law of khul'i and its effect has also been discussed. Finally the role of Shari'a courts the societal implication of khul'i have equally been examined in the paper.

Conclusively, the paper found among many other things that first, Sharia Courts in northern Nigeria relied on one juristic view under Islamic Law in their interpretation of women's right of redemption. Second, reliance of the courts on a lone juristic view under Islamic Law is inimical to positive development of the life of women, children and the society at large. Another finding of this paper is that the women's right of redemption has not been enacted in to law by many states in the north including Gombe, Jigawa and Kano states. Bauchi state has been the only exception that enacted the law to regulate matter concerning khul'i. On the basis of these findings, the paper concluded that unless Sharia Courts in northern Nigeria embraces more expansive juristic views under Islamic Law in their interpretation of women's right to right of redemption under Islamic Law, there may not be end to the suffering of women and children in the society.

Finally, the paper's recommendation is that Shari'a Courts in northern Nigeria should adopt out-sourcing technique in their interpretation of the right of redemption for greater protection for women, children and the society. Its further recommended that for the auspicious future of these divorce women it is time for the religious and cultural bodies to extend their hands on these devastating issues for the well being of society. It is equally, the recommendation of this paper that religious scholar must intensify their da'awah in

this area with view of enlightening Judges, Lawyers, scholars and general public on the affects and implication of granting rampant khul'i to the society through organized workshop and conferences. It is further recommended that Shari'a court while granting khul'i should consider enforcing strictest conditions before khul'i can be granted considering the surrounding and prevailing circumstances of the contemporary society. Further research in this area using empirical methodological analysis is also recommended



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

EFFECTS OF CLAIMANTS AWARENESS AND INVOLVEMENT IN COMPULSORY
ACQUISITION AND COMPENSATION ON THEIR SATISFACTION WITH THE
COMPENSATION PROCESS: A CASE STUDY OF BAUCHI STATE, NIGERIA

Ibrahim Samirah Jibril¹, Muhammad Usman Adekunle ² and Aishatu Adamu Mazadu³

^{1,2}Department of Estate Management and Valuation, Abubakar Tafawa Balewa
University, Bauchi.

³Department of Estate Management, University of Jos, Plateau.

Abstract

The aim of this paper is to assess landholders' awareness and involvement in compulsory acquisition of land on their satisfaction with compensation process in Bauchi, Nigeria, with a view to identifying areas of weakness in the process and proposing areas of improvement.

The paper explores the extend of awareness and involvement of compulsory acquisition of land on satisfaction with payment of compensation adopted the use of empirical method and data were collected through questionnaire survey from 327 landholders affected by the compulsory acquisition and compensation exercise by the Bauchi State Government. The data collected was subjected to descriptive with mean ranking, frequency distribution. This shows that the model predicts about 81.2 percent of the of the landholders are not in satisfaction is greatly influenced by changes in both awareness and involvement of these landholders. In other words, about 81.2 percent not in satisfaction whether high or low can be explained by not in awareness and involvement. It recommended that Government needs to extend the compensation process from monetary term and include other non-monetary compensation, to compensate for other social effects such as loss of homes, source of income and disruption of families as well as neighbours. Governments need to come up with modalities to ensure that they pay compensation to affected landholders in time.

Keywords: *awareness, involvement, compulsory acquisition, compensation process, landholders' satisfaction.*

1.0 Introduction

The paper made effort to inquire why landholders do not get utmost satisfaction on payment of compensation when their lands are compulsory acquired by the Government. focused on compensation generally under the enabling statute, Land Use Act 1978(LUA)¹⁰⁹⁷with specific interest in the Bauchi State of North-eastern Nigeria. The problem of inadequate compensation that characterized compensation practice in Nigeria is rooted in the law that govern compulsory acquisition and compensation in the country. Compensation should reflect the current market value of the land at the time it was acquired. This law is needed to be reviewed in order to reflect the current circumstances. There is ambiguity, lack of clarity, inconsistency in content and interpretations of enabling statute¹⁰⁹⁸ which is partly responsible for inadequate compensation and the application of multiple standards, procedures and methods of valuation results in alarmingly wide discrepancies in compensation values over the same interest in land. Again, nuanced understanding of the position of the Constitution providing that compensation must be prompt and adequate as such provision is never mentioned in the LUA¹⁰⁹⁹.

1.1 Contextual Analysis

Compensation is defined as the monetary term or otherwise given to a disposed landowner to relief him/her from the compulsory acquisition of his land/land property for overriding public interest¹¹⁰⁰.

From the above it can be denoted that compensation is seen as a payback to disposed landowners either in cash or in kind to return him/her to the status quo prior to the compulsory acquisition. In general compensation should be for loss of any land acquired for the reduction in value of any land retained as a result of compulsory acquisition, and for any disturbances or other losses to livelihood, business and displacement of the landowner or occupant as a result of the compulsory acquisition.

¹⁰⁹⁷ Land Use Act, Cap.L5, *Laws of the Federation of Nigeria*, 2004.

¹⁰⁹⁸ Section 29 *ibid*

¹⁰⁹⁹ Section 44 (1)(a) of the Constitution of the Federal Republic of Nigeria, 1999

¹¹⁰⁰ Akujuru, V.A & Ogbonda, U. (2016), "Rationalising the Contemporary Issues in the Valuation of Land for Infrastructural Development in Nigeria", *Donnish Journal of Research in Environmental Studies*3(1), 1–7.

1.2 Acquisition Procedures Property in Nigeria

Before compensation is paid to the Landholders, the compulsory acquisition has taken place which includes; Inspection of the selected parcel of land by the staff of the government agency involved; Issuance of notice of the intention to acquire land to the landowner in the government gazettes, daily papers or by posting the notice on the tree or nearest buildings and to yield up possession within six week; ; Procurement of brief; Claim survey; Assessment for compensation; Valuation report; and Payment of compensation and professional fees Property identification; and Receiving of petitions, objection and complains over compensation.

1.3 Components of Compensation and Valuation Procedures under the Land Use Act of 1978

Section 29(4)¹¹⁰¹ of the LUA provides that compensation of Land is payable in respect of the following;

- i. For land- an amount equal to the rate, if any, paid by the occupier during the year in which the right of occupancy was revoked. There is no provision for compensation for bare land undeveloped irrespective of whatever cost incurred at acquiring the land either from the state or the community;
- ii. For Building- installation or improvements therein, for the amount of the replacement cost of the building, installation or improvement, that is to say such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, been such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer;
- iii. Crops on land- apart from any building installation or improvement thereon, for an amount equal to the value as prescribed and determined by the appropriate officer;

¹¹⁰¹ Op Cit

The valuation is done by the state without input from the landholder's in term of representation and or raising objections against the whole process. Compensation recoverable for unexhausted improvements on the land valued at replacement cost less depreciation, meaning that the compensation payable will be insufficient to replace the installation with a new one¹¹⁰².

1.4 Valuation Methodology for Compulsorily Acquired Interest: The Nigerian Practice

The Nigerian compensation practice involves the use of predetermined rate which is mostly applicable to buildings and structures affected by compulsory acquisition. The replacement cost approach of valuation is usually used based on the notion/assumption that cost is related to value, consideration is not usually taken whether the properties compulsorily acquired are income generating, which could be valued using either the investment or income method of valuation¹¹⁰³.

In applying the rate, no consideration is giving to the terrain within which compulsory acquisition is carried out. Thus, same rate are spread across similar properties without taking their location/terrain into consideration. The resulting value affect property owners in a difficult terrain to the advantages of their counterpart in less difficult terrain, thus creating doubts of equitability in the valuation and compensation process. The valuation method for valuing economic trees and cruse are dependent on the inputs of the appropriate officer who fix rates without considering the lifespan of the crop/tree, its income generating potentials and fruiting capacity.

Authors have shown that most rate used in compensation for crops and trees are mostly prescribed by the appropriate officers for agricultural crops does not relate to the market value of the economic crops and trees and cannot restore the dispossessed landowner to the position he/she is prior to the compulsory acquisition¹¹⁰⁴.

¹¹⁰²

Akintunde,O.(2012),“European and International Law Private Property Rights and Compulsory”,*European and International Law*, 8(2), 5–29.

¹¹⁰³ Nuhu, M. B. (2008),“Compulsory Purchase and Payment of Compensation in Nigeria”, A Case Study of Federal Capital Territory (FCT) Abuja . *Nordic Journal of Surveying and Real Estate Research*, 3(August 2007), 102–126.

¹¹⁰⁴ Akujuru, V. A., & Ruddock, L. (2013), “Compulsory Acquisition Practices and the Determination of Compensation Payable in the Niger Delta”, *Asian Journal of Social Sciences & Humanities*1(1), 1–10.

1.5 Methodology

Empirical research approach was adopted in this paper due to the nature of the research problem that involves the Effects of Landholders' awareness and involvement in compulsory acquisition and compensation paid in Bauchi. Thus, empirical method by the use of questionnaires involve collecting data, numerically analyzing and interpreting the data.

1.6 Finding and Result

The questionnaires were administered on-site with sample size of 327 landholders whose land was compulsory acquired by the Bauchi State Government for overriding public interest of construction flyovers and modern markets in the metropolis.

Table 1 Value of Questionnaire of Constructions Flyovers and Modern Markets in the Bauchi State Metropolis

S/No	Variables	Item Statistics/No. of construct	Reliability status
1	Awareness	10	Acceptable
2	Involvement	9	Acceptable
3	Satisfaction	14	Good

The study came at a time when the government compulsorily acquires land for overriding public interest so as to provide infrastructural facilities. The findings from the survey carried out indicated that landholders are fully aware, very well involved and very satisfied with the process of compulsory acquisition but dissatisfied with compensation process. This shows that the model predicts about 81.2 percent of the of the landholders are not in satisfaction is greatly influenced by changes in both awareness and involvement of these landholders. In other words, about 81.2 percent not in satisfaction whether high or low can be explained by not in awareness and involvement.

1.7 Recommendations

It recommended that Government needs to extend the compensation process from monetary term and include other non-monetary compensation, to compensate for other social effects such as loss of homes, source of income and disruption of families as well as neighbours. Governments need to come up with modalities to ensure that they pay compensation to affected landholders in time. Government should make the process of compensation more transparent. Government needs to extend the compensation process from monetary term and include other non-monetary compensation, to compensate for other social effects such as loss of homes, source of income and disruption of families as well as neighbours. Governments need to come up with modalities to ensure that they pay compensation to affected landholders on time. It is also recommended the word “adequate” as was provided by the constitution should be included the provisions of Section 29 of LUA.

1.8 Conclusion

The paper concluded that the assessment process could be improved considerably by the introduction of a compensation valuation code in Nigeria. The implication is that the LUA needs to be review to fair market value as basis of valuation and payment for site value as well as reduce the incidence of many communities and land owners protest against the decision of government or its agents to acquire their land for public purposes without adequate compensation to the satisfaction of the landholders.

Reference

- Akintunde, O. (2012), “European and International Law Private Property Rights and Compulsory”, *European and International Law*, 8(2), 5–29.
- Akujuru, V.A & Ogbonda, U. (2016), “Rationalising the Contemporary Issues in the Valuation of Land for Infrastructural Development in Nigeria”, *Donnish Journal of Research in Environmental Studies*3(1), 1–7.
- Akujuru, V. A., & Ruddock, L. (2013), “Compulsory Acquisition Practices and the Determination of Compensation Payable in the Niger Delta”, *Asian Journal of Social*

*Sciences & Humanities*1(1), 1–10.

Nuhu, M. B. (2008), “Compulsory Purchase and Payment of Compensation in Nigeria”,
A Case Study of Federal Capital Territory (FCT) Abuja . *Nordic Journal of Surveying
and Real Estate Research*, 3(August 2007), 102–126.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT IN
NIGERIA: POLICY IMPLICATIONS AND FUTURE DIRECTIONS

Hadiya Aliyu¹¹⁰⁵

Department of Private and Commercial Law, Faculty of Law, Bayero University Kano.
+2347030803838. Email: hadeeyakazaure@yahoo.com

Abstract

As global attention shifts towards corporate accountability and environmental stewardship, Nigeria faces unique challenges and opportunities in integrating Corporate Social Responsibility and sustainable development within its economic growth narrative. This paper examines the interplay between CSR and sustainable development in the context of Nigeria's policy on environment and corporate practices. Using doctrinal research methodology, the paper provides a critical analysis of the existing policy frameworks, including the Nigerian Sustainable Development Goals Implementation Plan and other regulatory mechanisms. Through this examination, the paper seeks to understand the extent to which CSR has influenced sustainable development initiatives on the overall socio-economic landscape of Nigeria. This paper further discusses the challenges that hinder progress, such as policy implementation gaps and the need for greater corporate governance. It was found that Nigeria is lagging behind in attainment of the SDGs despite the efforts put in place by the government and the corporations through CSR. Finally, it offers a set of future-oriented policy recommendations aimed at enhancing the effectiveness of CSR practices and achieving sustainable outcomes in line with both national priorities and the global sustainable development agenda. The insights provided herein endeavor to guide policymakers, corporations, and other stakeholders towards fostering an environment conducive to responsible business conduct and sustainable growth in Nigeria.

Keywords: Corporate Social Responsibility, Sustainable Development, Regulatory Framework, Policy Implication, stakeholder engagement and environmental sustainability.

¹¹⁰⁵ Hadiya Aliyu PhD. Department of Private and Commercial Law, Faculty of Law, Bayero University Kano.
+2347030803838. Email: hadeeyakazaure@yahoo.com

1.1 Introduction

Corporate Social Responsibility and Sustainable Development have emerged as essential concepts in contemporary Nigeria, reflecting a growing awareness of corporate entities' role in promoting socio-economic and environmental well-being. In Nigeria, these paradigms have shifted from voluntary practices to more strategic imperatives that align closely with global development goals and local societal expectations (Okade, 2020). This paper aims to contribute to ongoing discussions and initiatives aimed at harnessing the transformative power of business to drive positive social change and environmental sustainability. Using doctrinal research methodology, the paper examines the landscape of CSR and sustainable development in Nigeria, delving into the various policies that have shaped their evolution, implementation, and the resultant impact on businesses and the country at large. The paper explores the intersection between CSR initiatives and sustainable development goals within Nigeria's socioeconomic context, analyzing how businesses integrate these concepts into their core strategies. Moreover, the paper examines the current policies and regulatory frameworks in facilitating or constraining the successful adoption of CSR and sustainable development practices. By exploring these dynamics, it highlights the existing policy implications and provide informed recommendations for future directives to ensure that CSR and sustainable development efforts are enhanced towards tangible improvements in the quality of life and environmental stewardship in Nigeria.

1.2 Corporate Social Responsibility

The concept of Corporate Social Responsibility (CSR) was born out of discussions about the role of business in society (Bowen, 1953). It came from societal concerns about negative outcomes of business activities such as child labour, poor working conditions, unpaid overtime, and environmental degradation (Murray., 2014). Although responsible companies had already existed for a long while, the term Corporate Social Responsibility was officially coined in 1953 by American economist Howard Bowen in his publication *Social Responsibilities of the Businessman* (Bowen, 1953). Currently, it is widely used to define non-commercial relations between corporations with other social actors and the society at large (Yakouleva, 2019). CSR centers on accountability and

transparency of corporate activities that include social, ethical, environmental, and economic efforts, which are often voluntary and positioned within and outside of market and commercial transactions.

Stakeholders in the form of consumers, workers, and communities are becoming more conscious of the harmful effects of some business practices on their lives and the lives of the future generations. To mitigate that and ensure peaceful coexistence between business corporations and host communities, corporations employ Corporate Social Responsibility (CSR) mechanism to tackle social issues bedeviling the society (Okade, 2020).

Corporate social responsibility has now become a standard practice across the globe, and yet its purpose, scope, rationale, mechanisms and outcomes are still passionately debated as the whole concept of CSR is wrapped in controversy (Sahoo, 2011). There are basically two school of thoughts on the applicability of CSR. The first school of thought is based on the position of the economist, Milton Friedman. Friedman opined that, a firm's main responsibility is to its shareholders, where he said, "Social responsibility of business is to increase its profits" (Friedman, 1970). Accordingly, the only responsibility of business is to maximise profit for its shareholders and not to bear expenses in the interest of any stakeholders which he believed should be the responsibility of the government. This school argues that business is an economic institution and its real function is economic performance and not social activity (Rhee, 2017). Supporters of this theory believe that since shareholders are the company's primary source of income, they are the sole people to whom the company has social responsibility.

This means that the main goal of a firm is to maximise returns or profit for the shareholders. Friedman further argued that companies have no social responsibility to the public but to the shareholders. This school believes that all business activities should be conducted legally and without infringing upon the rights of others.

The second school of thought is the direct opposite of the first school and it is based on Stakeholder Theory. It states that the purpose of a business is to create value for stakeholders not just shareholders for instance the consumers, suppliers, employees, and the general community. The stakeholder theory was developed by Freeman who was named the father of stakeholder theory. Freeman's *Strategic Management: A*

Stakeholder Approach (Freeman, 1984) is widely cited in the field as being the foundation of stakeholder theory, which projected CSR from the management perspective. The idea of the theory is that the corporations are expected to take into consideration the other entities they interact with in carrying out their business activities including the society and the environment. Meaning that the rights and interests of other groups that can be affected by the actions of the companies should be added to the shareholder value. This include those with direct interest with the business like the consumers, and the employees and the remote ones like the civil society groups and the general community (Hummels, 1998). In strengthening this theory further, Oshionebo and Adamolekun (Ademolekun, 2011) opined that “corporate social responsibility attempts to ameliorate decrepit socio-economic development (challenges) in areas such as poverty alleviation, health care, infrastructural development and education.”

Stakeholder theory is like a mirror image of CSR, because it purports to protect the interest of those whose lives are touched by the activities of corporations directly or indirectly. It is concerned with integrating group of people with a stake in the corporation’s decision making processes. It is a key factor for the success of CSR, because the idea of CSR is for business to be accountable to the various stakeholders who can have a legal or social claim on their activities that affects them (Mitnick, 1995).

An essential contribution of stakeholder theory in CSR conceptualization is that it recognized an individual company’s responsibilities towards particular stakeholder groups comprising of community and the environment (Clarkson, 1995). This means that the stakeholder theory helped in explaining and clarifying the word ‘social’ in CSR. In addition, the stakeholder approach proposed balancing interests of shareholders with other stakeholders (R Edward Freeman, 2006). Jamali suggested that the stakeholder approach helps in interpreting responsibilities of a company in a new fashion: “By suggesting that the needs of shareholders cannot be met without satisfying to some degree the needs of other stakeholders, it turned attention to considerations beyond direct profit maximization” (Jamali, 2008).

1.3 CSR in Nigeria (Practice and Implication)

Nigeria is a country that is rich in natural resources and has a population of over two hundred and twenty million people (220,000,000) (UN, 2023). The country has some development challenges ranging from unemployment, hunger, environmental degradation and infrastructure gap in almost all sectors of the country. Nigeria host a large number of Multinational Corporations in many sectors such as, oil and gas, banking, telecommunications, manufacturing, and many others. Nigerian economy is heavily reliant on the revenues accruing from the oil and gas sector which is why there are a lot of multinational companies in the country (Ekhaton, 2014a). Oil replaced all other export commodities in Nigeria in the late 1960s. Nigeria became the 7th largest petroleum producer in the world and it became a member of Organisation of Petroleum Exporting Countries (OPEC) (Romanova, 2007). The explorative activities by the MNCs in some regions in Nigeria are adversely affecting the host communities and their environments for many decades now. The oil producing region of Nigeria and the rest of the entire nation have been seeking for environmental protection and social justice from the MNCs because the country's oil sector is dominated by the activities of these MNCs.

The Nigeria's business practice and its CSR is shaped by some demographic characteristics inherent in the country like religion, ethnicity and language blended with some colonial influences. A well-known practice among the different cultures, which is likely to have implication for the CSR discourse, is the communal philosophy of life and concern for the less privilege. This practice is rooted in the notion of 'extended kinship', which is common to all the groups (Fort, 2000).

It has been argued that the socio-cultural characteristics of Nigeria are unique hence, the meaning and practice of CSR amongst companies in Nigeria would mostly be designed according to the socio-economic conditions in which these companies operate which is mainly philanthropic. Ameashi et al opined that CSR in Nigeria would be aimed towards addressing the peculiarity of the socio-economic development challenges of the country (e.g. poverty alleviation, health care provision, infrastructure development, education, etc) and would be informed by socio-cultural influences (e.g. communalism

and charity). They might not necessarily reflect the popular western standard/expectations of CSR (e.g. consumer protection, fair trade, green marketing, climate change concerns, social responsible investments, etc) (Kenneth Ameashi, 2006)

The above opinion is very important in shaping the CSR practice in Nigeria in the sense that CSR in Nigeria cannot be the same with CSR in the United Kingdom or USA especially because there is no universally accepted nature and scope of CSR. The socioeconomic challenges and the cultural influences in Nigeria will always dictate the manner in which CSR will be practiced.

In Nigeria, there are three basic elements of CSR expression: Philanthropic, Economic Support and Compensatory (C. Mordi, 2012). Philanthropic refers to a humanitarian and charitable service projected to the people by the corporations. The corporations in the host communities have often engaged in donation of small sum to community development, cultural practices and celebrations. The other element of CSR practiced in Nigeria is identified as economic support. In this case, the corporations assist by providing social amenities like portable water, building and maintenance of schools, maintenance of parks, promotion of basic and primary health care scheme, launching of empowerment schemes for the less privileged etc. Lastly, compensatory CSR is also gradually gaining ground. Here, the companies compensate the Nigerian government, communities and individuals for certain operational breaches that have occurred during their corporate activities. For instance, The CSR activities of the Shell BP was done basically to remedy the harmful effects of their extractive activities in the host communities. All these CSR practices carried out by different types of businesses in Nigeria are aimed at enhancing the life of their host communities. This is also in line with attaining the desired Sustainable Development Goals (SDGs) by 2030.

1.4 Sustainable Development

The connection between development and environment has given rise to the sustainable development concept. The main idea of sustainable development is that global ecosystems and humanity itself can be threatened by neglecting the environment.

Sustainable development is an equilibrium of three main pillars that wish to attain all-encompassing growth as well as create collective prosperity for the current generation and to continue to meet the needs of future generations. These three pillars are Economic, Social and Environmental Development, and are interconnected and reflect the goals of community development and social and environmental stability (Mensah, 2019).

Sustainable development has transformed the global debate from one choice between economic development and community's welfare to achieving a common ground where the two instead of contradicting each other can work in a unified manner. As Pearce states, 'the whole rationale of sustainable development therefore is to raise the standard of living and especially the standard of living of the least advantaged society while at the same time avoiding uncompensated future costs' (Atkinson, 1993).

The WCED report published in 1987, acknowledged the importance of both economic development and environmental protection. It revealed that poverty was the major environmental polluter and that economic development is necessary for the improvement of life of the people in global south. The Commission revealed that it was imperative to integrate environmental protection into economic development process i.e. Sustainable Development. It further defined sustainable development to mean "development that meets the needs of the present without compromising the ability of future generations to meet their needs" (World Commission on Environment and Development 'OUR COMMON FUTURE' 43, 1987). This means that development today should not be at the expense of future generations.

1.4.1 Adopting the Sustainable Development Goals (SDGs)

The SDGs also known as the Global Goals are call for action by the international community encompassing all countries developed and developing to promote prosperity while protecting the environment. SDGs recognise that eradicating poverty should be carried out together with strategies for economic development and addressing some social problems including education, health, social security and creating job opportunities while tackling climate change and environmental protection.

In 2015, the international community adopted the Paris Agreement on Climate Change (UN, Paris Agreement,, 2015) and adopted the 2030 Agenda for Sustainable Development, which contains the 17 Sustainable Development Goals (SDGs). The 17 SDGs are:

Goal 1 Ending poverty

Goal 2 Ending hunger,

Goal 3 Ensuring healthy lives and promoting well-being

Goal 4 Ensuring inclusive and quality education

Goal 5 Achieving gender equality and empowering all women and girls

Goal 6 Ensuring sustainable water and sanitation for all

Goal 7 Ensuring access to modern energy for all

Goal 8 Promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

Goal 9 Building resilient infrastructure, promoting inclusive and sustainable industrialization and fostering innovation

Goal 10 Reducing inequality within and among countries

Goal 11 Making cities and human settlements inclusive, safe, resilient and sustainable

Goal 12 Ensuring sustainable consumption and production patterns

Goal 13 Taking urgent action to combat climate change and its impacts

Goal 14 Conserving and sustainably using the oceans, seas, and marine resources for sustainable development

Goal 15 Protecting, restoring and promoting sustainable use of terrestrial ecosystems, sustainably managing forests, combating desertification, and halting and reversing land degradation and halting biodiversity loss

Goal 16 Promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels and

Goal 17 Strengthening the means of implementation and revitalizing the Global Partnership for Sustainable Development.

According to Agenda 2030, the SDGs are integrated and inseparable meaning success in one affects success for others. The international community wants to build on the Sustainable Development Goals (SDGs) and achieve what was not achieved in the MDGs. The goals are plan to build a better world for the people and the planet, and are intended to be achieved by 2030. The goals are set to meet the urgent environmental, political and economic challenges facing the world. The three dimensions of sustainable development are economic development, social development and environmental protection.

1.5 CSR and Sustainable Development in Nigeria: the Nexus

In most developing nations, sustainable development encourages economic development that will eradicate poverty, promotes inclusive growth, and increase environmental resources (Aman, 2001). It may sound confusing as to how a business corporation domiciled in developing countries whose sole objective is profit maximization and accumulation of positive return on investment, will take active part in implementing policies that will help in eliminating poverty in their host nations. A common strategy used by business corporations is to include CSR as part of their vision, mission, value or policy (Abdellatif, 2011).

Corporate Social Responsibility plays an important role in attaining sustainable development in Nigeria through addressing critical economic, social, and environmental challenges. Companies in Nigeria engage in various CSR activities that contribute to sustainable development (Okade, 2020).

1.6 CSR Policies in Nigeria

It is a known fact that corporations spread their operations across national boundaries in a global market, hence their activities gradually fall outside the regulatory reach of individual States (Rahman, 2009). Apart from contributing to the economic progress of a country through the creation of wealth and employment, these corporations are expected to do more. This has been augmented by the contemporary policy orientation

in many developed countries. A lot of initiatives towards creating a corporate policy for social responsibility are found in codes of conduct.

There are some of self-regulatory International Codes and Standards being applied by Corporations in Nigeria, such as the United Nations (UN) Global Compact 2011 (Kingo), International Standards Organization (ISO) 26000, Global Reporting Initiative (GRI) and Responsible Care, in addition to the Special Representative of the United Nations Secretary General (SRSG) adopted later on the issue of human rights and transnational corporations, which was approved by the UN Human Rights Council in 2011.

In 1976, member nations of the Organisation for Economic Cooperation and Development adopted the Declaration on International Investment and Multinational Enterprises, and in 1977 the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Progress achieved at the ILO and OECD resulted in the adoption of the OECD guidelines for multinational enterprises later in 1977.

Despite the existence of these codes and standards, it has been rightly observed that 'Only a negligible number of firms (mainly MNCs) in Nigeria produce CSR reports' (Kenneth Ameashi, 2006). Not only that, there are some national laws that have in them certain provisions that take care of CSR practices in the country. For example, Section 279 (4) Companies and Allied Matters Act (CAMA) 1990 as amended 2020. In order to strengthen responsible behavior, various laws are put in place for the protection of the environment. These laws stipulate sanctions for non-compliance as opposed to voluntary adherence. Examples of these laws are: The Petroleum Industry Act (PIA) 2021, National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA) 2007 and Harmful Waste (Special Criminal Provisions Act) 1988. Other laws that deal with the protection of the environment can be found in the Criminal Code Act. Certain sections of the Code specifically provide for the protection of the public health.

The PIA was enacted to provide for the legal, governance, regulatory, and fiscal framework for the Nigerian Petroleum Industry, the establishment, and development of host communities and other related matters in the upstream, midstream and

downstream sectors of the petroleum industry. Section 235 (1) and (4) provides that the settlor shall incorporate the Host Community Development Trust (HCDT) for the benefit of the host communities with a board of trustees to oversee the affairs of the host communities. The main objective of the HCDT is to finance and execute projects for the benefit and sustainable development of the host communities; to undertake infrastructure development of the host communities; facilitate economic empowerment opportunities; advance and propagate educational development; support healthcare development, enhance environmental protection etc, under S.239 (3).

Section 240 (2) of the PIA provides that each settlor shall make an annual contribution to the applicable Host Communities Development Trust Fund (HCDTF) of an amount equal to 3% of its actual annual operating expenditure of the preceding financial year in the upstream petroleum affecting the host communities. In addition, the Act stipulates a penalty for failure to comply with host community obligations, including revocation of license. Based on these provisions of the PIA, it can be argued that CSR in Nigeria is now regulated by a hard law to some limited extent just like what is obtained in France, India, Denmark and China (Ezeani, 2022).

1.7 Sustainable Development Goals (SDGs) in Nigeria

The SDGs are provided to guarantee a more sustainable future for all people on the planet. They are related and interconnected, since action in one aspect of the goals affect the outcomes of the other goals. This is because development must balance social, economic and environmental sustainability.

In Nigeria, attaining these SDGs has been a constant struggle since their adoption in 2015, because available reports indicate that Nigeria is far from achieving the SDGs. For instance, in June 2020, Nigeria scored 49.30 and this score places Nigeria on the 160th global position out of the assessed 166 countries, and according to the 2023 Sustainable Development Index, Nigeria scored 54.27/100 and ranked 146/166 (Sustainable Development Report 2023). The overall score measures the total progress towards achieving all 17 SDGs. The score is interpreted as a percentage of SDG achievement. A score of 100 indicates that all SDGs have been fully achieved.

It is crucial to enact and put into effect integrated, enforced, and efficient rules and regulations in order to successfully incorporate environment and development into each country's policies and practices. These laws are based upon sound social, ecological, economic and scientific principles (UN Economic and Social Development, 'Core Publications: Agenda 21', paragraph 8.13).

The United Nations International Covenant on Economic Social and Cultural Rights (ICESCR) is the Instrument that contains the socioeconomic rights, which are fundamental for the realization and promotion of quality of life of the people like housing, transportation, education, health among others. Most of these rights are tied down to the realization of most of the SDGs.

There is an obligation on Nigeria as a State Party to the Covenant to enact national legislations that will fit with the obligations created under the Covenant. Nigeria has taken a positive step to meet up with this requirement and has included these rights in its Constitution. However, the weight of legality conferred on the rights are merely directives not capable of being enforced. The Constitution of the Federal Republic of Nigeria 1999 includes the social and economic rights and classify them as Fundamental Objective and Directive of State Policy (Constitution of the Federal Republic of Nigeria 1999). The Fundamental Objective was formulated to realise the promises made in the Preamble to the Constitution, of promoting good governance and welfare of all persons in the country. The state social order is founded on the ideals of freedom, equality and justice, having equal rights, obligations and opportunities on all citizens. Meaning that all citizens should have opportunity for securing adequate means of livelihood and secure employment, adequate facilities for leisure, health safety and adequate health care facilities.

The above provisions undoubtedly recognise and include the social and economic rights provided by the International Covenant on Economic Social and Cultural Rights. At the same time, they are the backbone of sustainable development agenda. The provision is by way of satisfying the requirement set by the ICESCR which Nigeria has ratified.

However, there is no intention of creating any legal obligation on the part of the government. That is to say, the provisions are mere directive principles that the government and its agencies and institutions are advised to observe, hence non-justiciable. This is because the same Constitution prohibits the courts from entertaining cases under or as a result of Chapter II (Section 6(6)(c) of the Constitution of Nigeria 1999).

Similarly, Nigeria is a signatory to African Charter on Human and People' Rights (ACHPR) and having domesticated it as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, is part of the Nigeria's national legislation. It may possibly be argued that social and economic rights are recognized in the country and Nigeria has obligation both negative and positive (to constitutionalize and enforce the contents of the African Charter) to ensure obedience (S. 1 of the Ratification Act) to the legitimate requirement of the order of the legislation as may be enforced by the Courts. The simple reason being that the African Charter provides for socio-economic rights, and the Ratification Act has neither been inconsistent with the Constitution, suspended nor repealed by it.

The debate in Nigeria deals with the enforcement of the socioeconomic rights not their inclusion in the Constitution. Although they are constitutionally non-justiciable, they are provided under the African Charter that is now part of the national laws and the provisions relating to socio-economic rights have not been declared as inconsistent with the provisions of the Constitution by any court so far.

As a member of the African Union, Nigeria has an obligation under the Constitutive Act and the African Charter on Human and Peoples Rights to enforce socio-economic rights that are provided in the Charter (Schedule to the Ratification Act. 2004). The obligation imposed on the member nations is that they must obey and enforce the contents of the Charter, which means that the constitutionalism for all such agreements must be honored. Although Section 6 of the 1999 Constitution makes such rights non-justiciable, but when read together with the provisions of Section 13 of the same Constitution, it becomes obvious that the intention of the makers of the Constitution is to make justiciability of such rights a matter of eventuality and choice of the executive and the

legislative arm of the government and recognizing judicial intervention in matters of interpretation.

However, in Nigeria, the Constitution is supreme (S. 1(1) Nigerian Constitution 1999), and any other law that is inconsistent with the provisions of the constitution shall be declared null and void to the extent of its inconsistency. Hence, unless it can be shown that the socio-economic rights provisions in the African Charter are inconsistent with provisions of the Constitution, the State has obligations under international law to obey and enforce the provisions pursuant to the Ratification Act. That notwithstanding, the judicial enforcement of socioeconomic rights has been problematic to a great extent, with a web of complex issues and as a result, the protection and enforcement of these rights remain vague in many countries. Rather than being considered as judicially enforceable rights of immediate application, such rights have usually been considered non-justiciable programmatic goals to be realized progressively within available resources, through administrative processes.

Socioeconomic rights and the Sustainable Development Goals (SDGs) are closely connected, as both aim to improve the well-being and quality of life for individuals and communities. While socioeconomic rights are a legal framework that emphasizes the entitlement of individuals to certain basic rights, the SDGs are a broader global agenda that encompasses a set of interrelated goals and targets designed to address various dimensions of sustainable development. To maximize the potential of CSR in driving sustainable development, this paper provides some recommendations as future directions.

1.8 Future Directions of CSR and Sustainable Development in Nigeria

Corporate Social Responsibility (CSR) and sustainable development are critical for addressing Nigeria's socio-economic and environmental challenges. Here are some key future directions:

- a. **Strengthening Regulatory Frameworks:** to strengthen and enforce existing CSR and sustainability regulations, necessary policies need to be formulated and implemented to maximize the inherent potentials of the corporate organizations.

- b. **Making Socioeconomic Rights Justiciable:** The fact that most SDGs are connected to socioeconomic rights, the rights should be made in clear and unambiguous terms under the Nigerian laws with justiciability status. This is because treating these matters as mere directive principles with no binding obligation and considering the weak institutional capability in the country, Nigeria may not be able to achieve the desired sustainable development goals come 2030. Implicit from the attitude of the Nigerian government, it cannot be trusted to discharge its responsibilities based on discretionary and voluntary grounds. There should be a positive legal approach that can compel the government to deliver its responsibility and give the people the tool to hold the government accountable.
- c. **Strategic Integration:** by embedding CSR and sustainability into the core business strategies of companies, with clear, measurable goals and regular progress reports. Aligning CSR efforts with the United Nations Sustainable Development Goals (SDGs) will ensure that corporate actions contribute to global development priorities. Focus areas should include education, healthcare, environmental sustainability, and economic growth.
- d. **Sustainable Business Practice:** To firmly establish sustainable business practices that take into account the three facets of sustainable development—economic, social, and environmental, the government must work in tandem with the private sector to create an enabling environment.
- e. **Collaborative Efforts and Community Engagement:** Strengthening partnerships between businesses, government (Public Private Partnerships), and civil society to address issues like poverty, education, and healthcare. Similarly, ensuring CSR initiatives involve and benefit local communities, creating a sense of ownership and sustainability.
- f. **Adopting Global Best Practices:** Learning from international best practices and adapting them to the Nigerian context can enhance the effectiveness of CSR efforts. Companies should strive to meet global standards in their sustainability practices.

1.9 Conclusion

This paper explores the intricate relationship between Corporate Social Responsibility (CSR) and sustainable development in Nigeria, emphasizing the crucial role of CSR in addressing the nation's socio-economic and environmental challenges. The paper delves into the current landscape of CSR practices, identifies key challenges, and proposes policy implications and future directions to enhance the effectiveness of CSR in promoting sustainable development. It was found that Nigeria is lagging behind in attainment of the SDGs despite the efforts put in place by the government and the corporations through CSR.

In conclusion, the convergence of CSR and sustainable development presents a unique opportunity for Nigeria to achieve inclusive growth and environmental sustainability. By implementing supportive policies and focusing on strategic future directions, Nigeria can harness the power of CSR to address its development challenges and create a prosperous, equitable, and sustainable future.

REFERENCES

References

- Abdellatif, A. A. (2011). Partnership for integrating the corporate social responsibility of project stakeholders towards affordable housing development: A South African perspective. *Journal of Engeneering Design and Technology*.
- Ademolekun, B. O. (2011).). Corporate Social Responsibility: The case for Small and Medium Business Involvement. *Public Relations Journal*, 50-66.
- Aman, J. S. (2001). Introduction: Syncopated Sustainable Development. *Indiana Journal of Global Legal Studies*.
- Atkinson, D. W. (1993). Capital Theory and the Measurement of Sustainable Development: an Indicator of “Weak” Sustainability. *Ecological Economics*, 103-108.
- Bowen, H. (1953). *Social Responsibilities of the Business- man*. New York: Harper and Row.

- C. Mordi, I. S. (2012). Corporate Social Responsibility and the Legal Regulation in Nigeria. *Economic Insights-Trends and Challenges*, 1-8.
- Clarkson, M. B. (1995). A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance. *Academy of Management Review*, 97-99.
- Constitution of the Federal Republic of Nigeria 1999. (n.d.).
- Ekhaton, E. (2014a). Corporate Social responsibility and Chinese Oil Multinationals in the Oil and Gas Industry of Nigeria: an Appraisal . *Cardenos De Africanos* 28, 119-140.
- Ezeani, J. D. (2022). Corporate Social Responsibility under the Petroleum Industry Act 2021: Achieving Environmental Sustainability through Multi-Stakeholder Partnership. *African Journal of Engeneering and Environment Research* .
- Fort, E. L. (2000). Nigerian Business Practices and their Interface with Virtue Ethics. *Journal of Business Ethics*, 169-179.
- Freeman, E. (1984). *Strategic Management: A Stakeholder Approach* . Boston: Pitman Boston.
- Friedman, M. (1970, September). The Social Responsibility of Business is to Increase Its Profits. New York Times.
- H., B. (1953).) *Social Responsibilities of the Business- man*. New York: Haper and Row.
- Hummels, H. (1998). Organizing Ethics: A Stakeholder Debate. *Journal of Business Ethics*, 1403-1407.
- Jamali, D. (2008). A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective into Theory and Practice. *Journal of Business Ethics*, 213-217.
- Kenneth Ameashi, B. A. (2006). Corporate Social Responsibility (CSR) in Nigeria: Western mimicry or indigenous practices? *Journal of Corporate Citizenship*, 83-99.
- Kingo, L. (n.d.). *The UN Global Compact: Finding Solutions to Global Challenges*. . Retrieved from The UN Global Compact: Finding Solu<https://www.un.org/en/un-chronicle/un-global-compact-finding-solutions-global-challenges>. .

- L., E. C. (2000). Nigerian Business Practices and their Interface with Virtue Ethics. *Journal of Business Ethics*, 169-179.
- Mensah, J. (2019). Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review. *Cogent Social Sciences*.
- Mitnick, B. M. (1995). Systematics and Corporate Social Responsibility: The theory and processes of normative referencing. *Business and Society*.
- Murray., M. B. (2014). *Corporate Responsibility*. Oxford: Oxford University Press .
- Nations, U. (2023). *United Nations Data*. Retrieved from United Nations Data available at <https://www.worldometers.info/world-population/nigeria-population/>. Last accessed on 15/07/2024.
- Okade, N. I. (2020). Sustainable Development Goals and Corporate Social Responsibility in Africa: Policy Options for Nigeria. *Sub-Saharan African Journal of Administration and Development*, 15-25.
- R Edward Freeman, a. S. (2006). Company Stakeholder Responsibility: A New Approach to CSR. <http://www.corporate.ethics.org>.
- Rahman, S. F. (2009). Impact of Multinational Corporations on Developing Countries. *The Chittagong University Journal of Business Administration* , 113-137.
- Rhee, R. J. (2017). A Legal Theory of Shareholder Primacy . *Minnesota Law Review*.
- Romanova, I. (2007). *Oil boom in Nigeria and its Consequences for the Country's Economic Development*. Munich: GRIN Publishing.
- S. 1 of the Ratification Act. (n.d.).
- S. 1(1) Nigerian Constitution 1999. (n.d.).
- Sahoo, C. (2011). Corporate Social Responsibility: Issues and Controversies. *European Journal of Business and Management*.
- Schedule to the Ratification Act. 2004. (n.d.).
- Section 6(6)(c) of the Constitution of Nigeria 1999. (n.d.).

(n.d.). *Sustainable Development Report 2023*.

UN. (1987). 'OUR COMMON FUTURE' 43 . *World Commission on Environment and Development* .

UN. (2015, December 12). Paris Agreement,. *FCCC/CP/2015/10/Add.1*.

UN. (2023). *United Nations Data*. Retrieved from United Nations Data available at <https://www.worldometers.info/world-population/nigeria-population/>.

UN Economic and Social Development, 'Core Publications: Agenda 21', paragraph 8.13. (n.d.).

World Commission on Environment and Development 'OUR COMMON FUTURE' 43. (1987).

Yakouleva, J. R. (2019). Corporate Social Responsibility. In A. M. Walter Leal Filho, *Responsible Consumption and Production*. Switzerland: Springer Switzerland.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

EXAMINATION OF HUMAN RIGHT AND HUMANITARIAN VIOLATION IN
NIGERIA

¹Dije Mohammed, ²Abdulsalam Muhammad Aminu, ³Sulaiman Onilude Boluwatife

¹Public law department, faculty of Law, Ahmadu Bello University, Zaria.

²Legal Department Federal Teaching Hospital Katsina

³Faculty of Education, Ahmadu Bello University, Zaria

Abstract

This research was carried out to examine the level of violation of human and humanitarian violations in Nigeria being one of the country affected by banditry activities. Victims of Banditry suffered from cattle rustling, kidnapping and abduction, killings and even sexual abuse. The objective of which is how to identify and help the victims in order to enforce their rights which was violated. It appears for one reason or the other that the government is not willing to protect or help the victims after the occurrence of the activities, it due to lack of will to enforce the relevant laws from the international, regional and national level or even state level. Most of the victims of banditry in Nigeria are wondering on the street metropolis and other towns in search of livelihood and the government failed to provide effective Internally Displaced Persons IDPs camp for the victim in order to provide shelter, healthcare, food, education and further security guarantee for the victims. In essence therefore the whole research tries to identify the problems and propose solution to that effect. The research recommended for the provision of Internally Displaced Persons IDPs camp across the state where the livelihood will be provided thereby helping and supporting the victims through various laws and Non-Governmental Organizations.

1.1 Introduction

Armed Banditry, together with other components and crimes (cattle rustling, kidnapping, killings etc.) poses the major threat to the Nigerian security situations. It is Nigeria's emerging security threat that become rampant especially in more recent times in Nigeria's history particularly in Katsina State. The aim of this paper is analysing the legal and institutional framework for the protection of victims of banditry in Katsina State. In order to achieve the aims the paper intends to provide solutions to the problems affecting the victims of banditry in Katsina State. This is with a view to provide healthy IDPs camp that provide livelihood to the victims such as food, clothing, education, healthcare services and security. The paper start by explaining some conceptual analysis of the subject matter.

1.1.1 Banditry

Banditry is the systematic use of murder and destruction, and the threat of murder and destruction in order to terrorise individuals, groups, communities, or governments into conceding to the terrorist demands.¹¹⁰⁶ It is also defined as systematic use of acts of terror for the objectives of private material gains¹¹⁰⁷

Banditry also refers to the incidences of armed robbery or allied violent crimes, such as kidnapping, cattle rustling, and village or market raids. It involves the use of force, or threat to that effect, to intimidate a person or a group of persons in order to rob, rape or kill.¹¹⁰⁸

¹¹⁰⁶ Wilkinson, P. (1994). *Terrorism. British Perspective*. <https://trove.nla.gov.au/version/12974102>

¹¹⁰⁷ Udama, R.A. (2013). *Understanding Nigeria Terrorism, its Implications to National Peace, Security, Unity and Sustainable Development: A Discuss*. IOSR Journal of Humanities and Social Science. 8(5):100-115

¹¹⁰⁸ Ibid.

1.1.2 Bandits

Bandits are individuals or groups who engage in illegal activities for profit employing terror where necessary.¹¹⁰⁹ The dilemma of banditry in the North-West particularly Katsina State reached peak and became a serious security threat in the zone while in the angle of the government is, helpless and has no clue to get out of this situation.

1.1.3 Displacement

Displacement is a situation whereby people are forced to leave the place where they normally live.¹¹¹⁰ It is also an involuntary forced movement, evacuation or relocation of persons or groups of persons within internally recognized state borders.¹¹¹¹

1.1.4 Internally Displaced Persons (IDPs) and victims of banditry

Internally displaced persons (IDPs) and victims of banditry are persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid effects of armed conflicts, situations of generalized violence, violation of human rights, natural or human-made disasters, and who have not crossed an internationally recognized State boarder.¹¹¹²

1.1.5 Human Rights

Human Rights has been shown as just and valid claim including real and personal properties, privileges, chooses in actions or even liberty protected by the law

¹¹⁰⁹ Ibid.

¹¹¹⁰ Ibid.

¹¹¹¹ Ibid.

¹¹¹² Sheka, M.S and Hope Lifted Haruna, (2022) *Examination of the main causes of Internal Displacement in North-west Nigeria*, Umaru Musa Yar'adua University Law Journal (UMYU) Vol.3 No.1 October p. 225

or enforce by law or power enforces by law.¹¹¹³ The victim of banditry also are to enjoy concept of human rights which is the rights that all human beings equally enjoyed at all times by virtue of their existence as human beings.¹¹¹⁴

The UN defined human rights as those rights that are inherent in our state of nature without which one cannot live as human being.¹¹¹⁵ Human rights are the rights that everyone has equally by virtue of their humanity.¹¹¹⁶ Human rights are categories of rights that nature bestowed on human beings which are norms that described certain moral behavioral standards and falls under the protection of legal rights in the constitution of any country.¹¹¹⁷ Today, the concept of human rights includes civil and political rights or public liberties, economic, social and cultural needs particularly with regard to development, the environment and self-determination.¹¹¹⁸

Human Rights emanated from the genesis and aftermath trauma of the Second World War in 1948 via Universal Declaration of Human Rights (UDHR) and by the International Law Commission.¹¹¹⁹ Hence the significant link with the principle of humanity.¹¹²⁰

¹¹¹³ Ogbu, O. N, (2013) *Human Rights Law and Practice in Nigeria* Snaap Press Limited Enugu 2nd Revised Edition p. 1

¹¹¹⁴ Ibid.

¹¹¹⁵ O' Byrne, Darren J. (2005) *Human Rights: An Introduction*, Singapore: Pearson Education, p. 5.

¹¹¹⁶ Ibid.

¹¹¹⁷ Timothy Onimisi, (2018) *Trends of Human Rights Abuse in Nigeria: 1996-2013*, international journal of Advanced Studies in Social Science and innovation (IJASSI) Vol. II No. 2

¹¹¹⁸ O' Byrne, Darren J. (2005) *Human Rights: An Introduction*, Singapore: Pearson Education, p. 5.

¹¹¹⁹ Suleiman A. J, (2020) *International Humanitarian Law*, Malthouse Press Limited Lagos p.28

¹¹²⁰ Ibid.

Human rights are the those basic rights that are inherent and fundamental to our existence as human beings not withstanding our nationality, place or circumstances of birth, sex or national ethnic or origin, religion colour, language or any other status.¹¹²¹ This paper will examine the legal and violation of human rights and humanitarian law in Nigeria. To this end the appropriate laws will be explain hierarchically from international, regional and the domestic/national laws. Accordingly, this will include the analysis of human rights and humanitarian violations in Nigeria.

It is established that everyone has a right to adequate food and a fundamental right to be free from hunger. These rights are assumed to be universal, though clearly they are not yet globally enjoyed. While there has been a long process to make these rights universal since 1948, much remains to be done.¹¹²²

1.2 International Instruments

International instruments are the International Conventions and mechanisms that protect the rights of victims of banditry which are ratified by Nigeria through the enabling laws. These include the Universal Declaration of Human Rights, the United Nations High Commission for Refugees and the International Convention for the Protection of all Persons against Forced Disappearance.

1.2.1 Universal Declaration of human Rights (UDHR)1948

The Universal Declaration of human Rights is the major international Instrument for the human rights protection and guarantee under the United Nations

¹¹²¹ Amalu, N.S and Adetu, (2019) *The Role of the National Human Rights Commission (NHRC) in Post Conflicts in Nigeria*, International Journal of Arts and Humanities (IJAH) Ethiopia Vol. 8, p.134

¹¹²² Ibid.

Charter. The instrument was adopted by the United Nations General Assembly on the 10th December 1948. The Declaration consists of about Thirty Articles covering civil, political, economic, social and cultural rights for all including women and children.¹¹²³ The rights contained in the Declaration are also referred to as the fundamental rights, basic rights, inherent rights, natural rights and the birth rights which are essential for all individuals globally to protect themselves against violations by the state or any other person in authority or otherwise.¹¹²⁴

The United Nations was initially established with the primary purpose of safeguarding and protecting all human beings from suffering either resulting from war or any other internal disturbance. To this end internally displaced persons and the refugees were merged together when it comes to protection through international treaties.¹¹²⁵ Analytically the UDHR contained 30 articles meant to promote, protect and enhance human rights as well as enjoining the member states standard of achievement for the protection of all people globally as follows:

Equality of all human beings in dignity and rights as well as in the spirit of brotherhood, this is without discrimination as regards sex, colour religion or political opinion, It include right to liberty and security of person, rights against slavery and servitude, inhuman degrading treatment or punishment, equality before the law, right to file for enforcement of rights when violated,¹¹²⁶ right against unlawful arrest, Right fair public hearing, presumption of innocence, private and family life, freedom of

¹¹²³ Satyanarayana, D., (2015) *An Exploration on nature of Human Rights*, International Journal of Academic Research Vol.II p. 307

¹¹²⁴ Ibid. p. 308

¹¹²⁵ Abuya E. O., (2003) *Refugees and Internally Displaced Persons: Examining Overlapping Institutional Mandates of the ICRC and the UN High Commissioner for Refugees*; Singapore Journal of International and Comparative Law p.3

¹¹²⁶ Article 8 *ibid.*

movement, rights to seek asylum, rights to own property, rights to conscience and religion, freedom of expression and opinion, freedom of association, right to take part in government of one's country, rights to social security, right to standard of living, rights to education, right to cultural life, realization of international order and right not to deny or destruct other rights by any.¹¹²⁷

Ideally the UDHR is a comprehensive declaration for the protection of all around the globe including men, women and children which has the global application. Unfortunately there has been no awareness on how a common person can channel complain of breach.

1.2.2 United Nations High Commission for Refugees (UNHCR) 1954

This Convention was adopted and approved on the 28th July, 1951 under the United Nations General Assembly Resolution 429(v) of 14th December 1950 and came into force on the 22nd April, 1954. The Convention contained provisions relating to the protection of refugees and the Internally Displaced Persons due to the change of circumstances from the interstate wars to the internal Conflicts. The United Nations High Commission for Refugees being a global organization is dedicated to saving lives, protecting rights and building a better future for refugees, forcibly displaced communities and stateless people as well as charged with the task of supervising International Conventions provided for the protection of Refugees.¹¹²⁸

¹¹²⁷ Article 1 Universal Declaration on Human Rights 1948

¹¹²⁸ Preamble to the Convention relating to the status of Refugees adopted and approved on the 28th July, 1951 under the UN General Assembly Resolution 429(v) of 14th December 1950 and came into force on the 22nd April, 1954.

This too is however not without shortcomings; this is because the majority of the regulations guiding the Commission are the status of refugees with little concern about the status of Internally Displaced Persons (IDPs). It is therefore important to demarcate the regulation on refugees and IDPs for administrative convenience hence achieving the purpose.

Under this Convention all refugees and Internally Displaced Persons have human rights that are enshrined internationally in the United Nations Charter and the Universal Declaration of Human Rights as well as nationally under Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria.¹¹²⁹ The rights include the fundamental rights to life, liberty and security of person: protection of law; freedom of thought conscience and religion and the rights to ow

n property.¹¹³⁰ This is achieved through the appropriate coordinating structure.¹¹³¹

1.2.3 International Convention on the Protection of All Persons from Enforced Disappearance (ICPAPED) 2006

This is an international Treaty adopted by the General Assembly in its Resolution 61/177 of 20th December, 2006 with 98 signatories to the Convention including Nigeria concerning enforced disappearance and the punishment for the offence. The Convention protects the rights of persons against forced disappearance which right was derived from the fundamental rights to personal liberty.¹¹³² The right

¹¹²⁹ Handbook for Emergencies(2007), United Nations High Commissioner for Refugees, Geneva Third Edition. P.6

¹¹³⁰ Ibid.

¹¹³¹ Ibid.

¹¹³² Joy Ngozi, Festus Okechukwu Ukweze and Uchechukwu Nwoke,(2022)*Examining the extent of the Application of the United Nations Convention on the Protection o All Persons from Enforced Disappearance in Nigeria* 17 The Nigerian Judicial Review pp. 43

can be traced back to the promulgation of the Magna Carta 1215 strengthen by the Habeas Corpus Act of 1679 followed by the Universal Declaration of Human Rights which was finally adopted into Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria through the enabling statutes.¹¹³³ In Nigeria the act of enforced disappearance is viewed as a violation of fundamental human rights and crime as well though no specific legislation on that but it is illegal under the international legal instruments applicable especially International Covenant on Civil and Political Rights as well as articles 4,5&6 of the African Charter on Human and Peoples Rights¹¹³⁴ and Chapter 4 of the Constitution that prohibits unlawful detention.

Force Disappearance when committed constitute a crime under the international law as a crime against humanity and accordingly no one shall be subjected to it or secret detention as they constitute gravest human rights and humanitarian violation.¹¹³⁵

1.3 Regional Instruments

The regional (African Union) Instruments for the protection of the victims of banditry include the following:

1.3.1 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009

Kampala Convention is a regional African Convention adopted in Kampala Uganda by the African Heads of States including Nigeria in October 2009 through the

¹¹³³ Ibid.

¹¹³⁴ Ibid. p. 49

¹¹³⁵ Ibid @ p. 44

African Union. The Convention is primarily adopted for the protection and assistance of Internally Displaced Persons (IDPs) at the Refugees summit. This is with a view to sustaining solutions to the issue of internal displacement in Africa and in providing humanitarian assistance to the victims.¹¹³⁶

In Nigeria the convention serve dual purpose of human rights and humanitarian violations that lead to internal displacement of people through banditry, unlike the UN Guiding principles which is primarily based on humanitarianism.¹¹³⁷

1.3.2 African Charter on Human and People's Rights (Ratification and Enforcement), Act.¹¹³⁸

The African Charter on Human and Peoples Rights is a regional African Convention adopted in Dakar, Senegal from November 28th to December 8th 1979 by experts to prepare an African Charter based on the African legal philosophy and response to African need.¹¹³⁹

The Charter is in three parts; the two chapters of part one deal with rights duties and: chapter 1 set out the real human and people's rights to be protected by the Charter while part II set out the individual duties towards his family and society part II of the charter comprised 4 chapters on the measures to safeguard the rights set out in part 1. Chapter I call for the establishment of the African Commission of Human and People's Rights. Chapter II deals with the powers of the Commission. Chapter III deals

¹¹³⁶ Abegunde Babalola, Humanitarian Law and Internal Displacement in Nigeria: An Urgent Need for Legal Framework, International Journal of Law and Legal Jurisprudence Studies Vol. IV Issue 3. P.56

¹¹³⁷ Ibid. p. 57

¹¹³⁸ Cap. A9, Laws of the Federation of Nigeria, 2004.

¹¹³⁹ Richard Gittlemen, (1984) *The African Charter on Human and Peoples Rights: A Legal Analysis*, Virginia Journal of International Law, Vol. 24 p.669.

with the procedure of the Commission. The final Chapter of Part II indicates the applicable principles by which the Commission will secure the protection of human rights in Africa. Finally the procedure of enforcing the rights was provided.¹¹⁴⁰

The African Charter being the regional instrument has to place certain avenues where each and every African whether rural or urban dwellers can report human rights and humanitarian norms in relation to them. For instance the Charter or the Commission as the case may be does not provide either ways of enlighten the rural dwellers on human rights and its sanctity as well as providing avenues of reporting breaches nor provide an avenue to observe the violation in rural communities.

Accordingly every African individual shall be entitled to the enjoyment of the rights and freedoms guaranteed and recognized under the Charter. This include equality before the law,¹¹⁴¹ right to life,¹¹⁴² right to dignity,¹¹⁴³ right to personal liberty and security,¹¹⁴⁴ right to fair hearing, ¹¹⁴⁵right to conscience and religion,¹¹⁴⁶ freedom of information and association,¹¹⁴⁷ freedom of movement from one place to another.¹¹⁴⁸

1.4 National Laws

The National laws for the protection of victims of banditry in Nigeria are as follows:

1.4.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)

¹¹⁴⁰ Ibid. p. 673-674

¹¹⁴¹ Article 3(1) African Charter on Human and People's Rights (Ratification and Enforcement), Act.

¹¹⁴² Ibid. Article 4

¹¹⁴³ Ibid. Article 5

¹¹⁴⁴ Ibid. Article 6

¹¹⁴⁵ Ibid. Article 7

¹¹⁴⁶ Ibid. Article 8

¹¹⁴⁷ Ibid. Article 10

¹¹⁴⁸ Ibid. Article 12

One of the major domestic mechanisms for the protection and safeguarding the Fundamental Human Rights in Nigeria is the 1999 Constitution of the Federal Republic of Nigeria.¹¹⁴⁹ This is more particularly Chapter IV of the Fundamental Human Rights as well as the Enforcement Procedure 2009 under the schedule to the Constitution.¹¹⁵⁰ The rules of enforcement enjoin judges to interpret and apply the Constitution in that respect in order to advance the rights and freedoms guaranteed by the African Charter on Human and People's Rights and the Universal Declaration of Human Rights including any other relevant Convention/treaty established to safeguard specific aspects of human rights such as women, children and the vulnerable rights,¹¹⁵¹ after being domesticated in accordance with the enabling statutes of its adoption,¹¹⁵² hence the establishment of the procedure.

Preamble 3(d) requires the Nigerian courts to practically pursue and enhance justice for all classes of people especially the vulnerable and unrepresented. The court shall also welcome public interest litigation in the human rights field.

However, it is observed as far as this paper is concerned that though the constitution is the supreme law which domesticate and adopt the human rights treaty via Section 12 of the Constitution into Chapter IV still the lives of the vulnerable and the weak are at stake. This is because majority of human rights and humanitarian norms is in relation to the rural dwellers vulnerable. According to this paper this may be due to

¹¹⁴⁹ Cap. C23 Laws of the Federation of Nigeria 2004

¹¹⁵⁰ Abiola Sanni, (2011) *Fundamental Rights Enforcement Procedure Rules 2009 as a tool for the Enforcement of the African Charter on Human and Peoples Rights in Nigeria: The need for Far-reaching Reforms*, African Human Rights Law Journal, Shumani Printers, VOL. II No. 2011., Enyinna Nwauche, (2010) *The Nigerian Fundamentals Rights Enforcement Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights*, African Human Rights Journal, Vol. II.

¹¹⁵¹ Ibid.

¹¹⁵² Section 12(2) Constitution of the Federal Republic of Nigeria 1999, Cap. C23 Laws of the Federation of Nigeria 2004

lack of enlightenment to the rural dwellers. Therefore one can rightly say that the provision of the Constitution has no or very little implementation in relation to human rights despite the international and regional obligation in that respect.

1.4.3 National Commission for Refugees, Migrants and Internally Displaced Persons (IDPs) Act.¹¹⁵³

This is one of the National laws and legislation made by the National Assembly for the establishment of the National Commission of Refugees, Migrants and the Internally Displaced Persons in Nigeria¹¹⁵⁴ with the sole objectives of safeguarding the interest of refugees, migrants and internally displaced persons¹¹⁵⁵ in order to ensure sanctity of human persons are protected and to coordinate the activities of all agencies of government in relation to the internally displaced persons.¹¹⁵⁶

The law shall also implement the following:

- i. United Nations Convention relating to the status of refugees and the internally displaced persons;¹¹⁵⁷
- ii. Protocols relating to the status of refugees.¹¹⁵⁸
- iii. African Union Convention concerning the specific aspect of refugee problems in Africa.¹¹⁵⁹

¹¹⁵³ Cap. N21 Laws of the Federation of Nigeria, 2004.

¹¹⁵⁴ Ibid. S. 2,

¹¹⁵⁵ Ibid. S. 1 (a)

¹¹⁵⁶ Ibid. S. 1 (b)

¹¹⁵⁷ Ibid. S. 1 (c)

¹¹⁵⁸ Ibid. S. 1 (d) ii

¹¹⁵⁹ Ibid. S. 1(c) iii

- iv. African Union Convention for the protection and assistance of Internally Displaced Persons (Kampala Convention) as it relates to the provision of durable solutions and assistance and coordinating activities aimed at protecting Internally Displaced Persons.¹¹⁶⁰
- v. Other Treaties and Conventions in relation to Refugees, Migrants and the Internally Displaced Persons which may be adopted by Nigeria.¹¹⁶¹

The commission was established with the following functions:

- i. Advise federal government on policy matters relating to refugees, migrants and internally displaced persons.¹¹⁶²
- ii. Coordinating activities aimed at protecting, and assisting internally displaced persons.¹¹⁶³
- iii. Ensure compliance with the provision of African Union Convention for the protection and assistance of internally displaced persons referred to as the Kampala Convention.¹¹⁶⁴
- iv. Support state governments in the creation and maintenance of up to date data of internally displaced persons.¹¹⁶⁵
- v. Register and make personal documentation of internally displaced persons.¹¹⁶⁶
- vi. Promote donors commitments to humanitarian response by organizing missions.¹¹⁶⁷

¹¹⁶⁰ Ibid. S. 1(c) iv

¹¹⁶¹ Ibid. S. 1(c) v

¹¹⁶² Ibid. S. 6 (1) (a)

¹¹⁶³ Ibid. S. 6 (1) (b)

¹¹⁶⁴ Ibid. S. 6 (1) (g)

¹¹⁶⁵ Ibid. S. 6 (1) (h)

¹¹⁶⁶ Ibid. S. 6 (1) (h)

¹¹⁶⁷ Ibid. S. 6 (1) (j)

- vii. Liaise on a sustainable basis development and funding requirements for humanitarian interventions targeting refugees, migrants and internally displaced persons.¹¹⁶⁸
- viii. Identify the threats to the rights of refugees, migrants and internally displaced persons as well as their host communities.¹¹⁶⁹
- ix. To ensure that IDPs are protected during and after displacement return or settlement and reintegration.¹¹⁷⁰

Despite all this functions only very few IDP camp is in existence when it relate to the number of people that lost their homes and environments. More so this law has more impact or more concern about refugees from the atrocities of armed conflict whether of international or internal. It is only by way of extension that internally displaced person gets little relevance so that they cannot be left unattended. This means that there is no comprehensive regulation specifically for the IDPs and this may be the reason of neglecting them by the domestic/national laws. This is because if the leaders know that there is going to be international consequence appropriate mechanisms may be placed to respond to the situation.

1.4.3 National Human Rights Commission, Act 1995.

National Human Rights Commission, Act 1995 established the National Human Rights Commission in line with the Resolution of the United Nations General Assembly which enjoins all member states to establish national human rights institutions for the promotion and protection of human rights. The Commission is an extrajudicial mechanism and tool for the enhancement and enjoyment of human rights thereby establishing an enabling environment for the promotion, protection and enforcement of human rights as well as enlightenment, awareness, research and dialogues.¹¹⁷¹ This is from the background that during the first and the second world

¹¹⁶⁸ Ibid. S. 6 (1) (k)

¹¹⁶⁹ Ibid. S. 6 (1) (n)

¹¹⁷⁰ Ibid.S. 6 (1) (z)

¹¹⁷¹ Anyabolu, M.N., (2021) *The Nature of Human Rights*, Journal of International Human Rights and Contemporary Legal Issues, (JIHRCIJ) Vol.II November,

wars (that lead to the Universal Declarations of Human Rights and the Regional African Treaties) it was clear that during any violence or conflict civilians are always at risk of being deprived of their fundamental human rights and humanity.¹¹⁷² Therefore the roles of the National Human Rights Commission include but not limited to advocacy for human rights for the affected people as well as the vulnerable especially the Internally Displaced Persons (IDPs) affected by violence.¹¹⁷³

The roles of the Commission according to Part II Section 5 of the Act (National Human Rights Commission Act 1995) include organization of international Conferences and post violence human rights protection, obtainment of justice and reparation for victims of violence, organizing collaboration and partnership for effective post violence performance, establishment of dialogue and ensure human rights and humanitarian-centered negotiations and investigation of post violence human rights abuses etc.¹¹⁷⁴

Based on the provision of the law that established the Commission, as far as this Commission is concerned there has to be a channel of human rights and humanitarian violations reports. The problem is that majority of banditry victims are from the rural communities where no existing channel of reporting to the Commission. In fact the people don't even know the existence of the Commission or the available remedies in case of violation.

¹¹⁷² Amalu, N.S and Adetu, (2019) *The Role of the National Human Rights Commission (NHRC) in Post Conflicts in Nigeria*, International Journal of Arts and Humanities (IJAH) Ethiopia Vol. 8, p.1

¹¹⁷³ Ibid. at p.135.

¹¹⁷⁴ Ibid.

1.4.4 National Emergency Management (Establishment) Act¹¹⁷⁵

The National Emergency Management Agency was established under the National Emergency Management (Establishment No. 12 of 1999) the law made to inter alia to manage disasters by providing relief materials to the victims of such disaster in Nigeria. This includes the settlement of Internally Displaced Persons (IDPs). The Federal Government of Nigeria through the Agency has a mandate to assist victims across the Local Governments and States in the country.¹¹⁷⁶

The majority of IDPs are nationals of the state in which they find themselves. As such they are entitled to the full protection of the national law and the rights it grants nationals, without any adverse distinction resulting from the fact of their displacement.¹¹⁷⁷ The National Emergency Management Agency (NEMA) was established in order to among other things intervene and help to ameliorate the suffering of the IDPs in the affected areas or regions in Nigeria in collaboration of the State Emergency Management Agency (SEMA) in the state of its operation hence care of the IDPs is part of the primary responsibilities of the concerned states.¹¹⁷⁸ This is to ensure human right to life and many more aspects of human right and humanitarian norms as well as provision of health and education are observed and protected.¹¹⁷⁹

¹¹⁷⁵ Cap. N34 Laws of the Federation of Nigeria 2004

¹¹⁷⁶ <http://www.nema.gov.ng/index.htm>

¹¹⁷⁷ Ibid.

¹¹⁷⁸ Shittu R., Folashade, A. A. et al, (2021) *North-Eastern Nigeria: Assessing the Response Capacity of National Emergency Management Agency to the Plights of Internally Displaced Persons*, 2021. P.5 Journal homepage; www.cell.com/heliyon

¹¹⁷⁹ Ibid.

1.5 Conclusion

The paper examine This research was carried out to examine the level of violation of human and humanitarian violations law in Nigeria taking into consideration the genesis of the laws from the international, regional, national and state mechanisms that protect and safeguard the right of victims of banditry thereby addressing human rights and humanitarian violations. Despite not being the beneficiaries of a specific convention, as is the case for refugees, internally displaced persons are protected by the various bodies of law. To this end the appropriate laws has been explained hierarchically from international, regional and the domestic/national laws. Accordingly, this also includes the analysis of human rights and humanitarian violations in Nigeria.

From the foregoing, the following findings are made:

1. Despite the existence of all Conventions, and laws that safeguard the right of human and victims of all sort of violation, majority of the victims are still wondering in streets of Nigeria metropolis and some Local Government Areas, in search of livelihood, with no food, shelter, clothing, education, healthcare facility and further security guarantee.
2. It is observed that there is no adequate and effective Internally Displaced Persons (IDPs) camp with provision of Healthcare facility, education, economic opportunities and security.
3. It is also observed that illiteracy lack of awareness prevent the victims from forwarding any complain of violation in respect of human rights and humanity.

From the above findings the following recommendations are proffered:

1. The government should provide enough IDPs camps for the victims to protect them and their freedom from further occurrence across the state.
2. There should be an existing channels of reporting to the Commission in charge any human rights and humanitarian abuse in rural communities and Nigeria at large.
3. The government should through the modern media network create an awareness campaign in order to enlighten the citizens on the existence of the Commission as well as other relevant institutions and how they can forward their complaints of violation.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

IN SEARCH OF THE REASONING OF A CASE: A PHILOSOPHICAL EXPLORATION
OF THE METHODOLOGY OF DERIVING *ILLAH* AND *RATIO DECIDENDI* IN
ISLAMIC AND ENGLISH JURISPRUDENCE

Abdulazeez Adavize Sadeeq

Centre For Islamic Legal Studies, Ahmadu Bello University, Zaria

munhaminnah24@gmail.com, 09034199978

ABSTRACT

Legal analogy is the most common method of legal reasoning and deduction in most legal systems including Common and Islamic law systems. One of the problems that comparative study of analogical reasoning in Common law and Islamic law system reveals is that, in practice, the most difficult and most challenging aspect of the application of analogical reasoning is the elusive nature of the legal cause which is called *illah* in Islamic law and *ratio decidendi* in Common law. The aim of this paper is to examine the methods laid down by legal scholars and jurists in both Islamic and Common law systems in order to correctly identify the *ratio decidendi*. This research employs a doctrinal method of research and places reliance on the Qur'an, Sunnah, Statutes and Cases as primary sources and Books, Journal Articles, Seminar Papers as secondary source. The research reveals that the methods of identifying *illah* in Islamic law are more definite, certain and diverse than the methods of determining the ratio in the common law. The recommendation of the paper is that, Jurists of Common Law should consider developing clear, rational guidelines for determining ratio decidendi, that closely mirrors the methods of the Jurists of Islamic law but that is tailored specifically to the Common Law system. These guidelines would reduce uncertainty, imprecision, and subjectivity in identifying material facts and abstracting them into general principles, thereby increasing the precision with which ratio decidendi is determined.

Keywords: Comparative, Jurisprudence, *Illah*, *Ratio Decidendi*, *Qiyas*, *Analogy*

1.1 Introduction

Legal analogy is the most common method of legal reasoning and deduction in most legal systems including Common and Islamic law systems. It has also been described as

the most familiar¹¹⁸⁰ and the archetype of all forms of legal argumentation. Legal analogy is reasoning from part to part, or case to case which is used in both common and Islamic law systems to answer most needs of the law¹¹⁸¹. In Islamic law, legal analogy is called *Qiyas*. The practice of deduction or reasoning by analogy both in Common and Islamic legal systems are quite similar in some aspects. However, there are fundamental differences in the application of the doctrine in Islamic legal system when compared to its application in the common law system. The similarities and differences in legal analogy in common law and Islamic jurisprudence puts it in the realm of comparative intellectual discourse¹¹⁸²

A comparative study of analogical reasoning in Common law and Islamic law system reveals that the understanding and application of the mode of reasoning and deduction presents some jurisprudential and practical problems. One of such the overarching challenges, which is the problem this paper identifies is that, in practice, the most difficult and most challenging aspect of the application of analogical reasoning is the elusive nature of the legal cause which is called *illah* in Islamic law and *ratio decidendi* in Common law. It has rightly been observed that ‘the *ratio decidendi* and the *illah* have remained the most elusive doctrines in Common law and Islamic law¹¹⁸³’. The most valid criticism therefore, against analogical reasoning in Common and Islamic law is the difficulty in identifying the legal cause and this indeed made reasoning by analogy a weak and doubtful legal authority¹¹⁸⁴. Hence, determining the most effective method of finding the legal cause or ratio is a question of abiding interest in jurisprudence.

The aim of this paper is to examine the methods laid down by legal scholars and jurists in both Islamic and Common law systems in order to correctly identify the *ratio decidendi*. This is with a view to make comparison and thus to suggest ways by which the practice can be improved. In line with this, the paper discusses the meaning and nature of *ratio decidendi* in Islamic and Common Laws.

¹¹⁸⁰ Sustain, C. R. (1993), ‘Commentary on Analogical Reasoning’, *Harvard Law Review*, USA, vol.6 , no.3, p.741

¹¹⁸¹ Hallaq, W.B. (1985), ‘The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law’, *Cleveland State Law Review*, USA, p.85

¹¹⁸² Zakariyah, I.(2016), ‘Al-Shafi’i’s Position on Analogical Reasoning in Islamic Criminal Law: Jurists Debates and Human Right Implication’, *International Journal Semiot Law*, Malaysia, p.3

¹¹⁸³ Hallaq, W.B *op.cit.*, p.85

¹¹⁸⁴ Hassan, A .(2009), *Analogical Reasoning in Islamic Jurisprudence*, Adam Publishers and Distributors, New Delhi, India,p.13

1.2 Meaning and Nature of *Illah* in Islamic Law

The term *illah* is usually translated into English as “effective cause” or “operative cause.” The Latin terms used in English to refer to effective cause or legal cause, are *ratio legis*, *ratio decidendi* and *ratio essendi*¹¹⁸⁵. Al-Bazdawi¹¹⁸⁶ defines *illah* as one to which the obligation of a rule of law is attributed primarily, as ownership of an article is the *illah* of sale, lawfulness of a woman is the *illah* of marriage and retaliation is the *illah* of murder and the like. He further remarked that the legal cause cannot be said to be the origin of the rules of law independently, but rather, Allah it is who legislates the law. He further explains that if we regard the *illah* as obligating the rules of law by themselves that would amount to polytheism as Allah alone obligates rules of law¹¹⁸⁷.

Al-Bukhari¹¹⁸⁸ opines that al- Bazdawi’s definition amply distinguished *illah* from other similar but different terms. This is in response to opinions such as that of the Hanbalis and al- Ghazali that consider the *illah* as the same thing as sign (*alamah*), mediate cause (*sabab*) and condition (*shart*). He further observes that Al- Bazdawi’s definition includes varieties of *illah* such as positive causes which includes *illah* for certain things in the *Shariah* like sale for ownership and marriage for lawfulness of woman. It also includes *illah* derived by the instrument of *ijtihad*.

1.2.1 Conditions of *Illah*

The following are conditions for the validity of *illah*;

- I. The *illah* must be *zahir* (evident) and not *khafi* (obscure)¹¹⁸⁹

The term *zahir* is found throughout the science of *usul al-fiqh* with varying usages and meanings. *Zahir* may, for instance, refer to words considered as bearers of probable meanings and it may refer to the meanings themselves. In its broadest sense, *zahir* includes all that which is evident or manifest through indicators of the law--an indicator is the means by which the law becomes evident. Often, indicators

¹¹⁸⁵ Farrar, J.H (1997) “Reasoning by Analogy In the Law”, *Bond Law Review*, England, vol. 9, p.150

¹¹⁸⁶ Al- Bazdawi, A. M. (ND) *Usul al- Bazdawi*, Jawid Brees Publishers, Karachi, Pakistan, p. 106

¹¹⁸⁷ *ibid*

¹¹⁸⁸ Al- Bukhari, A. A (1997) *Kashf-al- Asrar an Usul al- Fakhr al- Islam al- Bazdawi*, Dar-al- Kutub al- Ilmiyah, Beirut, Lebanon, vol. 3, p.1064

¹¹⁸⁹ Hassan, A . op. cit., p. 191

are not *zahir* and thus must be pondered upon by the jurist. Such obscurity is referred to by the term *khafi* which might arise from ambiguity or vagueness. If the *illah* were *khafi*, the senses would be unable to perceive it, and *Qiyas* would be highly difficult if not impossible. Therefore, the *illah* must be *zahir*. For instance, the intoxicating quality of *khamr* is *zahir*; perceiving this quality in *khamr* is possible through the senses just as it is perceptible in other alcoholic beverages.

When the 'illah is obscure, the Lawgiver establishes in its place a clear thing upon which it is presumed the hukm is established. For instance, mutual consent in the transfer of ownership is deemed obscure as are other hidden phenomena such as intention, good will, satisfaction, and happiness, and there is no way of perceiving these definitively. Such an obscure feature cannot be the 'illah. The Lawgiver has established in place of the obscure phenomenon of mutual consent, the phrasing or wording of the contract--akin to the concepts of offer and acceptance in Anglo-American law¹¹⁹⁰. Another example is the paternity of a child. The 'illah of paternity is conjugal relations between spouses¹¹⁹¹. Conjugal relations, however, are considered an obscurity because they are not subject to inspection or cognizance and assurity¹¹⁹². Thus, in place of this obscurity the Lawgiver has established the marriage contract, marital cohabitation, and acknowledgments of paternity all of which are external phenomena and are susceptible to evidence and proof.

- II. According to majority of jurists, the *illah* must be *mundabit* (inherently determinate) in that the *illah* is applicable in all cases regardless of changes in time, person, place or circumstances¹¹⁹³. The opposite, inherent indeterminacy, is termed *mudtarib*. In other words, the *illah* must be fixed, determinate, and precise. For example, the *illah* of the legal rule regarding a murderer does not depend on the identity of the murderer or the murdered. In the case of *khamr*, the *illah* of its prohibition, which is its intoxicating quality, is fixed, determinate and precise. No regard is given to the possibly different manner in which *khamr*

¹¹⁹⁰ . Kamali, M. H. (1991), *Principles of Islamic Jurisprudence*, Islamic Text Society, Cambridge, London, p. 209

¹¹⁹¹ *ibid*

¹¹⁹² Zaydan, A. *infra*, p. 164

¹¹⁹³ *ibid*, p. 189

(or alcohol entirely) might affect a particular individual or the extent of the substance's ability to intoxicate; the fact that it intoxicates or has such a quality suffices. The reason for this condition of determinacy is that the essence of *Qiyas* is the extension of the *hukm* of the *asl* to the *far'* because of equivalency of the existence of the *illah* between the two. If the *illah* were not conditioned to be determinate, precise, and specified (contrasted with indeterminate and ambiguous), extending the *hukm* to the *far'* would itself be an imprecise and inaccurate process.

- III. The *illah* must be *munasib*, or bear an appropriate and reasonable relationship, to the ruling¹¹⁹⁴. This relationship is deemed appropriate, and this particular condition fulfilled so long as the *hikmah* of the rule is secured and the *maqasid al-Shari'ah* are fulfilled. The attribute of intoxication of alcohol, for instance, is *munasib* to its prohibition because constructing this prohibition upon it secures the realization of benefit for humanity and fulfills the *maqasid al-shariah* by protecting the intellect. The *illah* must be such that we may presume it to lead to the realization of the *hikmah* and the objectives sought by the Lawgiver.
- IV. The *illah* must be a feature that the Lawgiver has considered. It might appear to a *mujtahid* at first glance that the feature is entirely suitable to the *hukm*, but in reality, it conflicts with the text and opposes legal evidence¹¹⁹⁵. Therefore, this feature cannot have been considered by the Lawgiver, and it is not *munasib* to the *hukm*.

Zaydan¹¹⁹⁶ states that a certain Andalusian scholar, when asked by a 'Abbasid caliph of what the expiation is for having had sexual intercourse while fasting during Ramadan, replied it was to fast sixty days. The expiation according to the explicit directions of the text is to free a slave, but if unable then to fast sixty days, and if unable to do that, then to feed sixty poor persons¹¹⁹⁷. The Andalusian scholar, however, seems to have thought that since the caliph was wealthy, it would be easy for him to free a slave but difficult to fast sixty days given the

¹¹⁹⁴Kamali, M. H. op. cit, p. 190

¹¹⁹⁵ ibid, p.192

¹¹⁹⁶Zaydan, A. (1987) *Al -Wajiz fi Usul al – Fiqh*, Maktabat al-Quds, Lebanon, p.163

¹¹⁹⁷ A hadith reported by Bukhari, no. 1936 and Muslim, no. 1111, on the authority of Abu Hurairah.

caliph's luxurious lifestyle. Such reasoning, as stated above, is incorrect because it is based on the peculiarities and particular circumstances of an individual.

V. The *illah* must be *muta'addi* (transient) or have an objective quality which is transferable to other cases, for an analogy cannot be constructed upon an *illah* which is limited to the *asl* alone¹¹⁹⁸. The *illah* of *khamr*, for example, is transferable to other alcoholic beverages as well as other substances.

1.3 Meaning and Nature of *Ratio decidendi* in Common Law

Goodhart¹¹⁹⁹ rightly observed that when dealing with the concept of *ratio decidendi*, the initial difficulty with which we are faced is the meaning of the phrase '*ratio decidendi*' itself. He opines that apart from the legal term 'malice', *ratio decidendi* is the most misleading expression in English law. This is because the reason which the judge gives for his decision is, in Goodhart's view never the binding part of the precedent. The preceding sub-sections discuss the meaning of *ratio decidendi* as well as the means of ascertaining or determining it.

1.3.1 Definition of *Ratio decidendi*

Montrose¹²⁰⁰ reasoned that the fact that the term *ratio decidendi* is Latin has not preserved it from the ambiguity of English words. He blames the complexity of English as a language for the confusion inherent in the term as indeed it may be responsible for some of this ambiguity since as a mere matter of translation it may be rendered equally by the phrases 'reason for deciding' and 'reason of decision'. Throughout the history of the development of Common law, Judges and scholars alike have used the phrase on some occasions for any reason which influences the ultimate decision, whether it be a finding of fact, or a determination of law, or an opinion about social circumstance or public policy, and on some occasions for a rule of law, whether influencing the court or not, for which it is thought the case can be used as authority.

¹¹⁹⁸Hassan, A . op. cit, p. 192

¹¹⁹⁹ Goodhart, L. A. (1930) 'Determining the *Ratio Decidendi* of a Case', *Yale Law Journal*, vol. XL. no. 2, p. 162

¹²⁰⁰ Montrose, J. L. (1957) '*Ratio Decidendi* and the House of Lords', *The Modern Law Review*, vol. 20, no. 2, p. 124

Paton¹²⁰¹ asserts that in accordance with the language of many jurists but not with that of the judges, *ratio decidendi* means the rule of law for which a case is binding. It is argued that Paton's definition is not ambiguous¹²⁰². This is due to fact that the classical view was that the ratio was the principle of law which the judge considered necessary to the decision. But Julius Stone criticized this conception of *ratio decidendi* on the ground that it does not embody an explanation of the meaning of the word ratio, but a criterion of the already defined thing. Stone further contend that the classical view leads to many difficulties of application, particularly where multi-judge tribunals are concerned. He cited the case of *Walsh v Curry*¹²⁰³ to buttress this point as in that case, Lord Simonds and Lord Tucker in *Wimpey's case* adopted one interpretation of the relevant section, while Lord Reid adopted another.

Goodhart¹²⁰⁴ cites some definitions of *ratio decidendi* particularly that of Halsbury and Morgan. Halsbury's definition goes that:

It may be laid down as a general rule that part alone of a decision of a court of law is binding upon courts of co-ordinate jurisdiction and inferior courts which consists of the enunciation of the reason or principle upon which the question before the court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*¹²⁰⁵.

Similarly Morgan¹²⁰⁶ remarked that:

Those portions of the opinion setting forth the rules of law applied by the court and the application of which was required for the determination of the issues presented in essence are to be considered as decision and as primary authority in later cases in the same jurisdiction.

Having cited these two definitions, Goodhart¹²⁰⁷ opined that if these statements are to be understood in their literal sense, it is respectfully submitted that the words are misleading, for it is not the rule of law set forth by the court, or the rule enunciated as

¹²⁰¹ Cited in Montrose, J. L. (1957), op. cit. p. 124

¹²⁰² *ibid*, p.125

¹²⁰³[1955] N.I. 112

¹²⁰⁴ Goodhart, L. A. , op. cit., p. 161

¹²⁰⁵ *ibid*

¹²⁰⁶ Quoted in Goodhart, L. A., p. 162

¹²⁰⁷ Goodhart, L. A., p. 162

Halsbury puts it, which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion,' or the rule when stated may be too wide or too narrow. In appellate courts, the rules of law set forth by the different judges may have no relation to each other. Nevertheless each of these cases contains a principle which can be discovered on proper analysis.

1.4 Searching for the *Illah* in Islamic Law

There are three broad methods adopted by the jurists in determining the *illah*. These are; *illah* from the text (*illa mansusah*) *illah* on the basis of *ijma* (*illa ijma'i*) and *illah* ascertained by juristic exercise (*illa mustanbatah*). These methods of ascertaining the *illah* shall be discussed below:

1.4.1 Textual *Illah* (*illah Mansusah*)

The textual *illah* is one that is stated in the text of the *Quran* or *Sunnah*. It may be stated in clear terms in which case it is *sarih* i.e. explicit and sometimes it may be alluded to in the case in which case it is *tanbih ima'* i.e. indicative or suggestive. When the *illah* is expressly identified by the text, there can be no disagreement as to what constitutes the '*illah* of a ruling. We can thus say that an *illah* expressly provided in the text is in this sense definitive (*qat'i*). However, an *illah* mentioned by allusion cannot be definitive. Rather, such an *illah* is speculative or probable (*Zanniy*)¹²⁰⁸. Examples of *illah mansusah sarihah* is given below:

“Because of this incident (min ajli *dhalik*) We laid down for the children of Israel¹²⁰⁹”; “And I have not created the jin and men except that they should worship me (*li ya'budun*)¹²¹⁰” “Observe the prayer because of the declining of the sun (*li duluk al-shams*) till the darkness of the night¹²¹¹”, “A book we have revealed to you so that by the leave of your Lord you may lead men (*li tukhrijal-nasa*) out of darkness into light¹²¹²”, So that (*kay la*)it not be a thing taken in turns among the rich of you¹²¹³”, “So we brought you back to your mother so that (*kay*) her eyes might be cooled

¹²⁰⁸ Moghul, U. F. (1999) “Approximating Certainty in Ratiocination: How to Ascertain the ‘Illah (Effective Cause) in the Islamic Legal System and how to Determine the Ratio Decidendi in the Anglo-American Common Law”, *the Journal of Islamic Law*, vol.125, p. 24

¹²⁰⁹ *Qur'an* 5: 32

¹²¹⁰ *Qur'an* 51: 56

¹²¹¹ *Qur'an* 17: 78

¹²¹² *Qur'an* 14: 1

¹²¹³ *Qur'an* 59: 7

and she will not grieve¹²¹⁴”, So for the iniquities of the Jews (*fa bi zulmin*) we forbade them the good things¹²¹⁵”

An example given by the jurists of *zanniyyah* form of *illah mansusah* is the tradition of the Prophet where he said: “the judge should not make a decision while he is in anger¹²¹⁶”. The quality ‘while he is in anger’ signifies the cause of prohibition for making a decision because anger disturbs the peace of mind and causes confusion.

1.4.2 Consensus *Illah* (*Illah Ijmai*)

This type of *illah* is derived from the authority of consensus of the *Ummah*. While there exist disagreement as to the validity of an *illah* determined by *ijma*, the majority of the jurists are agreed that *ijma* constitutes an authoritative and valid means of ascertaining the *illah*. An example of an *illah* established by *ijma* is the punishment of eighty lashes for the offence of wine drinking which was based on the analogy of slandering that may occur when a person consumes intoxicant. Ali RA made the analogy and it was approved tacitly by all the companions. Another example of this is the priority of germane over consanguine brothers in inheritance, the *illah* for which is held to be the former's superior tie with the mother. This ruling of *ijma* has subsequently formed the basis of an analogy according to which the germane brother is also given priority over the consanguine brother in respect of guardianship (*wilayah*). *Ijma* has also determined the *illah* of the father's right of guardianship over the property of his minor child to be the minority of the child.

1.4.3 *Illah* of Juristic Exercise (*Illah Ijtihadi*)

This *illah* is also referred to as *illah mustanbatah*. Some of the jurists have also referred to this method of determining the *illah* as *Sabr wa Taqsim* which means probing and division¹²¹⁷. It is called so because it involves investigating a certain quality whether it is fit to be the *illah* and the jurist declaring the probable *illah* from a multitude of *illah*. In other words this method basically involves eliminating the alternatives.

¹²¹⁴ *Qur'an* 20: 40

¹²¹⁵ *Qur'an* 4: 160

¹²¹⁶ Sunan Tirmidhi, Hadith no. 1334. It was reported on the authority of Abu Bakrah

¹²¹⁷ Hassan, A . op. cit, p. 233

This method of eliminating the alternatives is an extensive and detailed process of reasoning. This process is employed when the *illah* is neither stated nor indicated. The three steps in reasoning employed by the jurist is termed *tanqih al-manat* or isolating the *illah*, *takhrij al-manat*, or extracting the *illah*, and *tahqiq al-manat*, or verifying the *illah*¹²¹⁸. It is pertinent to make a note on the term *manat*. It is a word used in the stead of *illah*. It simply refers to the basis of the rule contained in the law. *Manat* is generally used in place of *illah* in the discourse of juristic exercise in *illah*.

The first mode employed in tracing the *illah* may be *Takhrij al-manat*. After a careful examination of the case at hand, the jurist enumerates a list of possible features that may constitute the '*illah*'. It therefore means the deduction of the basis of the rule from the text in which *illah* has not been mentioned. In this mode, the duty of the jurist is basically to extract the basis of (*manat*) by exercising his reason and considered opinion. For instance, regarding the prohibition of usury, the sale of wheat in exchange for wheat at an unequal rate is unlawful for it belongs to the categories of usurious transactions. The *illah* of usury in barter according to the Hanafis is inequality of rate and homogeneity, while the Shafi'i's are of the view that the *illah* is that wheat in this instance is of an esculent nature with homogeneity¹²¹⁹. In the opinion of Malik, the sale is unlawful because wheat is preservable and it is a food item which forms the *illah*¹²²⁰. It is clear that the determination of the *illah* in this case is by the exercise of juristic reasoning which accounts for the difference of opinion among the jurists.

Tahqiq al-manat which means verification or authentication of the *illah*, refers to the exercise of juristic opinion to verify the basis of rule in various cases and situations, where it applies and where it does not. For example, in order to appoint a leader, to determine the quantity in the rules which involves quantities, to determine the amount to be paid to a woman as maintenance, compensation for offences and other similar issues, requires verification of *illah*. This is because the bases in these examples are already established by the text but it is difficult to determine with certainty instances

¹²¹⁸ *ibid*

¹²¹⁹ *ibid*

¹²²⁰ *ibid*

where they apply and where they do not. Hence probable indications are used for its verification.

The last mode of determining the *illah* is *tanqih al-manat* which refers to a process of refinement of the *illah*. There are several forms of *tanqih al-manat*. However we shall discuss two prominent and important forms which are the *munasib* and *shabah*. *Munasib* means suitable or appropriate¹²²¹. Appropriateness is generally defined as the fulfillment of interest or the ultimate objectives of the *Shariah*. In this process the objective of the law giver is used to determine the *illah* of a case. It is necessary at this juncture to discuss briefly the concept of the objectives of the law i.e *maqasid al-shariah*. *Maqasid al- Shariah* refers to the objectives that the *Shariah* seeks to achieve through legislated laws. These *maqasid* are categorized into three broad categories, the *daruriyyat*(essentials), the *hajiyyaat* (supporting), the *tahsiniyyaat* (embellishments) and the *takmiliyyat* (complementary).

The *daruriyyat* which are essential interests are six, namely preservations of faith, life, property, lineage, intellect and honour. These are, by definition, essential to normal order in society as well as to the survival and spiritual well-being of individuals, so much so that their destruction and collapse will precipitate chaos and collapse of normal order in society¹²²². The *Shariah* seeks to protect and promote these values and validates measures for their preservation and advancement. *Jihad* has thus been validated in order to protect religion, and so is just retaliation (*Qisas*) which is designed to protect life. The *Shariah* takes affirmative and also punitive measures to protect and promote these values. Theft, adultery and wine-drinking are punishable offences as they pose a threat to the protection of private property, the well-being of the family (protection of lineage) the integrity of human intellect and honour respectively.

The second class of the interests known as *hajiyyat* or complementary interests are not an independent category as they also seek to protect and promote the essential interests, albeit in a secondary capacity. The *hajiyyaat* are the interests which are required for the betterment of the society, absence of which though may not create chaos, however, may

¹²²¹Kamali, M. H. op. cit., p. 192

¹²²²Kamali, M. H. (1999) *Maqasid al-Shari'ah: The Objectives of Islamic Law*, Islamic Studies ,Islamic Research Institute, , *Islamabad Summer, International Islamic University*, vol. 38, No. 2, p. 193

lead to hardship and difficulty¹²²³. These are defined as benefits which seek to remove severity and hardship that do not pose a threat to the very survival of normal order.

The *tahsiniyyat* are interests are beautification leading to a desirable status¹²²⁴. These are, for example, shaping oneself with the noblest characters and attitudes, and maintaining *ihsan* at every stage. The *Shariah* thus encourages cleanliness of body and attire for purposes of prayer and recommends, for instance, the wearing of perfume when attending the congregational Friday prayer. It discourages the consumption of raw garlic on that occasion.

The *Takmiliya* simply ensures that all levels of the objectives of the *Shariah* work in harmony. *Takmiliy* is therefore complementary. For example where the required number of witnesses cannot be gotten to sustain the offence of zina, the man and woman may still be given discretionary punishment if they are found to have secluded in a room. Another example is that of a person who commits theft out of unbearable hunger. In this case, such a person will not be given the maximum punishment.

In essence *munasib* entails that a jurist should seek to determine the *illah* of a rule where such is not stated using the objectives discussed above as the compass to guide them. The *illah* extracted from this type or through this form may not altogether be definitive. However, through the use of the above methods, the possibility of arriving at an unjust or invalid Qiyas as a result of a wrong *illah* is minimized if not eliminated.

1.5. Determining the *Ratio decidendi*

Stone¹²²⁵ captures the essence of *ratio decidendi* and the importance of ascertaining it with certainty in the following words:

In a system of law which lives by *stare decisis* the precise identification and delimitation of the ratio is the deepest secret of juristic life. Whatever the other meanings of the *ratio decidendi* of a case they must include whatever is meant by that identified and delimited decisum to which *stare decisis* requires us to adhere. But its historical meaning is no less vivid. In the stream of time in which the common law is assumed to unfold from its own pre-existing resources to

¹²²³ *ibid*

¹²²⁴ *ibid*

¹²²⁵ Stone, J. (1959) *op. cit.* p.599

govern a changeful society, the *ratio decidendi* would be the indispensable organic link between generations both of men and of emerging legal precepts. It would be this ratio which, as it were, legitimizes new precepts as being indeed the offspring of those patriarchal fundamental principles of the common law which unify it by their pristine origins. If *stare decisis* seems to import a mood of resting on the old ways, of stability and even stasis in the legal materials, then history compels us to observe that this apparent mood overlays a process of constant and often dynamic change. And if such contradictions are to be understood, it must be in the nature of the *ratio decidendi* that we must seek some main clues. For, it is the use of this notion through which new decisions can be made in the comfort and respectability of a proper social relation, and in a manner legitimizing the fruits of decision. Here, if anywhere, is the operating concept allowing courts which base themselves on *stare decisis* to do the day-to-day job of deciding new cases sensibly, even while purporting to adhere to the older rules.

The import of the above quoted statement of Stone is that the *ratio decidendi* is the link between the past, present and future of the common law. However in order to guarantee that the correct legal principles are arrived at, used for the moment and passed down to the future generation, there is need to ensure that the proper mode of ascertaining the ratio is followed in order to rightly discover the ratio which Stone refers to as the deepest secret of juristic life.

It is important to note that before Stone, Goodhart had the dangers of a wrongly deduced ratio. He observes¹²²⁶ that it is precisely some of those cases which have been decided on in-correct premises or reasoning which have become the most important in the law. New principles, of which their authors were unconscious or which they have misunderstood, have been established by these judgments. He further observed that the modern common law of torts has been developed to a considerable extent by a series of bad arguments, and our property law is in many instances founded on incorrect history.

Owing to the overarching relevance and the need to correctly determine the ratio, a great deal of thought and effort has thus been expended in defining and analyzing this concept and in finding a reliable method for working out how the *ratio decidendi* of a

¹²²⁶ Goodhart, L. A. (1930) op. cit. p. 162

case is best ascertained. The methods put forward by legal scholars to determine will be the subject of discussion in the preceding section. There appear to be three main approaches: the classical theory; the wide-spread view and the 'material facts' theory developed by Goodhart.

1.5.1 The Classical Theory

Montrose¹²²⁷ has defined the classical view as being that the *ratio decidendi* of a case is 'the principle of law propounded by the judge as the basis of his decision'. Similar definitions are to be found in early textbooks on jurisprudence¹²²⁸. Such definitions seem to imply that determination of the *ratio decidendi* is not an unduly difficult task: first one searches the precedent for a convenient statement of a rule, then one ensures by an appropriate test that this rule was actually the basis of the decision rather than a mere obiter dictum, and then one applies the rule to the facts of later cases, rather as one would apply a statutory provision.

It is certainly a matter of common experience that judges often express the legal principle upon which they are acting too widely and that courts are later forced to issue qualifying statements. A random, but well-known and fitting example is the statement of the 'High Trees' principle in the original case by Denning J and the way in which it was later limited by the Court of Appeal in *Combe v Combe*¹²²⁹.

Conversely a stated ratio may be too narrow and in need of being broadened, or it may be too broad in some respects and too narrow in others, so that it later becomes authority for a proposition quite different from the one originally stated. Several judges of an appellate court, even when they concur as to the result, may announce quite different ratios which are not easy to reconcile.

Another difficulties faced by the adherents to the classical theory is that judgment may contain reasons but no statement of a single proposition which could serve as a coherent ratio. Worse still, judges sometimes announce decisions without giving any reasons whatsoever. The classical theory would force one to the conclusion that such decisions

¹²²⁷ Montrose, J. L. (1959), op. cit. p. 124

¹²²⁸ *ibid*

¹²²⁹ (1951) 2 KB 215

can have no ratio; yet that is not how they have been viewed. For example, the judgment in *Raffles v Wichelhaus*¹²³⁰ consists of only one sentence ('There must be judgment for the defendants.'). yet generations of common lawyers have debated the legal effect of the decision as a precedent¹²³¹.

When the difficulties of establishing the intended ratio become extreme, the suggestion that such ratios are binding assumes an air of unreality. As Lord Dunedin stated in the *Mostyn*:

When any tribunal is bound by the judgment of another court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear., what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it¹²³².

Lucke¹²³³ commented that even the most clearly stated ratio will not necessarily be given an operation in accordance with its literal meaning. Should a judge feel that such a ratio leads him in an inappropriate direction, he is able to declare the precedent in which the ratio was stated inapplicable by pointing to a significant factual difference between the precedent and the case before him, and then to distinguish the precedent 'on the facts.

1.5.2 Goodhart's "Material Facts" Theory

The summary of the theory of Goodhart is as follows:

- a. The principle of a case is not found in the reasons given in the opinion
- b. The principle is not found in the rule of law set forth in the opinion.

¹²³⁰ (1864) 2 H&C 906; 159 ER 375

¹²³¹ Lucke, H. K. (1989) 'Ratio Decidendi : Adjudicative Rational and Source of Law', *Bond Law Review*, Issue 1

vol.1 p. 40

¹²³² (1928) AC 57, 73.

¹²³³ Lucke, H. K. p. 39

- c. The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision
- d. The principle of the case is found by taking account (i) of the facts treated by the judge as material, and (ii) his decision was based on them
- e. In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion¹²³⁴.

Lucke¹²³⁵ is of the view that serious difficulties with Goodhart's formula lie in (i) his reference to the 'facts of the case' as part of the ratio, and (ii) his insistence that the precedent judge has the power to declare facts material or non-material and thus to shape the future course of the law. These aspects of his theory raise issues of fundamental importance concerning the logical structure of the *ratio decidendi* and the nature of the judicial law-making process.

Stone¹²³⁶ severely criticized Goodhart on his insistence that facts formed part of the ratio. Stone argues that what is more, each of these "facts" is usually itself capable of being stated at various levels of generality, all of which embrace "the fact" in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case.

Lucke¹²³⁷ after considering the criticisms of other scholars submits that if Goodhart had given serious attention to Montrose's criticisms, he would have been forced to ponder the merits of a *ratio decidendi* which has the specific and concrete facts of the precedent case as its first component. Such a version of the concept is in danger of invoking nothing more than a factual description of an historical event, including its forensic aftermath. If it is to be turned into a working hypothesis, a number of qualifications will be unavoidable.

In addition it was contended that if concrete facts are to be of any use as parts of a *ratio decidendi*, they must be abstracted at least to the point where they are detached from

¹²³⁴ Goodhart, L. A. (1930), p. 182

¹²³⁵ Lucke, H. K. p. 41

¹²³⁶ *ibid*

¹²³⁷ *ibid*, p. 49

their temporal setting. If *Donoghue vs Stevenson* is to be applied today we must ignore the fact that the events occurred in 1928. Those facts must be projected forward to the present day so as to test their applicability to a present-day dispute. Thus, Goodhart's statement that 'all facts of... time., are immaterial unless stated to be material' lacks merit.

On the second problem with Goodhart's theory, it was argued¹²³⁸ that there are many facts which are connected with the precedent but which the judge will have ignored because they are legally irrelevant. Other facts might at first have been thought potentially relevant (and are thus included in the judicial account of the case) but then turned out, on closer inspection, to be just as irrelevant legally as those which the judge excluded from his descriptive account in the first place. It seems obvious that such facts cannot have been part of the reason for the decision. It must have been considerations of this kind which prompted Goodhart to include in his proposed *ratio decidendi* only those facts which were considered material facts by the precedent judge. The first difficulty with this suggestion is that Goodhart's use of 'material' is just as fundamentally ambiguous as is his use of 'facts'. The second difficulty arises from his suggestion that the precedent judge has the power to rule one or several factual features of the case before him material or non-material¹²³⁹.

1.5.3 The Widespread View Theory or Leeways of Choice Theory

Lucke¹²⁴⁰ argues that the apparent ease with which judges seem to be able to escape the supposed binding effect of precedent has, not surprisingly, persuaded many lawyers that the whole system is nothing more than an illusion. One of the most striking comments to this effect was made by Bentham, who condemned the common law for its uncertainty, its arbitrariness and its lack of political legitimacy. His version of the rule of precedent was: 'Follow it unless it is most evidently contrary to what you like. Stone, who was, unlike Bentham, a life-long admirer of the common law, summed up his scepticism towards the binding force of precedent in the phrase 'leeways of choice'. Like

¹²³⁸ *ibid*

¹²³⁹ Stone, J. (1959) *op. cit.*, p. 604

¹²⁴⁰ Lucke, H. K. (1989) *Ratio Decidendi : Adjudicative Rational and Source of Law*, *Bond Law Review*, Issue 1 vol.1 p. 40

Bentham, he denied the binding force of precedent, but saw the resulting judicial freedom as a positive, creative force which kept the legal system open to great and, perhaps, changing values and new influences, and enabled it to adapt to changing circumstances .

Lucke¹²⁴¹ further contends that when members of the school of thought of which Stone was a representative deny the binding force of precedent, they do not mean thereby to accuse the judiciary of lax practice. Rather, they tend to view the case law (or at least the authoritative force of individual decisions) as so lacking in logical structure that a truly binding effect is not really possible. It is submitted, with respect, that such a view is mistaken.

1.6 Conclusion

Making a comparison between aspects of two or more legal systems involves enormous complexities. These complexities are especially pronounced when the two legal systems are distinct in nature and philosophy as the Common Law and the Islamic legal system. Law is not only a body of rules; rather, it is an essential aspect of a whole civilization integrated into the various institutions of society, and it is a reflection, if not a direct outgrowth, of that civilization's beliefs and values. For this reason, borrowing from another legal system will invariably involve the adoption of sources of law, beliefs, and values that may be alien to the borrowing system.

In developing their methodologies of legal reasoning, jurists of the Common Law and Islamic legal system responded to a variety of factors. Many of the differing concerns to which they respond are due to the contradictory nature of the sources and the differing philosophies of the two legal systems. One may argue though that given the two systems under comparison this particular difference is to be expected and perhaps even assumed. More importantly, for the purposes of this discussion, is the jurists' recognition of and shared concern for the uncertainties and challenges involved in linguistic and textual interpretation in ratiocination.

¹²⁴¹ *ibid*

The methods of legal reasoning developed by Muslim jurists to ascertain the *'illah* are far more developed, detailed, and systematic than the methods developed by the Common Law to determine the *ratio decidendi*. One might even state that the manner in which the *'illah* is determined is seemingly quantifiable. In order to increase the probability with which Muslim jurists could properly and correctly determine the *'illah*, they imposed a number of conditions upon the feature under examination for the *'illah*. For these same reasons, jurists also imposed a variety of conditions upon the other three elements of *Qiyas*. These conditions represent an excellent and highly successful attempt to approximate certainty, to the greatest extent rationally possible, in ascertainment of the *'illah*. The conditions also serve to significantly reduce, if not entirely eliminate, arbitrariness, indeterminacy, and improperly subjective determinations of the *'illah*. These conditions, moreover, assist in approximating the correctness of the *'illah*. Furthermore, the conditions demand that the *'illah* be articulated with tremendous precision.

In determining the *'illah* and examining whether or not the applicability of a rule of law should continue, the rationales of the Lawgiver and the underlying objectives of the law, which are held constant, are closely examined and protected. In this manner, ascertainment of the *'illah* is made an even more certain and precise process. The relationship and “interplay” among the *'illah*, the *hikam*, and the *maqasid al-Shari'ah* are fully articulated and described so as to promote certainty and accuracy in determining the *'illah*, the law, and its applicability. Securing the purposes and objectives of the legal system as a whole is also greatly promoted in this manner.

Jurists of the Common Law deal with issues of ambiguity and uncertainty in the English language in general, and in the language of case opinions used by judges to express their reasoning and conclusion. The methods of legal reasoning developed by the Anglo-American system seek to reduce the uncertainties and inaccuracies involved in determining the *ratio decidendi* in order to assure a proper and correct determination. However, the Common Law's legal reasoning does not succeed in approaching certainty as nearly as is rationally possible.

The first step in ascertaining the *ratio decidendi* of a precedent requires a determination of its material facts. This step, discussed above, is often a highly difficult and somewhat

ambiguous process. Both uncertainty and subjectivity are somewhat reduced by the use of the court's reasoning. But because judges, in their case opinions, do not, as a norm, explicitly state which facts they have deemed material, there remains much uncertainty, ambiguity and imprecision in the determination of which facts are material. Furthermore, the process of determining the *ratio decidendi* allows for the use of facts to promote a certain end; in this respect, the process contains, or at least has the potential for, much improper subjectivity.

The material facts, once selected, are then abstracted into generalities in a process that very often involves, in part because of the challenges and uncertainties inherent in language, much imprecision and inaccuracy. These linguistic challenges are not fully and sufficiently dealt with by Common Law jurists. The process of abstraction, as it stands, also allows for much improper subjectivity. The imprecision involved in abstraction is somewhat reduced though by linking this process with the purposes of the rule of law in question.

Jurists of the Common Law contend that as the number of decisions expounding a rule of law increase, the *ratio decidendi* of a case increases in certainty. Moreover, the *ratio decidendi* are further pondered upon and examined in light of policy considerations and factual settings; this provides the opportunity for the *ratio decidendi* to be clarified and made more precise. Jurists are correct in stating that what constitutes the *ratio decidendi* becomes more certain, but why it is the *ratio decidendi* and the process by which it was and will be determined do not themselves become more certain or precise by the amassing of precedents. Whether this entails any form of injustice to the first parties, assuming that the *ratio decidendi* was imprecisely and therefore incorrectly stated in the first instance, is a possibility that Anglo-American jurist sought to consider. In addition, it is neither clear at what point in the amassing of precedents certainty is approximated nor at what level of probability the *ratio decidendi* has been properly determined and precisely articulated.

From the foregoing, the findings of this paper are, that the subject of analogy in the general and specific area of determining the *ratio decidendi* or the *illah* is very complex and difficult to grasp. In addition, the methods of identifying *illah* in Islamic law are

more definite, certain and diverse than the methods of determining the ratio in the common law.

From the above findings, the recommendations of the paper are that, in view of the strategic importance of analogy in legal reasoning and considering its role in the development of any legal system and given the central position that *ratio decidendi* and the *illah* occupy in analogy, Judges in Nigeria should be made to attend compulsory trainings in the use and application of the doctrine. This kind of training can be provided by the National Judicial Institute in collaboration with the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria.

Furthermore, jurists of the Common Law ought to develop, or at least consider the development of, a coherent and rationalized set of guidelines by which the ratio decidendi is determined; these should not necessarily be those of the Muslim system but rather developed with specific reference to the Common Law system. These conditions should be directed at reducing the uncertainty, imprecision and improper subjectivity with which the materiality of facts is determined and the process in which the material facts are then abstracted into generalities. This would also serve to increase the precision with which the ratio decidendi is stated.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

INTERROGATING FIFA'S NON-INTERFERENCE POLICY BY NATIONAL
GOVERNMENT'S IN THE ADMINISTRATION OF FOOTBALL FEDERATIONS

^{1*}Antom Vanen Lawrence, ²Agbakor Zugwem Emmanuel

¹Faculty of Law, Nigeria Police Academy, Wudil, Kano

²Faculty of Law, Salem University, Lokoja, Kogi State, Nigeria

*vanenantom@gmail.com +234-8065901567,

agbakor@salemuniversity.edu.ng ,+234-8185100116

Abstract

This paper examines the non-interference policy of Federal International de Football Association (FIFA) an international self regularity body of global football, the policy seeks to maintain independence of the various countries football associations insulating them from government interference. This has occasioned grave injustice to actors in the industry. It has brought monumental corruption as the national government cannot question how the federations are run. The rule has excluded football disputes from the domestic jurisdictions of courts. Where disputes are submitted to domestic tribunals, the country stands the risk of been suspended. The contradiction particularly in Nigeria which is common to African countries is that the state is the sole financial of theses federations. The question that is begging for answers is that can't the man who pays the piper not dictate the tune? This research observes that FIFA's policy is neocolonialism of a kind and it is time this rule should change for the development of football especially in Nigeria.

Keywords: Interrogating, Non-interference, Policy, National Governments, Football.

1. Introduction

Football known in other climes as soccer is one of the greatest unifying factors in Nigeria. Nigeria is the most divided country politically, ethnically and religiously. However, football from time immemorial has been one great unifying factor, source of

joy and happiness to Nigerians¹. The love and craze for football transcends the support for the national team. Most Nigerians are fans of different clubs all over the world. Huge crowds besiege viewing centres when clubs of their choice in the premier league, Spanish Laliga, German Bundesliga, Italian Serie A are playing².

The passion for the game more often than not results to quarrels and sometimes physical combat. Some of the clubs including Real Madrid, Atletico Madrid, Barcelona from Spanish Laliga, Manchester United, Manchester City, Chelsea, Liver Pool and Arsenal in the English Premier League, Intermilan, AC Milan, Atlanta and Juventus in Italian serie 'A' for instance command a huge following amongst Nigerians. Nigerian league which has maintained its importance at the home area is structured into fewer sections as follows:

1. Nigerian Professional Football League (NPFC)
2. Nigerian Women's Premier League (NWPL)
3. Nigeria National League (NNL)
4. National League One (NLS)³

The league has produced great players who have left footprints and some are currently making imprints in top flight leagues in Europe.

2. Football Administration in Nigeria

The administration of football in Nigeria is in the hands of the Nigeria Football Association (NFA) which was established in 1945; and was transmuted into Nigerian

¹ Steemit. "The Unifying Factor of Football in Nigeria - Why Nigerians are the Happiest People in the World" available at steemit.com/sports110eugencer accessed 26/6/2024.

² Ibid.

³ The Nigerian League, available at <https://soccerinteraction.com/the-nigeria-league-history> accessed 26/6/2024.

Football Federation in 2008. The Federation joined confederation of African Football (CAF) in 1959 and FIFA in 1960⁴.

3. Legal status of Nigerian Football Association (NFF).

The NFF is a creation of the statute⁵ which Act provides⁶

- (1) There is hereby established an associations known as the Nigerian Football Association (in this Act referred to as “the Association”)
- (2) Shall be a body corporate with perpetual and common seal; and
- (3) May sue and be sued in its corporate name.

The aims of the association is to encourage the development of all forms of amateur and professional football in accordance with the statutes and laws of the federation of the sport of football, and of any other international football body to which the association is affiliated. Again the association is empowered to enable the affiliation of Nigerian football clubs with recognized international football bodies as this will improve performance of Nigerians in the world soccer and to enhance the status and impartiality of football referees in Nigeria; to find ways and means of ensuring the security and safety of the participants and the soccer fans. The Association is also to provide source of funding the game of football in Nigeria and finally to encourage the participation of youths in the game of soccer.

The Act has provided for a governing board of the Association. Membership of the board consists of one member each from the armed forces of the federation, the police,

⁴ Nigerian Football History. Available at <https://www.schoolsofware.com.ng/nigerian-football-history/>

⁵ Nigerian Football Association Act NO. 101 of 1992, and/or 2013 edition.

⁶ Section 2 Ibid.

Nigerian Intercollegiate sports association, the Nigerian Schools Sports Federation, the Nigerian Referees Association, the Nigeria Coaches, Sports Writers Association, Association of Physical and Health Education, Four appointees to be appointed by the minister and representing the ministry of sports, eight other persons to represent the amateur and professional football clubs to be selected from the zones which may from time to time be established by the ministry and the secretary General of the Association⁷. The chairman of the board shall be selected by the members amongst themselves subject to the guidelines as may have been made by the members of the board.

The functions of the board shall include among others⁸.

- (a) Organize league and other matches for professional and amateur clubs in cooperation with the respective bodies recognized by the Association;
- (b) Organize the participation of Nigerian clubs in international competitions, subject to the prior approval of the minister
- (c) Provide, in cooperation with other bodies adequate training for employee and various personnel, who may be involved in the administration and organization of league matches and its activities, with a view to improving the standard of football administration and officiating
- (d) Determine such area of league activities to be commercialized, in order to earn income for the league, the professional players, professional clubs and association;

⁷ Section 3 Ibid.

⁸ Section 6 Ibid.

- (e) Organize and regulate the activities of the Nigerian Referees Association and the Nigerian Coaches Association;
- (f) Grant annual licence to persons seeking to be members of the Nigerian Referees Association and Nigerian Coaches Association;
- (g) Recommend, for the approval of the minister, the international bodies to which the Association may, from time to time, associate;
- (h) Set up or recognize such subsidiary bodies to assist the board in the performance of its function under this Act;
- (i) Setup standing and adhoc committees as the board may consider necessary to enable the board perform its function under this Act; and
- (j) Carryout such other functions as the minister and the board may consider necessary to facilitate the implementation of the provision of the Act.

The board is empowered under the Act to maintain a fund which shall be defrayed with the general or specific approval of the minister, all expenditure incurred by the board⁹. The sources of the funds shall be grants to the association by the Federal Government, grants in aid, endowments and donations, all charges, fees dues or amounts recovered by the board¹⁰; the board is to cause to be prepared, not later than 30th September in each year an estimate of the expenditure necessary to carryout programmes approved by the board for the next succeeding year and they shall submit to the minister the estimate of expenditure and that of its income during the next succeeding year¹¹.

⁹ Section 15 of the Act.

¹⁰ Section 15 of the Act.

¹¹ Section 16 of the Act.

The audited accounts of the board shall be prepared in accordance with the guidelines supplied by the Auditor General for the federation¹². The minister has to give directives to the board which are of general or specific nature with regards to the functions of the boards and the board is bound to comply with such direction¹³.

4. History and Objectives of FIFA

The *Federal Internationale de Football Association* was founded in 1904 with the coming together of National Associations of France, Belgium, Denmark, Netherlands, Spain, Sweden and Switzerland¹⁴. There are about 211 associations of countries. The initial motive of the founding national associations was to setup uniform guidelines to officiate football matches in the international competition they intended to stage¹⁵. The objectives of FIFA are¹⁶:

- (a) To improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth development programmes.
- (b) To organize its own international competitions
- (c) To draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement.

¹² Section 18 of the Act.

¹³ Section 19 of the Act.

¹⁴ History of FIFA foundation. Available at <https://fifa.com/aboutfifa/who-we-are/history/>

¹⁵ Ibid.

¹⁶ General Provisions NO. 2 FIFA Statutes 2016 also quoted by Abba Amsami Elgужja and Augustine Edobor Arimoro. FIFA Regulations, Redress in Domestic Courts and Non-interference: Matters Arising; available at www.researchgate.net/publications.

- (d) To control every type of football association by taking appropriate steps to prevent infringements of the statutes, regulations or decisions of FIFA or the laws of the game;
- (e) To use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age;
- (f) To promote the development of women's football and the full participation of women at all levels of football governance; and
- (g) To promote integrity, ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation, which might jeopardize the integrity of matches, competitions, players, officials and member associations or give rise to abuse of association football.

According to Walid, FIFA like other bodies is governed through transnational private governance, establishes its own rules and standards of behavior by enacting statutes that are binding on all members. Failure to adhere to these rules or standards of behavior result in sanctions which are passed by FIFA for instance the “non-interference rule” which is to the effect that members should perform the functions without interference with third parties¹⁷.

5. FIFA's Non-Interference Policy

FIFA's Non-Interference Rule is founded within the FIFA statutes which provides¹⁸.

1. Each member shall manage its affairs independently and with no influence from third parties.

¹⁷ Kan Walid. “The FIFA Rule of Non-interference: How it contributes to corruption and How it contravenes. Kenya Law” available at [Surplus Strattunore.edu>download](http://SurplusStrattunore.edu/download) accessed 13/7/2024.

¹⁸ See Article 17 of the FIFA Statutes, 2014 now Article 19 of the FIFA Statutes, 2016.

2. A member's bodies shall be either elected or appointed in that association. A member's statutes shall provide for a procedure that guarantees the complete independence of the election or appointment.
3. Any member's bodies that have not been elected or appointed in compliance with the provisions of par. 2 even on an interim basis, shall not be recognized by FIFA.
4. Decisions passed by bodies that have not been elected or appointed in compliance with Par 2 shall not be recognized in giving effect to the provisions, the court of arbitration on sports in the consolidated cases of *Nigerian Football Federation v. FIFA CAS2014/A/3744* and *Nigerian Football Federation v. FIFA CAS2014/A/3766*¹⁹ held thus:

In reading Article 17 of the FIFA statutes (significantly entitled “independence of member's and their bodies”), it is clear to the panel that FIFA has the authority-for the purpose of participating in its activities-to not recognize an election of one of its member associations if the relevant lacks “complete independence”. The purpose of Article 17 is to grant FIFA power to not recognize an election where the association's electoral process does not guarantee the complete independence of an election. In the panel's view, Para 2 of Article 17 may not be interpreted as setting forth a merely formal requirement that the member associations statutes provide rules that guarantee the independence of the election; the panel is of the

¹⁹ CAS 2014/A/3744 and CAS 2014/A/3766 available at www.sennferrero.com>tas-cas>

opinion that Para 2 of Article 17 requires, more significantly, that each time there is an election within a member association, the electoral process actually guarantees the complete independence of the election. Moreover, the panel is of the view that the requirement of “complete independence” found in Para 2 must be understood in the light of Para 1 of Article 17, forbidding “influence from third parties”. Accordingly, third parties of any kind (e.g. Governmental officials or bodies).

According to Elgujja, FIFA is very strict in the application of its rule of non-interference in the administration of football²⁰. Quoting Thierry Ragenass, Elgujja wrote, the most common political interference is when government perceives that the executive committee of the national team is losing many games, they decide that changes must be made and want to put someone else in charge”²¹

6. Application of Non-Interference Rule in Selected Jurisdictions.

There are instances where FIFA has invoked its rule of non-interference against members associations as demonstrated herein below.

i. Spain

The Spanish football Act provides for the minister in charge of sports to issue decrees and orders to the Royal Football Federation²². The conflict arose in 2008 when the federation refused the ministerial order to conduct elections. FIFA was involved and threatened to suspend Spain from taking part in international

²⁰ Abba Amsami Elgujja Op Cit.

²¹ Ibid.

²² Law 10/1990.

football competitions. The Spanish government succumbed to the threats, elections were subsequently held in accordance with the guidelines set by the Royal Spanish Football Federation which saw the re-election of Angel Villar the incumbent²³.

ii. Venezuela

In 2010, the Venezuelan supreme court had overturned its decision which directed fresh elections under revised laws as FIFA threatened to ban the nation's governing body. FIFA believes that allowing an ordinary court to interfere in a matter governed by its international rules constitutes a violation of its statutes. FIFA stated that it would not recognize the revised electoral process ordered by court²⁴.

iii. Pakistan

The Pakistani football federation was suspended by FIFA after a Lahore court appointed an administrator to take control of the sports body. FIFA recognized this as "third party interference" and implemented the ban. This prevented Pakistan from playing in any FIFA recognized competition²⁵.

iv. Poland

The Polish football was enmeshed in widespread corruption including members of the Polish Football Association. The Polish government suspended the executives of the Football Association Board and replaced it with an interim management committee. FIFA and UEFA were involved in the matter and

²³ Khan Walid Op Cit.

²⁴ Soham Mukherjel, "Instances where FIFA has Banned Football Associations after court interference" available at www.goal.com/en.ng/news accessed 13/7/2024.

²⁵ Ibid.

threatened to suspend Poland. UEFA also threatened that it would not consider Poland's candidature for hosting the 2012 European Championships, the government succumbed to the threat and reinstated the sacked Board²⁶.

v. Kenya and Zimbabwe

FIFA banned the two countries from participating in FIFA organized competitions due to interference from national governments in the activities of their respective federations. Kenya's sport ministry shutdown the football Kenya federation after allegations that funds had been mismanaged. Zimbabwe's football association was suspended by government officials following allegations of fraud and sexual harassment of female referees²⁷.

vi. Nigeria

In 2014 FIFA suspended Nigeria due to the intervention by government due to the struggle by factions within the NFF which culminated into a court order. On 28 November, 2013, the NFF held a General Assembly, put in place an electoral committee to organize elections for the executive of the federation. On 2nd July, 2014, a Federal High Court sitting at Jos placed an injunction on the entire NFF Executive Committee. The High Court also directed the minister of sports to appoint a senior member of the civil service in the NFF to take charge, during the injunction, the minister of sports acting on this order appointed Mr. Lawrence Katken. FIFA's threatened for a reversal of the sacking of the executives²⁸.

²⁶ Walid Op Cit.

²⁷ Sanya Mansoor, "These are the countries FIFA has ever Banned from the world cup" available at time.com/6234776/countries accessed 15/7/24.

²⁸ FIFA threatens to band Nigeria for 3rd time over court ruling CBC News available at <https://www.cbc.ca/sports/soccer> accessed 17/07/2024.

The status of FIFA within International Law.

7. FIFA is considered an International Non-Governmental, nonprofit organization and operates based on Association and affiliation of member associations¹²⁴². Under the Swiss Code¹²⁴³ Associations with political, religious, scientific, cultural, charitable, social or other non-commercial purposes acquire legal personality as soon as their intention to exist as a corporate body is apparent from their statutes. Articles of Association may be in willing and indicate the objectives of the Association, its resources, and organizations¹²⁴⁴.

Under Nigerian Law, Treaties and International Conventions must be domesticated to become domestic laws¹²⁴⁵. The section provides

No treaty between the federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly

It is doubtful whether the FIFA statutes fall within the contemplation of this constitutional provision. Be that as it may, the Question that calls for determination is how and where does FIFA a non-governmental organization acquire enormous powers that it forbids National governments from determining how organization like NFF for instance are run. The answer will best be answered in understanding first the monopoly status of FIFA

¹²⁴² Gabriel Nickolas Cazotto, Mauricio feonzagila “ Institutional Aspects of FIFA Governance and its impact on international Relations” available at www.scip.org/jornal/paper/ng/

¹²⁴³ Art 60 Swiss Code, 1907.

¹²⁴⁴ Gabriel Nickolas Op Cit .

¹²⁴⁵ Section 12 of the Constitution of Nigeria 1999.

8. Monopoly of FIFA in Global Football

FIFA has monopolized the sport as member countries must adhere to the laws governing Football as set by FIFA. It is assumed that the members of FIFA act on behalf of their respective states in matters concerning football. As a result, no other than FIFA this is secured by FIFA luring member states into participation in world cup and International football competitions¹²⁴⁶ FIFA membership is a symbol of independent states and sovereignty for instance by Kosovo and Taiwan.¹²⁴⁷

It has been argued that monopoly is necessary as it ensures that players, fans, teams etcetera's can participate in competitions with uniform form rules which was not the case in some times past. It was therefore important to have football played in uniform rules of the game. The proponents of FIFA monopoly have argued that a tournament as prestigious as world cup is best provided by a monopoly because participation and rules of play are standard across the board¹²⁴⁸

8.1.The Challenge of Monopoly by FIFA

FIFA's emergence as a monopoly in football sport has thrown up serious challenges of lessening competition in the administration and organization of football. Lessening competition means that the process of rivalry is diminished or lessened, or the competitive promise is compromised or impacted. "lessening competition" extends to prevention or hindering competition.¹²⁴⁹ Monopolies leads to anticompetitive

¹²⁴⁶Khar Walid Op Cit.

¹²⁴⁷ Ibid.

¹²⁴⁸ Ibid.

¹²⁴⁹"Lessening competition definition" available at www.lawinsider.com/dictionary/ accessed 16/7/24.

behaviour in industry which are strategies to limit the degree of competition inside a market and reinforce the monopoly power.¹²⁵⁰

FIFA's monopoly of football has given birth to large scale corruption at the Centre and in the Federations. In 2015 for instance, fourteen top FIFA officials were arrested on allegations of Tax evasion, fraud, bribery and money laundering. They engaged in these activities in order to secure their own interests regarding marketing rights as well as to locations for the world cup. It is estimated that a total money that exchanged hands through corruptions in the scandal was over one hundred and fifty million dollars (\$150M) arrest were made by the Swiss police on behalf of the Federal Bureau of investigation (FBI) of the United State of America¹²⁵¹

In Kenya, the football Federation was dissolved in November, 2021 after an investigation into the finances of the federation revealed it has failed to account for funds received from the government and other sponsors, its leader, Nick Mwendwa was arrested the same month, the case was dropped for want of evidence but Mwendwa was rearrested on a new charge of misappropriating 38 million shillings equivalent of ₧312,000. FIFA banned Kenya for interfering with FKF it was until the officials were reinstated that FIFA lifted the suspension.¹²⁵²

In Nigeria, the bubble will soon burst as stakeholders are engaging former and current executives over large scale corruption. According to stakeholders, the funds include \$8.6M world cup grant in 2014, \$10M 2018 world cup grant amongst other streams of FIFA and CAF development funds as well as sponsorship money from corporate organization.¹²⁵³ There are fresh petitions at Independent Corrupt Practices Commission, ICPC, the Attorney General of the Federation, the Senate President, the

¹²⁵⁰ "Monopoly and Anti-competitive Behaviour-key definitions" available at <https://www.tutor2u.net> refer eve accessed 16/07/2024 .

¹²⁵¹ Walid Op Cit.

¹²⁵² African news, " FIFA lifts suspension of Kenya football Association" available at www.google.com accessed 16/07/24.

¹²⁵³ Abiodun Adewale "Corruption; stakeholders engage NFF in fresh legal battles" available at punching.com accessed 16/07/24.

Speaker House of Representatives and President of the Federal Republic of Nigeria⁴¹ It is doubtful whether the anticorruption agency and government of Nigeria will do anything against the NFF officials since they work under the “presumed immunity” of FIFA’s Non-interference rule.

9. Nigerian Law and FIFA Statutes

As earlier discussed in this work, the FIFA Statutes are not qualified as international treaties as contemplated by the Constitution of the Federal Republic of Nigeria⁴² and do not need to be ratified. The issue of whether such statutes are superior to Nigerian Laws has not been an issue for determination before the courts⁴³. However, the courts of Kenya was faced to determine this issue. *In Salim Sumra & 2 Others v. Kipehoge Keino & 3 Ors*⁴⁴ *Maraga J* (as he then was) stated in a dictum that if it was indeed true that FIFA had no powers to control football nativities in Kenya, FIFA would not have banned the Kenya National Team from participating in world cup qualifiers in 2004. Though this judgment was not founded on the interpretation of any statute⁴⁵. In *football Kenya Federation v. Kenya Premier League Ltd. & 4 Ors*⁴⁶. In considering whether FIFA Statutes are above Kenya law the court held that FIFA statutes were not ratified as treaties or conventions, what was presented to him was not in any form ratification of FIFA statutes. It is indeed that FIFA statutes have not been ratified in Kenya, therefore, it will be risible to refer to FIFA statutes as international law. She held further that if indeed it is proven that FIFA statutes is considered a treaty, it will still not be above the constitution and Kenya statutory law. It is the position of these researchers that this position holds true for Nigeria. Therefore, the ouster of court jurisdiction and non-recognition of Nigerian Judicial process in the determination of disputes in football related matters is simply illegal given the fact that the NFF itself is a creation of statute.

10. Recommendations

⁴¹ Ibid.

⁴³ This is to the knowledge of the researcher.

⁴⁴ Civil Suit No. 266 of 2004.

⁴⁵ Walid Op Cit.

⁴⁶ (2015) eKLR.

It is the position of the researchers that the non-interference rule by FIFA has raised more questions than answers as it is against equity and good conscience. Equity in the sense that it takes away the powers of those who created and fund their National Football Associations, and good conscience in the sense that it keeps corrupt leaders in office who are immuned to domestic judicial process. It is therefore, the recommendation by the researchers that:

- (i) FIFA should be unbundled to erase its monopoly of organizing football competitions. In sports like boxing, several successful prestigious competitions are being organized by competing organisations for instance the World Boxing Organization (WBO), World Boxing Association (WBA) and the International Boxing Federation (IBF). In cycling, the sponsors and organisers (not the institution, that is, Union Cyclist International) of events are the most powerful. In tennis, the players became more involved in governance of the sport by taking away powers from the organization and vesting them in their own player organisations⁴⁷.
- (ii) The process of monopoly has lessened competition in the football industry this has created monumental corruption within the industry as millions of dollars are given in exchange for hosting rights and leadership positions in the industry.
- (iii) If recommendation (i) above is not feasible, Article 19 and 59 of FIFA statutes that forbids third party interventions be deleted to enable countries have direct control over their football federations.

11. Conclusion

⁴⁷ Walid Op Cit.

The idea behind FIFA's non-interference rule is to shield the activities of football federations from political interference. However, it appears that this policy is too draconian as it has promoted excessive corruption. Football Associations are creation of statutes and you cannot completely insulate the executives from the watch of their funders. FIFA needs to reverse this policy as the saying goes he who pays the piper dictates the tune. It has been recommended that FIFA be unbundled to allow other organisations organize prestigious football competitions, this will allow best practices and fair play in the organization of the game. As it stands now the FIFA statutes remain below the constitution of Nigeria and the rules made pursuant thereto, FIFA cannot dictate to member nations on when to interfere with the administration of football in any member nation.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

HARMONIZING COOPERATIVE INDUSTRIES IN AFRICA THROUGH A
COMPARATIVE STUDY OF ANTITRUST APPROACHES

Umar Ahmadu Gwamna

Department of Civil Law, School of Legal Studies
Gombe State College of Education and Legal studies, Nafada

E-mail Address: umargwamna@gmail.com

Phone Numbers: 08069280885, 09029927663

Abstract

This paper examines the antitrust approaches in Africa, with a focus on harmonizing cooperative economic models and antitrust legislations across the continent. A comparative study of antitrust laws and policies in South Africa, Nigeria, Egypt, and Kenya reveals similarities and differences in their approaches to promoting competition and preventing anticompetitive behaviors. The lack of harmonization and consistency in antitrust approaches across the continent hinders the effective promotion of competition, innovation, and consumer welfare, leading to high prices and low-quality products and services, inadequate protection of consumer rights, insufficient cooperation and information sharing among competition authorities. This fragmentation and inconsistency in antitrust approaches undermine the potential benefits of economic integration and hinder the development of a vibrant and competitive African market. The paper further examines the relationship between cooperative economic models and antitrust regulations in the continent, evaluates the effectiveness of national antitrust laws and explores regional harmonization efforts. The paper employed a case studies method. The case studies method facilitates comparative analyses in multiple jurisdictions, identifying common patterns and best practices in antitrust enforcement and cooperative economic initiatives. Key findings highlight challenges in implementing effective antitrust measures in African economies, such as informal markets, resource disparities, and cultural diversity. The paper identifies some regional initiatives promoting cooperation in antitrust matters. The paper proposes a framework for balancing cooperative economic models with robust antitrust enforcement for African nations and made some recommendations.

Keywords: Africa, Antitrust Approaches, Comparative Study, Co-operative Industries, Harmonization.

1. INTRODUCTION

Antitrust laws are important global tools for encouraging fair competition, safeguarding consumer interests, and boosting economic efficiency. The African continent has witnessed significant economic growth and integration efforts in recent years, with the establishment of the African Continental Free Trade Area (AfCFTA) being a notable milestone. However, the lack of harmonization in antitrust approaches among African countries hinders the effective promotion of competition and innovation in cooperative industries. In Africa, the adoption and enforcement of Antitrust laws vary widely by countries, reflecting diverse economic landscapes and regulatory systems. African countries have established antitrust laws and competition authorities to prevent monopolistic practices, price fixing, and other anti-competitive activity¹. Regardless of these efforts, antitrust enforcement in Africa faces substantial challenges due to the continent's unique socioeconomic circumstances. One of the most pressing challenges is the fragmented regulatory landscape, with each country having its own legal frameworks and institutional capacity for antitrust enforcement. This fragmentation leads to inconsistencies in the application of antitrust legislation. This fragmentation leads to unequal implementation of antitrust legislation and varying degrees of effectiveness in preventing anticompetitive activity².

The emergence of informal marketplaces in many African economies complicates standard antitrust enforcement efforts. Informal markets, which are distinguished by their unregulated character and reliance on informal networks, usually operate outside of standard regulatory frameworks, making it difficult to effectively address anti-competitive acts². Resource constraints also pose significant challenges to effective antitrust enforcement in Africa. Many competition authorities in the region lack the necessary financial resources, technical experience, and institutional capabilities to conduct thorough investigations and implement antitrust laws³.

In response to these concerns, regional economic integration programs have emerged as a potential means of harmonizing antitrust policies among African

countries. The African Union (AU), Economic Community of West African States (ECOWAS), and Southern African

1. M. García-Alonso and W. Mina, *Antitrust in Developing Countries: Competition Policy in a Globalizing World* (Cambridge University Press, 2020).

2. A. Brink et al., "Competition Policy in Africa," in *Handbook of Competition Economics*, eds. M. Gal and G. Zekos (Springer, 2021), Vol. 2.

3. United Nations Conference on Trade and Development (UNCTAD), *Competition Law and Policy in Africa: A Peer Review Guide* (2019).

4. Organisation for Economic Co-operation and Development (OECD), *Competition Law and Policy in Africa: A Peer Review* (2020).

Development Community (SADC) have collaborated to coordinate economic policies, including antitrust regulations, in order to promote regional economic integration and regulatory coherence¹. Furthermore, the changing global economic landscape, as evidenced by trends such as digital transformation and the growing influence of multinational corporations, presents new challenges and opportunities for antitrust enforcement in African markets. The digital economy, in particular, introduces problems such as data privacy, platform dominance, and cross-border competition, necessitating adaptive regulatory frameworks capable of effectively addressing these concerns².

This paper aims to look into the interaction of cooperative economic models and antitrust legislation in Africa, against a backdrop of challenges and opportunities. Cooperative economic models, which promote collaboration and shared gains among stakeholders, has the ability to align with antitrust goals such as boosting competition and innovation. The study looks at recent scholarly literature and empirical evidence to provide insights into how African countries can strategically leverage cooperative economic practices to strengthen antitrust enforcement and foster a more competitive and consumer-friendly economic environment on the continent.

2. ANTITRUST LAWS IN AFRICA

Antitrust laws in Africa vary widely in scope, implementation, and efficacy, reflecting the continent's diverse economic and legal settings. While many African countries have established legislation to encourage fair competition and protect consumer interests, their implementation faces significant challenges due to fragmentation and inconsistency among jurisdictions. Antitrust laws and competition authority have been implemented unevenly throughout Africa. Countries such as South Africa, Kenya, Nigeria, and Egypt have effective antitrust regulations and enforcement authorities³. These bodies frequently monitor mergers and acquisitions, investigate anti-competitive practices such as price fixing and market allocation, and campaign for consumer rights

protection. However, some other African countries lack comprehensive antitrust legislation or have nascent competition authorities with limited enforcement powers. These countries' legal systems may be underdeveloped or inadequately implemented, making it difficult to effectively combat anticompetitive activity and create competitive markets⁴.

-
1. E. Fox and M. Bakhoun, "Competition Law and the Global Landscape," in *Making Markets Work for Africa*, 2019, <https://doi.org/10.1093/OSO/9780190930998.003.0003>.
 2. S. Okpe, "Anti-Impunity Norm of the International Criminal Court: A Curse or Blessing for Africa?," *Journal of Asian and African Studies* 55 (2020): 1077-1090, <https://doi.org/10.1177/0021909620909455>.
 3. E. Fox and M. Bakhoun, "Better Laws for Africa," in *Making Markets Work for Africa*, 2019, <https://doi.org/10.1093/OSO/9780190930998.003.0009>.
 4. Abbott, "US Antitrust Laws: A Primer," *SSRN Electronic Journal*, 2021, <https://doi.org/10.2139/ssrn.3834496>.

Antitrust laws in Africa vary greatly, with some nations having strong legislation and active competition bodies, while others suffer difficulties due to fragmented legal systems and different institutional capacities. The basic goals of antitrust laws in Africa include:

1. Enforcing competition regulations: This means ensuring compliance with laws and regulations that promote competition and prevent anticompetitive practices.¹²⁵⁴
2. Prohibiting anticompetitive conduct: That is Preventing agreements, abuses of dominance, and other practices that restrict competition.¹²⁵⁵
3. Regulating mergers and acquisitions: Reviewing and approving mergers and acquisitions to prevent harm to competition.¹²⁵⁶
4. Protecting consumer welfare: Ensuring that consumers have access to quality products and services at fair prices.¹²⁵⁷
5. Promoting economic efficiency and innovation: This means encouraging competition to drive innovation and economic growth.¹²⁵⁸
6. Encouraging competition and entry into markets: That is fostering entry and expansion of new businesses to increase competition.¹²⁵⁹

¹²⁵⁴ African Competition Network (ACN) aims to strengthen competition enforcement in Africa.

¹²⁵⁵ Egyptian Competition Law (2014) prohibits anticompetitive agreements and abuses of dominance.

¹²⁵⁶ South African Competition Act (1998) requires merger notification and approval.

¹²⁵⁷ Nigerian Federal Competition and Consumer Protection Act (2018) aims to protect consumer interests.

¹²⁵⁸ Kenyan Competition Act (2010) aims to promote economic efficiency and innovation.

¹²⁵⁹ Moroccan Competition Law (2014) encourages competition and entry into markets

7. Reducing market power and dominance: That is preventing the abuse of market power and promoting competitive markets.¹²⁶⁰
 8. Enhancing consumer choice and protection: It means ensuring consumers have access to a range of products and services and are protected from exploitation.¹²⁶¹
 9. Fostering economic growth and development: That is promoting competition to drive economic growth and development.¹²⁶²
 10. Encouraging regional integration and cooperation: Promoting competition cooperation among African countries to enhance regional integration.¹²⁶³
 11. Addressing cross-border competition issues: this goal means addressing competition issues that affect multiple African countries.
 12. Establishing a continental competition framework: that is creating a harmonized competition framework across Africa.¹²⁶⁴
- 3. COMPARISON OF ANTITRUST LAWS AND POLICIES IN SOUTH AFRICA, NIGERIA, EGYPT, AND KENYA**

Here is the summary comparison of the antitrust laws and policies of South Africa, Nigeria, Egypt, and Kenya:

3.1 South Africa

The primary competition and antitrust laws and regulations are governed by the Competition Act of 1998 (Act No. 89 of 1998), as amended. This legislative framework is designed to promote competition, prevent anti-competitive behavior, and protect consumer welfare within the South African marketplace. The Competition Act establishes the Competition Commission as the primary enforcement authority responsible for implementing and enforcing the provisions of the Act.¹²⁶⁵

The Act Aims to promote competition, prevent anti-competitive behavior, and protect consumer welfare. Key provisions of the Act are:

1. Prohibits anti-competitive conduct, such as price fixing and market allocation;

¹²⁶⁰ Botswana Competition Act (2018) aims to reduce market power and dominance.

¹²⁶¹ Ghanaian Competition Act (2010) enhances consumer choice and protection.

¹²⁶² African Union's Agenda 2063 recognizes competition policy as a key driver of economic growth.

¹²⁶³ COMESA Competition Regulations (2004) aim to promote regional competition and integration.

¹²⁶⁴ African Union's Competition Policy Framework for Africa (2019) aims to establish a continental competition framework.

¹²⁶⁵ Competition and Antitrust: Comprehensive Analysis in South Africa, (2023). Accessible at [Globalregulationinsights.com](https://www.globalregulationinsights.com)

2. Regulates mergers and acquisitions;
3. Protects consumer rights.

3.2 Nigeria

The primary antitrust law and regulation in Nigeria is the Federal Competition and Consumer Protection Act 2018 (FCCPA)

The objectives of this FCCPA 2018 are to:

1. Promote and maintain competitive markets in the Nigerian economy.
2. Promote economic efficiency.
3. Protect and promote the interests and welfare of consumers by providing consumers with wider variety of quality products at competitive prices.
4. Prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria.
5. Contribute to the sustainable development of the Nigerian economy.¹²⁶⁶

The Act is regulated by the Federal Competition and Consumer Protection Commission (FCCPC)

3.3 Egypt

The main antitrust law and regulation in Egypt is the Prime Ministerial Decree No. 1316 of 2005 Issuing the executive regulations of Protection of Competition and Prohibition of Monopolistic Practices law No. 3 of 2005. The Purpose of the Law is to protect competition and prevent monopolistic practices and it applies to all acts, including practices, contracts or agreements committed locally or abroad, which constitute crimes under the Law if they harm the freedom of competition in Egypt. the Key Provisions of the law are:

1. Prohibits anti-competitive conduct, such as price fixing and market allocation;
2. Regulates mergers and acquisitions;
3. Protects consumer rights;

The law establishes the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices which is the Egyptian Competition Authority (ECA). It also provides for Penalties by Imposing fines on those who violate the

¹²⁶⁶ Federal Competition and Consumer Protection Act 2018

provisions of the law. The primary aims to protect competition, prevent monopolies, and promote consumer welfare in Egypt.

3.4 Kenya

The primary antitrust Law in Kenya is the Kenya Competition Act of 2010. It is an Act of the Kenyan Parliament to safeguard competition in the national economy, protects consumers from unfair market conduct and provides for the establishment, powers and functions of the Competition Authority and the Competition Tribunal. It provides for the investigation of prohibited practices, mergers and acquisitions, and consumer complaints. The Act as well provides for penalties and fines for non-compliance. The Act is regulated by the Competition Authority of Kenya (CAK). It aims to promote competition, protect consumer welfare, and prevent anti-competitive conduct.

3.5 Similarities in antitrust laws among the African countries under review:

- i. All four countries have antitrust laws and regulations in place
- ii. All the laws aim to promote competition, protect consumer welfare, and prevent anti-competitive conduct.
- iii. Regulatory bodies in each country have similar powers and functions

3.6 Differences in their antitrust laws:

- i. South Africa's Competition Act is from 1998, while the other countries have more recent legislation;
- ii. Nigeria's FCCPA has a broader scope, including consumer protection;
- iii. Egypt's Competition Law has specific provisions for the telecommunications sector;
- iv. Kenya's Competition Act has specific provisions for the regulation of dominant firms.

1. FACTORS THAT LEAD TO LACK OF COMPETITION, INNOVATION, AND CONSUMER BENEFITS IN A MARKET OR ECONOMY.

One of the most serious obstacles to antitrust enforcement in Africa is lack of harmonization and consistency in regulatory frameworks and enforcement methods. To address these difficulties, African countries must work together to harmonize antitrust laws and strengthen collaboration. Regional economic communities, such as

the African Union (AU), as well as regional economic blocs like ECOWAS and SADC, play critical roles in encouraging regulatory convergence and uniform enforcement methods¹. These challenges are:

1. Inefficient markets: Markets that don't allocate resources effectively, leading to waste and stagnation.
2. High concentrations of market power: A few large players dominate the market, limiting competition.
3. Limited entry and expansion of new businesses: Barriers prevent new companies from entering or growing in the market.
4. High prices and low-quality products and services: Consumers face high costs and poor quality due to lack of competition.
5. Inadequate protection of consumer rights: Consumers have limited recourse or protection from unfair practices.
6. Insufficient cooperation and information sharing among competition authorities: Regulatory bodies don't collaborate or share information effectively.

1. E. Fox and M. Bakhoun, "Better Laws for Africa," in *Making Markets Work for Africa*, 2019, <https://doi.org/10.1093/oso/9780190930998.003.0009>.

7. Inconsistent enforcement and leniency programs: Laws and penalties are applied unevenly or with inconsistent severity.
8. Limited resources and capacity for effective antitrust enforcement: Regulatory bodies lack the resources or expertise to effectively enforce competition laws.

4.1 Impact of Fragmented Antitrust Approaches in Africa.

Fragmentation in antitrust strategies in African countries has deep implications, contributing to various negative outcomes that harm market efficiency and consumer welfare. The following are negative impact of antitrust fragmentation:

- i. High prices and low-quality goods and services: One of the principal implications of fragmented antitrust enforcement is the predominance of high-prices and low-quality products in many African markets. Monopolies frequently result in inflated prices and limited incentives for enterprises to develop or improve their products and services in the absence of strong competition¹.

- ii. **Inadequate Protection of Consumer Rights:** Fragmented antitrust regimes lead to inadequate protection of consumer rights across jurisdictions. Consumers may confront limited options, poor service standards, and difficulty in obtaining remedy for anti-competitive practices such as deceptive advertising or unfavorable contract terms. Weak enforcement and inconsistent application of consumer protection rules exacerbate these issues².
- iii. **Insufficient cooperation and information sharing among the competition authorities:** Effective antitrust enforcement is dependent on collaboration and information exchange among competition authorities, both within and across national borders. Fragmented regulatory regimes frequently impede such collaboration, resulting in investigative delays, duplication of efforts, and missed opportunities to effectively address cross-border anti-competitive behavior. This lack of coordination reduces the overall effectiveness of Africa's antitrust enforcement operations¹.

1. United Nations Conference on Trade and Development (UNCTAD), *Competition Law and Policy in Africa: A Peer Review Guide* (2019).

2. Organisation for Economic Co-operation and Development (OECD), *Competition Law and Policy in Africa: A Peer Review* (2020).

4.2 Case Studies Illustrating the Effects of Fragmented Antitrust Approaches

Case studies from various African countries provide convincing illustrations of the consequences of fragmented antitrust tactics.

- i. **Case Study 1: South Africa versus Zambia:** In South Africa, strong competition laws and an active competition authority have created competitive markets, leading in reduction of prices and more customer choice in industries such as telecommunications and retail. In contrast, Zambia's less developed antitrust framework struggles to resolve comparable market inefficiencies, resulting in higher costs and less market options for consumers¹.
- ii. **Case Study 2: The East African Community (EAC)** The East African Community, which includes Kenya, Uganda, and Tanzania, have made progress towards regional integration but has obstacles in coordinating competition rules. Disparities in enforcement capacities and legal norms

among EAC member states impede efforts to build a seamless economic space, reducing the benefits of a united market for both enterprises and consumers².

- iii. **Case Study 3:** The impact of fragmented antitrust enforcement on Nigeria's telecom sector is a stark contrast. While the country has extensive competition legislation and a proactive regulatory authority (the Nigerian Communications Commission), issues remain in maintaining consistent enforcement of the industry. The fragmentation of telecom carriers has led to variable service quality and pricing, affecting customer choice and market competitiveness¹.
- iv. **Case Study 4:** Agricultural Markets in East Africa: Fragmented antitrust enforcement poses substantial issues for the region's agricultural markets. Kenya, Tanzania, and Uganda, despite being members of the East African Community (EAC), have discrepancies in regulatory frameworks and enforcement capabilities. This fragmentation impedes farmers' access to fair pricing for their output and inhibits market integration initiatives in the region, affecting agricultural productivity and rural livelihoods¹.

-
- 1. S. Kwon and A. Marco, "Can Antitrust Law Enforcement Spur Innovation? Antitrust Regulation of Patent Consolidation and Its Impact on Follow-On Innovations," *Research Policy* 50 (2021): 104295, <https://doi.org/10.1016/j.respol.2021.104295>.
 - 2. M. Baldauf and J. Mollner, "Trading in Fragmented Markets," *Journal of Financial and Quantitative Analysis* 56 (2019): 93-121, <https://doi.org/10.1017/S0022109019000814>.

- v. **Case Study 5:** Cross-border mergers and acquisitions (M&A) in West Africa demonstrate the challenges of heterogeneous antitrust regimes. While regional economic communities such as ECOWAS encourages economic integration, disparities in national competition laws and enforcement procedures impede seamless M&A transactions. Inconsistent regulatory requirements and approval processes in member states cause uncertainty for firms and investors, reducing cross-border investment flows and regional economic cohesion¹⁴.

- vi. **Case Study 6:** focuses on pharmaceutical markets. The pharmaceutical business in various African countries is facing issues due to fragmented antitrust enforcement. Price collusion among suppliers, counterfeit pharmaceuticals, and restricted competition in generic drug markets all exist as a result of poor regulatory frameworks and insufficient enforcement power. Antitrust policy fragmentation contributes to market inefficiencies, putting consumers' access to affordable and high-quality healthcare at risk¹⁵.

2. COOPERATIVE ECONOMIC MODELS IN AFRICA

Cooperative economic models in Africa refer to business entities owned and controlled by members who share common goals and interests. These models aim to promote economic development, social welfare, and community empowerment.¹²⁶⁷ Here are some key aspects of cooperative economic models in Africa:

2.1 Types of Cooperatives:

There are various types of cooperatives in Africa, example of such cooperatives include:

- i. Agricultural cooperatives (e.g., farmers' cooperatives)
- ii. Consumer cooperatives (e.g., housing cooperatives)
- iii. Worker cooperatives (e.g., labor cooperatives)
- iv. Financial cooperatives (e.g., credit unions)
- v. Healthcare cooperatives
- vi. Marketing cooperatives
- vii. Social cooperatives (e.g., education cooperatives)¹²⁶⁸

2.2 Characteristics of cooperatives:

The following are basic characteristics of cooperative businesses:

- i. Voluntary membership: Members join voluntarily and participate in decision-making processes.

¹²⁶⁷ Africa Co-Operative Development Strategy 2023- 2033 “One Co-Operative - One Africa”, October 2022. Available at https://icaafrica.coop/sites/default/files/2022-10/Africa%20Cooperative%20Development%20Strategy%202023%20-%202033_0.pdf

¹²⁶⁸ *ibid*

- ii. Democratic control: Members have equal voting rights and control the cooperative.
- iii. Autonomy: Cooperatives operate independently, making their own decisions.
- iv. Solidarity: Members support each other and work together to achieve common goals.

2.3 Benefits of cooperatives:

Some of the benefits of cooperatives businesses are as follows:

- i. Economic benefits: Cooperatives provide members with better prices, improved market access, and increased bargaining power.
- ii. Social benefits: Cooperatives promote social cohesion, community development, and member empowerment.
- iii. Political benefits: Cooperatives give members a voice in policy-making processes.

2.4 Challenges of cooperatives:

Some challenges face by cooperative businesses include:

- i. Limited access to finance: Cooperatives often face difficulties accessing capital and credit.
- ii. Lack of capacity and skills: Members may require training and capacity-building programs.
- iii. Regulatory frameworks: Cooperatives often operate in unclear or unfavorable legal environments.
- iv. Scaling up: Cooperatives may struggle to expand their operations and reach due to lack of strategic expansion plan.

2.5 Examples of successful cooperatives in Africa:

The following are some examples of successful cooperative businesses in Africa:

- i. Kenya: The Kenya Cooperative Creameries Limited (KCC) is a successful dairy cooperative.
- ii. South Africa: The South African Cooperatives Movement has a strong presence in various sectors.
- iii. Nigeria: The Nigerian Cooperative Movement has a large membership base.
- iv. Ethiopia: The Ethiopian Cooperatives Federation is a leading player in the country's cooperative sector.

Cooperative economic models in Africa have the potential to promote economic development, social welfare, and community empowerment. However, they face challenges that need to be addressed through supportive policies, capacity building, and access to finance.

3. RELATIONSHIP BETWEEN COOPERATIVE ECONOMIC MODELS AND ANTITRUST REGULATIONS IN AFRICA

In Africa, cooperative economic models and antitrust regulations have a complex relationship as itemized below:

1. Cooperatives are encouraged as a means of promoting economic development and social welfare, particularly in rural areas.¹²⁶⁹
2. Antitrust regulations aim to prevent anti-competitive behavior and promote competition, which can lead to conflicts with cooperative models that involve collaboration and collective action.
3. Some antitrust authorities in Africa, such as the Competition Commission of South Africa, have recognized the importance of cooperatives and have implemented exemptions or special rules to accommodate them.
4. However, there is still a need for clarification and guidance on how antitrust regulations apply to cooperatives, particularly in countries with limited experience in enforcing competition laws.
5. The African Competition Network (ACN) has acknowledged the importance of cooperatives in promoting economic development and has called for a balanced approach to antitrust enforcement that takes into account the specific characteristics of cooperatives.¹²⁷⁰
6. Some countries, like Kenya, have established specific laws and regulations to govern cooperatives, which may interact with antitrust regulations.

The relationship between cooperatives and antitrust regulations in Africa is still evolving and requires ongoing dialogue and collaboration between policymakers, regulators, and stakeholders to strike a balance between promoting competition and supporting cooperative economic models.¹²⁷¹

¹²⁶⁹ African Competition Network (ACN). (2019). Competition Policy and Cooperatives in Africa.

¹²⁷⁰ International Cooperative Alliance (ICA). (2019). Cooperatives and Competition Law in Africa.

¹²⁷¹ United Nations Development Programme (UNDP). (2018). Cooperatives and Economic Development in Africa.

7. HARMONIZING COOPERATIVE ECONOMIC MODELS WITH ROBUST ANTITRUST ENFORCEMENT

Harmonizing cooperative economic models with robust antitrust enforcement requires a balanced approach that considers the following:¹²⁷²

1. Cooperative principles: It should be ensured that cooperatives operate in accordance with principles like voluntary membership, democratic control, and solidarity.
2. Antitrust exemptions: Competition authorities should consider exempting cooperatives from certain antitrust regulations to allow for collective action and collaboration.
3. Competition advocacy: Government should encourage competition authorities to advocate for policies that promote competition and innovation in industries where cooperatives operate.
4. Monitoring and enforcement: Competition authorities should regularly monitor cooperative activities and enforce antitrust regulations to prevent anti-competitive behavior.
5. Education and training: Ministries of Trade and Industries should provide education and training for cooperative members and managers on antitrust compliance and competitive practices. This method not only develops institutional capacities but also promotes regulatory homogeneity among African nations.¹²⁷³
6. Regulatory framework: there should be established a clear regulatory framework that balances the needs of cooperatives with the need for robust antitrust enforcement.
7. Collaboration and dialogue: Foster collaboration and dialogue between cooperatives, competition authorities, and other stakeholders to ensure a harmonized approach. Engaging stakeholders in the construction of regulatory

¹²⁷² United Nations Conference on Trade and Development (UNCTAD), (2019), *Cooperatives and Competition Policy*. United Nations.

¹²⁷³ Brink, A., et al. (2021). "Competition Policy in Africa." In: Gal, M., & Zekos, G. (Eds.), *Handbook of Competition Economics* (Vol. 2). Springer.

frameworks improves policy legitimacy and efficacy by matching regulatory objectives with market realities and social expectations.¹²⁷⁴

8. Flexibility and adaptability: Allow for flexibility and adaptability in the regulatory framework to accommodate the diverse needs of cooperatives and the evolving competitive landscape.
9. Regional Cooperation and Information Sharing: Collaboration between national competition agencies and regional economic communities is crucial. African countries may improve collaboration to streamline regulatory efforts, address cross-border anti-competitive practices more effectively, and build a cohesive regulatory environment. As Sauvart and Davies (2020) emphasized, establishing platforms for data sharing on market behaviors allow for timely actions to combat market distortion.

7.1 Regional Harmonization Efforts

Regional harmonization efforts in Africa seek to promote consistency and collaboration in antitrust legislation and enforcement across different nations in regional economic communities. Regional harmonization initiatives are critical to boosting competition, innovation, and consumer welfare throughout Africa. Some African regional harmonization efforts of cooperative economic models with robust antitrust enforcement include:

- i. African Cooperative Development Strategy: A strategy adopted by the African Union to promote cooperative development and harmonize policies across the continent.
- ii. East African Community (EAC) Cooperative Framework: A framework that harmonizes cooperative laws and regulations among EAC member states.
- iii. Southern African Development Community (SADC) Competition Policy: A policy that promotes competition and consumer welfare among SADC member states. The SADC Protocol on Competition intends to harmonize competition policies and legislation among member states, improve enforcement, and promote economic integration through increased market competition²¹.

¹²⁷⁴ African Integration Report, Dec, (2020)

- iv.** West African Economic and Monetary Union (WAEMU) Cooperative Directive: A directive that harmonizes cooperative laws and regulations among WAEMU member states.
- v.** African Competition Forum: A platform that brings together competition authorities and stakeholders to promote competition and consumer welfare in Africa.
- vi.** International Cooperative Alliance (ICA) Africa: A regional office of the ICA that promotes cooperative development and advocates for policies that support cooperatives in Africa.
- vii.** African Union's Department of Economic Development and Trade: A department that promotes economic development and trade in Africa, including cooperative development and competition policy.
- viii.** African Continental Free Trade Area (AfCFTA) to create a single market for goods and services across the continent. AfCFTA has provisions for harmonizing competition policies to improve market integration and competitiveness¹.

These efforts aim to promote cooperative economic models while ensuring robust antitrust enforcement and competition policy in Africa. However, the problem of overlapping membership and the rivalry it generates are well illustrated by the relationship between ECOWAS and CEAO/UEMOA in West Africa and between PTA/COMESA and SADC in Eastern and Southern Africa. In both sub-regions, this problem is associated with lack of commitment due to divided loyalty and poor funding due to inadequate resources for the several organizations. It was argued that assessment of the record of performance of African regional integration arrangements shows that they have not been as beneficial to the region as policymakers had hoped. In general, African countries have exhibited few of the features that are normally associated with successful trade-focused regional integration schemes.¹

7.2 Case Studies on Regional Cooperation in Antitrust laws

- i. The East African Community (EAC) has made progress in aligning competition policies and regulations among member states (Kenya, Uganda, Tanzania, Rwanda, Burundi, and South Sudan). The EAC Competition Act establishes a framework for cooperation among national competition authorities, allowing for joint investigations and information exchange to combat cross-border anti-competitive conduct¹.
- ii. The West African Monetary Zone (WAMZ). This is a group of six countries within ECOWAS that was formed in the year 2000 (Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone). WAMZ is a West-African economic and integration organization. The purposes of the WAMZ are to achieve the economic integration of the Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone and the creation of a single currency (ECO, Western Africa Monetary Institute). Cooperation activities are aimed at unifying regulatory frameworks and creating a level playing field for enterprises (WAMZ, 2021).

7.3 Benefits of a Harmonized Antitrust Framework for Economic Integration and Development

Implementing a harmonized antitrust framework holds significant potential benefits for economic integration and development in Africa. Firstly, it can facilitate regional trade by reducing barriers to entry and enhancing market access for businesses in borders. A unified regulatory approach promotes market efficiency, attracts foreign investment, and stimulates intra-regional trade, thereby fostering economic growth and creating employment opportunities.

Moreover, a harmonized framework supports innovation and entrepreneurship by providing a predictable business environment and incentivizing investments in research and development. By protecting intellectual property rights and ensuring fair competition, policymakers can nurture a vibrant entrepreneurial ecosystem that drives technological advancement and diversifies economies beyond resource-based industries.

Furthermore, such a framework enhances consumer welfare by promoting competitive pricing, improving product quality, and expanding consumer choices. Robust enforcement of antitrust laws safeguards consumer rights, ensuring that market forces operate in favor of consumers, with access to diverse goods and services at competitive prices.

-
1. F. Sucker and J. Klaaren, "Trade and Competition (Laws): Interrelations from a Southern African Perspective," *Political Economy - Development: Domestic Development Strategies eJournal* (2021),
 2. A. Konstantinus, M. Zuidgeest, A. Christodoulou, Z. Raza, and J. Woxenius, "Barriers and Enablers for Short Sea Shipping in the Southern African Development Community," *Sustainability* (2019), <https://doi.org/10.3390/SU11061532>.

8. CONCLUSION

Antitrust laws in Africa are complicatedly linked to cooperative economic models, presenting challenges and transformative potentialities through regulatory harmonization. From this paper, several insights have emerged regarding the harmonization of antitrust laws and cooperative economic models in Africa. The summary of these insights:

1. **Fragmented Antitrust Approaches:** Africa's regulatory landscape is characterized by fragmentation in antitrust enforcement, leading to market inefficiencies, higher consumer prices, and inconsistent quality standards across different jurisdictions.
2. **Impact on Economic Growth:** These challenges pose significant barriers to economic growth, innovation, and equitable development. Fragmented antitrust enforcement exacerbates disparities within sectors and regions, hindering overall economic progress.
3. **Role of Cooperative Economic Models:** Cooperative economic models present opportunities for inclusive growth and regional integration. However, their effectiveness depends on operation within a framework of robust antitrust enforcement that ensures fair competition and market efficiency.
4. **Potential Benefits of Harmonization:** A harmonized antitrust framework has the potentials to streamline regulatory processes, enhance market competitiveness, attract investment, and improve consumer welfare across African economies. By

aligning competition policies and enforcement practices, countries can create a level playing field that stimulates innovation, lowers prices, and enhances product quality.

5. **Promote Fair Competition:** Aligning competition policies promotes fair market practices, encourages innovation, and benefits consumers through improved product offerings and pricing.
6. **Facilitate Economic Integration:** Harmonized antitrust laws support economic integration within regional economic communities. This coherence reduces trade barriers, fosters cross-border investment, and creates a favorable environment for business growth.
7. **Enhance Stakeholder Engagement:** Foster inclusive dialogue among governments, businesses, civil society organizations, and consumer groups to shape and implement effective competition policies. Collaborative efforts ensure that regulatory reforms reflect diverse economic interests and promote sustainable development goals.
8. **Invest in Capacity Building:** Allocate resources to strengthen the capacity of national competition authorities through training, technical assistance, and institutional support. Enhanced capabilities enable more effective enforcement of competition laws and regulations, ensuring market fairness and integrity.
9. **Monitor and Evaluate Impact:** Continuously monitor the impact of harmonized antitrust frameworks on economic integration, innovation, and consumer welfare. Longitudinal studies and policy assessments help to measure effectiveness and adapt strategies to emerging challenges, ensuring ongoing improvement and adaptation.

9. FINDINGS

Based on the foregoing discussion, the paper has made the following major findings:

1. Informal markets in Africa are unregulated commerce and economic activity. These types of markets pose difficult hurdles to antitrust enforcement operations. The decentralized and unstructured character of informal trade practices make it difficult for regulatory bodies to adequately monitor and implement competition laws. The absence of openness and reliable data by

informal market operators hinder regulatory actions intended to promote fair competition and protect consumer interests.

2. Economic and resource differences among African countries have a substantial impact on the enforcement of antitrust legislation. Countries with different levels of economic development and resource availability may have difficulty establishing consistent and successful competition policies. Limited resources may limit competition authorities' ability to conduct extensive investigations, monitor market behaviors, and enforcing regulatory measures effectively. As a result, gaps in market competition and consumer protection may emerge, jeopardizing efforts to standardize antitrust practices in the continent.
3. Cultural diversity in African countries have significant impact on corporate operations, consumer behaviors, and regulatory attitudes towards competition policies.

10. RECOMMENDATIONS

Based on the findings, the following recommendations are made towards Harmonizing cooperative economic models with strong antitrust enforcement in Africa which necessitates deliberate measures centered on competition law harmonization, institutional capacity investment, and market promotion:

1. **Harmonized Competition Laws:** Creating regulatory coherence among African countries entails adopting regional standards and harmonizing national competition laws with frameworks established by regional economic communities and organizations such as the African Union. This harmonization effort seeks to establish a consistent regulatory framework that facilitates cross-border trade and investment. Establishing procedures for member nations to mutually recognize regulatory decisions, improves legal clarity and allows for better cross-border corporate activities.
2. **Investing in Institutional Capacity:** National competition authorities must be strengthened to effectively enforce competition laws at all markets including the informal markets. This necessitates appropriate resource allocation in terms of financing, expertise, and infrastructure. African countries can increase enforcement effectiveness by investing in institutional capacity, improving

investigation tools, imposing consequences for noncompliance, and collaborating with other regulatory organizations.

3. Promoting Competitive Markets: This requires continual efforts to liberalize economies and remove entry obstacles such as cultural diversities. This method encourages competition, which benefits consumers by resulting in cheaper pricing, higher product quality, and more innovation. Additionally, sector-specific competition rules geared to rising industries, digital markets, and strategic sector-specific policies that respond to market trends and promote long-term economic growth.

REFERENCES

- Abbott, A. (2021). US Antitrust Laws: A Primer. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3834496>.
- Africa: Overview of competition & antitrust regulations and developments in 2021
- Baldauf, M., & Mollner, J. (2019). Trading in Fragmented Markets. *Journal of Financial and Quantitative Analysis*, 56, 93 - 121. <https://doi.org/10.1017/S0022109019000814>.
- By Lerisha Naidu, Mohamed Elfar, Kamal Nasrollah, Celine Van Zeebroeck And Angelo Tzarevski April 18, 2021 2 Mins Read
- Brink, A., et al. (2021). "Competition Policy in Africa." In: Gal, M., & Zekos, G. (Eds.), *Handbook of Competition Economics* (Vol. 2). Springer.
- Competition and Antitrust: Comprehensive Analysis in South Africa (2023) Last Updated: January 3, 2024 access able at GlobalRegulatoryInsight.com
- Fox, E., & Bakhoun, M. (2019). Better Laws for Africa. *Making Markets Work for Africa*. <https://doi.org/10.1093/oso/9780190930998.003.0009>.
- Fox, E., & Bakhoun, M. (2019). Competition Law and the Global Landscape. *Making Markets Work for Africa*. <https://doi.org/10.1093/OSO/9780190930998.003.0003>.
- Geradin, D., & Layne-Farrar, A. (Eds.). (2020). *Regulating Competition in Africa: Law, Economics, and Practice*. Wolters Kluwer.
- Kabue, S. N. (2019). Competition Policy and Law in Africa: A Comparative Analysis. *African Journal of International Economic Law*, 7(1), 45-68.
- Katz, M. (2019). Multisided Platforms, Big Data, and a Little Antitrust Policy. *Review of Industrial Organization*, 54, 695-716. <https://doi.org/10.1007/S11151-019-09683-9>.
- Kimani, P. (2020). Harmonizing Competition Law in Africa: Challenges and Prospects. *East African Journal of Peace & Human Rights*, 26(2), 245-268.
- Konstantinus, A., Zuidgeest, M., Christodoulou, A., Raza, Z., & Woxenius, J. (2019). Barriers and Enablers for Short Sea Shipping in the Southern African Development Community. *Sustainability*. <https://doi.org/10.3390/SU11061532>.
- Kwon, S., & Marco, A. (2021). Can antitrust law enforcement spur innovation? Antitrust regulation of patent consolidation and its impact on follow-on innovations. *Research Policy*, 50, 104295. <https://doi.org/10.1016/J.RESPOL.2021.104295>.

- Nkwoka, C. F. (2021). Antitrust Laws and Policies in Africa: An Overview of Regional Efforts and National Implementations. *Journal of African Law*, 65(1), 95-118.
- Okpe, S. (2020). Anti-Impunity Norm of the International Criminal Court: A Curse or Blessing for Africa?. *Journal of Asian and African Studies*, 55, 1077 - 1090. <https://doi.org/10.1177/0021909620909455>.
- Orbach, B. (2023). The Friction Paradox: Intermediaries, Competition, and Efficiency. *The Antitrust Bulletin*, 68, 234 - 249. <https://doi.org/10.1177/0003603X231162999>.
- Robb, G., & Paelo, A. (2020). Competitive dynamics of telecommunications markets in South Africa, Tanzania, Zambia, and Zimbabwe. . <https://doi.org/10.35188/unu-wider/2020/840-5>.
- Rooney, W., Lee, C., & Payne, A. (2023). Taking Innovation Seriously: A Dynamic Competition Model for Antitrust Law. *Columbia Business Law Review*. <https://doi.org/10.52214/cblr.v2023i1.11893>.
- Sauvant, K. P., & Davies, K. J. (2020). The Role of Regional Economic Integration Organizations in Promoting Competition Law and Policy in Africa. *Journal of International Economic Law*, 23(2), 285-308.
- Sucker, F., & Klaaren, J. (2021). Trade and Competition (Laws): Interrelations from a Southern African Perspective. *Political Economy - Development: Domestic Development Strategies eJournal*. <https://doi.org/10.2139/ssrn.3925061>.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

RESURGENCE OF COUPS AND THE LEGAL CHALLENGE FOR ECOWAS
INTERVENTION IN WEST AFRICA

¹Taiwo Abbas Ayodele, ²Abubakar Sani Tambai, ³Yusuf Barau Abdulrahman

¹Department of Political Science and International Studies, Ahmadu Bello University,
Zaria ²Department of Political Science, Umaru Musa Yar'Adua University, Katsina
State

³Department of Political Science and International Studies, Ahmadu Bello University,
Zaria

*abbasayodele@gmail.com +234-7039004872, abubakar.tambai@umyu.edu.ng +234-
8034350866, yusfadah@yahoo.com +234-9063060478 +234-8095563559

Abstract

The resurgence of military coups in West Africa disrupts regional stability and challenges the Economic Community of West African States (ECOWAS) commitment to democracy. However, ECOWAS's interventions raise complex legal questions due to the tension between its mandate and the principle of non-intervention in international law. This study explores these challenges and opportunities through legal analysis and a case study of the 2023 Niger coup. Scholarly literature and key ECOWAS documents (Treaty and Lomé Protocol) inform the analysis of ECOWAS' legal basis for intervention and its deterrence strategy against coups. The analysis reveals ECOWAS's deterrence strategy of sanctions and military threats, but also limitations imposed by international law and UN authorization. Ambiguity exists within the Lomé Protocol's "anticipated consent" clause. The Niger coup exemplifies these complexities. To strengthen its response, the study recommends a multifaceted approach; a clearer legal framework, a tiered response system with preventative measures, improved transparency and internal unity, and addressing root causes of coups through collaboration with civil society and regional initiatives. By implementing these recommendations, ECOWAS can build a more effective and legitimate strategy for deterring coups and fostering long-term regional stability.

Keywords: Coups, legality, ECOWAS, intervention, West Africa, Niger

Introduction

The Economic Community of West African States (ECOWAS) stands as a testament to the region's longstanding aspiration for unity and prosperity. Established in 1975,

ECOWAS emerged from a desire to transcend the colonial legacy that divided West Africa into 15 distinct states, each with its own colonial history and administrative framework. This vast region, encompassing over 300 million people spread across 5.1 million square kilometres, boasts remarkable cultural, linguistic, and ecological diversity. Over a thousand local languages, including cross-border tongues like Ewe, Fulfulde, Hausa, Mandingo, Wolof, Yoruba, Ga, etc., coexist alongside the three official languages (English, French, and Portuguese). While this diversity presents challenges for integration, it also fosters a sense of shared heritage and potential for collaboration. The yearning for regional cooperation has deep roots (ECOWAS, n.d.).

The first attempt at economic integration dates back to 1945 with the creation of the CFA franc, a common currency used by several French-speaking West African countries. In 1964, Liberian president William Tubman proposed an even broader economic union, leading to a 1965 agreement signed by Liberia, Sierra Leone, Guinea, and Côte d'Ivoire (ECOWAS, n.d.). The crucial turning point arrived in 1972 when Nigerian leader General Yakubu Gowon and his Togolese counterpart, Gnassingbe Eyadema, championed the idea of a formal West African union. Their efforts resulted in drafts that formed the basis for the Treaty of Lagos in 1975, officially establishing ECOWAS. Initially conceived as an economic initiative, ECOWAS' mandate expanded in response to the region's turbulent political landscape. The treaty was revised in 1993 to encompass a broader scope, including activities related to conflict prevention, management, and peacebuilding. This recognition of the link between economic progress and regional stability has become a cornerstone of ECOWAS' mission (ECOWAS, n.d.).

Since the 1990s, ECOWAS has taken a proactive approach to regional security. Legal frameworks like the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security (Mills, 2022) empower the organization to deploy military forces, offer mediation services, and provide post-conflict support to member states. Despite its efforts, ECOWAS faces significant challenges. After a period of relative stability, West Africa has witnessed a troubling resurgence of coups d'état in Mali, Guinea, Niger, and Burkina Faso. This trend presents a major test for ECOWAS, forcing it to navigate complex legal issues while upholding democratic values enshrined in its founding documents (Buchan & Tsagourias, 2023).

The research methodology employed in this study primarily relies on the examination of secondary sources, particularly the legal frameworks guiding ECOWAS interventions, including relevant provisions within the ECOWAS Treaty and the Lomé Protocol. It critically evaluates the principle of non-intervention and its implications for ECOWAS, elucidating the obstacles and limitations encountered by the organization in justifying its intervention activities, with a specific emphasis on the 2023 Niger coup as a case study. The study also presents a series of recommendations aimed at strengthening the legal foundations of ECOWAS interventions in countering coups, drawing insights from international law, and the pivotal role of ECOWAS in advancing democratic principles.

Theoretical Framework

This research employs deterrence theory as a fundamental framework for examining the response of the Economic Community of West African States (ECOWAS) to coups d'état in the region. Deterrence theory, a fundamental concept in the realm of international relations studies, suggests that the mere threat of punishment can deter individuals or groups from engaging in undesirable actions. In the specific case of ECOWAS and coups, the underlying premise is that the possibility of military intervention by ECOWAS acts as a deterrent to potential coup instigators. In essence, ECOWAS seeks to discourage any attempts at orchestrating a coup by increasing the perceived costs and risks associated with such actions (Raskolnikov, 2021).

The perceived costs that could dissuade potential coup plotters include the fear of encountering a well-equipped ECOWAS military force and the consequent risk of defeat. Moreover, the threat of economic sanctions imposed by ECOWAS and the broader international community could severely hamper the prospects of a new regime following a successful coup. Additionally, the potential loss of international recognition and the risk of being isolated diplomatically could further deter coup instigators. Furthermore, there is the looming threat of domestic turmoil and resistance within the country as a result of the coup, adding to the deterrent effect (Williams, n.d.).

Thomas Schelling's contributions to the concept of deterrence have been instrumental in shaping the theoretical underpinnings of this study. Scholars like Schelling have emphasized the significance of "credible threats" in deterrence, stressing the

importance of the target's belief in the seriousness of the threat and the sender's commitment to follow through with it. Schelling's seminal work, "Arms and Influence" (1966), remains a foundational text in this field, providing valuable insights into the dynamics of deterrence strategies.

In the case of ECOWAS, the deterrence strategy encompasses a range of actions aimed at preventing coups in the region. This includes issuing public statements that clearly express ECOWAS' stance against coups and its dedication to upholding democratic principles. Additionally, conducting joint military exercises serves to showcase ECOWAS' regional military capabilities, thereby reinforcing the deterrent effect. Moreover, ECOWAS adopts a policy of swift and decisive action in response to coup attempts, employing sanctions or diplomatic pressure promptly to deter future coup plotters. By establishing a precedent through such actions, ECOWAS aims to deter any potential threats to the democratic stability of the region (Schelling, 1966).

Limitations of Deterrence Theory

While deterrence theory provides a valuable framework, it exhibits limitations when applied to the endeavours of the Economic Community of West African States (ECOWAS) to avert coups in the West African region. These limitations encompass the complexities of internal military politics, a factor not fully accounted for in traditional deterrence theory. The conventional assumption in deterrence theory is the presence of rational actors who meticulously evaluate the costs and benefits before engaging in any action. Nevertheless, internal military politics can be intricate and steered by a multitude of factors that surpass a simplistic cost-benefit analysis. Power struggles among military factions, personal ambitions of military leaders, or internal factionalism within the armed forces can collectively contribute to coup attempts, even in the face of potentially grave consequences. Consequently, the mere threats of intervention may not suffice to counterbalance these intricate internal dynamics (Raskolnikov, 2021).

Additionally, an additional constraint lies in economic desperation, an aspect often overlooked by deterrence theory. The theory predominantly concentrates on the perceived costs associated with a particular action. However, scenarios of economic hardship and desperation can cultivate an environment where potential coup

instigators perceive themselves as having very little to forfeit. In such circumstances, the looming threat of sanctions or even military intervention might not present a robust enough deterrent. The individuals plotting a coup may take a gamble, assuming that the potential gains from seizing power outweigh the ambiguous risks involved.

Moreover, a significant challenge arises from potential miscalculations and misinformation on the part of coup plotters. The efficacy of deterrence heavily relies on the accurate comprehension of the threat by the target and the determination of the entity issuing the threat (Johnson, 2019). Miscalculations or misinformation on the side of coup instigators can undermine deterrence endeavours. For instance, coup plotters might underestimate ECOWAS' readiness to engage in military intervention, thereby fostering a belief that they can seize power without facing repercussions.

An inconsistency in the application of deterrence to coup situations in West Africa represents yet another limitation. The potency of deterrence is contingent on its consistent application. Should ECOWAS choose to intervene in some coup instances but not others, potential coup instigators may perceive intervention as a remote possibility, consequently feeling emboldened to execute their plans. Such inconsistencies serve to diminish the overall deterrent impact (Idris, 2024).

Furthermore, the extent of leverage available is an essential consideration. Deterrence effectiveness is intrinsically linked to the credibility of the threat and ECOWAS' capability to enforce consequences. The efficacy of sanctions or potential military intervention could be constrained, particularly if the coup garners a degree of backing from domestic factions or if the nation in question maintains robust economic ties with external entities not aligned with ECOWAS (Idris, 2024).

The theory fails to address the fundamental root causes prevalent in the West African context. Deterrence primarily focuses on deterring immediate actions without delving into the underlying triggers of coups. Factors such as poverty, corruption, frail democratic institutions, and ethnic tensions can collectively create a fertile breeding ground for military interventions. Unless these root causes are effectively tackled, deterrence initiatives may essentially resemble a game of whack-a-mole, with new coup endeavours emerging incessantly despite the deterrent threats (Johnson, 2019).

Relevance of the Theory to the Study

While not without limitations, deterrence theory remains a valuable tool for analyzing the Economic Community of West African States (ECOWAS) response to coups d'état. This framework provides a systematic approach to understanding the complex motivations driving ECOWAS' interventions. By scrutinizing how ECOWAS employs a combination of threats (sanctions, military intervention) and proactive measures (democracy promotion, conflict resolution), we gain valuable insights into their deterrence strategy.

Deterrence theory allows us to assess the effectiveness of ECOWAS' actions on multiple levels. Firstly, we can evaluate whether ECOWAS successfully deters potential coup plotters by raising the perceived costs and risks associated with such actions. Secondly, the theory helps us understand if these deterrence tactics influence the behaviour of ongoing coups, pressuring them to relinquish power or negotiate a peaceful resolution.

Furthermore, exploring deterrence theory within the context of ECOWAS interventions allows us to identify areas for improvement. For instance, the theory highlights the importance of clear and consistent communication of threats. When ECOWAS demonstrates a wavering commitment to intervention, or when threats seem hollow, the deterrent effect weakens. Additionally, deterrence theory underscores the need to address the root causes of coups, such as poverty, corruption, and weak democratic institutions. By tackling these underlying issues, ECOWAS can create a more fertile ground for democracy to flourish, reducing the overall appeal of military takeovers.

Ultimately, a nuanced understanding of deterrence theory, acknowledging both its strengths and limitations, can significantly contribute to ECOWAS' efforts in promoting regional stability and democratic governance. This framework equips us to analyze past interventions, assess their effectiveness, and shape future decision-making processes. By strategically utilizing deterrence tactics alongside other crucial approaches, such as preventive diplomacy and regional cooperation, ECOWAS can bolster its capacity to address threats to peace and stability in West Africa.

Discussion and Analysis

The legal foundation for ECOWAS' involvement in member states facing coups d'état is intricate and multifaceted (Falana, 2023). While the 1975 ECOWAS Treaty itself doesn't explicitly grant intervention rights, subsequent protocols have established a framework for action. The most relevant instrument is the 1999 Lomé Protocol, which explicitly authorizes military intervention in member states experiencing "the overthrow or attempted overthrow of a democratically elected government" (Article 25) (Hammady, 2023). This provision serves as the primary legal cornerstone for ECOWAS to respond to coups and reinstate democratic governance.

Beyond the Lomé Protocol, other instruments contribute to ECOWAS' mandate (Raube, 2023). The 1978 Protocol on Non-Aggression prohibits member states from using force against each other, upholding regional stability. The 1981 Mutual Assistance on Defence Protocol enables collective self-defence against external threats, bolstering the region's security posture. Additionally, the 1999 Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security establishes a collective security mechanism that addresses various scenarios, including coups d'état.

However, a point of legal interest arises concerning Article 25 of the Lomé Protocol. It could be viewed as an "anticipatory invitation" extended by member states to ECOWAS, authorizing intervention in the event of a coup (Hammady, 2023). The concept of anticipatory intervention clauses has a historical basis in international law, particularly in bilateral defence treaties. However, their legal validity remains a subject of ongoing debate. While ECOWAS may choose to invoke this clause, its effectiveness as an autonomous legal justification for intervention is uncertain, posing potential challenges in practical application (Hammady, 2023).

Pro-Democratic Intervention and the Limits of International Law

The concept of pro-democratic intervention, where a regional entity like ECOWAS intervenes to reinstate democratic governance, adds another layer of complexity (Darko, 2015). The Protocol on Democracy and Good Governance of ECOWAS (2001) contains a mechanism for addressing unconstitutional changes in government. It also includes clauses about democratic governance within member states, encompassing

aspects like electoral processes, judicial impartiality, and the neutrality of security forces (ECOWAS, 2001).

Unfortunately, ECOWAS' efforts to promote democracy and peaceful transitions of power have been challenged by the recent resurgence of coups in Mali, Guinea, Burkina Faso, and most recently, Niger (Darko, 2015). It is important to note that while promoting democracy is an objective of ECOWAS (stipulated in Article 3 of its Treaty and the Protocol on Democracy and Good Governance), using military force solely to restore democracy lacks strong legal backing under international law (Raube, 2023). Exceptions to this principle exist, such as interventions with explicit UN Security Council authorization or in response to widespread and severe human rights violations. However, these exceptions are highly context-dependent and open to interpretation, leaving room for legal ambiguity (Raube, 2023).

The fundamental tenet of non-intervention, enshrined in Article 2.4 of the United Nations Charter, prohibits states from using force or coercion against another state's sovereignty (Falana, 2023). This principle forms a cornerstone of international law, safeguarding the territorial integrity of nations. However, some delineated exceptions exist. For instance, a state can use force in self-defence when faced with an armed attack (Article 51 of the UN Charter). Additionally, the UN Security Council can authorize the use of force to uphold international peace and security under Chapter VII of the Charter. This authorization can extend to regional organizations like ECOWAS (Article 53(1) of the UN Charter) (Falana, 2023).

The burden of proof for justifying intervention under these exceptions rests with ECOWAS (Hammady, 2023). The organization must provide compelling evidence for a sound legal basis and demonstrate strict adherence to international law principles. Examining specific instances highlights the challenges of navigating this legal labyrinth. In The Gambia (2016), ECOWAS issued warnings about potential intervention to reinstate the elected president, but the subsequent limited intervention by Senegal lacked a clear legal justification. Similarly, in Sierra Leone (1998), ECOWAS intervened without prior UN Security Council authorization raising questions about the intervention's legality (Hammady, 2023).

Case Study: The 2023 Niger Coup and ECOWAS Intervention

On July 26, 2023, the military in Niger, led by General Abdourahamane Tchiani, toppled the democratically elected president, Mohamed Bazoum, in a coup d'état. The reasons behind the coup remain shrouded in ambiguity, encompassing a spectrum of conjectures ranging from internal military grievances over promotions and pay to discontentment with Bazoum's handling of poverty, security challenges, and perceived corruption (International Crisis Group, 2023). The international community responded with a chorus of condemnation. The UN Security Council, the African Union, the US, France, Germany, the EU, and even Russia and Algeria all denounced the coup, highlighting the international community's growing intolerance towards unconstitutional power grabs (International Crisis Group, 2023).

The Economic Community of West African States (ECOWAS) adopted a multifaceted approach to the crisis in Niger, showcasing a blend of diplomatic, legal, and political measures aimed at pressuring the junta and restoring democratic order (Ronceray, 2023). ECOWAS convened an emergency summit in Abuja on July 30th, demanding Bazoum's reinstatement and warning that "in the event, its demands are not met within one week, (ECOWAS would take) all necessary measures, which may include the use of force" (Hammady, 2023). This swift response sent a clear message to the junta but also raised concerns about the potential consequences of military intervention. After the ultimatum expired with no signs of compliance from the junta, ECOWAS held a second summit in Abuja on August 10th, 2023, and ordered the deployment of its standby force as a deterrent and a signal of resolve (Hammady, 2023). On August 18th, 2023, they declared a "D-day" for military intervention, raising the stakes and pressuring the junta to negotiate (Hammady, 2023). This escalation tactic, however, risked inflaming tensions and potentially destabilizing the region.

In a bid to exert economic pressure and isolate the junta, ECOWAS imposed a raft of economic and travel sanctions on Niger (Melly, 2023). These sanctions targeted key sectors of the economy, such as mining and trade, restricted the movement of junta members, and aimed to cripple their ability to govern effectively. However, sanctions also imposed hardships on ordinary citizens and businesses, raising concerns about the effectiveness and fairness of this approach (Melly, 2023). The junta, for its part,

attempted to downplay the impact of sanctions, claiming they could rely on support from external actors (Zambakari, 2023).

The legal ramifications of ECOWAS' actions in response to the Niger coup are intricate and contested. The UN Charter's Article 2(4) enshrines the principle of non-use of force in international relations. ECOWAS' threat of military intervention treads a fine line, potentially contravening this principle if not demonstrably justified under exceptions like self-defence or UN Security Council authorization (Raube, 2023).

Under international law, the use of force generally requires authorization from the UN Security Council, except in self-defence (Article 51) or under Chapter VII provisions that address threats to international peace and security. While ECOWAS can invoke the Lomé Protocol (Article 25) to justify intervention in coups, the absence of UN Security Council authorization weakens the legal foundation for its actions, particularly if the intervention is deemed overly coercive (Raube, 2023).

The Lomé Protocol's Article 25 grants ECOWAS the authority to intervene in member states experiencing coups. However, the concept of "anticipated consent" embedded within this article is a point of contention (Hammady, 2023). Can ECOWAS rely on the consent of a democratically elected government to intervene in the event of a coup, even if the new military rulers revoke that consent? The ambiguity surrounding this issue further complicates the legal basis for ECOWAS' actions (Buchan & Tsagourias, 2023). The limited international recognition of the ousted president, Mohamed Bazoum, further complicated the situation. With only France, the EU, and ECOWAS recognizing Bazoum's legitimacy, the legal basis for intervention based on his reinstatement became questionable (Raube, 2023).

Justifications and Inconsistencies within ECOWAS

ECOWAS justified its intervention in Niger primarily on the grounds of protecting democracy and upholding the rule of law in the region (Hammady, 2023). They argued that the military takeover in Niger constituted a dangerous precedent that, if left unchecked, could destabilize the entire region. ECOWAS emphasized its commitment to democratic values enshrined in its founding treaties and presented itself as a champion of constitutional rule. However, ECOWAS's response to the Niger coup was

marred by inconsistencies in its approach to similar situations in Mali, Guinea, and Burkina Faso. The lack of a firm and unified response to these earlier coups weakened the moral and legal arguments for intervening in Niger. Critics accused ECOWAS of selective enforcement of democratic norms, suggesting the organization was more concerned with geopolitical considerations than with upholding a consistent standard (Zambakari, 2023).

The decision to lift sanctions on Niger after the formation of the Alliance of Sahel States (ASS) further eroded ECOWAS's credibility as a defender of democracy (Idris, 2024). This move was seen as a concession to maintain regional economic ties and woo Niger back into the fold, but it also sent a message that ECOWAS' commitment to punishing coups could waver in the face of political expediency. Similarly, internal disagreements within ECOWAS also hampered its ability to take decisive action. Powerful member states like Nigeria were hesitant to commit troops for a long-term military intervention, highlighting the lack of consensus on how to address coups (Zambakari, 2023). The formation of the ASS by Niger, Mali, and Burkina Faso further complicated the situation, creating a regional bloc potentially at odds with ECOWAS' goals.

Moreover, the involvement of external actors like France, with its strategic interests in the Sahel region, added another layer of complexity (Zambakari, 2023). France's approach might not always align with ECOWAS's, making it difficult for the organization to present a unified front and exert pressure on the junta.

Thus, ECOWAS' policymakers faced a challenging dilemma. While they aimed to restore democracy in Niger, they also had to be mindful of the potential for military intervention to destabilize the country and the broader region (Raube, 2023). Harsh sanctions, while intended to pressure the junta, could also inflict hardship on ordinary citizens and potentially fuel resentment. The aftermath of the Niger coup raises critical questions about ECOWAS's future role in promoting democracy and upholding regional stability. Can ECOWAS develop a more consistent and unified approach to coups in the face of internal divisions and external pressures? How can the organization balance the need to uphold democratic norms with the potential risks of military intervention? The exploration of alternative strategies, such as strengthened mediation efforts and more nuanced sanctions, will be crucial in addressing these challenges. The Niger coup serves

as a stark reminder of the complex challenges facing West Africa. It underscores the need for ECOWAS to reform and strengthen its capacity to respond effectively to threats to democracy and regional stability. Only through a more unified and strategic approach can ECOWAS fulfil its mandate and ensure a peaceful and democratic future for its member states (Raube, 2023).

Summary

This study delves into the intricate relationship between the Economic Community of West African States (ECOWAS) and its response to coups d'état. It explores the tension between ECOWAS's aspirations for a democratic region and the international legal constraints that limit its ability to intervene. The study utilizes deterrence theory as a lens to analyze ECOWAS's actions. Deterrence theory posits that the threat of punishment discourages actors from engaging in undesirable behaviour. In the context of ECOWAS, the threat of intervention, including sanctions and potentially military force, aims to deter potential coup plotters by raising the perceived costs associated with overthrowing a democratically elected government. ECOWAS's efforts to uphold democratic norms are constantly challenged by the principle of non-intervention enshrined in the UN Charter. This principle generally prohibits states from using force against another sovereign state. Additionally, under international law, the use of force typically requires authorization from the UN Security Council, further complicating ECOWAS's ability to intervene militarily. To overcome these hurdles, ECOWAS relies on the Lomé Protocol, a treaty that grants the organization the right to intervene in member states experiencing unconstitutional changes of government. However, the interpretation of "anticipated consent" within the Lomé Protocol remains a point of contention. Can ECOWAS justify intervention based on the consent of a democratically elected government, even if the new military rulers revoke that consent? This ambiguity creates a legal grey area surrounding the legitimacy of ECOWAS's actions.

The 2023 Niger coup serves as a compelling case study, highlighting the multifaceted nature of regional interventions in such political crises. While ECOWAS aimed to restore democracy by demanding the reinstatement of the ousted president and threatening military intervention, its actions faced several obstacles. The lack of

widespread international recognition for the ousted president's government weakened the legal rationale behind ECOWAS's intervention efforts; disagreements within ECOWAS, particularly regarding the use of military force, hampered the organization's ability to present a unified front. Additionally, the involvement of external actors with competing interests in the region further complicated the situation; the potential for military intervention to destabilize Niger and the broader region forced ECOWAS to carefully consider the consequences of its actions.

Key Findings of the Study

- i. ECOWAS utilizes the threat of sanctions and military intervention to deter coups d'état in the region.
- ii. International law principles of non-intervention and the need for UN Security Council authorization restrict ECOWAS's ability to intervene. The Lomé Protocol offers some leeway, but the interpretation of "anticipated consent" creates ambiguity.
- iii. This case highlights the complexities of intervention. Legal challenges, internal divisions within ECOWAS, external pressures, and the risk of destabilization all hindered a decisive response.
- iv. A more unified interpretation of "anticipated consent" within the Lomé Protocol is crucial for a stronger legal basis for intervention.
- v. Military intervention should be a last resort. ECOWAS should explore more emphasis on diplomacy, targeted sanctions, and support for democratic institutions.
- vi. A nuanced approach is needed. ECOWAS must balance its commitment to regional stability with the pursuit of democratic values.

Recommendations

Based on the key findings of the study, the following are some recommendations for ECOWAS to improve its response to coups d'état:

- i. Member states of ECOWAS should work towards a clear and unified interpretation of "anticipated consent" within the Lomé Protocol. This would provide a stronger legal foundation for ECOWAS intervention and discourage arguments about revoked consent by coup leaders.

- ii. ECOWAS, in collaboration with the African Union (AU), could lobby the UN Security Council for a clearer mandate or resolution that recognizes ECOWAS' authority to intervene in certain cases of coups d'état, particularly those that blatantly disregard democratic processes.
- iii. ECOWAS should lay more emphasis on a tiered response system for coups. This could involve starting with diplomatic pressure and targeted sanctions, escalating to military intervention only as a last resort after demonstrating the ineffectiveness of other measures.
- iv. ECOWAS should invest in robust early warning systems to detect potential coup plots and intervene with preventive measures such as mediation and dialogue before a coup unfolds.
- v. ECOWAS should communicate its intervention criteria and decision-making processes to member states and the international community. This transparency will enhance legitimacy and discourage selective enforcement accusations.
- vi. ECOWAS should dedicate resources and expertise to strengthening democratic institutions within member states. This could include supporting the training of electoral officials, and security forces and collaborating with civil society organizations.
- vii. ECOWAS can play a proactive role in addressing the root causes of coups, such as poverty, inequality, and corruption. This could involve promoting good governance practices and supporting economic development initiatives in member states.
- viii. ECOWAS needs to address internal political rivalries and disagreements over intervention strategies. Open dialogue and consensus-building are crucial for presenting a united front in response to coups.
- ix. ECOWAS should engage constructively with external actors like France to ensure their interests align with upholding democratic norms in the region and avoid undermining ECOWAS's efforts.

References

Buchan, R. & Tsagourias, N. (2023). The Niger coup and the prospect of ECOWAS military

intervention: An international law appraisal. *Lieber Institute*. <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/>

ECOWAS, (n.d.). *History*. <https://www.ecowas.int/history-2/>

ECOWAS (2001). *Protocol on Democracy and Good Governance* <https://caselaw.ihrda.org/fr/entity/gnhvkzfoaw9etidhcq96n7b9>

Darko, S. (2023). West African leaders shelves third-term ban proposal. *BBC News*. <https://www.bbc.com/news/world-africa-32808685>

Falana, F. (2023). *ECOWAS can't justify intervention in Niger without UN's approval*. <https://punchng.com/ecowas-cant-justify-intervention-in-niger-without-uns-approval-falana/>

Hammady, O. (2023). Assessing the legality of ECOWAS planned military intervention in Niger. <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/>

Idris, A. (2024). ECOWAS lifts sanctions on Niger amid tensions in West Africa bloc. *Aljazeera*. <https://www.aljazeera.com/news/2024/2/24/ecowas-lifts-sanctions-on-niger-amid-tensions-in-west-africa-bloc>

International Crisis Group (2023). *ECOWAS, Nigeria and the Niger coup sanctions: Time to recalibrate*. <https://reliefweb.int/report/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate>

Johnson, B. (2019). *Do criminal laws deter crime? Deterrence theory in criminal justice policy: A primer*. <https://house.mn.gov/hrd/pubs/deterrence.pdf>

Melly, P. (2023). Niger coup underlines challenge to democracy across West Africa. *Chatham house*. <https://www.chathamhouse.org/2023/08/niger-coup-underlines-challenge-democracy-across-west-africa>

Mills, L. (2022). *The effectiveness of ECOWAS in mitigating coups in West*. <https://www.ipinst.org/wp-content/uploads/2022/04/Leonie-Mills-Effectiveness-of-ECOWAS.pdf>

Raskolnikov, A. (2021). *Deterrence Theory: Key Findings and Challenges*. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3580&context=faculty_scholarship

p

Raube, R. (2023). *An International Law Assessment of ECOWAS' Threat to Use Force in Niger*.

<https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/>

Ronceray, M. (2023). *Can ECOWAS still defend democracy in West Africa after the Niger coup?*

<https://ecdpm.org/work/can-ecowas-still-defend-democracy-west-africa-after-niger-coup>

Schelling, T. C. (1966). *Arms and influence*.

<https://media.defense.gov/2019/Nov/19/2002213420/-1/-1/1/READINGLIST2018.PDF>

Touray, O. A. (2024). *ECOWAS lifts sanctions on Niger*. Abuja,

Williams, K (n.d.). *Deterrence theory | definition, types & effect*. <https://study.com/academy/lesson/deterrence-theory-of-punishment-definition-effect-on-law-obedience.html>

Zambakari, C. (2023). *Military coup in Niger: The legacies of colonialism and the US war on*

terror in West Africa. Accord. <https://www.accord.org.za/conflict-trends/military-coup-in-niger-the-legacies-of-colonialism-and-the-us-war-on-terror-in-west-africa/>



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

IMPACT OF CORPORATE SOCIAL RESPONSIBILITY ON SURVIVAL OF QUOTED
MANUFACTURING COMPANIES IN ABUJA

Halima Shuaibu

Distance Learning Centre, Ahmadu Bello University, Zaria.

halima.shuaibu@abudlc.edu.ng

+2348069807220

ABSTRACT

The study was designed to examine the effect of corporate social responsibility on survival of Quoted Manufacturing Companies in Abuja. The study used a cross sectional survey research design to elicit responses from the research participants. Three hypotheses were formulated for the study and tested using SmartPLS version 4.9.9. The findings showed that donation, social amenities and taxation have positive significant effect on survival of Quoted Manufacturing Companies in Abuja. The study concluded that there is significant effect of corporate social responsibility on survival of Quoted Manufacturing Companies in Abuja. In view of the findings, this research therefore recommends that Government should put machinery in place to monitor firms' investment in CSR so as to serve as motivation for their involvement in social responsibility activities, particularly in their immediate environment.

Key Word: *Corporate social responsibility, survival of Quoted Manufacturing Companies, donation, social amenities, Taxation*

Introduction

The field of Corporate Social Responsibility (CSR) has grown quite well over the last decade although there are different views of the role of the firm in society and disagreement as to whether wealth maximization should be the only goal of a

corporation (Jason, 2022). Through corporate social responsibility we have seen that economic power has shifted to the corporations, that is should have an increasing role in and responsibility for addressing social problems. Acknowledging the fact that the government sets the regulations and the minimum standards for the workplace, but a company can further improve the work environment and the quality of living of its employees which is where social responsibility comes in as an important factor. A firm cannot ignore the problems of the environment in which it operates (Bbattacharya & Korchun, 2021). The poverty of a nation state's citizens, political unrest, and the exhaustion of natural resources can have destructive and negative effects for a corporation. Take for instance as a manufacturing company resources that are inputs in the production process and which, at the beginning of the industrial revolution, were abundant, are now in many regions of the planet scarce, polluted, or diminishing. Naturally, this imposes an extra cost to the corporations and may force them to relocate or to cease operations. Researchers perspective differ in the sense that from one perspective we can see that companies may be poorly equipped to address some of the social or environmental problems, but from another perspective, no matter how poorly equipped, companies may still be best positioned to solve the problems posed for them. Adoption of the CSR principles involves costs. These costs might be short term in nature or continuous outflows that is long term. These costs might involve the purchase of new environmentally friendly equipment, the change of management structures, or the implementation of stricter quality controls. Since being socially responsible involves costs, it should generate benefits as well in order to be a sustainable business practice. A corporation could not continue a policy that constantly generates negative cash flows

or loss. The shareholders invest their money in a corporation, expecting the highest possible risk adjusted returns. Therefore, being socially responsible should have positive returns or benefits in order to be sustainable.

Companies which seem to have a strong CSR commitment often have an increased ability to attract and to retain employees (Nalini, 2019), which leads to reduced turnover, recruitment, and training costs. There are some other issues that are to be considered under CSR and they include the firm's commitment to act correctly so that its actions may work with the development of the society. Another issue is referred to meeting the stakeholder's (owners) needs. The third is to move a step forward from what is established by law. Companies that better their working conditions and labor practices also experience an increase in productivity and reduced error rates. Regular controls in the production facilities throughout the world ensure that all the employees work under good conditions and earn living wages as well. These practices are costly, but the increased productivity of the workers and improved quality of the products generate positive cash flows that cover the associated costs. Thus, firms may actually benefit from socially responsible actions in terms of employee morale and productivity (Malik, Ali & Ishfaq, 2018). Most firms are too busy going after short-term financial benefits thereby tend to ignore the strategic value of CSR to them. The issue at hand is therefore, to make corporate organizations understand how social responsibility impact on business survival and performance at various levels of the organization.

Extant studies on CSR generally focused on the effect it has on financial performance and profitability of the firms (Fauzi, 2019; Uadiale & Fagbemi, 2020; Okafor & Oshodin, 2017; Babalola, 2017) with little attention on the continuous existence and survival of the

companies. Similarly, CSR studies looked at it in terms of provision of social amenities like good roads, good water, and hospital among others. In addition to corporate social amenities, this present study captured corporate donations and taxation as part of CSR of firms. This study therefore examines the impact of CSR in terms of provision of social amenities, offering donations and payment of corporate tax on the survival of manufacturing firms in Abuja.

Literature Review and Theoretical Framework

Concept of Corporate Social Responsibility

The term Corporate Social Responsibility has no one or particular definition as different scholars at various times try to give their own definition based on the perception of the concept. However, we will attempt to define it by looking into various works by different scholars. Jason. (2022) in his work states that “there is no exact definition of Corporate Social Responsibility (CSR), nor is there an accepted single method or approach that all companies need to follow. There are multiple variables that could be incorporated into an action plan. Corporate Social Responsibility sees to those management philosophies, policies, procedures and actions that have the advancements of society’s welfare as one of their primary objectives (Olaroyeke & Tabitha, 2015). Oluwaseyi, A. A., & Adeyemi (2012) says that “according to one of the most frequently cited definitions, CSR is ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. In the work of Osisoma, Nzewi and Nwoye (2015) also made a very good attempt in defining CSR. He said that, with so many conflicting interests and goals of stakeholders, the definition of CSR is not always clear. For the purpose of his study, he defined CSR

as “actions that appear to further some social good, beyond the interest of the firm and that which is required by law.” In this definition, voluntary aspect of CSR is also emphasized while he further maintained that it is beyond the interest of the firm. It is obvious that not every CSR carried out by a company is beyond their interest, in fact it can be said that it is as much their interest since it will boost the perception of the company in the eye of the host community, it will bring about a relative peace which will enable the company to operate peacefully and avoid loss of man hour and high security cost due to risk of invasion by the host community.

Concept of Organizational Survival

The capacity or status of an organization to continue to exist, typically in the face of adversity, challenges, or dangers, is known as organizational survival. There are several subjective and objective meanings associated with organizational survival. Observing an organization's continued existence is the most scientific approach to gauging its survival. Given the nature of mergers and acquisitions, this is problematic (Delacroix & Carroll, 1983). As long as a company "purchases inputs from suppliers and delivers product to a certain audience," it is considered to have survived (customers, clients, etc.). When coalitions of its resource suppliers are unable to be persuaded to contribute resources and the company is unable to compensate resource providers for prior contributions, the organization is viewed as having failed (Sheppard, 1989). Similar to this, Huber (2011) claimed that organizational leaders must overcome this challenge if they are to survive in a changing environment. This means that a company's executives need to be flexible and aware of the outside factors affecting it in order for it to remain viable. They may accomplish this by continuously surveying their surroundings. The

ability of a business to endure in both internal and external contexts is essential to its survival. Every business aspires to continue operating. Since surviving is the main goal of most organizations (Barnard, 1947). The accomplishment and execution of other company goals are aided by paying attention to this purpose.

Empirical Review

Empirical studies conducted so far provide conflicting results on the relationship between CSR practices and firms' organizational survival with some studies showing a positive relationship and others also showing a negative relationship. In few other cases, no relationship was reported. However, the largest number of investigations found a positive relationship. Makni, Francoeur & Bellavance (2018) is an assessment of the causal relationship between corporate social performance and organizational survival of 179 publicly held firms using Granger causality approach. No significant relationship was found between a composite measure of a firm's corporate social performance and organizational survival, except for market returns. On the other hand, using individual measures of corporate social performance, the result provided a robust significant negative impact of the environmental dimension of corporate social performance and three measures of financial performance (return on assets, return on equity and market returns). Also in North America, Fauzi (2019) reports an investigation of the relationship between CSR and financial performance of a sample of 101 companies listed on the New York Stock Exchange. Using a regression model, the study reveals no significant relationship between corporate social responsibility and firm performance. It also provides evidence of leverage (a control in the model) having a moderating effect on the interaction between Corporate Social Responsibility and organizational survival

variables. Results from African data have also been very helpful. Singh (2021) utilized data of 47 listed firms in Nairobi Stock Exchange to carry out a cross-sectional study on the relationship between CSR index and firm performance proxies (return on assets, return on equity and return on sales). The result revealed a statistically significant relationship between CSR and organizational survival. A later study (Eboh & Uzor, 2022) investigated the relationship between CSR practices and organizational survival of 10 firms in the manufacturing, construction and allied sector of the Nairobi Stock Exchange. The results indicate an insignificant positive relationship between corporate social responsibility practice and organizational survival. Using individual measures of corporate social responsibility practice, the study provides additional result of a significant and inverse relationship between organizational survival and manufacturing efficiency.

In a Nigerian study, Uadiale and Fagbemi (2020) focused on forty listed companies to evaluate the impact of corporate social responsibility activities on financial performance (return on asset and return on equity). Their results showed that CSR had a positive and significant relationship with the organizational survival measures. In a smaller study, Okafor and Oshodin (2017) examined the relationship between CSR and companies' performance for 20 Nigerian listed firms for three years: 2008 to 2010. The ordinary least squares (OLS) method was used to estimate the coefficient of the independent variables. The results revealed a positive and insignificant relationship between profitability and companies' contribution towards education and health; and negative but insignificant relationship between profitability and communities' development investment by companies. Babalola (2017) utilized a similar method to explore the relationship between CSR and the' profitability of 10 randomly selected listed firms in Nigeria.

Findings revealed that the firms invested less than 10% of their annual profit to social responsibility activities. However, a negative but insignificant relationship was found between corporate social responsibility and organizational survival. From the foregoing review, the following hypotheses were raised and address:

Hypothesis 1: H_0 = CSR donation does not have significant effect on survival of manufacturing companies in Abuja.

Hypothesis 2: H_0 = CSR on provision of social amenities have no significant effect on survival of manufacturing companies in Abuja.

Hypothesis 3: H_0 = CSR on taxation has significant effect on survival of manufacturing companies in Abuja.

Theoretical Framework

This study aims to use stakeholder theory to analyze the organizational survival of quoted manufacturing companies. Even though the stakeholder concept has been extensively researched over the past two decades it is frequently defined as the ‘opposite’ to the shareholder (or stockholder) model. Other stakeholder theorists summarize the two basic principles defining the stakeholder concept as follows: “that to perform well, managers need to pay attention to a wide array of stakeholders, and that managers have obligations to stakeholders which include, but extend beyond, shareholders” (Jones et al., 2012). From a rather business-driven perspective, stakeholder theory interest lies in three premises: “organizations have stakeholder groups that affect and are affected by them; these interactions impact on specific stakeholders and the organization; and perspectives of salient stakeholders affect the viability of strategic options” (Simmons,

2014). However, the stakeholder theory does not reject profitability as a corporate purpose, but rather widens the shareholder model. The stakeholder approach recognizes the legitimate claim of shareholders, but challenges the idea that shareholders should be either the only claimants or the privileged ones over the interests of other legitimate claimants (Emiliani, 2021).

Methodology

A cross-sectional survey research design was adopted for the study. The population of the study comprised of 4990 employees of manufacturing firms operating in Abuja. The sample size was 344 and it was arrived at using the formula developed by Dilman (2007). A structured questionnaire was utilized as the method to collect primary data from respondents. This study assessed corporate social responsibility through the use of donation, social amenities and taxation (Lusardi, 2019). Corporate social responsibility and organizational survival are the two thematic areas covered in the study. Thus, Lusardi and Mitchell's (2008, 2011 & 2011) offered the measurement for corporate social responsibility. In the instance of organizational survival, Parker, Castillo, Garon, and Levy's (2016) scale of measurement was used. This study focused on the employees as a unit of analysis. A five-point Likert-type scale (1 = strongly disagree, 5 = strongly agree) was used in the study to measure the scale. Simple and SmartPLS statistics was used to test for possible relationships between corporate social responsibility and organizational survival.

Analysis of Results and Discussions

The present study adopted a two-step process to evaluate and report the results of PLS-SEM path, as suggested by Henseler, Ringle and Sinkovics (2009). This two-step process adopted in the present study comprises the measurement model and the structural model (Hair et al., 2014; Hair et al., 2012; Henseler et al., 2009).

Measurement Model (outer model)

Analysis of a measurement model involves determining individual item reliability, internal consistency reliability, convergent validity and discriminant validity (Hair et al., 2014; Henseler et al., 2009). The Figure 1 and Table 1 present the measurement model of the study.

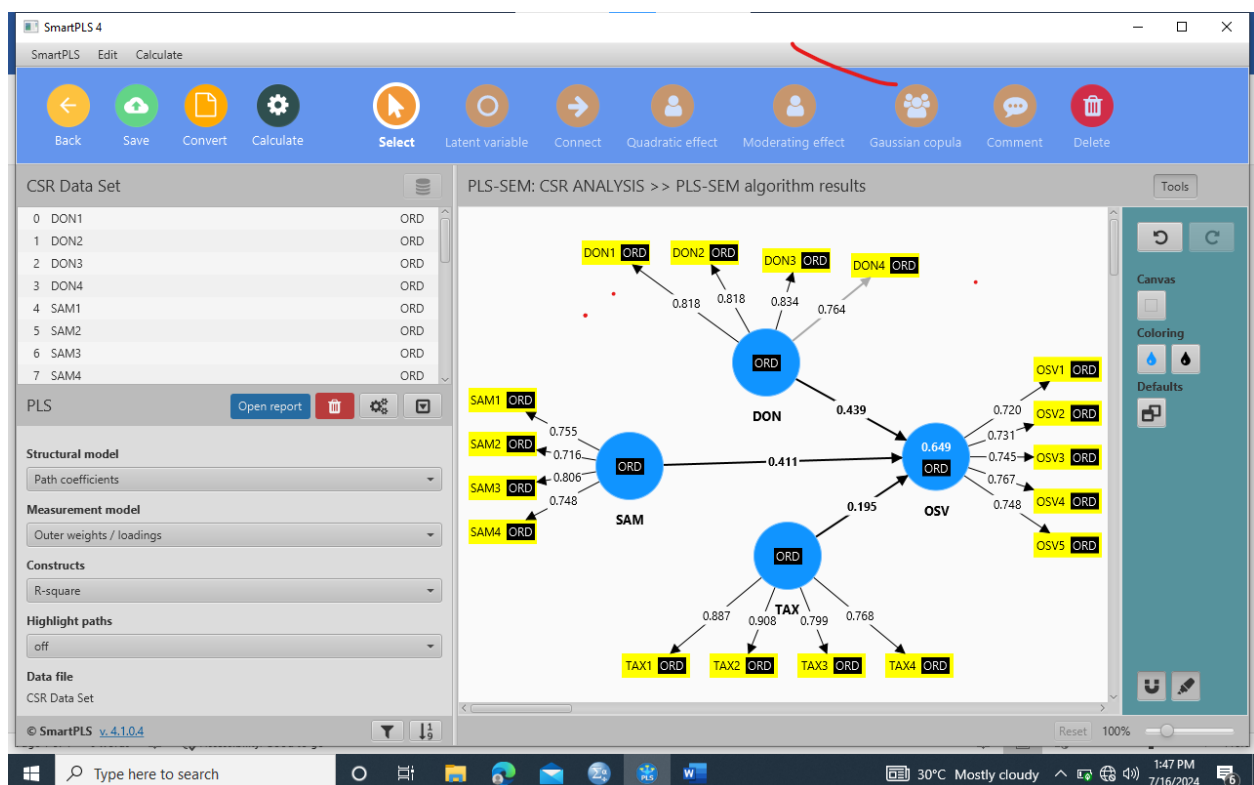


Figure 1: PLS Algorithm

Table 1: Construct Reliability and Validity

Construct	Items	Loadings	CA	CR	AVE
Donations	DON ₁	0.818	0.824	0.883	0.655
	DON ₂	0.818			
	DON ₃	0.834			
	DON ₄	0.764			
Organizational Survival	OSV ₁	0.720	0.797	0.860	0.551
	OSV ₂	0.731			
	OSV ₃	0.745			
	OSV ₄	0.767			
	OSV ₅	0.748			
Social Amenities	SAM ₁	0.755	0.753	0.843	0.573
	SAM ₂	0.716			
	SAM ₃	0.806			
	SAM ₄	0.748			
Taxation	TAX ₁	0.887	0.869	0.907	0.710
	TAX ₂	0.908			
	TAX ₃	0.799			
	TAX ₄	0.768			

From Table 1, all the constructs in the study met the composite reliability benchmark of 0.7 and average variance extracted of 0.5. As shown in Table 1, the composite reliability coefficient of each constructs ranged from 0.716 to 0.908, with each exceeding the minimum acceptable level of .70, suggesting adequate internal consistency reliability of the measures used in this study (Bagozzi & Yi, 1988; Hair et al., 2011). In addition, convergent validity was assessed by examining the Average Variance Extracted (AVE) of each construct, as suggested by Fornell and Larcker (1981). To achieve adequate convergent validity, Chin (1998) recommended that the AVE of each

latent construct should be .50 or more. Following Chin (1998), the AVE values exhibited high loadings ($> .50$) on their respective constructs, indicating adequate convergent validity. Furthermore, the discriminant validity was assessed using the HTMT approach. Table 2 present the result.

Table 2: Heterotrait-Monotrait Ratio (HTMT)

	DON	OSV	SAM	TAX
Donations				
Organizational Survival	0.866			
Social Amenities	0.747	0.870		
Taxation	0.143	0.317	0.119	

The result of HTMT in Table 2 revealed that the cross loading of all the constructs used in this study satisfy the condition of Kline (2011) as the coefficient of the inter-correlations are less than 0.85. Thus, this further confirmed the validity of the measures employed in the study.

Structural model (Inner model)

The second part of the model is the structural model or inner model which Hair et' al. (2013) identified four key criteria for assessing the structural model in PLS-SEM. These criteria include assessments of significance of the path coefficients, coefficient of determination (R^2), the effect size (f^2), and predictive relevance (Q^2). Figure 2 presents the structural model of the effects.

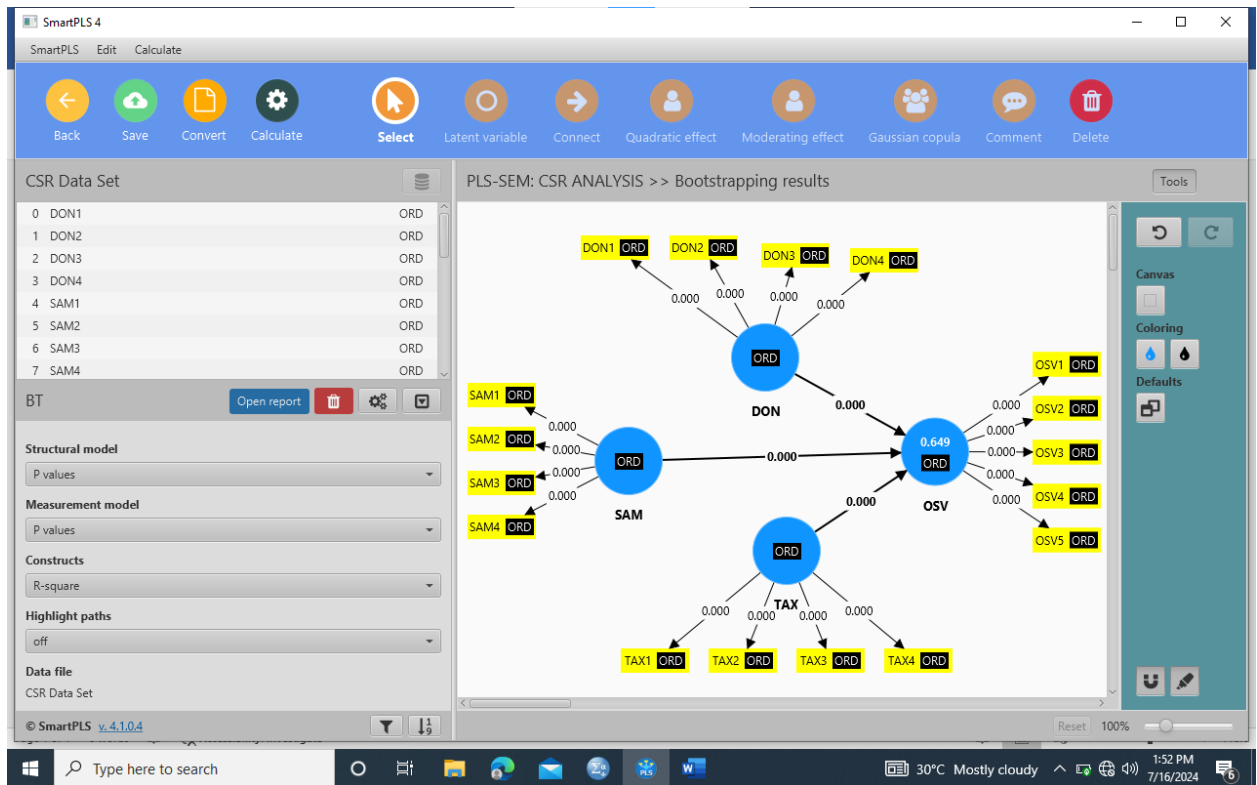


Figure 1: Structural model

Table 3: Path coefficient of the structural model

	Original sample (O)	Sample mean (M)	Standard deviation (STDEV)	T statistics (O/STDEV)	P values
DON -> OSV	0.439	0.438	0.037	11.961	0.000
SAM -> OSV	0.411	0.412	0.037	11.085	0.000
TAX -> OSV	0.195	0.196	0.029	6.726	0.000

From Table 3, it can be seen that corporate social donations has positively significant impact on survival of manufacturing companies in Abuja ($\beta = 0.438$, STD= 0.037, t- value = 11.961 and p-value= 0.000). This implied that corporate social donations can influence continued survival of manufacturing companies. Hence, the hypothesis that states that corporate social donations has no significant impact on survival of manufacturing companies in Abuja is rejected. Furthermore, corporate social amenities has positively

significant impact on survival of manufacturing companies in Abuja ($\beta=0.412$; $STD=0.037$; $t = 11.085$; $p = 0.000$). This implied that corporate social amenities can influence continued survival of manufacturing companies. Hence, the hypothesis that states that corporate social amenities has no impact on survival of manufacturing companies in Abuja was rejected. Lastly, corporate taxation has positively significant impact on survival of manufacturing companies in Abuja ($\beta=0.196$; $STD=0.029$; $t = 6.726$; $p = 0.000$). This implied that corporate taxation can influence continued survival of manufacturing companies. Hence, the hypothesis that states that corporate taxation has no impact on survival of manufacturing companies in Abuja was rejected.

Table 4 Coefficient of Determinant (R Squared)

Constructs	R-square	R-square adjusted	Assessment criterion by Chin, (1998)
Organizational Survival	0.649	0.647	Substantial

Table 4 and Figure 1 displayed the variance explained of the model (measurement model). Based on the criterion for assessing R^2 (Chin, 1998), all the independent variables (corporate social donations, corporate social amenities and corporate taxation) explained 64.9% variance in survival of manufacturing companies in Abuja.

Table 5: Effect Size

Constructs	f-square	Effect Size
Donations	0.353	Medium
Organizational Survival		
Social Amenities	0.310	Medium

Taxation

0.107

Small

From Table 5, the effect size of corporate social donations on survival of manufacturing companies in Abuja is 13.4% and this indicated a medium effect size on the endogenous variable. Furthermore, corporate social amenities indicated a medium effect size of 31% on survival of manufacturing companies in Abuja. Lastly, corporate taxations has a small effect size of 10.7% on the survival of manufacturing companies in Abuja. It can be concluded from this analysis that all the exogenous variables have an effect size on the endogenous variables.

Table 6: Predictive Relevance

Variables	SSO	SSE	Q ² (=1-SSE/SSO)
Donations	2112.01	4715	0.621
Organizational Survival	1524.12	1524	
Social Amenities	2658.110	2658.000	
Taxation	4621.02	4321	

Note: SSO = squared observations; SSE= squared prediction error

From Table 6, it can be seen that the Q² values of survival of manufacturing companies in Abuja is greater than 0. It has the Q² value of 0.621. This means all the exogenous variables (corporate social donations, corporate social amenities and corporate taxation) have 62.1% relevance in predicting the endogenous variable (survival of manufacturing companies in Abuja).

Discussion of Findings

The study focuses on corporate social responsibility and survival of manufacturing companies in Abuja. In line with extant literature, the study construes corporate social

responsibility in terms of donation, social amenities and taxations leading to the formulation and testing of three hypotheses. The first hypothesis of the study stated that donation has no significant positive effect on survival of manufacturing companies in Abuja. In pursuance of this, the study discovers that there is significant effect of donation on organizational survival. The finding aligns with earlier studies such as (Buch, 2018), Lusardi, Michaud, and Mitchell (2017) among others which significant effect of donation on organizational survival. The second hypothesis of the study postulated that social amenities has no significant positive effect on survival of manufacturing companies in Abuja. The study discovers that there is significant effect of social amenities on organizational survival. This finding is in consonance with extant studies (Damayanti, Murtaqi, and Pradana, 2018; Buch, 2018 and Lusardi et al., 2017) who also reported significant effect of donation on organizational survival. Lastly, the third hypothesis of the study depicted that taxation has no significant positive effect on survival of manufacturing companies in Abuja. In pursuance to this, the study discovers that there is significant effect of taxation on organizational survival. This finding is line with existing literature such as Mian and Sufi (2018) who show significant effect of taxation on organizational survival.

Policy Implementation

The findings in this study indicate that, all the variables used have statistical impact though at different levels of significance. This implies that both regulatory authorities and companies must take corporate social responsibility issues very seriously as it could have a significant impact on their overall organizational survival. There is a need for every company to be rendering social responsibility every now and then as this could

bring about an enhancement in their profitability. However, this could become achievable by in-building into their policy statements and backed up by objective budget plans. Also, there is a need for regulatory authorities to come up with clearly defined regulations on how to go about social responsibility issues of the companies and the government should however ensure its full implementation.

Conclusion

From the empirical data of the study showing a positive significant relationship between corporate social responsibility (natural logarithms of the total amount spent by the manufacturing companies) and organizational survival (return on assets, earnings per share, dividend per share and return on equity) of quoted manufacturing companies in Nigeria, it can be concluded that the amount spent by the manufacturing companies from their annual earnings in providing corporate social responsibility services to the operating community aids organizational survival. The findings of this study show a positive significant relationship between corporate social responsibility and all the organizational survival variables (return on assets, earnings per share, dividend per share and return on equity) of quoted manufacturing companies in Nigeria. Unquoted manufacturing companies are thereby encouraged to have their equity listed on the Nigerian stock exchange and to also comply with the regulations of the stock exchange market. The period of listing of manufacturing companies on the stock exchange is highly influencing their organizational survival. In line with the findings of the study that show statistical significance of the variables under study, we conclude that corporate social responsibility plays a significant role on the organizational survival of manufacturing companies in Nigeria.

Recommendation

- i. CSR projects should be well structured and implemented for maximum effect.
This would enhance the wellbeing of the beneficiaries.
- ii. Companies should liaise with community head to identify areas or opportunities available to them to better the lives of the people through the provision of social amenities. This will go a long way to improve the general living standards of the people. Manufacturing companies in Nigeria should increase their investment in CSR as this would enhance their marketability of their products and increase their profits before tax.
- iii. As corporate social responsibility has cost implications linked up with it, there is the need for the employees to become more effective and efficient in discharging their functions. By being effective and efficient the companies can be able to produce products at less cost which by extension means part of the money saved could be used in attaining responsibility issues.
- iv. Given the fact that corporate responsibility leads to profit realization management of conglomerate should ensure that the responsibility is inbuilt into their policy statements and back it up with effective budget

References

- Babalola B. (2017). Corporate social responsibility: Panacea to corporate growth. *Journal of Economics and Sustainable Development*, 5(12) 29 – 39.
- Bbattacharya, C.B and Korchun, D (2021). The value of Corporate Social Responsibility, *Journal of Business Management*. Vol. 2 . No. 5 Pg 31
- Chatterjee, S., & Yilmaz, M. (1992). A review of regression diagnostics for behavioral research. *Journal of Applied psychological measurement*, 16(3), 209-227.
- Chin, W. W. (1998). The partial least squares approach to structural equation modelling. In G. A. Marcoulides (Ed.), *Modern methods for business research* (pp. 295-336). Mahwah, New Jersey: Laurence Erlbaum Associates.

- Eboh O. S. & Uzor O. A. (2022) Corporate Social Responsibility and Organizational Performance in Nigeria. *International Journal of General Studies (IJGS)*, Vol. 2, No. 1, April-June 2022
- Fauzi S. (2019) Corporate Responsibility and Financial Performance: The Role of Intangible Resources. *Strategic Management Journal*, 31, 463-490.
- Fernando, Jason. (2022). Corporate Social Responsibility (CSR). <https://www.investopedia.com/terms/c/corp-socialresponsibility.asp>
- Fornell, C., & Larcker, D. F. (1981). Evaluating structural equation models with unobservable variables and measurement error. *Journal of marketing research*, 18(1), 39-50.
- Hair Jr, J. F., Hult, G. T. M., Ringle, C., & Sarstedt, M. (2014). *A primer on partial least squares structural equation modeling (PLS-SEM)*. London, UK: SAGE Publications, Incorporated.
- Hair, J. F., Black, W. C., Babin, B. J., & Anderson, R. (2010). *Multivariate data analysis* (7 ed.): Pearson Prentice Hall Upper Saddle River, NJ.
- Hair, J. F., Black, W. C., Babin, B. J., Anderson, R. E., & Tatham, R. L. (2012). *Multivariate data analysis* (6th ed.). Upper Saddle River, NJ Pearson Prentice Hall.
- Hair, J. F., Money, A. H., Samouel, P., & Page, M. (2013). *Research methods for business*. WestSussex: John Wiley & Sons Ltd.
- Henseler, J., Ringle, C. M., & Sarstedt, M. (2015). A new criterion for assessing discriminant validity in variance-based structural equation modeling. *Journal of the Academy of Marketing Science*, 43(1), 115-135.
- Henseler, J., Ringle, C. M., & Sinkovics, R. R. (2009). The use of partial least squares path modeling in international marketing. *Advances in International Marketing*, 20(1), 277-319.
- Jason F. (2022). Relationship between Corporate Social Responsibility (CSR) and firm performance. <https://www.investopedia.com/terms/c/corp-socialresponsibility.asp>
- Kline, R. B. (2011). *Principles and practice of structural equation modelling*. (3rd ed.). New York: Guilford Press
- Makni C. W., Francoeur, O. G. & Bellavance, A. R. (2018). Impact of corporate social responsibility on organisational effectiveness: An empirical analysis of oil and gas industry in the Niger Delta, Nigeria. *Journal of Business and Management*, 16(12), 32 - 36.
- Malik, M. S., Ali, H., & Ishfaq, A. (2018). Corporate social responsibility and organizational performance: Empirical evidence from banking sector. *Pakistan Journal of Commerce and Social Sciences*, 9(1), 241-247.

- Nalini, K. (2019). Impact of corporate social responsibility on the financial and non financial performance of select BSE listed companies. PhD Thesis in Business Management, Dr. D.Y. Patil University, Mumbai.
- Okafor F. & Oshodin, S. (2017). Corporate Social and Financial Performance: A meta Analysis. *Journal Organization Studies*, 46(9), 1437 – 1443
- Olaroye, R. T. & Tabitha, N.(2015)Effect of corporate social responsibility on performance of Manufacturing companies in Nigeria. *International Journal of Current Advanced Research*. 4 (8)228-233.
- Oluwaseyi, A. A., & Adeyemi, B. (2014). Corporate social responsibility: Panacea to corporate growth. *Journal of Economics and Sustainable Development*, 5(12) 29 – 39.
- Osisioma, H., Nzewi, H., & Nwoye, P. (2015). Corporate social responsibility and performance of selected firms in Nigeria. *IMPACT: International Journal of Research in Business Management*, 3(3), 57 - 68.
- Sarstedt, M., Hult, T., Ringle, C., & Hair, J.(2014). A Primer on Partial Least Squares Structural Equation Modeling (PLS-SEM). Thousand Oaks, CA: Sage Publications, Inc.
- Singh K. (2021) Corporate Social Responsibility (CSR) and Organizational Performance: A Study of A Local Council. *Journal of Advanced Management Science* Vol. 9, No. 2, June 2021
- Tabachnick G. B. & Fidell S. L. (2007). *Using multivariate statistics* (5th ed.). Boston, MA: Allyn & Bacon/Pearson Education.
- Tabachnick, G. B., & Fidell, S. L. (2013). *Using multivariate statistics* (5th ed.). New York: Pearson Educational Inc.
- Uadiale S. & Fagbemi S. (2020). Impact of Corporate social responsibility on Organizational Performance. *European Journal of Business and Management*. 6 (27) 40-47
- Verardi, V., & Croux, C. (2008). Robust regression in Stata. *Available at SSRN 1369144*.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LEGAL REGIME OF PRIVACY AND DATA PROTECTION OF E-COMMERCE
CONSUMERS IN NIGERIA

Muhammad Nuruddeen*

Department of Public Law, Faculty of Law, Bayero University Kano

mnuruddeen.pbl@buk.edu.ng, [08063003991](tel:08063003991)

Abstract

Given the openness and accessibility of the Internet, the protection of data and privacy has been a source of concern for Internet users. This remains a threat to e-commerce in Nigeria. Nigerian consumers who want to transact business through the Internet will want their privacies regarding data to be protected. But this is not possible. Any information fed into the Internet could be accessed anywhere in the world by other persons using the same Internet. Nigerians are always security conscious and are very careful when disclosing their personal information. Due to lack of trust, many Nigerian consumers nowadays source their information online but make purchases the traditional way. In the alternative, they place orders online but make payment upon delivery of the physical goods. They feel that the traditional way or payment upon delivery guarantees safety of their business transactions. This is not healthy to e-commerce as an emerging way of conducting commercial transaction. Section 37 of the Nigerian Constitution 1999 has guaranteed the right to privacy as one of the recognised Fundamental Rights. However, the constitution does not seem to provide a solution to the problem highlighted above. A seeming comprehensive data protection legislation was put in place in 2023 (Nigeria Data Protection Act, 2023) and same does not seem offer solution too. It is against this background that this paper explores doctrinal research methodology to examine the legal regime protecting the data and privacy of electronic consumers in Nigeria with view to proffering formidable recommendations that will aid in coming up with a better and more comprehensive legal regime that will ensure adequate protection of e-consumers' privacy and data capable of harnessing the development in the area of e-commerce in the country.

Keywords: E-commerce, Data, Privacy, Consumer, Legal, Regime and Nigeria

1.1 Introduction

The success of e-commerce depends on factors such as the legal and institutional frameworks established to ensure that the rights of e-consumers are adequately protected.¹²⁷⁵ It is believed that this will boost consumer confidence and trust in all the

* LL.B, LL. M (BUK); LL. M (ABU); BL (Enugu); PhD (UUM).

transactions he/she wishes to conduct via the Internet.¹²⁷⁶ Legal and institutional frameworks are needed the world over to tackle issues bedevilling e-commerce such as data and privacy protection, unfair trade practices, cybercrime, trans-border disputes among other things.¹²⁷⁷ The UN had since enjoined its member countries, Nigeria inclusive to enact laws and establish institutions that will protect the interest of public who use the Internet as a medium of conducting commercial transactions.¹²⁷⁸ Thus, keeping pace with the legal challenges brought by the breakthrough in the modern day technology generally and e-commerce in particular.¹²⁷⁹

Regrettably, in Nigeria, significant efforts at the regulation of related e-commerce activities are still at the stage of draft bills before the Nigerian National Assembly.¹²⁸⁰ Studies on e-commerce in Nigeria support the conclusion that the Nigerian legal system lags behind the ICT based legislation and that the existing statutory laws are quite inadequate to address legal issues affecting e-commerce transactions.¹²⁸¹ For instance, an investigation revealed that at the moment, there seems to exist inadequate legislation in the country targeted at regulating e-commerce.¹²⁸² This is the case both for consumer rights protection and issues relating to data protection and privacy invasion resulting from unauthorised use of personal information.¹²⁸³ Perhaps, that is why many consumers nowadays source for information online but make purchases the traditional

¹²⁷⁵ Ahmad Alhusban, "The Importance of Consumer Protection for the Development of Electronic Commerce : The Need for Reform in Jordan" (PhD. diss., University of Portsmouth, 2014), 15.

¹²⁷⁶ Ibid.

¹²⁷⁷ Akomolede, (2008): 4.

¹²⁷⁸ Ibid.

¹²⁷⁹ Kamal Halili Hassan, "E-Commerce and Consumer Protection in Malaysia : Advertisement and False Description," in *2012 International Conference on Economics and Finance Research*, vol. 32, 2012, 45–48; Putra, (2013); Zuryati Mohamed Yusoff, "The Malaysian Personal Data Protection Act 2010: A Legislation Note.," *New Zealand Journal of Public and International Law* 9, no. 1 (2011): 119.

¹²⁸⁰ Bernard Oluwafemi Jemilohun and Timothy Ifedayo Akomolede, "Regulations or Legislation for Data Protection in Nigeria? A Call for a Clear Legislative Framework," *Global Journal of Politics and Law Research* 3, no. 4 (2015): 3.

¹²⁸¹ Jonah Nwokpoku, "Nigeria Needs Legislation on E-Commerce - Vanguard News," last modified 2014, accessed September 8, 2017, <http://www.vanguardngr.com/2014/12/nigeria-needs-legislation-e-commerce/>; Bamodu, (2004): 17; Akomolede, (2008): 1, 17–18.

¹²⁸² Edesiri G Okoro and Promise E Kigho, "The Problems and Prospects of E-Transaction (The Nigerian Perspective)," *Journal of Research in International Business Management* 3, no. 1 (2013): 12.

¹²⁸³ Jonah Nwokpoku, "E-Commerce: Nigerians Decry Dearth of Legislations - Vanguard News," last modified 2015, accessed September 7, 2017, <http://www.vanguardngr.com/2015/01/e-commerce-nigerians-decry-dearth-legislations/>.

way or place orders online but make payment upon delivery of the physical goods.¹²⁸⁴ They feel that the traditional way guarantees the privacy and safety of their business transactions.¹²⁸⁵ Hence, e-commerce stakeholders are hitherto agitating and crying for a comprehensive legal and institutional frameworks that will adequately protect them in online commercial activities. It is believed that doing this will aid the orderly conduct of electronic transactions in a manner that is fair especially to the consumers.¹²⁸⁶ It is against this background that this paper makes a modest attempt to analyse the legal regime for the protection of privacy and data of those who engage in commercial transactions using the internet otherwise referred to in this paper as “electronic commerce consumers or simply e-consumers.” The paper is divided into four different but inter-related segments. The first segment contains introduction while the second contains definition of key terms and concepts. The third segment focuses on an analysis of the legal regime of the protection of privacy and data of e-consumers and the fourth is the final one which contains recommendations and conclusion.

1.2 Clarification of Key Terms

Before delving into a legal analysis of the Nigerian legislation dealing with privacy and data protection of e-consumers, it is imperative from the onset to appreciate the meaning of some key terms and phrases relevant to this paper, such as e-commerce, consumer, e-consumer, privacy and data.

1.2.1 Electronic Commerce

The term “electronic commerce (e-commerce)” has no specific definition.¹²⁸⁷ Thus, scholars, judges and businesses made efforts to define the term from different perspectives. Akintola *et al.*, for instance, defined e-commerce as buying and selling of

¹²⁸⁴ Okoro and Kigho, (2013): 11-13.; United Nations, “E-Business Primer,” in *Compliance with Information and Communication Technology-Related Multilateral Frameworks: Information Technology Enabling Legal Framework for the Greater Merong Subregion* (New York: United Nations Publication, 2004), 127.

¹²⁸⁵ Okoro and Kigho, (2013): 13.

¹²⁸⁶ Peter Ugwu, “E-Commerce Firms Must Look Beyond E-Transaction Bill- Supermart.ng | Nigeria CommunicationsWeek,” last modified 2015, accessed September 7, 2017, <http://www.nigeriacommunicationsweek.com.ng/news/e-commerce-firms-must-look-beyond-e-transaction-bill-supermartng>.

¹²⁸⁷ OECD, *Report on Electronic Commerce: Opportunities and Challenges for Government*, 1997, 20.

products or services electronically via the Internet and other computer networks.¹²⁸⁸ Also, Khairi defined e-commerce as a business where traders use the Internet as a means of promoting and selling products and services for consumers the world over.¹²⁸⁹ Here, it is the Internet that allows direct communication between an electronic trader (e-trader or e-merchant) and electronic buyer (e-buyer or e-consumer) without any physical contact.¹²⁹⁰ On the contrary, Bali opined that every time services are rendered and paid for on the Internet, it is e-commerce.¹²⁹¹ Thus, for the purpose of this paper “e-commerce” means transactions that involve buying and selling of goods and services with the aid of the Internet. However, this paper focuses on buying and selling via the websites of e-traders or e-merchants.

1.2.2 Consumer

According to Kanyip, the word “consumer” is generic, and so it is of broad generalisation.¹²⁹² Kanyip further opined that the word “consumer” encompasses different categories of persons.¹²⁹³ Therefore, a consumer comprises of all end users of goods and services. This includes the user of electricity, the hirer, the hotel guest, the bank customer and the insured or policyholder.¹²⁹⁴ Section 32 of the Repealed CPC Act 1992¹²⁹⁵ defined a consumer as an individual who purchases, uses, maintains or disposes of goods or services.¹²⁹⁶ Monye *et al.* opine that the use of the word “individual” in this

¹²⁸⁸ Akintola, *et al.*, (2011): 331.

¹²⁸⁹ Quoted by Omar and Anas, (2014): 292.

¹²⁹⁰ *Ibid.*

¹²⁹¹ Bali, (2004), 121.

¹²⁹² B. B. Kanyip, “Protecting the Rights and Interest of Consumers,” in *Seminar for Judges on Regulation in the Power Sector* (Kaduna, Nigeria, 2010). Kanyip was also quoted by Steven Andzenge, “Regulatory Measures and Consumer Issues in Electricity Consumption,” in *Law and Principles of Consumer Protection*, ed. Adedeji Adekunle and Shankyula Tersoo Samuel (Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies, 2013), 302–304.

¹²⁹³ *Ibid.*

¹²⁹⁴ *Ibid.*, 303–304.

¹²⁹⁵ CPC Act has now been repealed by Section 165 of the *Federal Competition and Consumer Protection Commission Act, 2018* which also defined a consumer to “include any person who purchases or offers to purchase goods otherwise than for the purpose of resale...” See also. Nuruddeen Muhammad, “Access to Justice by Electronic Commerce Consumers (*E-consumers*) through the *Federal Competition and Consumer Protection Commission*” *NIALS Journal of Business Law*, Vol. 4 (2021): 148-182.

¹²⁹⁶ Janet M. Asagh, “Consumer Protection and Telecommunications Services in Nigeria: Regulatory and Policy Issues,” in *Law and Principles of Consumer Protection*, ed. Adedeji Adekunle and Shankyula Tersoo Samuel (Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies, 2013), 279; F.O. Ukwueze, “Protection of Consumers of Financial Service in Nigeria: A Review,” *Consumer Journal* 2, no. 1 (2006): 108–144.

definition did not bar an action by a group or class of individuals.¹²⁹⁷ Put differently, group or class of individual consumers can be accommodated within the meaning of a “consumer” under the CPC Act. However, in the context of this paper, the word “consumer” means a purchaser of goods and services electronically via the Internet or website. Otherwise referred to and interchangeably used in this paper as “e-commerce consumer” or “electronic consumer (e-consumer).”

1.2.3 E-consumer

According to Amin and Mohd Nor, an e-consumer is any person who engages in commercial transactions via the Internet.¹²⁹⁸ Ilobinso argued that there is no much difference between an e-consumer and ordinary consumer.¹²⁹⁹ The only difference is the mode through which they make purchases.¹³⁰⁰ The e-consumer uses electronic means such as the Internet while the ordinary consumer uses the conventional markets.

1.2.4 Data

Data is defined as basic facts (numbers, digits, words, and characters) fed into a computer system to be stored and processed for a specific purpose.¹³⁰¹ Section 58 of the *Nigerian Cybercrimes Act 2015* defines “Data” to mean “representation of information or concepts that are being prepared or have been prepared in a form suitable for use in a computer.” When data is processed, organised, structured or presented in a given context to make it useful, it is called information.¹³⁰² Hence, data and information in a computer are closely related. The two are sometimes used interchangeably.

Consequently, where information or data stored in a computer concerns someone, then it becomes a personal data or information. Personal data here refers any information

¹²⁹⁷ Felicia Monye, et al., *Research Report on the State of Consumer Protection in Nigeria : A Review of Consumer Protection in the Telecommunications Sectors in Nigeria* (Nigeria, 2014), 10.

¹²⁹⁸ Amin and Mohd Nor, (2013): 79.

¹²⁹⁹ Ihuoma Kelechi Ilobinso, “Consumer Protection in the Context of Electronic Commerce: A Nigerian Perspective,” in *Faculty of Law Seminar Series* (Lagos, Nigeria: Faculty of Law, University of Lagos, 2015), 6.

¹³⁰⁰ Ibid.

¹³⁰¹ Isaac A., *Oxford Dictionary for International Business* (New York: Oxford University Press Inc., 1998), 213.

¹³⁰² F. Gilbert, “Data vs Information - Difference and Comparison | Diffen,” *Fraciose Gilbert on Privacy, Security And, Coud Computing*, last modified 2014, accessed January 11, 2017, http://www.diffen.com/difference/Data_vs_Information.

relating to an individual, who can be identified or is identifiable, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, psychological, cultural, social, or economic identity of that individual.¹³⁰³

It is trite that personal data or information in the hands of private and/or public organisations must be used and respected. Personal data or information covers a broad range of information concerning a particular individual. It includes data about someone's identity, health and financial records. It is important to note that, personal data within the context of this paper refers to the information of persons who use the internet to conduct commercial transactions.

1.2.5 Privacy

The word privacy is elastic and difficult to define.¹³⁰⁴ Privacy is described as the condition of being away from the presence or scrutiny of others.¹³⁰⁵ Perhaps, this is what Warren and Brandeis referred to it as one's right "to be let alone" and "to be free from unwarranted publicity."¹³⁰⁶ Privacy is also defined to mean none interference into one's private sphere of life.¹³⁰⁷ Islamically, privacy includes *inter alia* the right to keep all personal information confidential free from all sorts of interference.¹³⁰⁸ Interference with one's privacy can take many forms. It can take the form of misuse of personal information, illegal intrusion into one's home, photography, telephone line or e-mail box.¹³⁰⁹ Privacy is lost where there is any form of illegal interference into one's personal

¹³⁰³ Section 65 of the *Nigeria Data Protection Act, 2023*.

¹³⁰⁴ Daniel J Solove, "Conceptualizing Privacy," *California Law Review* 90, no. 4 (2002): 1088; Iheanyi Samuel Nwankwo, "Information Privacy in Nigeria," in *African Data Privacy Laws: Law, Governance and Technology Series (Volume 33)*, ed. Alex B. Makulilo (Cham, Switzerland, 2016), 47.

¹³⁰⁵ Zuryati Mohamed Yusoff, "Protection of Privacy in Malaysia: A Law for the Future" (PhD. diss., Victoria University of Wellington, 2014), 31–32.

¹³⁰⁶ SD Warren and LD Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 195; *The Black's Law Dictionary, Edition*, 6th ed., 1990, 1195.

¹³⁰⁷ Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, 2nd ed. (Oxford University Press, 2009), 1005.

¹³⁰⁸ Mohamed Berween, "The Fundamental Human Rights: An Islamic Perspective The International Journal of Human Rights," *The International Journal of Human Rights* 6, no. 1 (2002): 72.

¹³⁰⁹ Clayton and Tomlinson, (2009): 1005; Kunbei Zhang and Aernout H J Schmidt, "Thinking of Data Protection Law's Subject Matter as a Complex Adaptive System: A Heuristic Display," *Computer Law and Security Review* 31, no. 2 (2015): 202.

sphere of life.¹³¹⁰ For example, under Islamic law, it is strictly prohibited to enter into another person's house or premises without permission.¹³¹¹ This prohibition is contained in *Suratun Noor* (24), verse 27, where Allah (SWA) said:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْذِنُوا وَتُسَلِّمُوا
عَلَىٰ أَهْلِهَا ذَٰلِكُمْ خَيْرٌ لَّكُمْ لَعَلَّكُمْ تَذَكَّرُونَ ﴿٢٧﴾

“O ye who believe! Enter not houses other than your own, until ye have asked permission and saluted those in them. That is best for you; perhaps, you will be reminded.”¹³¹²

Therefore, any person who enters into another person's house without permission and salutation is said to have illegally interfered with the privacy of another. But it is important to note that privacy is not lost where the interference is allowed by the law or voluntarily consented by the affected individual.¹³¹³ Thus, privacy includes the right to selective disclosure about a given individual's personal information.¹³¹⁴ In other words, a person has a right to decide what, when and to whom his/her information may be revealed to or sensed¹³¹⁵ by others.¹³¹⁶

1.2.3 Privacy, Data and Human Rights Law

Under the human rights law, privacy is an inalienable right that inheres in all humans. Scholars consider privacy as the touchstone of all human rights. Privacy supports other values (rights) essential for life to flourish.¹³¹⁷ Therefore, right to privacy gains

¹³¹⁰ Ibid., 212.

¹³¹¹ MA Hayat, “Privacy and Islam: From the Quran to Data Protection in Pakistan,” *Information and Communications Technology Law*, no. 2 (2007): 137.

¹³¹² Abdullah Yusuf Ali, *The Holy Quran: Text, Translation and Commentary* (USA: Amana Corporation, 1989).

¹³¹³ Between, (2002): 61–72.

¹³¹⁴ Elizabeth Beardsley, “Privacy: Autonomy and Selective Disclosure,” in *Privacy and Personality*, ed. JR Pennock and JW Chapmans (USA: Transaction Publishers, 1971), 65.

¹³¹⁵ Meaning by the five sense organs of human beings. That is, the eye, ear, skin, nose and tongue. Yusoff, (2014), 38.

¹³¹⁶ Richard B Parker, “A Definition of Privacy,” *Rutgers Law Rev* 27 (1974): 280; Beardsley, (1971), 65.

¹³¹⁷ NA Moreham, “Why Is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort,” in *Law, Liberty and Legislation*, ed. Jeremy Finn and Stephen Todd (Newzealand: LexisNexis NZ Limited, 2008), 238.

recognition under the international, regional and domestic legal instruments.¹³¹⁸ For example, Article 12 of the *Universal Declaration of Human Rights (UDHR) 1948* provides thus:

*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 or attacks.*¹³¹⁹

Although the UDHR was adopted in 1948, it remains relevant in the current 21st Century.¹³²⁰ The UDHR is claimed to be a powerful tool for the fight against the affront to human dignity and privacy.¹³²¹ The UDHR guarantees other rights to which every person is equally and inalienably entitled to.¹³²² From the wordings of the UDHR, privacy is an absolute right. Meaning, the right to privacy of a person cannot be derogated from or denied.

The *European Convention on Human Rights (ECHR) 1950* stipulates the circumstances under which a person can be denied his/her right to privacy.¹³²³ According to Article 8 (2) of the ECHR, denial of the right to privacy is justified if stipulated by law or on the grounds of national security or to protect the rights of others.¹³²⁴ Equally, denial of privacy right is justified where a person *suo motu* waives its encroachment by others. Put together, data or privacy protection entails all legal, technical, administrative and physical measures to guard against unauthorised access to personal life, data or information.¹³²⁵

¹³¹⁸ Some of these legal instruments include the following: The United Nations, *International Covenant on Civil and Political Rights (ICCPR) 1966* (United Nations: Vol. 999, I-14668, 1966); The Council of Europe, *European Convention on Human Rights 1950 (as Amended)*, *International and Comparative Law Quarterly* (Rome, 4.XI.1950, 2010); Organisation of African Unity, *African Charter on Human and Peoples' Rights 1981* (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1986); *Personal Information Protection Act (as Amended) 2014* (Korea: Act No.12504, 2014).

¹³¹⁹ United Nations, *Universal Declaration of Human Rights 1948* (United Nations: UNGA Resolution 217 A (III), 1948), 4.

¹³²⁰ *Ibid.*

¹³²¹ *Ibid.*

¹³²² *Ibid.*

¹³²³ Article 8 (1) and (2), The Council of Europe, *European Convention on Human Rights 1950 (as Amended)*, *International and Comparative Law Quarterly* (Rome, 4.XI.1950, 2010).

¹³²⁴ The Council of Europe, *European Convention on Human Rights 1950 (as Amended)*, 11.

¹³²⁵ Franklin F Akinsuyi, "Data Protection Legislation for Nigeria: The Time Is Near," *Nigerian Economic Summit Group Economic Indicators* 13, no. 3 (2007): 32.

Thus, data and/or privacy protection in the context of this paper means the rules that are designed to protect the personal information of the Nigerian e-consumers against all forms of misuse and interference.¹³²⁶ Equally, it extends to the rules and practices regarding collection, use and processing of personal information of the e-consumers in Nigeria.¹³²⁷ Such personal information worthy of protection in online transactions includes sensitive information like credit card data, phone numbers, and addresses of the e-consumers.¹³²⁸

1.3 Analysing the Legal Regime for the Protection of Privacy and Data of E-consumers in Nigeria

Laws dealing with privacy and data protection in Nigeria are not contained in a single legal document. Privacy and data protection provisions could be found in some selected Nigerian legislation.¹³²⁹ The legislation includes the *Constitution of the Federal Republic of Nigeria 1999*, the *Freedom of Information Act of 2011*, the *Cybercrimes Act of 2015* and the *National Data Protection Regulation 2019 (NDPR) and the NDPR Implementation Framework 2020*, and *Nigeria Data Protection Act, 2023*. Hence, this paper will exert effort to analyse the said legislation with a view to finding out the extent to which they offer protection to e-commerce consumers in Nigeria.

1.3.1 Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria 1999 (the Constitution) is the *grundnorm*, *fons et origo* and the most authentic source of legitimacy in the country.¹³³⁰

¹³²⁶ Data protection or privacy protection are used interchangeably. Some countries such as the US and Japan called rules governing data/privacy protection as “privacy rules.” Whereas other countries such as Malaysia, Singapore, Taiwan, and Morocco call such rules as “data protection rules.” But the [Philippines](#) law is unique because it combines the two and is called “Data Privacy Act.” Therefore, Gilbert is of the view that data protection and privacy protection have the same meaning. He further said that it all depends on countries and sometimes the geographical location of the countries as well. F. Gilbert, “Data vs Information - Difference and Comparison | Diffen,” *Fraciose Gilbert on Privacy, Security And, Cloud Computing*, last modified 2014, accessed January 11, 2017, http://www.diffen.com/difference/Data_vs_Information.

¹³²⁷ Gilbert, (2014).

¹³²⁸ Deborah Enadeghe, “Comparative Analysis of the Applicable Legal Protection for Purchasers on the Internet, in Europe & USA- Lessons for Nigeria” (LL.M. thesis, Central European University Budapest, 2013), 8.

¹³²⁹ Nwankwo, (2016), 45.

¹³³⁰ Ogugua V. C. Ikpeze, “Constitutionalism and Development in Nigeria: The 1999 Constitution and Role of Lawyers,” *JILJ* 1, no. 1 (2010): 228; Jacob Abiodun Dada, “Human Rights under the Nigerian Constitution: Issues and Problems,” *International Journal of Humanities and Social Science* 2, no. 12 (2012): 43; Nwankwo, (2016), 46.

Meaning, the Nigerian Constitution is the supreme law of the land through which all persons and authorities derive their rights and obligations.¹³³¹ There is the supremacy clause which has been retained in all the Nigerian Constitutions from independence period till date.¹³³² Here, supremacy signifies that all the Nigerian legal norms (statutes) including customary laws must conform to the provisions of the Constitution.¹³³³ The supremacy also signifies that any legal norm that does not conform to the constitution is null and void to the extent of its inconsistency.¹³³⁴ In essence, the Constitution remains binding on all persons and authorities throughout Nigeria. In *Alhaji Karimu Adisa v. Emmanuel Oyinwola and Others* (2000) 10 NWLR (Pt. 674) 116 at 191, the court reiterated this principle, where it held:

It is both a fundamental and elementary principle of our law that the Constitution is the basic law of the land. It is the supreme law, and its provisions have binding force on all authorities, institutions and persons throughout the country...The Constitution being the supreme law of the land, stands above other enactments, statutes or laws. Its provisions cannot be made subject to any other Act or enactment except by direct and clear provisions of the Constitution to that effect. (bold added).

Chapter IV of the Constitution contains the fundamental rights of people in Nigeria.¹³³⁵ Chapter IV, Section 37 of the Constitution recognises the right to privacy as a

¹³³¹ T A Olaiya, "Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria," *Journal of Politics and Law* 8, no. 3 (2015): 24; Mamman Lawan, "Islamic Law and Legal Hybridity in Nigeria," *Journal of African Law* 58, no. 2 (2014): 316.

¹³³² Nigeria got its independence from the British Colonial Masters on the 1st of October 1960. Since then Nigerian has been having different versions of Constitutions. Each of the versions of the Constitutions has a supremacy section. Section 1 of the 1960 Constitution, Section 1 of the 1963 Constitution, Section 1 of the 1979 Constitution and Section 1 of the 1999 Constitution respectivel. Lawan (2014): 316.

¹³³³ Ikpeze, (2010): 228.

¹³³⁴ Section 1 of *The Constitution of the Federal Republic of Nigeria 1999* (Nigeria: Cap C23, Vol. 3, LFN 2004, 1999); Lawan, (2014): 316; *FRN v. Ifegwu* (2003) FWLR (Pt. 167) 703; *A.G. Fed. v. Abubakar* (2007) All FWLR (Pt. 37) 1264.

¹³³⁵ The Fundamental Rights enshrined under the Chapter include: The right to life (Section 33), Right to dignity of human persons (Section 34), Right to personal liberty (Section 35), Right to fair hearing (Section 36), Right to private and family life (Section 37), Right to freedom of thought, conscience and religion, (Section 38), Right to freedom of expression and the press (Section 39), Right to peaceful assembly and association (Section 40), Right to freedom of movement (Section 41), Right to freedom from discrimination (Section 42), Right to acquire and own immovable property (Section 43). These rights are held sacred and cannot be derogated from except as provided by the Constitution. For example, the rights can be restricted or denied "in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons" (Section 45). The Constitution further provides a mechanism for redress in the event of illegal encroachment upon all the rights guaranteed under the Chapter. This is to the effect that if "any person alleges that *any of his right contained* in the provisions of the Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress" (Section 46).

fundamental right in Nigeria.¹³³⁶ The Section provides: “the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.”¹³³⁷

An Assistant Chief Legal Draftsman (ACLD) at the National Assembly while responding to an interview¹³³⁸ states that going by this provision, the Constitution accords privacy to citizens. The ACLD further said that citizens have the freedom to have a private life, to be protected from their telephone conversations being tapped and things like that. According to ACL, this is the extent to which the Constitution can go as far as the right to privacy is concerned.¹³³⁹

Hence, one could be right to say that this 17-letter-word provision is not and cannot be sufficient enough to guarantee the privacy right of Nigerians. Alex is of the view that the provisions of the Constitution as quoted above are grossly inadequate to protect the privacy rights of citizens, e-consumers in particular.¹³⁴⁰ For instance, the Constitution is even silent about the definition of the word “privacy.” In other words, the meaning of the word “privacy” could not be found either under Section 37 or anywhere within the Constitution. The definition of privacy is paramount, since the word is subject to so many interpretations.¹³⁴¹

Moreover, a careful study of the provisions of Section 37 of the Constitution reveal that the right to privacy is guaranteed to citizens only.¹³⁴² This shows that the Constitution is

¹³³⁶ Tiwalade Adelola, *et al.*, “Privacy and Data Protection in E-Commerce: The Effectiveness of a Government Regulation Approach in Developing Nations, Using Nigeria as a Case,” in *The 9th International Conference for Internet and Secured Transactions (ICITST) 8th-10th December, 2014* (London, 2014), 235.

¹³³⁷ *The Constitution of the Federal Republic of Nigeria 1999* (Nigeria: Cap C23 LFN 2004, 1999); Bolande Eniola, “A Reflection on the Legal Framework for the Protection of the Reproductive Health Rights of Women in Nigeria,” *Bayero Journal of Private and Commercial Law (BJPCL)* 2, no. 2 (October) (2016): 147.

¹³³⁸ R3 is the Assistant Chief Legal Draftsman at the National Assembly, Abuja, Nigeria. The interview was conducted in her office at Legal Services Directorate, Drafting Department. The date of the interview with her was 30th May 2016.

¹³³⁹ Bernard Oluwafemi Jemilohun and Timothy Ifedayo Akomolede, “Regulations or Legislation for Data Protection in Nigeria? A Call for a Clear Legislative Framework,” *Global Journal of Politics and Law Research* 3, no. 4 (2015): 2.

¹³⁴⁰ Alex B. Makulilo, “The Context of Data Privacy in Africa,” in *African Data Privacy Laws: Law, Governance and Technology Series (Volume 33)*, ed. Alex B. Makulilo (Cham, Switzerland, 2016), 4.

¹³⁴¹ Solove, (2002): 1088; Ufuoma Akpojivi, “Rethinking Information Privacy in a Connected World,” in *Media Law, Ethics, and Policy in the Digital Age*, ed. Nhamo A. Mhiripiri and T. Chari (IGI Global, 2017), 279; Nwankwo, (2016), 47.

¹³⁴² The definition of a Nigerian citizen is provided under Constitution 1999 as : (a) any person born in Nigeria before the date of independence (1st October 1960), either of whose parents or any of whose grand-parents belongs

discriminatory.¹³⁴³ The implication of Section 37 of the Constitution is that the privacy of non-citizens who are residing or conducting businesses is not guaranteed in the country.

It suffices to say that this discriminatory position taken by the Nigerian Constitution goes contrary to the ideas of the Roman and Greek Philosophers of the Stoic School.¹³⁴⁴ According to these philosophers, fundamental rights such as the right to privacy belongs to all humans.¹³⁴⁵ They further argued that such rights do not only apply to citizens of a given state but rather to everybody and everywhere.¹³⁴⁶ This idea was also ascribed to by other renowned philosophers like John Locke, Jean-Jacques Rousseau and Thomas Hobbs.¹³⁴⁷

Furthermore, the plain wordings of Section 37 of the Constitution clearly suggest that the privacy of online consumer is not explicitly covered in the Constitution. The Constitution clearly refers to privacy concerning telephone and telegraphic¹³⁴⁸ communications only.¹³⁴⁹ It does not refer to privacy of communications via the Internet. On the contrary, the DLA PIPER believes that the right to privacy under Section 37 of the Constitution extends to privacy in an online environment.¹³⁵⁰ But this perception

or belonged to a community indigenous to Nigeria, is a citizen of the country; (b) every person born in Nigeria after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria; and (c) every person born outside Nigeria either of whose parents is a citizen of Nigeria. This is the definition of citizen by birth. However, the Constitution still recognises citizenship by registration, naturalization, dual and deemed citizenship. Sections 25, 26, 27, 28 and 31 of *The Constitution of the Federal Republic of Nigeria 1999*. Oladiran Afolabi, "Migration and Citizenship Question in Nigeria: A Study of the Berom and Hausa / Fulani Conflict in Jos," *African Journal of Political Science and International Relations* 10, no. 2 (2016): 10.

¹³⁴³ Dada, (2012): 10.

¹³⁴⁴ Cited by A. B. Ahmed, "A Critical Appraisal of the Legal Regime on the Rights of the Child in Nigeria" (PhD. diss., Bayero University Kano, Nigeria, 2008), 19.

¹³⁴⁵ Ibid.

¹³⁴⁶ Ibid.

¹³⁴⁷ Ibid.

¹³⁴⁸ Section 37 of the *The Constitution of the Federal Republic of Nigeria 1999*.

¹³⁴⁹ Perhaps, that is why Nwauche argued that this could lead to so many interpretations. More so, the Constitution provides a general right to privacy but restricts it to only five issues enumerated by the section. E.S Nwauche, "The Right to Privacy in Nigeria," *Centre for African Legal Studies (CALS) Review of Nigerian Law and Practice* 1, no. 1 (2007): 84; Nwankwo, (2016), 54. But the Nigerian Supreme Court in *MDP Disciplinary Tribunal v. Okonkwo* (2001) 3 SC 76, gives the right to privacy another interpretation. The court held that the right to privacy implies a right to protect one's thought, conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorised invasion. This clearly shows that there is lack of clarity as to what constitutes the right to privacy in Nigeria.

¹³⁵⁰ DLA PIPER, "Data Protection Laws of the World | Nigeria," 6, last modified 2016, accessed January 13, 2017, <https://www.dlapiperdataprotection.com/system/modules/za.co.heliosdesign.dla.lotw/functions/export.pdf?count=ry=all>.

appears to be faulty particularly looking at the historical antecedent of Section 37 and the entire Constitution.

As of fact, Section 37 is a *verbatim* reproduction of Section 34 of the *Constitution of the Federal Republic of Nigeria 1979*.¹³⁵¹ Apparently, the 1979 Constitution was enacted without the Internet or e-commerce in mind. This is because the Internet or e-commerce was only known and utilised in Nigeria in the mid-1990s.¹³⁵² Therefore, the privacy of e-consumers was not contemplated by the 1979 and the 1999 Constitutions by extension. It is against this background, Akpojivi argued that the provisions of Section 37 of the 1999 Constitution “are too simplistic and vague” in the current ICT era. Akpojivi further said that the Constitution does not reflect the changing dynamics of the modern societies, communications and businesses such as e-commerce.¹³⁵³ The views of the above scholars do not seem to be contrary to what the researcher was able to gather from the field. For example, one professor of law who specialises in the area¹³⁵⁴ of this paper says:

The idea is that, when you talk about privacy, we have adequate privacy laws in the Constitution. The Constitution guarantees the right to privacy. So, if you want to use it as an anchor, you can use it. But the Constitution is omnibus. It does not go very specific to details. So, if you argue that a person has a right to privacy, including extending it to data, you are right. But when you come to specifics of data protection, you will see that the Constitution might give room for multiple interpretations. And then ones you hit that rock, you are going to have difficulty with actually isolating the issues you want in data/privacy. This is why I feel while the Constitution is there, we have a Constitutional provision, and I still want to see a very specific law in the area of data protection. Particularly as it affects e-commerce.

Additionally, the learned Professor gave his general remarks on the adequacy of the Nigerian law dealing with privacy and data protection in the context of e-commerce, in the following words:

¹³⁵¹ Dada, (2012): 4; Nwauche, (2007): 64.

¹³⁵² The issue was discussed under Chapter Two of this study. Anthony Idigbe, “Legal and Institutional Framework for E-Commerce in Nigeria” (Lagos, Nigeria, 2010), 4.

¹³⁵³ Akpojivi, (2017), 276.

¹³⁵⁴ The interview was conducted on 16th May 2016, in his office at Faculty of Law, Usman Dan Fodio University Sokoto, Nigeria.

As far as the area of e-commerce is concerned, there is no specific legislation dealing with data protection. This is one of the main drawbacks in the area. Because you need a legal framework to be able to guide the practice of whatever you intend to do. The difficulty that we are going to face is that when issues of data/privacy protection are challenged in a court of law, it will be very difficult to anchor them on the existing legal framework. Because there is a radical departure from what is in practice today and the digital perspective to it. My opinion is that the Nigerian law on privacy and data protection, at the moment is inadequate.

Abubakar and Adebayo are of the firm view that Section 37 is grossly inadequate to cater for the challenges of the modern-day technology.¹³⁵⁵ Hence, they recommended a separate law that will govern the protection of personal data which takes into consideration the enormous issues and complexities of processing personal data in Nigeria.¹³⁵⁶ Additionally, Director Legal Drafting¹³⁵⁷ at the National Assembly, Abuja, while responding to a question, has this to say:

*The issue of privacy and data protection as far as Nigerian law (**the Constitution in particular**) is concerned, I can say is not adequate. Because if you look at the Nigerian statutes and particularly the relevant laws (**e.g. the Constitution**) that deal with data and privacy protection, you will discover that it is an old law, it is no longer functioning. Particularly if you observe the modern trend of what is happening now based on science and technological development and modern activities (**like e-commerce**). (bold added).*

It is important to note that the Amended Turkish Constitution (ATC) guarantees to all citizens, additional rights relating to their data.¹³⁵⁸ At the moment, the ATC makes explicit provisions regarding consent, limitation to use, access and correction of personal data in the country.¹³⁵⁹ Similarly, the South African Constitution (SAC) was drafted in such a way that its privacy provisions meet the standards of the OECD Guidelines for e-commerce.¹³⁶⁰ The SAC deals with the general issues regarding personal information security, uses and communications including online communications.¹³⁶¹ Moreover, South Africa has incorporated the OECD Guidelines regarding data

¹³⁵⁵ Aliyu Sanni Abubakar and Francis Ojo Adebayo, "Analysis of Electronic Transactions Bill in Nigeria: Issues and Prospects," *Mediterranean Journal of Social Sciences* 5, no. 2 (2014): 218.

¹³⁵⁶ *Ibid.*

¹³⁵⁷ The interview was conducted on 31st May 2016, at Legal Services Directorate, Drafting Department.

¹³⁵⁸ *Ibid.*

¹³⁵⁹ *Ibid.*

¹³⁶⁰ Section 14 of the *Constitution of the Republic of South Africa 1996* (South Africa: Law No. 108, 1996).

¹³⁶¹ Akpojivi, (2017), 274.

protection of e-consumers under a distinct law.¹³⁶² That is Sections 50 and 51 of the *Electronic Communication and Transaction Act of 2002*.¹³⁶³ Therefore, the practice in Turkey and South Africa is worthy of emulation.

Assuming the Nigerian Constitution contemplates the right to privacy of e-consumers, then such right is attached to the interests of defence, public safety, public order, or public health” among others.¹³⁶⁴ Regrettably, the Constitution does not provide meanings of these expressions.¹³⁶⁵ This lacuna may likely inhibit the e-consumers from full enjoyment of their right to privacy on the cyberspace.¹³⁶⁶ Although, the restrictive exercise of the right to privacy and/or data protection is recognised under international law and even in the developed nations. It was, however, argued that such restrictions should be limited and clearly defined by the law.¹³⁶⁷ Otherwise, the right will just become a sham.

Accordingly, the Constitution provides that the breach of a person’s right to privacy entitles such person to file an action before a high court for remedy.¹³⁶⁸ Unfortunately, the Nigeria judicial system is characterised by the high cost of litigation as well as prolonged litigation period.¹³⁶⁹ Given the highlighted problems, it could be argued that the protection or redress mechanism offered by the Constitution may not be favourable to a Nigerian e-consumer.

1.3.2 Freedom of Information Act, 2011

¹³⁶² For example, an e-trader is not permitted by law to use, collected, disclose the personal data of an e-consumer without his/her consent or as required law. So also, the e-trader is not permitted to electronically request, collect, collate, process or store personal information on an e-consumer which is not necessary for the lawful purpose for which the personal information is required. Section 52 of the *Electronic Communication and Transaction Act of 2002* (South Africa: Act 25, 2011).

¹³⁶³ Ibid.

¹³⁶⁴ Section 45 of *The Constitution of the Federal Republic of Nigeria 1999*.

¹³⁶⁵ Dada, (2012): 41.

¹³⁶⁶ Ibid.

¹³⁶⁷ Ibid., 43.

¹³⁶⁸ Section 46 (1) of the Constitution provides that any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress. They interpreted “High court” in this section to include the Federal Hight Court. *Grace Jack v. University of Agriculture Makurdi* (2004) 5 NWLR (Pt. 865) 208; B. A. Haruna, “An Analysis of the Fundamental Rights Enforcement Instruments in Nigeria: Past and Present,” *Bayero University Journal of Public Law (BUJPL)* 2, no. 1 (2010): 1–7; Ojo Oluwaseun Viyon, “An X-Ray of Nigeria’s Cybercrimes Act 2015 Vis-a-Vis the Right to Privacy,” *The Lawyers Chronicle* (Jos, Nigeria, 2016), 3.

¹³⁶⁹ Akpojivi, (2017), 280.

Besides the Constitution, the *Nigerian Freedom of Information (FOIA) 2011*¹³⁷⁰ contains provisions dealing with privacy protection in the country. The FOIA was enacted to make public records and information available to every person regardless of gender or nationality.¹³⁷¹ Thus, unlike the provisions of Constitution dealing with privacy, the FOIA entrenches the principle of equality and non-discrimination. The right to access information under the FOIA is guaranteed to all irrespective of gender or nationality.¹³⁷² This is established under Section 1(1) of the FOIA as follows:

Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established. (Underline for emphasis).

Thus, evidence of citizenship is not a required when a person wishes to exercise his/her right under the FOIA.¹³⁷³ However, notwithstanding this unbiased provision, the FOIA prohibits intrusion into personal information of individuals.¹³⁷⁴ The prohibition covers personal information in forms of electronic data, images, and paper files or documents of individuals in the hands of public institutions.¹³⁷⁵

Therefore, protecting the privacy of individuals is core as far as FOIA is concerned. For instance, Section 12 of the FOIA prohibits public institutions from *inter alia* granting access to any information which will constitute an invasion of personal privacy of

¹³⁷⁰ *Freedom of Information Act 2011* (Nigeria: Act No. 4 of 2011, 2011), <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

¹³⁷¹ Ibid., Section 1; S. Oguiche, "Freedom of Information and National Security in Nigeria: Practices of the United Kingdom," in *Freedom of Information Law and Regulation in Nigeria*, ed. E. Azinge and F. Waziri (Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies, 2012), 97.

¹³⁷² Muhammad Nuruddeen and Muhammad Isa, "The Procedural Guarantees of the Right to Freedom of Information in Nigeria," *Bayero Journal of Private and Commercial Law (BJPCL)* 2, no. 1 (2016): 278.

¹³⁷³ Ibid.

¹³⁷⁴ Section 31 of the FOIA defines personal information to mean any official information held about an identifiable person, but does not include information that bears on the public duties of public employees and officials. The definition of personal of personal information under the FOIA seems to be *impari materia* with the definition of personal data under the OECD Privacy Rules as follows: "Personal data" means any information relating to an identified or identifiable individual (data subject). OECD, "The OECD Privacy Guidelines 2013."

¹³⁷⁵ Federal Ministry of Justice, *Guidelines on the Implementation of the Freedom of Information Act 2011 (Rev. Ed.)* 2013 (Nigeria, 2013), 34.

individuals.¹³⁷⁶ A similar prohibition is contained in Section 14 (1) of the FOIA concerning:

(a) files and personal information maintained with respect to clients, patients, residents, students, or other individuals receiving social, medical, educational, vocation, financial, supervisory or custodial care or services directly or indirectly from public institutions; ...

(b) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

The above information is considered as personal and so cannot be disclosed save as expressly provided under the FOIA. A good example of a situation where the FOIA allows the disclosure of personal information could be found in Section 14 (2) and (3). The Section stipulates that personal information could be disclosed if the owner of such information consents or the information is already publicly available.¹³⁷⁷ Similarly, the FOIA permits granting access to personal information where the public interest outweighs the protection of the privacy of the individual to whom such information relates.¹³⁷⁸ Hence, Section 14 (2) of the FOIA seems to have some elements of collection limitation and security safeguards principles as contained in the OECD Guidelines for Consumer Protection in the Context of E-commerce.¹³⁷⁹

¹³⁷⁶ Section 12 of the FOIA provides: (1) A public institution may deny an application for any information which contains- (a) Records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure will- (i) interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency, (ii) interfere with pending administrative enforcement proceedings conducted by any public institution, (iii) deprive a person of a fair trial or an impartial hearing, (iv) unavoidably disclose the identity of a confidential source, (v) constitute an invasion of personal privacy under Section 15 of this Act, except, where the interest of the public will be better served by having such record being made available, this exemption to disclosure shall not apply, and (vi) obstruct an ongoing criminal investigation, (b) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions. (2) Notwithstanding anything contained in this section, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure will cause. (3) A public institution may deny an application for information that could reasonably be expected to facilitate the commission of an offence.

¹³⁷⁷ Section 14 (2)(a) and (b) of the FOIA.

¹³⁷⁸ Ibid., Section 14 (3).

¹³⁷⁹ These principles have been discussed under chapter three of this study. The two recommend that personal data should be obtained by lawful and fair means. And where appropriate, with the knowledge and consent of the data object. Also, personal data should be protected by reasonable safeguards against risks like loss or unauthorised access, destruction, use, modification or disclosure of data. United Nations, "E-Business Primer," in *Compliance with Information and Communication Technology-Related Multilateral Frameworks: Information Technology Enabling Legal Framework for the Greater Merong Subregion* (New York: United Nations Publication, 2004), 129.

Be that as it may, scholars¹³⁸⁰ are of the view that the FOIA is not a comprehensive legislation for privacy and data protection of the general public, e-consumers inclusive.¹³⁸¹ Adeniyi is of the view that the provisions dealing with data protection under the FOIA apply only to government institutions.¹³⁸² He further said that the FOIA provisions do not protect personal information in the custody of private organisations.¹³⁸³ In the same vein, Jemilohun and Akomolede also criticised the FOIA for not referring to personal information in the custody of private organisations.¹³⁸⁴ These private organisations may include the e-traders, banks, telecommunications and insurance companies.¹³⁸⁵ The fact remains that these organisations are the custodians of personal information of consumers particularly those who make online purchases.

However, contrary to the Adeniyi's, Jemilohun and Akomolede's views as stated above, careful perusal into the provisions of Sections 2 (7),¹³⁸⁶ and 30 (3)¹³⁸⁷ of the FOIA reveals that the FOIA extends its application to private organisations.¹³⁸⁸ The *Guidelines on the Implementation of the FOIA 2013*,¹³⁸⁹ re-affirms this position while itemising institutions and bodies expected to comply with the FOIA. The FOIA Guidelines 2013, therefore, interprets "Public institutions" to include "... private bodies providing public services, performing public functions or utilising public funds."¹³⁹⁰ (Underline for emphasis).

¹³⁸⁰ Such as Adeniyi, Jemilohun and Akomolede.

¹³⁸¹ Jemilohun and Akomolede, (2015): 16; A. S. Adeniyi, "The Need for Data Protection Law in Nigeria," *Ademola Adeniyi Law Journal (AALJ)* (2012): 5.

¹³⁸² *Ibid.*, 5.

¹³⁸³ *Ibid.*

¹³⁸⁴ Jemilohun and Akomolede, (2015): 16.

¹³⁸⁵ Adeniyi, (2012): 5.

¹³⁸⁶ Section 2 (7) of the FOIA says that "Public institutions" are all authorities whether executive, legislative or judicial agencies, ministries, and extra- ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, *and private companies utilizing public funds, providing public services or performing public functions. Freedom of Information Act 2011.*

¹³⁸⁷ Section 30 (3) of the FOIA says that "Public institution" means any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub- committees which are supported in whole or in part by public fund or which expends public fund and *private bodies providing public services, performing public functions or utilizing public funds.*

¹³⁸⁸ Federal Ministry of Justice, *Guidelines on the Implementation of the Freedom of Information Act 2011 (Rev. Ed.) 2013*, 5; Muhammad Nuruddeen, "The Right to Freedom of Information in Nigeria: A Call for Constitutional Recognition," *University of Maiduguri Law Journal* 13 (2015): 342.

¹³⁸⁹ Federal Ministry of Justice, *Guidelines on the Implementation of the Freedom of Information Act 2011 (Rev. Ed.) 2013*, 5.

¹³⁹⁰ *Ibid.*; Nuruddeen, (2015): 342.

Also, Nuruddeen believes that the FOIA covers private organisations.¹³⁹¹ He said that “the FOIA creates a legally enforceable right for the public to access information from government institutions and private institutions rendering public services.”¹³⁹² Going by this interpretation, it is then imperative on both public and private institutions to respect and protect the data of individuals when considering an application for granting access to any record or information in their custody.

By and large, it was argued that the FOIA does not meet the international standard of data/privacy protection legislation. Jemilohun and Akomolede argued that adequate data protection laws across the globe embrace core principles because they are the bedrock of privacy and data protection.¹³⁹³ Jemilohun and Akomolede further faulted the FOIA for not providing punishment against officers who release personal information of individuals contrary to the provisions of the FOIA. This is unlike the practice in the UK, US and Malaysia respectively where appropriate punishments are spelt out against misuse of personal information.

In Malaysia, the PDPA incorporates the OECD principles.¹³⁹⁴ The PDPA criminalises¹³⁹⁵ and punishes any act of misuse of personal information.¹³⁹⁶ Similarly, in a UK case of Alistair Fraser, the defendant in the case was found guilty of obtaining and selling personal information contrary to the UK *Data Protection Act 1998*.¹³⁹⁷ Fraser confessed obtaining the personal information from the Department for Works and Pensions.¹³⁹⁸ He then informed the court that he subsequently sold the information to third parties. The court ordered him to pay fine and cost respectively.¹³⁹⁹

¹³⁹¹ Ibid., 342.

¹³⁹² Ibid.

¹³⁹³ Jemilohun and Akomolede, (2015): 5.

¹³⁹⁴ Ibid., Adequate data protection laws across the globe must embrace OECD principles because they are the bedrock of privacy and data protection.

¹³⁹⁵ Sections 126, 133 and 134 of the *Personal Data Protection Act 2010* (Malaysia: Act 709 LOM, 2010).

¹³⁹⁶ The Sessions Court is empowered to try such offenders. Ibid., Section 135.

¹³⁹⁷ Under the *Data Protection Act 1998*, it is an offence for a person, knowingly or recklessly, without the consent of the data controller, to obtain personal data. It is also an offence to sell or offer to sell data obtained in contravention of the Act. Out-Law.com, “Illegal Dealings in Personal Information,” *Legal News and Guidance from Pinsent Masons*, August 22, 2002, <http://www.out-law.com/page-2873>.

¹³⁹⁸ This case was cited by Akinsuyi, (2007): 33.

¹³⁹⁹ Ibid.

In the US, private organisations found guilty of violating data protection laws are also punished. For example, in the case of *FTC v. Hershey Foods Corporation* (2003) 4CV-03-350, the defendant's websites violated the *Children's Online Privacy Protection Act* (COPPA), 1998.¹⁴⁰⁰ The gist of the case is, the defendants collected personal data from minors without obtaining parental consent as required by the COPRA Rule.¹⁴⁰¹ The defendants were severely fined and warned not to violate the COPRA Rule in the future.¹⁴⁰²

The Malaysian PDPA, as well as the UK and US cases cited above, demonstrate the highest level of commitments by these governments in dealing with persons and e-traders who violate privacy regulations. Hence, it was argued that Nigeria needs to align with other nations regarding e-commerce and data protection issues. In fact, Nigeria needs to be carried on board if the ultimate result in protecting consumers is to be achieved in the country.

1.3.3 Cybercrimes (Prevention, Prohibition, etc.) Act 2015

The *Cybercrimes (Prevention, Prohibition, etc.) Act 2015* is yet another legislation like the FOIA that is concerned with the protection of personal data of individuals in Nigeria. But unlike the FOIA, the Cybercrimes Act has a special interest in security issues, particularly on the cyberspace. A secure cyberspace environment is necessary for the smooth operation of e-commerce transactions. Cybercrimes are offences committed with the aid of computer technology.¹⁴⁰³ Cybercrimes include any criminal act, the execution of which involves the use of computers, computer networks and electronic

¹⁴⁰⁰ The COPPA Rule applies to operators of commercial Web sites and online services directed to children under the age of 13 and to general audience Web sites and online services that knowingly collect personal information from children under 13. Amongst other things, the Rule requires that Web site operators obtain verifiable consent from a parent or guardian before they collect personal information from children

¹⁴⁰¹ In fact, in another US case of *State of Texas v. The Doll Palace Corp and Alex Syrov* (2008) A 07 CA 988SS. The defendants in case were restraint from displaying personal information of children on its website. This is the case even if there is proof of parental consent. Therefore, defendants were strongly ordered to comply with the COPRA Rules in all marketing activities. The case is also available at <http://www.oag.state.tx.us/newspubs/releases/2007/120507dollpalace.pdf>.

¹⁴⁰² Accordingly, the defendants were ordered to pay civil penalties of USD 100,000 and USD 85,000 respectively.

¹⁴⁰³ L. Rana, "Cybercrimes," *Encyclopaedia of Criminology* (Anmol Publications Pvt. Ltd, New Delhi, India, 2006), 61.

superhighways.¹⁴⁰⁴ In short, cybercrimes or Internet crimes are various forms of offences committed through the Internet.¹⁴⁰⁵ Examples of cybercrimes include identity theft, hacking, scams and cloning.¹⁴⁰⁶

The concept of cybercrimes is very wide and not the concern of this paper, it is only intended to brief a reader how cybercrimes legislation fits into discourse of the legal regime for the protection of e-commerce consumers' in Nigeria. Particularly as it affects the misuse of personal information of consumers by those, who are not the genuine parties of e-commerce transactions in the country.

It is important to note that before 2015, there was no comprehensive legislation dealing with cybercrimes in Nigeria.¹⁴⁰⁷ The atmosphere for Internet transactions as at that time was (even now is) insecure and vulnerable to manipulation by fraudsters,¹⁴⁰⁸ due to security and privacy concerns, not every Nigerian consumer do patronise e-commerce in the country.¹⁴⁰⁹ Nigerians prefer making ordinary purchases in the traditional markets. Due to security concerns, some consumers in Nigeria only visit online stores to make window-shopping or gather information about goods and then later buy the goods in the conventional markets. There are also some who place orders online but insist on giving cash upon delivery of the physical goods.¹⁴¹⁰ The e-traders do give the consumers the option to pay for their orders upon physical delivery.¹⁴¹¹ The truth is that Nigerians do not want to disclose their personal information such as a PIN to e-traders for fear of fraud.¹⁴¹² Purchase in the traditional markets or payment upon delivery of

¹⁴⁰⁴ A. David and O.O. Abiodun, *Policing Cyberspace in Nigeria* (Ibadan, Nigeria: Life Gate Publishing Co., 2009), 14.

¹⁴⁰⁵ Muhammad Nuruddeen, "Legal Issues in Electronic Commerce: Challenges and Prospects for Nigeria," *Abuja Journal of Private and Comparative Law* 3 (2014): 176.

¹⁴⁰⁶ Oluwaseun Viyon Ojo, "An Assessment of Nigeria's Cybercrimes (Prevention, Prohibition Etc.) Act 2015," *The Lawyers Chronicle* (Jos, Nigeria, 2015), 1.

¹⁴⁰⁷ Ibrahim Abdullahi, *et al.*, "Cyber Crimes (Prohibition, Prevention, Etc.) Act, 2015: Issues and Challenges in Nigeria," in *49th Annual Nigerian Association of Law Teachers (NALT) Conference* (Keffi: Nasarawa State University, 2016), 2–3.

¹⁴⁰⁸ David and Abiodun, (2009), 11.

¹⁴⁰⁹ Adelola, *et al.*, (2014), 234.

¹⁴¹⁰ C. Chiejina and E. Soremekun, "Investigating the Significance of the 'Pay on Delivery' Option in the Emerging Prosperity of the Nigerian E-Commerce Sector," *Journal of Marketing and Management* 5, no. 1 (2014): 120–135; Edesiri G Okoro and Promise E Kigho, "The Problems and Prospects of E-Transaction (The Nigerian Perspective)," *Journal of Research in International Business Management* 3, no. 1 (2013): 11.

¹⁴¹¹ *Ibid.*, 11.

¹⁴¹² Chiejina and Soremekun, (2014): 120–135.

online purchased goods provides peace of mind to the consumers.¹⁴¹³ Even banks in Nigeria do warn their customers not to disclose their bank details such as a PIN to anybody including close ones.

Foreign e-traders such as eBay do not want to operate in Nigeria because the country is tainted as "the centre of cybercrimes."¹⁴¹⁴ Sadly, Nigeria emerged the third country among top 10 countries in the world that have a high prevalence of cybercrimes.¹⁴¹⁵ Recently, reports revealed that from September 2015 to August 2016, about 90% of foreign nationals arrested for cybercrimes in India are Nigerians.¹⁴¹⁶ Nigeria as a nation is being counted among the top five notorious perpetrators of cybercrimes in the world.¹⁴¹⁷ Thus, for this and several other reasons, many Nigerian consumers with legitimate intention to transact online business are barred or restricted from doing online transactions.¹⁴¹⁸

In France for example, web camera verification is required in most online transactions from Nigeria.¹⁴¹⁹ Therefore, Nigerian consumer's trust and confidence in patronising e-commerce at home and abroad are being eroded by the activities of cybercriminals.¹⁴²⁰

¹⁴¹³ Adelola, *et al.*, (2014), 236.

¹⁴¹⁴ Investigation shows that that Nigerian Websites and Email System were used by Al Qaeda to disseminate Internet information. This raises a serious question and suspicion on the security of Nigeria's national cyberspace. Okonigene Robert Ehimen and Adekanle Bola, "Cybercrime in Nigeria," *Business Intelligence Journal* 3, no. 1 (2010): 94.

¹⁴¹⁵ I. Frank and Eweniyi Odunayo, "Approach to Cyber Security Issues In Nigeria: Challenges and Solution," *International Journal of Cognitive Research in Science, Engineering and Education* 1, no. 1 (2013): 2; Abdullahi, *et al.*, (2016), 2.

¹⁴¹⁶ Yunus Y. Lasania, "90 Per Cent of Foreigners Involved in Cyber Crime Are Nigerians," *The Hindu* (India, August 16, 2016), last modified August 16, 2016, accessed January 17, 2017, <http://www.thehindu.com/news/cities/Hyderabad/90-per-cent-of-foreigners-involved-in-cyber-crime-are-Nigerians/article14572630.ece>.

¹⁴¹⁷ First on the list is the Russian Federation, followed by China, Brazil, Nigeria and Viet Nam. UNCTAD, "Cyberlaws and Regulations for Enhancing E-Commerce: Case Studies and Lessons Learned," *United Nations Conference on Trade and Development* (Geneva: UNCTAD, 2015), 12.

¹⁴¹⁸ Akinsuyi, (2007): 42; Folashade B Okeshola and Abimbola K Adeta, "The Nature, Causes and Consequences of Cyber Crime in Tertiary Institutions in Zaria-Kaduna State , Nigeria," *American International Journal of Contemporary Research* 3, no. 9 (2013): 99.

¹⁴¹⁹ *Ibid.*, 99.

¹⁴²⁰ Nigeria needs to also enhance it's international cooperation in combating cybercrimes by signing and demesticating the Budapest Convention on Cybercrime and the African Union Convention on Cyber Security and Personal Data Protection 2014. At the moment, Nigeria is not even a signatory to any cybercrime convention. Unfortunately, this makes international cooperation harder. Oluwakemi Oluwafunmilayo Oke, "An Appraisal of the Nigerian Cybercrime (Prohibition, Prevention Etc.) Act, 2015," *SSRN Electronic Journal*, 19, last modified 2015, accessed January 23, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655593; Caroline B. Ncube, "Data Protection in Zimbabwe," in *African Data Privacy Laws: Law, Governance and Technology Series* (Volume 33), ed. Alex B. Makulilo (Cham, Switzerland, 2016), 113.

Akinsuyi attributed this to the lack of technical and legislative safeguards against illegal interference with personal data of consumers.¹⁴²¹

It was in 2015, after several years of agitations from concerned stakeholders,¹⁴²² the Nigerian President signed into law¹⁴²³ the *Cybercrimes (Prevention, Prohibition, etc.) Act 2015* (the CA). The CA brings to life a legal framework for the prohibition, prevention, detection, investigation and prosecution of cybercrimes and other related matters.¹⁴²⁴ The aim of the CA is to among other things define what constitutes cybercrimes and provide penalties against the perpetrators of the crimes in Nigeria.¹⁴²⁵ Similarly, the CA is enacted to provide a platform for cybersecurity that will ensure the protection of computer systems, data, and privacy rights.¹⁴²⁶ Oluchi argued that if the provisions of the CA are actually implemented, they will create cybersecurity and provide the much-needed regulation of e-commerce and consumer protection in Nigeria.¹⁴²⁷ Scholars are of the view that CA is, indeed, another legislation that has privacy protection in mind.¹⁴²⁸

The relevant Sections of the CA on data/privacy protection are Sections 1, 38 and 39 respectively. Section 1 of the CA provides the objective of the CA which among other things include the protection of data and privacy. The section provides that the aim of CA is to among other things:

¹⁴²¹ Akinsuyi, (2007): 42.

¹⁴²² This came from the ICT and academic cum legal sectors. Ojo, (2015), 1; TI Akomolede, "Contemporary Legal Issues in Electronic Commerce in Nigeria," *Potchefstroom Electronic Law Journal* 11, no. 3 (2008): 1–25; Gbenga Bamodu, "Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary," *Journal of Information Law and Technology* 2 (Nov.) (2004): 1–24; Idigbe, "Legal and Institutional Framework for E-Commerce in Nigeria"; Akinsuyi, (2007): 42.

¹⁴²³ In fact, the former President Goodluck Jonathan, signed the Cybercrimes Act into law on the 15th May 2015. That was barely 14 days before he vacated office as the President of the Federal Republic of Nigeria.

¹⁴²⁴ *Cybercrimes (Prohibition, Prevention, Etc.) Act 2015* (Nigeria, 2015).

¹⁴²⁵ Prior to the enactment of the *Cybercrimes Act 2015*, offences such as Internet scam, hacking, identity theft were not offences within the contemplation of Nigerian law. Criminalising these activities became necessary because the Nigerian Constitution has categorically made it clear that no act is an offence unless it has been defined and punishment for the act has been prescribed by a written law. Therefore, if cybercrimes were not criminalised in the country then those who perpetrate the crimes may likely escape justice before Nigerian courts. (The Constitution of the Federal Republic of Nigeria, Cap C23, Laws of the Federation of Nigeria, 2004, Section 36 (9).

¹⁴²⁶ Nwankwo, (2016), 65.

¹⁴²⁷ Aniaka Oluchi, "Analyzing the Adequacy of Electronic Transactions Bill 2015 in Facilitating E-Commerce in Nigeria," *Social Science Research Network (SSRN)* (2015): 1.

¹⁴²⁸ Akpojivi, (2017), 11; Viyon, (2016), 3; Ojo, (2015), 2.

promote cybersecurity and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights.

Section 38 (1) specifically deals with record and protection of personal data. The section places a duty on the Nigerian service providers to keep all data and information of their subscribers for two years.¹⁴²⁹ Here, “services providers” means private or public telecommunications companies operating in Nigeria.¹⁴³⁰ This definition is extended to those organisations who rely on the services of such companies (like the e-traders, banks, cyber cafes) and other entities who store or process computer data on behalf of the said companies.¹⁴³¹

Furthermore, Section 38(2) of the Act provides the circumstances under which personal data or information held by these entities could be released. Thus, it expressly provides that the personal data so held by any of these entities could be released at the request of the relevant authority, law enforcement agency¹⁴³² or court of law.¹⁴³³ The relevant authority referred to in this section is the Nigeria Communications Commission (NCC).¹⁴³⁴

It is important to note that Section 38 (4) of the CA mandates the e-traders and other entities referred to above not to utilise any personal data in their custody except for the purposes stipulated under the CA.¹⁴³⁵ The implication of 38 (4) of the CA is that personal information must only be used based on the reasons specified by the law and not for any illegal purposes.¹⁴³⁶

¹⁴²⁹ Section 38 (6) of the *Cybercrimes (Prohibition, Prevention, Etc.) Act 2015*.

¹⁴³⁰ The full definition is provided under Section 58 of the CA as “any public or private entity that provides to users of its services the ability to communicate by means of a computer system, electronic communication devices, mobile networks; and any other entity that processes or stores computer data on behalf of such communication service or users of such service.” Another definition is offered by Oke who said that service providers are those public or private entities that provide to users of its services the ability to communicate by means of a computer system, electronic communication devices, mobile networks and any entity that processes or stores computer data on behalf of such service providers. Oke, (2015): 14.

¹⁴³¹ Ibid.

¹⁴³² Sections 38 (2) and (3) of the *Cybercrimes (Prohibition, Prevention, Etc.) Act 2015*.

¹⁴³³ As stipulated by Section 39 of the CA which provides that for the purpose of criminal investigation or proceedings, a judge may also order for the release, interception of any personal electronic communication in the hands of the said companies. Oke, (2015): 14.

¹⁴³⁴ Viyon, (2016), 24.

¹⁴³⁵ Or as may be otherwise stipulated by other legislation, regulations or a court of law.

¹⁴³⁶ Ibid., 3.

Additionally, Section 38 (5) of the CA mandates the service providers including the e-traders, law enforcement agencies and NCC to ensure that they strictly comply with the provisions of the Constitution dealing with the right to privacy.¹⁴³⁷ It is mandatory for them to equally take all necessary measures to protect the confidentiality of the personal data of individuals which they held, processed, or retrieved.¹⁴³⁸ It is, therefore, an offence against any person to contravene the provisions of Section 38 of the CA.¹⁴³⁹ The punishment for contravening the CA is three years imprisonment or a fine of not more than N7, 000,000.00 (Seven Million Naira Only); or liable to both fine and imprisonment.¹⁴⁴⁰

The CA shows the government's commitment to promoting privacy right on the cyberspace in Nigeria. Therefore, the main goal of the CA is to promote cybersecurity and prevent or combat cybercrimes in Nigeria.¹⁴⁴¹ The CA prescribes penalties against persons who destroy or grant unauthorised access to personal information of others. The philosophy behind is to preserve the personal information for criminal investigation and prosecution.¹⁴⁴² Therefore, CA is not enacted to protect the interest of the consumers regarding their data.

Just like the FOIA, the CA is more concerned with granting access to personal information than protecting same. Both CA and FOIA advocate for compliance with Constitutional provisions dealing with the right to privacy. The rationale behind is the fear of not falling into the trap of the inconsistency rule as enshrined in Section 1 of the Constitution.¹⁴⁴³ On the whole, scholars¹⁴⁴⁴ are of the view that the CA is not a comprehensive legislation for data protection in Nigeria. Indeed, Abdulrauf, while

¹⁴³⁷ Section 38 (5) of the *Cybercrimes (Prohibition, Prevention, Etc.) Act 2015*.

¹⁴³⁸ *Ibid.*, Section 38 (5).

¹⁴³⁹ *Ibid.*, Section 38 (6).

¹⁴⁴⁰ *Ibid.*

¹⁴⁴¹ The relevant Sections of the *Cybercrimes (Prohibition, Prevention, Etc.) Act 2015*, dealing with these issues include: Sections 1(c) and (3) (1), 41 (2) (a) and 43(1) (a).

¹⁴⁴² Viyon, (2016), 4.

¹⁴⁴³ *FRN v. Ifegwu* (supra); *A.G. Fed. v. Abubakar* (supra).

¹⁴⁴⁴ For example Abdulrauf, R1 and Nwankwo, Lukman Adebisi Abdulrauf, "New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension between Traditional and Modern Conceptions," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 7 (2016): 121–122.; Nwankwo, (2016), 65.

commenting on the provisions of Section 37 of the Constitution vis-à-vis Section 38 of the CA, submits as follows:

*...criminal laws **like the** CA are merely penal legislation that prescribes punishments for offences committed **and** may not be the best of instruments for the protection of the right to privacy from threats resulting from the proliferation of new technologies.*¹⁴⁴⁵ (bold added).

Similarly, Nwankwo is also of the view that although the CA partly purports to promote privacy right among its objectives, however, it does not specifically include provisions dealing with core data protection principles in it.¹⁴⁴⁶ Simply put, the CA is not a comprehensive data protection legislation. It was also argued that:

*...within the Cybercrimes Act, you may find some sections trying to accord protection to data. But in my opinion, that is inadequate. Why? Because digital data can be protected by a specific law. So that you cover all angles of data protection. Digital data has eight rules of protection. So, if you don't have the specific law, it will be very difficult for a law that is not meant for that particular area to cover all those angles.*¹⁴⁴⁷

The shortcomings of the CA is also expressed by Muhammad and Aminu who argued that the CA has failed to accord privacy and/or data protection rights to e-consumers.¹⁴⁴⁸ Nevertheless, the CA has been applauded and considered as a laudable achievement towards addressing security challenges confronting e-commerce and consumer protection in Nigeria.¹⁴⁴⁹ In fact, Nwauche argued that the right to privacy in Nigeria has not received adequate protection or elaboration both in the definition and philosophical basis.¹⁴⁵⁰ Using policy analysis, Akpojivi claims that the Nigerian legal framework for privacy is inadequate because it lacks specific privacy provisions.¹⁴⁵¹ Hence, Akpojivi submits to the fact that Nigerians and e-consumers, in particular, have no privacy legislation to protect them in this globalised era of connectivity.¹⁴⁵² The NITDA has come

¹⁴⁴⁵ Abdulrauf, (2016): 121–122.

¹⁴⁴⁶ Nwankwo, (2016), 65.

¹⁴⁴⁷ The interview was conducted on 16th May 2016, in his office at Faculty of Law, Usman Dan Fodio University Sokoto, Nigeria

¹⁴⁴⁸ Abdullahi, *et al.*, (2016), 18.

¹⁴⁴⁹ Ibid.; Muhammad Nuruddeen, *et al.*, “Legal Framework for E-Commerce Transactions and Consumer Protection: A Comparative Study,” *Bayero Journal of Private and Commercial Law (BJPCL)* 2, no. 2 (2016): 53; Oke, (2015), 19.

¹⁴⁵⁰ Nwauche, (2007): 66.

¹⁴⁵¹ Akpojivi, (2017), 17.

¹⁴⁵² Ibid., 268.

up with the Guidelines for Data Protection (GDP) 2013 and later Nigerian Data Protection Regulations 2019 and most recently the Nigeria Data Protection Act, 2023 all with a view to addressing privacy and data breaches in the country. The NDPR and NDPA are worthy of careful analysis as follows.

1.3.4 Nigerian Data Protection Regulations 2019

The National Information Technology Development Agency (NITDA) is an autonomous government agency that came into existence after enacting into law, the *National Information Technology Agency Act (The NITDA Act) 2007*.¹⁴⁵³ The NITDA Act empowers the NITDA to *inter alia* guarantee the privacy, integrity, accuracy, confidentiality, security, availability and quality of personal information in the country.¹⁴⁵⁴ To discharge this function effectively, Section 6 of the NITDA Act further empowers the NITDA to develop guidelines, policies and standards with the aim of monitoring the smooth operations of e-commerce, e-governance and e-communications in the country.¹⁴⁵⁵ Closely related to this, the NITDA is also mandated to ensure safety and protection of personal information and data of the Nigerian citizens. Therefore, pursuant to Section 6 of the NITDA Act, the NITDA came up with Guidelines for Data Protection (GDP) 2013 and subsequently replaced same with Nigeria Data Protection Regulations (NDPR) 2019.

The Nigerian Data Protection Regulations 2019 is a set of regulations introduced by the National Information Technology Development Agency (NITDA) to protect the privacy rights of Nigerian citizens in relation to the processing of their personal data. The regulations apply to all data controllers and processors who process the personal data of Nigerian citizens, regardless of their location. The regulations require data controllers and processors to obtain the express consent of the data subject before processing their personal data, while also ensuring that they have adequate security measures in place to protect against unauthorized access or disclosure.

¹⁴⁵³ Nuruddeen, (2014): 272.

¹⁴⁵⁴ Nwankwo, (2016), 59.

¹⁴⁵⁵ Jemilohun and Akomolede, (2015): 8–9.

Other key provisions of the regulations include the requirement for data breach notifications, data subject access requests, and restrictions on the transfer of personal data outside of Nigeria without the proper safeguards in place. Non-compliance with the Nigerian Data Protection Regulations 2019 can result in significant fines, penalties, or prosecution.

Upon all the statutes dealing with data and/or privacy protection in Nigeria, the NDPR just like the GDP appears to be the most comprehensive data protection piece of legislation in the country.¹⁴⁵⁶ The NDPR is in tandem with international standards and best practices. It contains far-reaching provisions of data protection.¹⁴⁵⁷ Other landmark achievements that follow include the coming into existence of the NDPR Implementation Framework 2020 and the establishment of Nigeria Data Protection Bureau (NDPB) in 2022. The 2020 Implementation Framework provided further detail and interpretation of the rules set out by the NDPR whereas the NDPB serves as an independent data protection authority established to promote, enforce and guarantee personal data protection in the country.

The NDPR has been seriously criticised by scholars for not being a product of the National Assembly. One of the reasons for that is that International standards require that data protection should be primarily governed by a distinct hard law not a soft law coming from an institution like NITDA.

1.3.4 Nigeria Data Protection Act, 2023

The Nigerian Data Protection Act (NDPA) 2023 came into existence in June, 2023 after several attempts by different administrations to legislate on data protection in Nigeria. The NDPA was enacted to provide a legal framework for the protection of personal information, and establish the Nigeria Data Protection Commission for the regulation and processing of personal information and for related matters in Nigeria.¹⁴⁵⁸

¹⁴⁵⁶ Nwankwo, (2016), 59.

¹⁴⁵⁷ Abdulrauf, (2016): 123.

¹⁴⁵⁸ Long title of the Nigeria Data Protection Act, 2023.

The objective of the NDPA is to among other things:

*safeguard the fundamental rights and freedoms, and the interests of data subjects, as guaranteed under the Constitution of the Federal Republic of Nigeria, 1999 ; (b) provide for the regulation of processing of personal data ; (c) promote data processing practices that safeguard the security of personal data and privacy of data subjects ; (d) ensure that personal data is processed in a fair, lawful and accountable manner ; (e) protect data subjects' rights, and provide means of recourse and remedies, in the event of the breach of the data subject's rights ; (f) ensure that data controllers and data processors fulfil their obligations to data subjects ; (g) establish an impartial, independent, and effective regulatory Commission to superintend over data protection and privacy issues, and supervise data controllers and data processors ; and (h) strengthen the legal foundations of the national digital economy and guarantee the participation of Nigeria in the regional and global economies through the beneficial and trusted use of personal data.*¹⁴⁵⁹

One of the laudable provisions of the NDPA is the creation of the Nigeria Data Protection Commission (NDPC) which is saddled *inter alia* with the responsibility of deploying technological and organisational measures to enhance personal data protection and also fostering the development of personal data protection technologies, in accordance with recognised international best practices and applicable international law.¹⁴⁶⁰

Another laudable provisions include the one that deals with the protection of the personal data and privacy of children. In categorical terms, the NDPA mandates all data controllers in Nigeria to obtain the consent of the parent or legal guardian of any child or persons who lack legal capacity before obtaining and processing personal data of such class of data subjects.¹⁴⁶¹

The NDPA has also mandated all data controllers and data processors operating in Nigeria to implement appropriate technical and organisational measures to ensure the security, integrity and confidentiality of personal data in its possession or under its

¹⁴⁵⁹ Ibid., Section 1(1).

¹⁴⁶⁰ Ibid., Section 4.

¹⁴⁶¹ Ibid., Section 31.

control, including protections against accidental or unlawful destruction, loss, misuse, alteration, unauthorised disclosure, or access.¹⁴⁶²

In the event of data breach, the data processor and controller must take appropriate steps to mitigate effectively the possible adverse effects of the data breach. The NDPC and data subjects concerned must be notified in that regard.¹⁴⁶³

It's important to note that data subject, who is aggrieved by the decision, action, or inaction of a data controller or processor in violation of the NDPA, or any subsidiary legislation made under it, may lodge a complaint with the NDPC.¹⁴⁶⁴ If after completing an investigation, the NDPC is satisfied that a data controller or processor has violated or aided in the violation of any provisions of the NDPA, the NDPC has the right to impose appropriate sanction against such data controller or processor.¹⁴⁶⁵ The NDPC is empowered to prosecute any data controller or processor who neglects or refuses to comply with its orders.¹⁴⁶⁶

Moreover, any data controller, processor or subject who is not satisfied with an order of the NDPC, may apply to the court for judicial review within 30 days after the order was made.¹⁴⁶⁷ In the case of a data subject, who suffers injury, loss, or harm as a result of action or inaction of a data controller or data processor, may recover damages from such data controller or data processor in a civil court.¹⁴⁶⁸ Unfortunately, the NDPA interprets the "court" to mean court of competent jurisdiction.¹⁴⁶⁹ This interpretation is ambiguous, vague and therefore needs further clarification.

Despite the above laudable provisions, the NDPA has a lot of lacunae particularly as regards protecting the rights data and privacy of e-commerce consumers in Nigeria. First of all, the NDPA does not contain specific provisions dealing with e-commerce or consumer protection. According ML Ahamdu, e-commerce needs to have a specific data

¹⁴⁶² Ibid., Section 39.

¹⁴⁶³ Ibid., Section 40.

¹⁴⁶⁴ Ibid., Section 46.

¹⁴⁶⁵ Ibid., Section 47-48.

¹⁴⁶⁶ Ibid., 49.

¹⁴⁶⁷ Ibid., Sections 50-51.

¹⁴⁶⁸ Ibid., Section 51.

¹⁴⁶⁹ Ibid., Section 65.

protection law that will cover all angles of data protection.¹⁴⁷⁰ For instance, the Malaysian *Personal Data Protection Act (PDPA) 2010* which incorporated, *mutatis mutandis* the OECD privacy rules¹⁴⁷¹ provides: “Act meant to regulate and protect the process of personal data from being **misused through commercial transactions** and matters relating to it.”¹⁴⁷² What an explicit piece of legislation on e-commerce and consumer protection!

In effect, Yusoff argued that the PDPA seeks to protect the personal data and information of e-consumers.¹⁴⁷³ Perhaps, Nigeria needs to have a specific data protection legislation for e-commerce just like the PDPA. Noting that the PDPA does not only protect the data of e-consumers but also ensures that those who misuse such personal data are brought to book and punished accordingly.¹⁴⁷⁴

Similarly, the enforcement mechanism provided by Act is cumbersome and not every e-consumer whose data or privacy has been breach online will have the wherewithal to go to Abuja and lodge a complaint to the NDPC. Also not every e-consumer can afford to hire a lawyer to prosecute his/her case where he/she alleges that his/her data or privacy has been encroached upon. Not also forgetting the fact that not every e-consumer is aware about the existence of the NDPA or the NDPC. Sensitisation is about the existence of the NDPA and NDPC is highly need at this critical moment.

1.4 Conclusion

This paper has made a modest attempt to examine the legal regime of privacy and data protection of e-commerce consumers in Nigeria. The paper has established the fact that protecting privacy and data of e-consumers is paramount. The only available means of achieving this is by way of putting the necessary legal and institutional frameworks that will guarantee adequate protection of privacy and data of all those who use the internet

¹⁴⁷⁰ This view was expressed in an interview with the author on 31st May, 2016. Audio and transcribed versions of the interview are with the author. See also Muhammad Nuruddeen, “Legal and Institutional Frameworks for the Protection of E-Commerce Consumers in Nigeria,” *Universiti Utara Malaysia* (PhD. diss., Universiti Utara Malaysia, 2017), 173.

¹⁴⁷¹ Zuryati Mohamed Yusoff, “The Malaysian Personal Data Protection Act 2010: A Legislation Note.,” *New Zealand Journal of Public and International Law* 9, no. 1 (2011): 121.

¹⁴⁷² This is provided under the Preamble of the *Personal Data Protection Act 2010*.

¹⁴⁷³ Yusoff, (2011): 121.

¹⁴⁷⁴ The Sessions Court is empowered to try such offenders. Section 135 of the *Personal Data Protection Act 2010*. See also Sections 126, 133 and 134.

for commercial transactions. The paper has analysed the relevant laws governing data and privacy protection in Nigeria and discovered that the laws are grossly inadequate to address the concerns of e-consumers. Although there exists on ground the *Nigeria Data Protection Act, 2023*, yet much needs to be done to allay the fears of Nigerian e-consumers. The paper, therefore, recommends *inter alia* the need to have a specific provisions in the NDPA that will guarantee the data and privacy of e-consumers as was done in jurisdictions such as Malaysia. The paper also recommends the provision of a simple and less cumbersome system of handling data breaches complaints in the country. There is also the need to intensify efforts from the part of the NDPC to create awareness among Nigerian consumers on its existence and NDPA as well as how to protect themselves when engaging in e-commerce transactions. The definition of court under Section 65 of the NDPA needs clarity. Specific court should be given power to handle cases bordering on online data and privacy breaches in the country.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

HARNESSING INTELLECTUAL PROPERTY IN TECHNOLOGY TRANSFER:
EMPOWERING INNOVATION-DRIVEN ENTERPRISES

Muhammad Umar
Faculty of Entrepreneurship and Business
Universiti Malaysia Kelantan, Malaysia
a22e115f@siswa.umk.edu.my
+2348035059974

Abstract

Intellectual Property (IP) is a crucial asset that significantly influences the success of Innovation-Driven and Digitally Enabled Small and Medium Enterprises (ID-DESMEs). IP enables these enterprises to protect and leverage their innovations, giving them a competitive advantage, attracting investment, and driving growth. It provides legal protection for inventions, designs, brands, and creative works, allowing businesses to control the use of their creations and maintain their market edge. This paper uses a qualitative research approach to examine the role of IP in facilitating technology transfer (TT) within ID-DESMEs in Nigeria. By analysing government documents, previous studies, and current industry trends, it highlights the strategic importance of IP in supporting the transfer of emerging technologies and innovations. As indicated by the National Digital Economy Policy and Strategy (NDEPS), a primary objective is to nurture the technology ecosystem by fostering innovation and entrepreneurship and ensuring that policy and regulatory frameworks support the digital business environment. The study finds that strong IP rights (IPR) frameworks are essential for stimulating innovation and technology transfer, as they encourage ID-DESMEs to invest in research and development (R&D). However, there is a significant gap in awareness of IPR among these enterprises compared to larger companies. Additionally, insufficient judicial systems and enforcement mechanisms hinder the creation of a supportive environment for technology transfer and innovation. To overcome these challenges, the study recommends increasing awareness and education about IPR among ID-DESMEs and strengthening judicial and enforcement systems to ensure timely and effective protection of intellectual property. By addressing these issues, Nigeria can enhance its ability to support technology transfer and drive sustainable economic growth through innovation-driven enterprises.

Keywords: Legal protection, Technology transfer, Innovation, Intellectual property, Nigeria.

Introduction

Developing economies (DEs) encounter a range of complex and interrelated structural challenges that impede their economic growth and transformation. These include heavy reliance on primary commodities, limited productive capacity, and low productivity (Stolze & Sailer, 2021). Additionally, inadequate legal frameworks for intellectual property protection, persistent human capital shortages, and weak digital and technological infrastructure further hinder progress (Hilkenmeier et al., 2020). Underdeveloped private sectors and significant infrastructure deficits exacerbate these issues, undermining socio-economic development. As a result, these countries struggle to advance toward the Sustainable Development Goals (SDGs) and remain highly susceptible to economic and environmental shocks. Technology transfer (TT) plays a vital role in the accomplishment of Innovation-Driven and Digitally Enabled Small and Medium Enterprises (ID-DESMEs). It is a collaborative process that permits scientific findings, knowledge and intellectual property to flow from creators, such as universities and research institutions, to public and private users (Leischnig & Geigenmüller, 2020). This process involves the movement of new technologies and innovations from research and development phases into practical applications within the market. ID-DESMEs, effective technology transfer can drive growth, enhance competitiveness, and foster sustainable development. Intellectual property and technology transfer are essential in promoting innovation among innovation-driven and digitally enabled enterprises as well as in economic growth.

Innovation and technological development are crucial for driving structural transformations in developing economies (DEs) like Nigeria. However, the limited domestic markets and insufficient funding in many DEs create minimal incentives for innovation. Additionally, the generally weak foundations in science, technology, and innovation further constrain technological advancement in the country. These challenges are reflected in the World Intellectual Property Organization's (WIPO, 2021) Global Innovation Index (GII, 2021), where most Developing Economies (DEs) are rank poorly. Moreover, many emerging economies (DEs) have not fully leveraged technology transfer, whether through informal channels like acquiring machinery, reverse

engineering, or subcontracting, or through formal methods such as foreign direct investment (FDI). Access to foreign technology licensing is typically beyond the reach of firms in EEs, largely due to insufficient absorptive capacity. This limitation stems from their domestic productive capacities being either underutilized or too weak to support effective technology integration. In developing economies (DEs), innovation typically occurs through incremental improvements to existing products, services, or processes. This is often driven by small and medium enterprises (SMEs), which can become innovation-driven and digitally enabled. Technological learning and advancement in DEs generally involve adapting and enhancing technologies from advanced industrial countries or other emerging economies to fit local conditions. Key technological capabilities in DEs include acquiring mature technologies—such as simple assembly techniques, product specifications, production know-how, technical personnel, and components—and adapting these technologies through incremental innovations. This also involves developing new markets through close customer relationships, strategically managing marketing functions, and establishing linkages with other enterprises, public research organizations, and technology transfer agencies.

For most developing economies, the primary sources of building endogenous knowledge include education and skill development, foreign technology transfer, and the mobility of experienced technical personnel (UNCTAD, 2020). Importing foreign technology, reverse engineering mature products, and leveraging skilled technical and managerial personnel are essential for effective technology adoption, adaptation, and diffusion. Additionally, a significant portion of domestic innovation occurs within the informal sector. While there is substantial research on intellectual property and technology transfer in SMEs, most conceptual and empirical work has focused on SMEs, with limited attention to innovation-driven enterprises, particularly in Europe and North America (Armanios and Eesley, 2021). This study, therefore, explores the critical role of a robust intellectual property framework in Nigeria for advancing technology transfer among SMEs. It aims to enhance their capabilities to become innovation-driven and digitally enabled, in alignment with the National Digital Economy Policy and Strategy (NDEPS) launched in 2019.

Research objective and scope

One of the key pillars of the National Digital Economy Policy and Strategy (NDEPS) initiative according to the Federal Ministry of Communications, Innovation and Digital Economy (FMoCIDE, 2020) and National Information Technology Development Agency (NITDA, 2020) is to enhance the capabilities of local SMEs to become Innovation-Driven and digitally-enabled enterprises (IDDEE). This is to enable them develop strong absorptive capacity for them to effectively recognize, assimilate, and apply new technology, idea and knowledge in the external environment to facilitate technology transfer and enhance their innovative capability (NITDA, 2019). As innovation and technological development are crucial for driving structural transformations in developing economies (DEs) like Nigeria, combatting poverty, unemployment, and effective judicial framework, have sparked significant research interest. Scholars seek to understand the multifaceted influences driving its remarkable progress (Ukpoju, 2023). Research in this area predominantly falls into two categories: examining the roles of both government and markets in fostering growth (OECD, 2019), and assessing the SMEs impact on poverty alleviation and its contribution to enhancing living standards (Lamidi & Igbokwe, 2021; Oyekunle, 2021). While the NDEPS is undeniably focused on innovation and digitalisation gap in Nigeria, social inclusion, and unemployment in Nigeria, IP and TT present an innovative pathway to further its objectives

The objective of this study is to investigate how IP and TT can facilitate and empower the local SMEs to enhance their innovative capability in becoming innovation driven. This investigation is imperative because the IP and TT are critical in encouraging innovation by creating a favourable environment for innovation and protected legal framework. Moreover, this inquiry is essential as it align with the national digital economy policy and strategy (NDEPS) and agenda resonate with the National Development Plan (NDP2021-2025) and the overarching Nigerian Agenda 2050 (NA2050).

Intellectual Property

Intellectual property (IP) entails the creations of the mind for which exclusive rights are recognized under the law (Hayter et al., 2020). These creations can include inventions, literary and artistic works, designs, symbols, names, and images used in commerce. IP is crucial for protecting the interests of creators and businesses, ensuring that their innovations and creative efforts are safeguarded from unauthorized use or infringement (Hayter et al., 2020). It encompasses trademarks, copyrights, trade secret, industrial designs, patents as well as geographical indications.

Technology Transfer

Technology transfer is widely recognised as a crucial method for enhancing technological capabilities. Organizations globally engage in technology transfer programs to leverage and expand their technological expertise (Zimmermann, 2018). In developing countries, small and medium enterprises (SMEs) are seen as pivotal drivers of economic growth. However, these SMEs often lack the resources necessary for significant in-house technological advancement. To address this gap, SMEs frequently rely on technology transfer programs to strengthen their technological capabilities (Zimmermann, 2018). Various initiatives from government agencies, universities, and businesses have been implemented to support and enhance the technology capabilities of SMEs.

Role of Sound Intellectual Property in Facilitating Technology Transfer on Local SMEs

An effective intellectual property (IP) management plays a critical role in facilitating technology transfer for local SMEs in Nigeria. By protecting and leveraging IP, local SMEs in the country can enhance their ability to acquire, adapt, and benefit from new technologies. According Liu & Hsiao (2019) IP provide protection and security by securing patents, trademarks, and copyrights, SMEs protect their own technological developments and creations. This protection prevents unauthorized use and ensures that the benefits of their innovations are preserved. They facilitate access to new technologies by providing sound IP management that enables SMEs to engage in licensing agreements (Ode, 2019). These agreements allow SMEs to access and utilize

technologies developed by others while providing revenue through licensing their own IP.

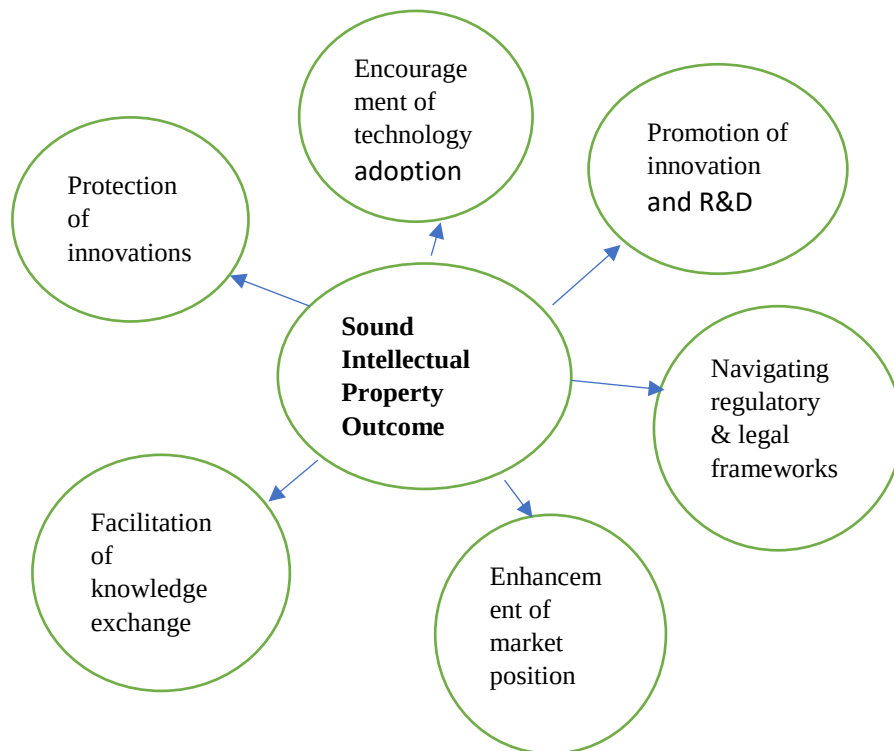


Figure 1: Sound intellectual property framework

Source: Adopted from the literature and developed by the author

Figure 1 presents a framework highlighting the critical role of robust intellectual property (IP) in facilitating effective technology transfer, which is essential for enhancing the innovative capabilities of local SMEs in Nigeria. The framework illustrates how strong IP protection supports local SMEs in fostering innovation and R&D, facilitating knowledge transfer, strengthening regulatory and legal frameworks. In summary, the framework highlights that strong IP not only promotes innovation and research but also supports the transfer and absorption of technology and knowledge, thereby contributing to the growth and competitive edge of local SMEs in Nigeria.

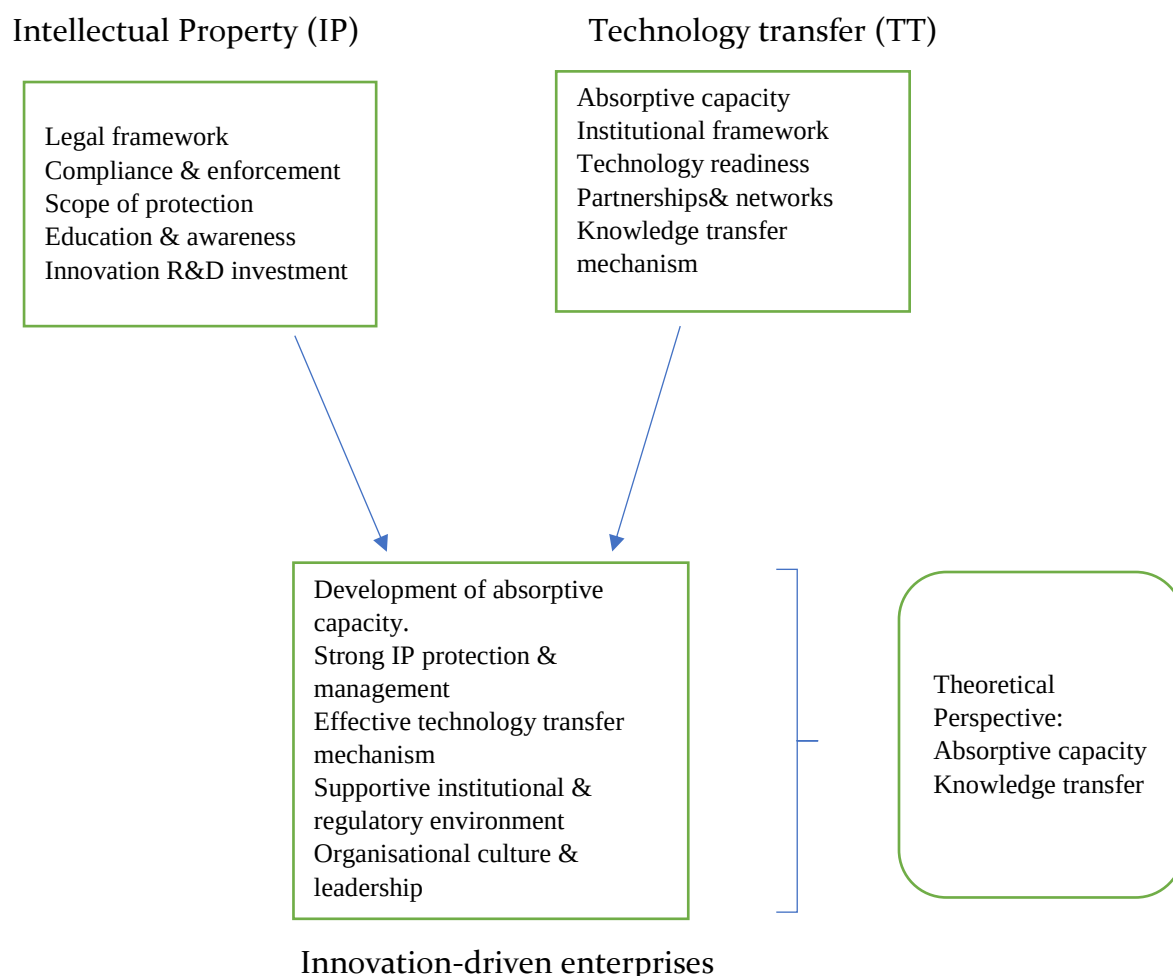


Figure 2: Conceptual framework

Source: Adopted from the literature and developed by the author

Figure 1, the conceptual framework of this study, illustrates the fundamental role of intellectual property (IP) in advancing technology transfer and fostering innovation among local SMEs in Nigeria. Supported by the theory of absorptive capacity and knowledge transfer theories, this framework establishes how effective IP management enhances SMEs' ability to absorb and apply new technologies, thereby driving their innovative capabilities and overall growth.

Underpinning theories

This study utilises theories of Absorptive Capacity (AC) and Knowledge Transfer (KT) to provide a theoretical foundation for understanding how intellectual property (IP) and

technology transfer (TT) can empower local SMEs in Nigeria to become innovation-driven. The theories underpin the role of IP and technology transfer in enhancing SMEs' innovative capabilities. The AC was developed by Wesley M. Cohen and Daniel A. Levinthal in (1990) to refer to the enterprise's ability to recognise, assimilate, and apply external knowledge and innovations. The theory explained how organizations utilize their existing knowledge to recognize, assimilate, and apply new information and technologies. It highlights how firms leverage their existing knowledge to integrate and utilize new information effectively. The KT theory on the other hand was developed by Kujiro Nonaka and Hirotaka Takeuchi in (1995) to examine how knowledge is shared, disseminated, and utilized within and between organizations. The theory focuses on the processes and mechanisms through which valuable information, skills, and expertise are exchanged and applied to drive organizational learning and innovation. The two theories are combined to provide a comprehensive understanding of how IP and technology transfer contribute to empowering local SMEs.

Methodology

This paper employs a qualitative research methodology that leverages secondary data from government documents, historical and contemporary studies, and current industry trends to critically examine the role of intellectual property (IP) in facilitating technology transfer (TT) within innovation-driven and digitally enabled SMEs (ID-DESMEs) in Nigeria. Initially, it utilises documentary analysis to explore historical records, existing reports, and other relevant documents, aiming to gather insights into the specific phenomena under investigation. The study seeks to enhance understanding and offer new perspectives on the interplay between IP, technology transfer, judicial systems on IP, innovation, and the entrepreneurial ecosystem, particularly within the context of Nigeria's aspirations to become a leading digital economy in Africa and globally through its National Digital Economic Policy and Strategy (NDEPS). These aspirations align with various legal reforms aimed at strengthening IP protection to attract technology transfer and foster innovation among local SMEs, ultimately transforming them into innovation-driven and digitally enabled entities. Additionally, a bibliometric analysis is conducted to complement and deepen the study's findings and theoretical framework. This analysis identifies key themes, emerging trends, and gaps

in the existing research related to IP and TT, as well as the effectiveness of legal systems and reforms in IP protection. By combining documentary analysis with bibliometric techniques, this study provides a comprehensive exploration of the relationships between IP, TT, innovation, entrepreneurship, IP legal system in Nigeria.

Conclusion and Recommendations

In today's rapidly evolving landscape of innovation and technology, Intellectual Property (IP) and technology transfer (TT) are essential to the success of enterprises across diverse sectors. As technology advances and global markets become increasingly interconnected, the importance of IP and TT has grown significantly. According to Nigeria's National Digital Economy Policy and Strategy (NDEPS), the primary objective is to cultivate a thriving technology ecosystem by fostering innovation and entrepreneurship while ensuring that policy and regulatory frameworks support the digital business environment. The study reveals that robust IP rights (IPR) frameworks are crucial for stimulating innovation and technology transfer, as they encourage Innovation-Driven and Digitally Enabled SMEs (ID-DESMEs) to invest in research and development (R&D). Despite this, there is a notable disparity in IPR awareness between these SMEs and larger corporations. Furthermore, inadequate judicial systems and enforcement mechanisms impede the creation of a supportive environment for technology transfer and innovation.

To address these challenges, the study recommends enhancing awareness and education about IPR among ID-DESMEs and reinforcing judicial and enforcement systems to ensure timely and effective protection of intellectual property. By tackling these issues, Nigeria can better support technology transfer and drive sustainable economic growth through innovation-driven enterprises. Although Nigeria has made progress in improving its legal framework for IP protection, more efforts are needed to align the country's IP laws with international standards. For instance, the Nigerian Copyright Act (NCA) should be updated to reflect current technological advancements and enhance protection for digital works. Similarly, the Patents and Designs Act (PDA) and the Trade Marks Act (TMA) need revisions to improve the registration process and the enforcement of rights. The implementation of the National IP Policy and Strategy aims to foster an environment that promotes innovation and creativity by committing to enhanced IP protection, increasing public awareness, and supporting robust IP enforcement.

References

- Citaristi, I. (2022). World intellectual property organization—wipo. In *The Europa Directory of International Organizations 2022* (pp. 395-398). Routledge.
- Canton, H. (2021). United nations conference on trade and development—unctad. In *The Europa directory of international organizations 2021* (pp. 172-176). Routledge
- Hayter, C. S., Rasmussen, E., & Rooksby, J. H. (2020). Beyond formal university technology transfer: innovative pathways for knowledge exchange. *The Journal of Technology Transfer*, 45, 1–8. <https://doi.org/10.1007/s10961-018-9677>.
- Hilkenmeier, F., Goller, M., Schaper, N., & Online First. (2021). The differential influence of learner factors and learning context on different professional learning activities. *Vocations and Learning*. <https://doi.org/10.1007/s12186-021-09266-4>.
- Hilkenmeier, F., Bohndick, C., Bohndick, T., & Hilkenmeier, J. (2020). Assessing distinctiveness in multidimensional instruments without access to raw data—a manifest Fornell-Larcker criterion. *Frontiers in Psychology*, 11, 1–9. <https://doi.org/10.3389/fpsyg.2020.00223>.
- Ibanez, M. J., Guerrero, M., Yanez-Valdes, C., Borros-Celume, S., & Online First. (2021). Digital social entrepreneurship: the N-Helix response to stakeholders' COVID-19 needs. *Journal of Technology Transfer*. <https://doi.org/10.1007/s10961-021-09855-4>
- Liu, T. H., & Hsiao, Y. C. (2019). Fitting cooperative mode in inter-organizational strategic alliance: a perspective from innovative and financial performances. *Journal of Technology Transfer*, 44(1), 73–96. <https://doi.org/10.1007/s10961-017-9593-9>
- Stolze, A., & Sailer, K. (2021). online first) Advancing HEIs' third-mission through dynamic capabilities: The role of leadership and agreement on vision and goals. *Journal of Technology Transfer*. <https://doi.org/10.1007/s10961-021-09850-9>.
- Zaichenko, S. (2018). The human resource dimension of science-based technology transfer: lessons from Russian RTOs and innovative enterprises. *Journal of Technology Transfer*, 43, 368–388. <https://doi.org/10.1007/s10961-017-9567-y>



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

EFFECTS OF GLOBALISATION ON INTERNATIONAL LAW

Muhammad Munir Sani

Abstract

The research is bothered on the problem of globalisation on international law. The cybercrime, terrorism, pollution of the oceans, migration of refugees, human trafficking, global warming, deforestation and technological progress and advancement. The doctrinal method would be used in conducting the research. The use of primary and secondary sources and to find the effects of globalisation on international law which are complex and far reaching. Although there are increased legal disputes due to globalisation, it has fostered greater cooperation among states and shifted the balance of power in international affairs. And the disagreement among member states of the EU and the liability of the UN to take effective action in places such as Bosnia, Kosovo Chechnya and Palestine. Suggest that international democracy, cooperation will not easily become a reality. Democracy must tackle the problems of globalisation, if power is not to become more distant from the citizens of the states. We must be able to reorient and reorganise our lives and actions, our organisation and institution along a local and global axis. The states should play a mediating role between the continuing forces of parochial identities and the local and regional effects of globalisation processes. With the failure of states, ethnicity and religion becomes dominant means of relating the local and the global.

Introduction

What is the legal definition of globalisation?

The globalisation of law means that legal authority has become more prominent in the governance of the state and the economy at national and international level.

Globalisation impacts the legal field in many fold ways. It boosts international trade and commerce by facilitating the easy movement of capital, labour, goods and services across national borders, thus, driving economic growth and the need for trained legal professional. The legal industry is changing. Globalisation and technology have made it easier than ever for companies to do business across borders, but they also provide global competitors with new opportunities to under cut local firms.

Globalisation has impacted international law by increasing the number and complexity of legal disputes as more people goods and services cross borders, legal disputes become more common. Although international law provides a framework for resolving these disputes, more is needed in the present scenario.

Globalization has made the world smaller by facilitating trade between states. But as global trade grows, there is greater demand for changes in international law to make it more suitable for current trade practices. The latest technological advancements must be monitored, like digital payments and cryptocurrency in global trade.

Globalization did not begin in the 20th century, it is a process that has occurred at different places and in different paces and in different ways over the past three millennia. Many of history's great empires, including the Roman and British Empires, created a type of international economy and culture that were, in many ways, analogous

to modern day globalisation, which is why, the presenter in my book GLOBAL GOVERNMENT and Re-globalisation, I called it re-globalisation because the world was already global.

The Effects

As a result of the latest technological in global trade, there is a great need to amend the current international law policies. Like cyber law, have already been added to the scope of the international law to promote easy governance.

Globalization has significantly reshaped the judicial process, presenting both opportunities and challenges for legal systems around the world. As societies become increasingly interconnected, the ability of courts to adapt to the demands of a globalized world be essential for upholding the rule of rule law, ensuring access to justice, and promoting fairness and equity in legal proceedings.

Human Trafficking:

The dynamism of globalisation are fuelling its growth. Human trafficking which includes forced labour and sexual exploitation, is far more widespread than many realise. It is an industry that brings about \$ 115 billion annually with an estimated 40.3 million victims globally. People are abducted or recruited in the country of origin, transferred through transit regions and then exploited in the destination country.

Deforestation:

Worldwide deforestation is one area linked to the rise of globalisation, and is a result both natural circumstances and human activity. As the global market for wood has grown, so too has the negative consequences of deforestation, most notably seen

through the effects, of climate change. Wood for example is used all around the world for home furniture, construction, and paper among other things. So, if the demand exceeds the supply, exporting might lead to deforestation.

Migration of Refugees:

Increased migration is one of the most visible and significant aspects of globalisation growing numbers of people move within countries and across borders, looking for better employment opportunities and better lifestyles. Although migration is usually seen as problematic, it contributes to sustainable development for households in poor areas, remittances improve security and with the support of populations, migrant workers are an increasingly important part of the labour force and support national welfare systems. National and international policies need to reflect the contribution of migration to sustainable development, and to explicitly protect the rights of migrants which are all too often ignored in attempts to curb their movement.

Global Warming:

Extreme weather can disrupt supply chains, damage the transport infrastructure necessary for trade in goods, and restrict people's ability to travel. Globalisation has been a huge force for worldwide prosperity. Historically, prosperity has meant more greenhouse gas emissions. But, the only practical response to greenhouse gas emissions is to decouple economic growth from emissions.

Terrorism:

On the other hand, certain views claim that globalisation may be one of the main causes of the spread of terrorism, because it against terrorist groups to terrorise the world.

Terrorism is globalised because of modernisation, development in technology, communication and ease in transportation. Thus, globalisation has started to serve terrorism, while with its positive effects it to become helpful in the fight against terrorism.

Cybercrime:

One of the ways in which globalisation made it easier to commit crime is through the rise of cybercrime and transitional crime, with the advent of internet, individuals can now conduct illegal activities online, such as purchasing illegal goods or services on the dark web. But, how does globalisation cause crimes? globalisation causes crime in multiple ways. Economic globalisation increases the gap between the rich and the poor, as well as increases the possibility of financial crimes. Cultural globalisation leads to cultural clashes and a rise in crimes like international terrorism.

Globalisation has affected cyber security by increasing the complexity and scale of potential threats and expanding the attack surface. In the era of globalisation, the world has become more interconnected than ever before. This has led to an increase in the complexity and scale of potential cyber threats. What is global cybercrime? It refers to illegal internet mediated activities that often take place in global electronic network cybercrime is “ international “or “ transnational”- there are “ no cyber borders between countries”.

Pollution and Globalisation:

According to Harvard Business School, one way that globalisation impacts the environment is through pollution caused by increased transportation of goods from one

country to another. Quote; “The farther a product travels, the more fuel is consumed, and a greater level of greenhouse gas emissions is produced”.

How does globalisation affect Pollution?

Increased greenhouse gases: As goods travel longer, it utilises more fuel and emits more greenhouse gases. Carbon gases significantly affect biodiversity while somehow increasing pollution, global warming, and acidification of the oceans throughout the world.

Pollution of Oceans:

Globalisation accelerated plastic production, waste generation, and emissions from fishing activities. Contributing to a significant increase in oceans plastic pollution since the turn of the century. Globalisation has led to an increase in ocean pollution through various mechanism. The rapid population growth and urban development associated with globalisation have intensified pollution from land - based sources, such as industrial and domestic waste, which ultimately find their way into marine ecosystems.

How does ocean link to globalisation? for the ocean increasing affluence from growth means increasing demands for resources from fisheries and mining, expansion of global shipping pollution and reaction and tourism and of course greater exposures to the impacts of climate change.

Technological Progress and Globalisation:

Advanced manufacturing technologies have altered long standing patterns of productivity and employment. Improved air and sea transportation has greatly accelerated the worldwide flow of people and goods. All this has both created and

mandated greater interdependences among firms and nations. Digital media rendered travel less necessary. The internet increased economic, social and cultural exchanges. Wireless communications reduces the need for person- person contact. Life – saving medicines brought more people closer together.

How did technology impact globalisation? The speed with which culture is diffused has changed as a result of technological advances. Sharing of ideas, information, goods and services through globalisation is also possible, because of advances in communication technology and the media.

Why is technology an important cause of globalisation?

Technologies are playing a crucial role in allowing the globalisation of economic and social activities. The ways in which new technologies penetrate individual nations is heavily affecting their actual and potential economic development.

Increase in Legal Dispute

Globalisation has impacted international law by increasing the number and complexity of legal disputes. As more people, goods, and services cross borders, legal disputes become more common. There is greater need for more efficient and effective legal mechanisms to deal with complex cases. More stringent law are required to resolve such trade disputes foster.

Impact of Globalisation on Legal Systems

The functioning of our legal systems is also being continuously reshaped by the various socio-economic parameters of globalisation. Globalisation has led to increased efforts to harmonize and standardize legal frameworks across countries, particularly in areas

such as trade, intellectual property, and human rights. International Organizations like the World Trade Organization (WTO) and the United Nations (UN) play crucial in developing and promoting these standardized legal norms.

New Sources of International Law

Globalization has led to the development of new sources of international law. Traditionally, international law was based on treaties and customary practices. However, with the rise of globalization, new sources have emerged that influence international law.

The New Sources of International Law are:

- i. Soft laws are guidelines and recommendations set by international organizations.
- ii. Traditional laws are legal principles that are enforced across national borders.

Compliance Issues

Globalization has compelled states to cooperate more efficiently on legal issues. International law relies on states to comply voluntarily with legal obligations. Some states do not comply with their legal obligations set in the agreement, causing compliance issues. These issues must be settled through international law, as they are classified as transnational issues.

A few states also promoted unfair trade practices and policies to gain an economic advantage. As these practices damage the economic and environmental balance of the world, they are monitored strictly. International law is now being used to discourage states from engaging in tax evasion, money laundering, and environmental degradation.

External Influence

Another effect of globalization on international law is the rise of non-state actors. Non-state actors include private entities like Multinational Corporations, international organizations, and civil society groups.

These private entities are now becoming important players in the global legal landscape. They are directly influencing international law development, through their contacts with government officials. This external influence can be used for the greater good or private gains.

Skewed Balance of Power

Globalization has also shifted the balance of power between states. As the global economy becomes more integrated, the role of states in shaping international law is changing. Smaller states, often overlooked in international affairs, may have more influence.

This change occurs when the smaller states have more economic power and leverage, that to shape the legal landscape that allows them global exposure. At the same time, larger states may face greater scrutiny and pressure to comply with international legal norms.

Competition Law

Since, India is a signatory of the world trade organization agreement of 1995. The Competition Act, 2002 was enacted in 2003 to do away with the monopolies and restrictive Trade Practice Act, 1969, after the economic reforms of 1991.

Law Relating to Human Rights

Enactments of new laws in regard to Human Rights around the world is the best example of the impact, of globalisation on judicial process and also provides an idea, how the administration of justice got affected by globalization.

Environment Law

Because of globalisation, environmental and human rights are struggling. The increase in economic activity leads to large emissions of industrial pollutants and environmental degradation.

Criminal Law

Each and every criminal justice delivery system today somehow overlaps and interacts with other criminal justice delivery systems. It is a well-known fact that control over the criminal justice delivery system has become an obvious jurisdictional battle between states, criminal jurisdiction is still considered as an essential element of sovereignty.

Intellectual Property Law

Intellectual Property Right (hereinafter mentioned as IPR) is a key issue of globalisation, however, IPR protection is narrow and limited, but it is taking a momentum.

CONCLUSION

Summary

The effects of globalization on international law are complex and far – reaching. Although there are increased legal disputes due to globalization, it has fostered greater cooperation among states and shifted the balance of power in international affairs. As the world continues to welcome globalization and become more interconnected, its impact on international law will continue.

Findings

The disagreements among member states of the EU and the liability of the UN to take effective action in places such as Bosnia, Kosovo, Chechnya and Palestine. Suggest that, international democracy and co-operation will not easily become a reality.

It is a proved fact that in the name of human rights violation, powerful nations have invaded various countries and taken over the entire government system or used to maintain a person in power who acts as puppet of invader state.

Recommendations

- i. Democracy must tackle the problems of globalization, if power is not to become more distant from the citizens of states.
- ii. According to Beck¹⁴⁷⁵, we must be able to reorient and reorganize our lives and actions, our organizations and institutions along a local and global axis.
- iii. The states should play a mediating role between the continuing forces of parochial identities and the local and regional effects of globalisation processes.
- iv. With the failure of states, ethnicity and religion become dominant means of relating the local and the global.

¹⁴⁷⁵ U. Beck, *What is Globalisation?* (Polity Press, 2009).



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN ANALYSIS OF CORPORATE INCOME TAXATION IN 21ST CENTURY NIGERIA

Magashi Hajara Garba

Lecturer I, Department of Islamic Law, Faculty of Law

Bayero University, Kano

ghmagashi@gmail.com; +2347036172289

Abstract

Digitization of the global economy makes it possible for businesses to have systematic online and large-scale communication without the need for physical presence. According to Tax Justice Network, countries are on course to lose \$ 4.7 trillion to global tax abuse over the next 10 years. Maintaining the power of states to tax income is crucial for both sovereignty and the provision of necessary government services to their citizens. In light of the digitization of the global economy, it is essential to analyse the long-standing principles of international tax law to determine whether or not they are still viable. The paper adopts analytical and comparative methods to review the sources involved. The introduction of Significant Economic Presence concept is a giant step towards securing the Nigerian tax net. Nevertheless, this concept may not completely capture all the economic activities of digital companies. This paper recommends that Nigeria should learn lesson from Indian Equalization levy.

Introduction

The issue of corporate income taxation has become increasingly crucial in the 21st century, given the growing globalization of the world economy and the need for governments to generate sufficient revenue to fund public expenditures. In the context of Nigeria, a developing economy, the approach to corporate income taxation has been

the subject of significant interest and debate. First, there is evidence that multinational companies operating in Nigeria have employed various strategies, such as transfer pricing and leverage, to reduce their effective tax rates. This has had a detrimental impact on the government's revenue generation and, consequently, the country's economic development and sustainability (Otusanya et al., 2013).

Nigeria as a sovereign State exercises jurisdiction to tax corporate income through the combined effect of domestic income tax rules and bilateral tax agreements. Hence, the Nigerian corporate income tax regime is made up of bilateral tax treaties to which Nigeria is a party and domestic legislations. Before the advent of economic globalization, the exercise of income tax jurisdiction by a sovereign State was solely based on domestic income tax rules. Afterwards, bilateral tax treaty evolved to tackle double taxation of income triggered by economic globalization. Currently, all over the world, corporate income tax rules for the exercise of tax jurisdiction by the States is made up of domestic income tax rules and bilateral tax treaties entered into by the States. The jurisdictional rules for taxing corporate income evolved from the concepts of source and residence. The central focus of this paper is the Nigerian approach towards using the source-based system of taxation for the purposes of taxing the corporate income of non-resident companies. The Nigerian corporate income tax regime is determined by the various legislations already mentioned and the bilateral tax treaties entered into by Nigeria. Nigerian corporate income tax regime employs 'corporate residence' and 'fixed place of business' tests for the determination of tax liability of resident companies and non-resident companies respectively (Avi-Yonah, 2004). This paper embarks on an analysis of the Nigerian corporate income tax regime, with a view to ascertain the position of the Nigerian legal regime in the face of digitalized global economy and base erosion and profit shifting. It is imperative to ascertain whether or not Nigeria as a sovereign State is adequately taxing corporate income using the current corporate income tax regime.

This paper employs the critical analysis method to analyse the available literature on jurisdiction to tax corporate income in a cross-border setting. The aim is to identify any gaps in the Nigerian legal framework. The paper also employs a comparative analysis

method to compare the Nigerian corporate income tax regime to that of India. India is selected because it is a common law jurisdiction with a tax system similar to that of Nigeria. Nigeria operates both a residence-based and source-based system for determining tax liability for companies' income. All companies in Nigeria are required to pay income tax on their global profits earned, brought in, derived from, or received in Nigeria. In line with the principle of permanent establishment (PE) in tax treaties, non-resident companies are considered to have derived income from Nigeria if they have a fixed place of business in Nigeria through which they conduct business or have a dependent agent in the country. Additionally, to address the challenge of taxing non-resident companies that derive income from Nigeria without a physical presence, Nigeria has adopted the concept of significant economic presence (SEP) to determine the tax liability of non-resident companies that carry on business in Nigeria without a taxable presence, with the aim of preventing revenue loss due to base erosion and profit shifting by modern digital businesses. India also uses the tax treaty principle of permanent establishment to determine the income tax liability of non-resident companies, and has recently adopted the concept of significant economic presence for purposes of determining the income tax liability of non-resident companies carrying on business in India without a taxable presence.

Digitization of the 21st Century Global Economy

Historically, corporate income tax emerged during a time when corporations exclusively conducted business within their home countries. However, the globalization of trade has enabled most corporations to operate on a global scale. This integration of national economies through the integration of trade, finance, and investment in the global market has led to activities and transactions taking place across national borders. In fact, an enterprise may have physical presence in two or more countries for the purpose of carrying on business. With the advancement of new communication and information technologies, an enterprise may now have both physical and digital presence in many countries.

Prior to the globalization of the economy, the exercise of jurisdiction to tax was a natural occurrence for individuals within the borders of a state. However, with the advent of

globalization, it became necessary to extend principles for taxing income across borders based on the residency of the taxpayer and the source of the income (Avi -Yonah, 2004; Brownlie, 2012). In the early 21st century, the intensity of economic globalization increased significantly due to the digitalization of the global economy, sparked by advancements in communication and information technologies. The rapid growth of the internet has led to the emergence of international e-commerce, which has challenged traditional trade models and transformed the global economy, market, and business structures, as well as the international legal framework (Wang, 2006). The Internet enables systematic, online, large-scale, and interactive communication between parties, resulting in the creation of cyberspace, where activities such as e-commerce can take place seamlessly, unrestricted by geographical boundaries, which is a marked departure from physical space. It has been claimed that countries are on course to lose \$ 4.7 trillion to tax havens over the next 10 years. The Tax Justice Network said in its state of tax justice report (2023) shows that countries are losing \$472 billion in tax year to global tax abuse (Goodal, 2023). It is also recently revealed that Tax Watch UK reports that Netflix is being put under pressure by UK, France and Spain to start recording subscription revenues in their jurisdiction in order to pay corporation tax. The report also claims that Netflix should have paid more than 13 million pounds UK corporation tax in 2018.

In a digitalized global economy, traditional notions of physical presence and jurisdiction become blurred, making it difficult to determine the source of income for tax purposes. This issue arises because digital businesses can operate and generate significant profits in multiple jurisdictions without a physical presence. As a result, it becomes challenging for tax authorities to accurately attribute and tax the income generated by these digital businesses. The digital economy has transformed the way businesses operate and generate income, posing significant challenges for source-based taxation. One of the main challenges is the determination of a fair and equitable allocation of tax right among jurisdictions where digital businesses operate. Another challenge is the difficulty in collecting and enforcing taxes from digital businesses that may not have a physical presence or substantial assets in a specific jurisdiction. The digitalization of the economy poses several challenges to the international tax system, including the need

for fundamental tax reform, transfer pricing rules, and the allocation of profits to intangible assets and business risks. The current tax system struggles to keep up with the rapidly evolving digital business models, leading to difficulties in determining the appropriate jurisdiction for taxation. Additionally, the lack of a clear definition of "value creation" in the digital economy makes it challenging to allocate profits accurately (Turina, 2020). Moreover, the absence of a precise definition of "value creation" in the digital economy adds to the difficulty of accurately distributing profits (Turina, 2020). The increasing globalization and the separation of risks and assets from functions have become significant tools for tax planning in transfer pricing. The OECD has acknowledged these challenges in its BEPS project, emphasizing the tax complexities arising from the digital economy and advocating for reduced reliance on a legalistic approach to assets and risks (OECD Report).

Essentially, the digitalization of the global economy is causing the corporate tax base of sovereign States to erode, making it easier for multinational corporations to shift profits to tax havens. This is creating a complex problem, as the principles of corporate income taxation in a cross-border setting are being impacted by new technologies, which have resulted in the digitalization of the global economy. Source-based taxation of corporate income is the most affected by digitization of the global economy, which necessitates that countries evolved new rules in order to preserve their sovereign right to tax and generate revenue for governmental expenditure.

Nigerian Sourced-Based Corporate Income Taxing Right

Source-based taxation refers to a taxation system in which tax liabilities are determined based on the source of income, rather than the residence of the taxpayer. This approach is particularly relevant and challenging in the context of a digitized global economy (Hanrahan, 2021). Sourced-based taxing right is founded based on a territorial connection between the taxing State and specific corporate income. This means that there shall be the existence of a geographical connection between the State asserting jurisdiction and a particular income. In this regard taxing right is determined by the combined effect of both the domestic corporate income tax legislation and the bilateral tax treaty entered into by the State. The assertion of corporate income tax jurisdiction

through the principle of source is also seriously challenged as a result of digitalization of the global economy. The treaty concept of permanent establishment has become very difficult to use since many corporations are engaged in digitalized businesses and have the choice to avoid physical presence in a particular geographical location for the purposes of carrying out business (Bakhru and Gupta, 2012).

Generally, under international tax law if a taxpayer is not a national or resident of a state, that State has only limited or source jurisdiction over the person's income (Mason, 2015). This principle is traced back to territoriality under international law. In tax matters, territoriality is the principle which allows a State to tax facts that have a genuine link with its territory. Most countries assert right to tax the income arising within their borders but accruing to foreign investors (Musgrave, 2001). This entitlement to tax at source is at the foundation of international tax treaties. And this entitlement to tax all income arising within its geographical borders has been recognized as a fundamental entitlement (Musgrave, 2001). This principle allows a country to share in the gains of foreign-owned factors of production operating within its borders. This may be in the form of cooperation with its own factors, which may be natural resources, an educated and/or low-cost work force, or the proximity of a market (Musgrave, 2001).

Generally, the source of income is where the economic activity creating the income is carried on (Schaefer, 2000). Under source-based taxation, a part of the taxpayer's worldwide income is taxed, and the taxing jurisdiction is only entitled to income earned within its own borders (Musgrave, 2001). Source taxation of income has been held to be best implemented by a corporation income tax based on the origin principle (Musgrave, 2001). The source jurisdiction to tax income accruing to non-residents is determined by two important elements. The first one is its definition of source, which determines its share in the tax base, and the second one is the tax rate which it applies to that share of the base. However, it is only in the absence of international treaty rules that each source country can choose income tax policy options to protect its own interests (Musgrave, 2001). Thus, no source country can unilaterally choose income tax policy options because of economic globalization. The definition of source by the domestic legislation of the country must capture both traditional and digital ways of sourcing income in the

host jurisdiction, otherwise a lot of tax revenue is bound to be lost, because the tax base will be eroded.

The exercise of jurisdiction to tax corporate income on the basis of source-based principle has been tied down to the concept of permanent establishment. This means that taxation of income can only occur if permanent establishment exists in the source country. The concept is traced back to bilateral tax treaties which allocate taxing rights between contracting states. That is the allocate taxing right between residence and source States over a piece of income. Avi-Yonah and Clausing (2008) concisely described the purpose of tax treaties as a consensus for implementing the underlying international tax regime by shifting the right to tax passive income from the source to the residence country, and by limiting the entitlement of source countries to taxing active income attributable to a permanent establishment only. Under the concept of permanent establishment foreign corporations are generally taxed on their business profits only when they have a substantial and continuing presence in the source country. The substantial and continuing presence is called a permanent establishment, hence foreign corporations with a permanent establishment in a country are usually taxed on the business profits attributable to the permanent establishment only. If the foreign corporation does not have a permanent establishment, the business profits are fortified from source-based taxes (Irish, 2008). With the rapid development of the internet, questions have arisen as to how the permanent establishment concept is impacted by a digitalized global economy and whether the concept is still viable.

The term permanent establishment has been defined under Article 5(1) as a distinct situs, a fixed place of business through which the business of an enterprise is wholly or partly carried on, and includes a place of management, a branch, an office, a factory, a workshop, a place of extraction of natural resources and a farm or plantation (OECD, 2005). The definition includes a building site, or construction or assembly project or supervisory activities provided such activities continue for a stipulated period of time. The definition encompasses situations where an agent (other than independent contractors, brokers or general commission agents acting in the ordinary course of business) habitually concludes contracts on behalf of the foreign company in the source

country, unless the activities are limited to the purchase of goods or merchandise for the foreign company.

The aim of the permanent establishment threshold is to define when a foreign company has a sufficient nexus with the source country to justify source-based taxation. The nexus to tax is determined by the fact that a foreign company carries on business activities through some level of physical presence, which could be in the form of labour or property, in the source country (OECD Report). The current permanent establishment concept requires a physical or representative presence as the nexus for source countries to tax business profits of a foreign company. Whether or not a foreign company has a fixed place of business in the source country is dependent on factors like the character of income, the duration of the activities, and the right to use a particular location (Goel and Goel, 2018). There is no existence of permanent establishment where the e-commerce operations carried on through representatives in the market country are restricted to preparatory or auxiliary activities. Examples of such activities include advertisement of goods or services (Goel and Goel, 2018).

CITA imposes source-based income taxation on foreign companies. While CAMA defines a foreign company as any company (other than corporation sole) established by or under any law in force in any territory or country outside Nigeria. This definition when viewed from the lens of the mandatory requirement for incorporation for foreign companies under section 54 of CAMA necessarily implies that any foreign company which does not satisfy this provision falls under the definition of foreign company under CITA and can be taxed using source-based income taxation. Does this imply that Nigeria cannot tax income emanating from Nigerian source where there is no double tax treaty between the company's country of residence and Nigeria?

In Nigeria, the Company Income Tax Act recognizes both Nigerian companies and foreign companies for the purposes of taxation. The Act taxes the global profits of foreign companies operating in Nigeria, which is accruing in, brought into, derived from or received in Nigeria (Section 9(1) Company Income Tax Act 2007). While Section 13(2) of CITA provides that "The profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria (a) if that company has a fixed base in Nigeria to the extent that the profit is attributable to the fixed base..."

And Section 13(3) stipulates that, for the purpose of subsection 2 in this section, a fixed base should not encompass facilities exclusively used for (a) the storage or display of goods or merchandise, or (b) facilities solely employed for the collection of information. Nevertheless, Section 4 of the Finance Act modified section 13 of the Companies Income Tax Act, specifically by substituting a new subsection 2 as follows:

"(2) the profits of a company, other than a Nigerian company, derived from any trade or business shall be considered as originating from or subject to taxation in Nigeria under the following circumstances:

- If the company possesses a fixed place of business in Nigeria, to the extent that the profit can be attributed to the fixed base; - If the company does not possess a fixed base in Nigeria but consistently conducts a trade or business through an authorized person in Nigeria, acting on its behalf or on behalf of other companies controlled by it or in which it holds a controlling interest; or consistently maintains a stock of goods or merchandise in Nigeria, from which deliveries are regularly made by a person on behalf of the company, to the extent that the profit can be attributed to the business, trade, or activities carried out through that person;
- If the company transmits, emits, or receives signals, sounds, messages, images, or data of any kind to Nigeria by means of cable, radio, electromagnetic systems, or any other electronic or wireless apparatus, in relation to any activity, including electronic commerce, application stores, high-frequency trading, electronic data storage, online advertising, participative network platforms, online payments, and so on, to the extent that the company has a significant economic presence in Nigeria and profit can be attributed to such activity;
- If the trade, business, or activities involve a single contract for surveys, deliveries, installation, or construction, the profit from that contract;
- If the trade or business consists of providing technical, management, consultancy, or professional services outside of Nigeria to a resident person in Nigeria, to the extent that the company has a significant economic presence in Nigeria.

However, it should be noted that the withholding tax applicable to the income under this paragraph shall serve as the final tax on the income of a non-resident recipient who does not otherwise fall within the scope of subsection 2 (a)-(d). Alternatively, if the trade, business, or activities are conducted between the company and another person controlled by it or in which it holds a controlling interest, and conditions are established or imposed between the company and such person in their commercial or financial relations that the Board deems to be artificial or fictitious, or if the Board adjusts a portion of the profit to reflect arm's length transactions, then the profit shall be subject to taxation.

Nigeria utilizes the principle of 'fixed place of businesses' in order to ascertain the income tax liability of non-resident companies. The terminology 'fixed place of business' employed in Nigeria corresponds to the term 'permanent establishment', which is utilized in the OECD Model Tax Convention and the United Nations Model Tax Convention. Additionally, Nigeria has engaged in multiple bilateral tax treaties that employ the concept of 'permanent establishment' to determine the tax liability of non-resident companies. Permanent Establishment is determined by the presence of a company's permanent establishment situated within the source State, and the income subject to taxation shall be attributed to the permanent establishment. Consequently, Nigeria is subject to the Permanent Establishment concept in accordance with the various bilateral tax treaties it has entered into. A Fixed Base represents a specific category of PE that signifies a permanent or fixed site from which specific services are delivered. Typically linked to independent personal services, the Fixed Base allows the country of source to tax income generated from services provided through that fixed location. The Fixed Base provision grants the authority to tax income from independent personal services to the source country if the taxpayer has a fixed base in that country and the income is attributable to that specific location (Ogueri-Onyeukwu and Monye).

Section 30 of CITA was modified to incorporate a new subsection 1(b)(a) that enables the evaluation of non-resident companies (NRCs) with a digital significant economic presence (SEP) in Nigeria for the purpose of imposing a fair and reasonable tax on a percentage of their turnover that can be attributed to a significant economic presence.

In cases where there is no assessable profit or the assessable profit falls below the expected level for that specific business or cannot be determined, NRCs with a SEP in digital services are currently required to file their tax returns based on the normal/profit basis, as outlined in section 55 of CITA. However, with this amendment, the Federal Inland Revenue Service (FIRS) may exercise discretion and subject such NRCs to income tax on a deemed profit basis, when it is not feasible to accurately compute their actual profits. It is important to note that the decision to opt for the deemed income basis of taxation should not be automatic for NRCs. While this amendment should partly resolve the issue of profit attribution for digital businesses in Nigeria, it remains unclear what percentage of turnover should be considered as taxable profits for these companies. Therefore, it can be inferred that FIRS has the authority to determine this percentage, possibly on a case-by-case basis, due to the open-ended nature of this provision.

Section 8 of Finance Act also amends section 30 of Companies Income Tax Act by inserting after subsection (1) (b) (ii) a new paragraph (ii a) provides that A company that transmits, emits, or receives signals, sounds, messages, images, or data through cable, radio, electromagnetic systems, or any other electronic or wireless device to Nigeria for any business activity—including e-commerce, app stores, high-frequency trading, electronic data storage, online advertisements, social networks, or online payments—will be assessed and charged for that fiscal year based on a fair and reasonable percentage, provided the company has a significant economic presence in Nigeria.

With the insertion of subsection (ii a) by Section 8 of the Finance Act, several questions. What constitutes a fair and reasonable percentage? How do we define a reasonable and fair percentage? What defines significant economic presence? It is evident that the subsection aims to establish a connection between Nigeria and an item of corporate income using the source-based principle of corporate income taxation. What is the basis for this test? Is this test overly elusive as a subjective method for determining corporate income tax liability in a digital context.

In addition, section 9 (1) of CITA (as amended by Finance Act, 2019 s. 2(a) (i)) provides that Under this Act, tax for each assessment year is payable at the rate specified in

Section 40 (1) on the profits of any company that are not taxed under the Capital Gains Tax Act, Petroleum Profits Tax Act, and Personal Income Tax Act. Taxable profits include:

(a) Profits from any trade or business. (b) Rent or premiums from granting rights for property use or occupation. (c) Dividends, interest, royalties, discounts, charges, or annuities. (d) Any other sources of annual profits or gains. Additionally, Section 9(2) of the CITA states that interest is deemed derived from Nigeria if: (a) A Nigerian company is liable for the interest payment, regardless of payment form or location. (b) Interest accrues to a foreign entity from a Nigerian company, regardless of how it accrues.

Section 11 (4) of CITA defines a foreign company as any company or corporation (excluding corporations sole) established under laws outside Nigeria. While taxable Profits for Foreign Companies are provided for under (Section 13 (2) of CITA, as amended by Finance Act 2019) as follows:

- Fixed Base: Profits from a trade or business with a fixed base in Nigeria are taxable to the extent attributable to that base.
- Business Operations without Fixed Base: Profits are taxable if the company operates through a person in Nigeria authorized to act on its behalf, maintains a stock of goods in Nigeria, or regularly makes deliveries through a person, to the extent attributable to such activities.
- Electronic and Digital Activities: Profits from transmitting signals, data, or engaging in electronic commerce and other specified activities are taxable if the company has a significant economic presence in Nigeria.
- Single Contracts: Profits from single contracts for surveys, deliveries, installations, or construction are taxable.
- Technical and Professional Services: Profits from furnishing services outside Nigeria to residents in Nigeria are taxable if the company has a significant economic presence in Nigeria.
- Controlled Transactions: Profits from artificial or fictitious transactions between the company and its controlled entities are adjusted to reflect arm's length transactions.

Facilities solely for storage/display of goods or information collection are not considered a fixed base. The Minister may determine what constitutes significant economic presence for electronic and service activities. These amendments provide a comprehensive framework for taxing the profits of foreign companies operating in Nigeria, particularly emphasizing their economic presence and digital activities.

The Finance Act 2019 and the Companies Income Tax (Significant Economic Presence) Order 2020 introduced major changes to Nigeria's taxation of non-resident companies (NRCs). These changes expanded the taxable presence to include digital activities and technology-driven economic engagements. The 2020 Order set criteria for determining when NRCs have a significant economic presence in Nigeria, making them liable for taxation. It also includes provisions for taxing NRCs that provide technical, management, consultancy, or professional services to Nigerian residents from abroad. Additionally, the legislation established thresholds that bring many foreign companies under Nigerian tax jurisdiction, potentially leading to double taxation for firms in countries without a double tax treaty with Nigeria (Ogueri-Onyeukwu and Monye). The traditional OECD guidelines on permanent establishments (PEs) focused on physical presence to determine tax residency and obligations, requiring a fixed location like an office or factory. However, with the rise of the digital economy and virtual business models, these guidelines are now insufficient for capturing the economic activities of companies operating internationally without physical premises (Ogueri-Onyeukwu and Monye).

The Companies Income Tax Act, along with the Finance Act 2019 and the Significant Economic Presence Order 2020, addresses modern corporate income tax issues. In the digital era, defining and applying the concept of a permanent establishment (PE) is challenging due to the increase in digital transactions. This shift complicates the assessment of a country's right to tax profits from foreign companies. The traditional PE definition, based on physical presence, is inadequate for the digital context. As a result, different countries and organizations have developed varying interpretations and definitions of PE, leading to inconsistencies and challenges in its application (Ogueri-Onyeukwu and Monye). The shift towards digital and virtual presence has significantly

impacted the traditional understanding of permanent establishments (PEs) for tax purposes. Previously, PEs were defined by physical presence, like an office or factory. However, digital transactions and virtual business models now allow companies to conduct substantial business in a country without any physical presence.

This shift challenges the traditional concept of a PE as it blurs the lines between where business is conducted and where a company is physically located. The digital economy allows companies to interact with customers, conclude contracts, and generate revenue in a country without the need for a physical office or establishment. Consequently, tax authorities must reevaluate how they define and identify PEs in the digital era to ensure that companies conducting significant economic activities in a jurisdiction are appropriately taxed, even if they lack a traditional physical presence.

In light of these evolving challenges, the OECD has introduced new guidelines that consider significant economic presence as a criterion for assessing tax responsibilities. These updated guidelines recognize that companies can engage in substantial business operations in a country through digital channels without a physical footprint. Factors such as possessing a local domain name, digital platform, established user base, online contract activities, marketing efforts, and revenue generation within a country are now considered in determining an SEP (Ogueri-Onyeukwu and Monye).

The introduction of these new guidelines demonstrates the OECD's acknowledgment of the shifting landscape of business practices in the digital age. The objective is to ensure that companies conducting significant economic activities in a jurisdiction, even in the absence of physical presence, are subject to appropriate taxation. By incorporating digital elements and economic interactions facilitated by technology, the OECD's updated guidelines offer a more inclusive framework for addressing tax challenges arising from the digital economy (Ogueri-Onyeukwu and Monye).

In summary, while a Permanent Establishment covers a broad spectrum of business activities conducted through a fixed business location, a Fixed Base specifically pertains to the provision of services from a permanent or fixed site. Both concepts are pivotal in determining the tax responsibilities of companies engaged in cross-border operations,

serving to prevent tax evasion and ensure equitable taxation in international business dealings (Ogueri-Onyeukwu and Monye). The concept of Significant Economic Presence (SEP) has emerged in response to the challenges presented by the digital economy, allowing companies to engage in substantial business activities in a country without a physical presence. SEP serves as a criterion for determining tax responsibilities based on economic interactions facilitated through digital channels, moving beyond reliance solely on physical presence for taxation purposes (Ogueri-Onyeukwu and Monye).

In the context of SEP, a non-resident company is considered to have a significant economic presence in a country if it actively engages in sustained and purposeful economic interactions with the country's economy using digital technology and automated tools. These interactions can encompass activities like transmitting data, messages, or images electronically, participating in e-commerce, offering online services, or conducting digital advertising campaigns. Various factors are taken into account when evaluating SEP, including possessing a local domain name, utilizing a digital platform, having a defined user base, concluding online contracts, engaging in continuous marketing efforts, and generating revenue within the country. These factors indicate the company's economic involvement with the jurisdiction, even in the absence of a physical establishment (Ogueri-Onyeukwu and Monye).

The introduction of the SEP concept acknowledges that the traditional framework of determining tax residency and obligations based on physical presence may not fully capture the economic activities of digital companies. By integrating digital elements and economic interactions facilitated by technology, the SEP concept aims to ensure that companies engaging in significant economic activities within a jurisdiction, regardless of physical presence, are subject to appropriate taxation (Ogueri-Onyeukwu and Monye). However, explicit operational guidelines for administering the SEP tax are not provided.

Indian Source-based Corporate Income Taxing Right

India uses the tax treaty principle of permanent establishment to determine the income tax liability of non-resident companies. India has also recently adopted the concept of

'significant economic presence' for purposes of determining the income tax liability of non-resident companies carrying on business in India without a taxable presence. This unilateral measure initiated in India is to tackle the loss of revenue due to innovative digital businesses which cause base erosion and profit shifting. Prior to the adoption of SEP, India has introduced equalization levy on certain non-resident business operation facilitated by advancement in e-commerce sector. India became one of the first countries to levy equalization levy of 6% on online advertising and related services in 2016. The equalization levy provision is triggered where the identified business activities interact with 300,000 or more number of users in India. The introduction of SEP provisions expands the scope of business connection with digitalised business, which is broader than the treaty principle of permanent establishment. The Indian domestic laws have both the equalization levy and the SEP provisions, and when a transaction is subject to the equalization levy, there will be no additional tax liability on the same item of income earned in India.

In India, a Permanent Establishment (PE) is defined as a fixed place of business through which an enterprise's business is conducted wholly or partly. This includes places like a management office, branch, factory, workshop, warehouse, mine, oil or gas well, quarry, or any location for extracting natural resources. The definition also encompasses the provision of services, including consultancy services, carried out by employees or personnel engaged by the enterprise, provided these activities continue for a specified period. India's PE definition aligns with the OECD Model Tax Convention, and most of India's tax treaties are based on this model, with some variations and additions (Bakhru and Gupta, 2012)

India's right to tax profits of foreign companies is governed in accordance with the treatment assigned to it in a tax treaty. The concept of Permanent Establishment (PE) in tax treaties is similar to the "business connection" concept in Explanation 2 of section 9(1)(i) of the Income Tax Act, 1961 (IT Act). In some cases, courts may focus on the existence of a PE, making it unnecessary to examine the "business connection" test under section 9. Explanation 2 defines "business connection" as including business activities conducted through a person in India who, on behalf of the non-resident,

habitually concludes contracts, maintains a stock of goods or merchandise, or secures orders (Goel and Goel, 2018).

In the case of *ABB FZ LLC v. CIT*, the Income Tax Appellate Tribunal allowed source-based taxation of virtual services provided by a foreign company from outside India but used in India. The case examined whether a foreign company has a Permanent Establishment (PE) in India without a fixed place of business or employees present in India for the required minimum period. This case underscores the limitations of the current PE rules in addressing digital companies' activities and highlights the need for a new PE nexus based on "significant economic presence (Goel and Goel, 2018)

The Indian Budget 2018 widens this definition of "business connection" by inserting a new Explanation 2A to section 9(1)(i) of the IT Act, according to which a non-resident shall be said to have a "business connection" in India if the non-resident has a "significant economic presence" in India (Goel and Goel, 2018). According to Article 7 of tax treaties that India has signed with foreign tax jurisdictions, business profits of a foreign company cannot be taxed in the source country unless the foreign company carries on business activities in the source country through a PE (Goel and Goel, 2018).

Indian Finance Minister proposed an "equalization levy" on specific digital transactions into India as part of the Finance Bill 2016. This proposal was a response to the Indian revenue authorities' loss in the *Right Florists* case, where the Income Tax Appellate Tribunal ruled that payments to Google and Yahoo for advertising services targeting the Indian market could not be taxed as business profits since the providers did not have a permanent Establishment (PE) in India (Avi-Yonah, 2016). India's adoption of BEPS-related measures, aligned with Action 1, targets base erosion and profit shifting in the digital economy, especially in online advertising transactions. This levy aims to ensure fair taxation by taxing profits where economic activities occur. It affects Indian entities involved in online advertising with non-resident counterparts and supports international efforts to combat tax avoidance (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1)

The amendment introduces a 6% equalization levy on payments from Indian entities to non-residents for specified services if the total amount exceeds INR 100,000. This aims

to ensure equitable taxation and prevent tax base erosion. However, the levy has faced criticism for being inconsistent with India's tax treaties and may increase compliance burdens and lead to double taxation for Indian entities. The cost of the levy could impact Indian entities' negotiating positions and harm small and medium-sized businesses. Additionally, Indian entities must reassess their inter-group arrangements to manage potential tax implications from the levy (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1)

The equalization levy in India comes with penalties for non-compliance. If a taxpayer fails to deduct the equalization levy as required, they may face a penalty equal to the amount of the levy that should have been deducted. If the deducted equalization levy is not remitted to the government on time, a penalty of INR 1,000 per day may be imposed until the levy is paid. If a payer fails to submit the annual statement on time, either voluntarily or as required by tax authorities, they may incur a penalty of INR 1,000 per day. If a taxpayer is found to have made a false statement or provided false accounts related to the equalization levy, they could face imprisonment for up to 3 years along with a fine, subject to the previous sanction of the Chief Commissioner of Income Tax. These penalties aim to ensure compliance with the equalization levy provisions and discourage non-compliance by imposing financial consequences and, in severe cases, criminal sanctions (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1)

The obligation of collecting and remitting the equalization levy rests with the taxpayer. Each taxpayer of specified services to a non-resident is required to deduct the levy at a rate of 6% and submit the collected sum to the central government within the first seven days of the subsequent calendar month. Prompt deposit of the equalization levy is crucial. Failure to deduct or transfer the levy punctually may lead to penalties. The eligibility of expenses for the payer, on which the levy has been deducted, hinges on the timely deduction and deposit of the levy. Every taxpayer must furnish an annual statement by the specified deadline, outlining the equalization levy collected and deposited (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1)

While acknowledging the role of equalization levy in curbing BEPS opportunities for foreign companies, promoting tax fairness, and contributing to government revenue, the levy has drawn criticism for imposing additional compliance burdens and penalties on domestic taxpayers (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1). Moreover, the absence of a tax credit in the taxpayer's country of residence raises concerns about potential double taxation. Additionally, the author raises questions about the levy's separate inclusion in the Finance Act rather than the Income Tax Act, prompting scrutiny of its alignment with international tax practices. Furthermore, the limited scope of the levy, which currently applies only to online advertising expenses and not to sales through online retail portals without a physical presence, underscores the need for ongoing monitoring of the Indian government's future actions regarding the levy.

Some countries have implemented various measures to address BEPS challenges in the digital economy. For instance, Saudi Arabia and Kuwait have introduced the concept of a virtual Permanent Establishment (PE), allowing non-residents to be deemed to have a PE based on the provision of services within the country, even without physical presence. Meanwhile, the United Kingdom has implemented a diverted profits tax, imposing a 25% tax on profits shifted out of the country by multinational enterprises (MNEs) to avoid tax. Saudi Arabia and Kuwait have introduced the concept of a virtual Permanent Establishment (PE), where a non-resident can be deemed to have a PE if they provide services to a person in the country for a specified period, even without physical presence. This approach aims to establish a nexus based on significant economic presence. This tax targets digital business models that generate substantial sales and activities in the UK without a physical presence, aligning with a nexus-based approach. These measures reflect the global effort to combat tax avoidance and ensure fair taxation in the digital era by adapting tax systems to address BEPS challenges (India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1)

Summary of Conclusion

The digitalized global economy challenges traditional tax systems by blurring the lines of physical presence and jurisdiction. Digital businesses can generate significant profits across multiple jurisdictions without having a physical presence, complicating the attribution and taxation of income. This shift poses significant issues for source-based taxation, as it is hard to determine fair tax allocation among jurisdictions and to enforce tax collection from businesses without substantial physical assets.

The international tax system is struggling to keep up with these changes, facing challenges in defining "value creation" and properly allocating profits to intangible assets and business risks. The OECD's BEPS project highlights these complexities and advocates for less reliance on a legalistic approach to assets and risks. Digitalization is eroding the corporate tax base of sovereign states, making it easier for multinational corporations to shift profits to tax havens. This situation necessitates new rules to preserve countries' rights to tax and generate revenue.

Source-based taxation determines tax liabilities based on the income source rather than the taxpayer's residence. This system, crucial in a digitized global economy, ties tax rights to a geographical connection between the income and the taxing state, influenced by domestic laws and bilateral treaties. Digitalization challenges this approach, particularly the "permanent establishment" (PE) concept, as digital businesses can avoid physical presence. Traditionally, non-residents have limited tax jurisdiction based on territoriality, allowing countries to tax income within their borders. However, with digital economies, this definition is strained.

Nigeria's Corporate Income Tax Act (CITA) recognizes both domestic and foreign companies for taxation, requiring a "fixed base" or PE to tax profits. The Finance Act 2019 amended CITA, introducing the concept of "significant economic presence" (SEP) for digital activities, allowing Nigeria to tax foreign digital businesses without a physical presence. The SEP criteria include transmitting data, engaging in e-commerce, and providing online services, reflecting modern digital transactions. This shift reflects global trends, acknowledging the need for new tax frameworks in the digital era.

India uses the tax treaty principle of Permanent Establishment (PE) to determine the income tax liability of non-resident companies. PE in India is defined as a fixed place of business, including management offices, branches, factories, and more. This definition aligns with the OECD Model Tax Convention and India's tax treaties. Courts may focus on PE existence, bypassing the "business connection" test under section 9 of the Income Tax Act (IT Act). Business connection includes activities conducted through a person in India who concludes contracts or maintains stock on behalf of a non-resident.

Recently, India adopted the concept of Significant Economic Presence (SEP) to address revenue loss from digital businesses causing base erosion and profit shifting. Prior to SEP, India introduced an equalization levy in 2016, a 6% tax on online advertising services provided by non-residents interacting with 300,000 or more users in India. The SEP provisions expand the scope of business connection beyond the treaty principle of PE.

Indian courts have also recognized subsidiaries as PEs, as seen in the Motorola case, where Motorola employees working for both Motorola and its subsidiary in India led to a PE designation. Another case, ABB FZ LLC v. CIT, allowed source-based taxation of virtual services used in India without a fixed place of business, highlighting the need for new PE nexus rules based on SEP. India's 2018 budget widened the "business connection" definition to include SEP. According to Article 7 of tax treaties, foreign company profits cannot be taxed in the source country unless through a PE.

The Indian equalization levy addresses base erosion in the digital economy by taxing specific services provided by non-residents to designated individuals, ensuring fair taxation. The levy imposes a 6% tax on payments exceeding INR 100,000 from Indian entities to non-residents for specified services. Non-compliance penalties include financial and criminal consequences. The payer must deduct and remit the levy monthly and submit an annual statement. Despite its role in curbing BEPS, the levy faces criticism for compliance burdens, potential double taxation, and limited scope.

Globally, countries like Saudi Arabia and Kuwait have introduced virtual PE concepts, while the UK implemented a diverted profits tax. These measures reflect global efforts

to combat tax avoidance and ensure fair taxation in the digital economy. The article emphasizes the need for redefining tax nexus criteria and international cooperation to adapt to the evolving global economy.

Findings

The concept of significant economic presence is ubiquitous under the amendment by the Finance Act and is key to the Nigerian approach and her ability to adequately tax corporate income using source-based system of taxation. This updated nexus would acknowledge the changing landscape of business operations in the digital economy, where companies can wield substantial economic influence in a market country without a physical presence.

Broader reforms may be necessary to address the complexities of digital business models, bring more digital business models into the Nigerian tax net, and ensure fair and effective taxation.

Recommendations

Nigeria should be vigilant and be at the forefront of looking out for opportunities to ensure fairer taxing right and revenue generation. implementing anti-avoidance measures to prevent base erosion and profit shifting by digital businesses.

Nigeria should introduce digital services taxes (DST), similar to the Indian equalization levy, as an interim measure to tax digital businesses based on their revenue generated in the source jurisdiction.

REFERENCES

1. Avi-Yonah, R.S. (2004). International Tax as International Law, 57 Tax L. Rev. 483
2. Andrew, G. (2023). Critics Dismiss Tax Justice Network Claims on Cost of Tax Abuse vol 111 Tax Notes International available at <https://www.taxnotes>

3. Alessandro, T. (2020). The Progressive Policy Shift in the Debate on the International Tax Challenges of the Digital Economy: A “Pretext” for Overhaul of the International Tax Regime?
4. Avi-Yonah R.S and Kimberly A. Clausing, ‘Business Income (Article 7 OECD MC)
5. John M. Olin Center for Law & Economic Working Paper No. 07-016, available at <http://ssrn.com>
1. Avi-Yonah, R.S (2016). Three Steps Forward, One Step Back? Reflections on “Google Taxes” and the Destination-Based Corporate Tax, 2 Nordic Tax J. 1
2. Barrett, S (2000) International Taxation of Electronic Commerce Income: A Proposal to Utilize Software Agents for Source-Based Taxation, 16 Santa Clara Computer & High Tech. L. J. 111 available at <http://heinonline.org>
3. Business Profits Appropriate for E-Commerce (2013) available at <https://www.oecd.org>
4. Charles, R. I. (2008). Taxation and the Internet, 1 Asian Bus. Law. 1 available at <http://www.heinonline.org>
5. David H. (2021) Digitalization as a determinant for Tax Revenue in OECD Countries: A Static and Dynamic Data Panel Analysis
6. Goel A and Goel S. (2018). Has the Permanent Establishment Rule Outlived Its Utility in a Digitalized World, 11 NUJS L. Rev. 25
7. Hongler, P. Justice in International Tax Law: A Normative Review of the International Tax Regime
8. Ian B. (2012). Brownlie’s Principles of Public International Law. Oxford
9. Malcom N. S. (2008) International Law, Cambridge
10. Minyan W. (2006). Tax Jurisdiction in Electronic Commerce from the Perspective of Public International Law: A Particular Examination of Income Tax Intertax, Vol.34, Issue 11 available at <https://www.kluwerwolters.com>
11. OECD, Model Tax Convention on Income and on Capital: Condensed Version (2005) available at <https://www.oecd.org>
12. Pallavi B and Nidhi G. (2012). Navigating Permanent Establishment in India 23 Int’l Tax Rev. 34 Available at <http://www.heinonline.org>

13. Peggy B. M. (2001). Sovereignty, Entitlement, and Cooperation in International Taxation, 26 Brook. J. Int'l L. 1335 Available @<http://heinonline.org>
 14. Ruth M. Citizenship Taxation, Southern California Law Review [Vol. 89:169] Available at <https://ssrn.com>
 15. Report of the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for Taxing Business Profits, Are the Current Treaty Rules for Taxing
-
1. Nwakaego O and Judith Monye. (2020) Taxing Nonresidents in Nigeria in the Digital Era Available at www.taxnotes.com
 2. M Agrawal. (2016) India at the Forefront in Implementing BEPS-Related Measures: Equalization Levy in Line with Action 1, International Transfer Pricing Journal



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

APPRAISING THE INHIBITORY FACTORS TO ACCESS INFORMATION AND
COURT UNDER THE NIGERIAN COMMUNICATIONS ACT IN NIGERIA

Yakubu Moses Ede

Nigerian Law School, Yenagoa Campus,

mosesede18@yahoo.com, 07030973264.

Abstract

The right to access information and court in Nigeria is constitutional guaranteed. Accessing information and court in Nigeria is faced with some inhibitory factors as enshrined in the Nigerian Communication Act. The law laid down some herculean and restrictive administrative procedure that limits access to the court. The NCC Act provides that any person aggrieved by its decision may request for the statement of the reason for the decision. This is contrary to the provisions of the Freedom of Information Act. The doctrinal method was adopted in in this research by considering available literatures on the subject matter. The Nigerian Communications Act requirement for application to review decision laid a procedural and technical hitch defeating justice. There are no punitive measures where the Commission fails to conclude the review of its decision within the stipulated period. The removal of the requirement for application to review decision constituting procedural and technical hitches that defeats the course of justice in Nigeria will aid access. Severe punitive measures against the Commission and any staff that fails to conclude the review of its decision within the stipulated time should be incorporated in the NCC Act. Legislative arm of government should not enact laws that promote impunity and abuse of power by public officers, authorities and statutory corporations. The Constitution and FoI Act provides for direct access to information. On the other hand, NC Act encourages delay access to information and court to ventilate grievances.

Keywords: Inhibitory factors, Information, Accessibility, Transparency, Good governance.

1.1 Introduction

The right to access information belongs to everyone without discrimination. Nigeria's Freedom of Information (FOI) Act was signed into law on May 28, 2011, after the longest legislative debate for over 12 years. The law was passed to enable the public access government information, in order to ensure transparency and accountability.¹⁴⁷⁶

The telecommunication law in Nigeria was first and formerly enacted to regulate the telecommunication sector in Nigeria. The Nigerian Communications Commission (NCC) was created under Decree number 75 by the Federal Military Government of Nigeria on 24th November, 1992. The NCC was charged with the responsibility of regulating the supply of telecommunications services and facilities, promoting competition, and setting performance standards for telephone service in Nigeria.¹⁴⁷⁷ The Nigeria Communication Commission was created with a view to handle matters relating to the activities of the licenced telecommunication companies in Nigeria. Before the advent of the private telecommunications in Nigeria the Nigeria Telecommunication (Nitel) was the major communication outfit saves for Nigeria Postal Service (Nipost). The extant law regulating the telecommunication is the Nigerian Communications Act, No. 19, 2003. The law laid down some herculean and restrictive administrative procedure that limits access to the court. This examines along with the provisions of the constitution.

Accessing information with ease encourages the citizens to actively participate in governance. This paper has it focus on the inhibitory legislative factors that limit citizens to access information and court in Nigeria. It examines the provisions of the Nigeria Communications Commission Act which lays down

¹⁴⁷⁶ Oluwasemilore, I. (2018) *A Critical Analysis of Nigeria's Freedom of Information Act*. Retrieved November 11, 2022, from <https://gravitasreview.com.ng/shop/nigerias-freedom-of-information-act>

¹⁴⁷⁷ Nigerian Communication Commission (2020). Retrieved November 10, 2022, from wiki: https://en.m.wikipedia.org/wiki/Nigerian_Communications_Commission

procedures in accessing information and the court. It is in the heart of this paper to help readers understand some of the challenges posed by the NCC Act in accessing information and court. The work took a step to suggestions some recommendations to the findings. Between the Constitution and the NCC Act which legislation clothes the court with a better jurisdiction? Can the NCC Act oust the provisions of the Constitution? Can the NCC Act confer jurisdiction where the Constitution provides otherwise? Why taking what you can't give? Should the provisions of the NCC Act be allowed to thrive in the midst of hindered access to court? If Mr. A being an aggrieved person applies for the statement of the reasons for a decision by the Commission via the instrumentality of the Freedom of Information Act, would the commission insist on its sixty days timeframe or would it comply with the seven days period stipulated under the Freedom of Information Act? The doctrinal method of research was adopted in resolving these questions. It is pertinent to state that enacting legislation that promotes openness and easy accessibility to information and court will bring about good governance in the best interest of the citizenry.

1.2 Definition of Terms

It is pertinent to briefly provide the definition of some terms. This will help to guide us through the work particularly in understanding the context of usage. Some of the terms to be defined are information and access.

1.2.1 Information

Information includes all records, documents and information stored in whatever form, including written, electronic, visual images, sound, audio recording¹⁴⁷⁸. Information in this regard is not only documentary but also contemplates any data stored in a retrieval form being it audio, visual, sound, electronic. Document has been defined to include:

books, maps, plans, graphs, drawings, photographs and
also includes any matter expressed or described upon

¹⁴⁷⁸ Section 31, Freedom of Information Act, 2011.

any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;

(b) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it, and

(c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and

(d) any device by means of which information is recorded, stored or retrievable including computer output¹⁴⁷⁹.

So long as the details contains the accurate information that is helpful falls within expectation. In other words, any material that the storage can be retrieved is qualified as an information. Any information sought for by a citizen is always contained in a document. Document here does not suggest that the information should only be contained in the hardcopy paper but it could electronically be contained in a soft copy form of paper. It further stated that a document could also mean any device by means of which information is recorded, stored or retrievable¹⁴⁸⁰. Device could mean a lot in this technological era. A device is a unit of physical hardware or equipment that provides one or more computing functions within a computer system. It can provide input to the computer, accept output or both. A device can be any electronic element with some computing ability that supports the installation of firmware or third-party software¹⁴⁸¹. Any electronic gadget that has the potentials of storing and retrieving information that is relevant to a citizen's request is qualified as a device for all intent and purpose.

1.2.2 Access

¹⁴⁷⁹ Section 258 (1) of the Evidence Act, 2011.

¹⁴⁸⁰ Ibid.

¹⁴⁸¹ Rouse, M. (2012) What Does Device Mean <https://www.techopedia.com>>device. Accessed on October 24, 2023.

Access has been defined as a right, opportunity, or ability to enter, approach, pass to and from, or communicate with¹⁴⁸². Access being a right or ability to enter and obtain available detail or information from public institution without inhibition.

Access to the Court means approach or means of approach to the Court without constraint¹⁴⁸³. Given the definition by the court it then means that a person is expected to be granted unfettered approach or means of approaching the court and by extension any public institution. Public institution under contemplation includes Nigerian Communications Commission. It is the citizen's ability to approach a public institution and demand for relevant information stored in their custody.

Access is also defined as the ability, right or permission to approach, enter, speak with, or use; admittance¹⁴⁸⁴. It can be said that access is an authorization to files or information that a citizen will require from an institution.

Access to court is synonymous to access to justice. Access to justice is the ability within a society to use courts and other legal institutions effectively to protect one's right and pursue claims¹⁴⁸⁵.

1.3 Legal Regime on Access to Information

The legal regime on access to information include the Constitution of the Federal Republic of Nigeria, 1999 (as amended), United Nations Convention Against Corruption, 2003, Freedom of Information Act, 2011, Universal Declaration of Human Rights, 1948, African Charter on Human and Peoples' Rights. The extant law in Nigeria on freedom of information right empowers¹⁴⁸⁶ individuals, groups and association(s) to access public information or records. The legal right to

¹⁴⁸² Bryan A. Garner, *Black's Law Dictionary*, 11th Edition

¹⁴⁸³ *Amadi vs NNPC* (2000) LPELR-445 SC, Pp. 49 paras. F Per Karibi-Whyte, J.S.C

¹⁴⁸⁴ <https://www.dictionary.com/browse> Accessed on October 19, 2023.

¹⁴⁸⁵ Ibid

¹⁴⁸⁶ History.com Editors, Freedom of Information Act (2018) <https://www.history.com/topics/1960s/freedom-of-information-act> Accessed on 14th November, 2022.

information has its foundation rooted in the Constitution¹⁴⁸⁷. A cursory view of Section 39¹⁴⁸⁸ reveals that the citizens of Nigeria have the right to freedom of expression. Subsection 1 of Section 39 is to the effect that all citizens are entitled to freedom of expression which also includes freedom to hold opinions and to receive and impart ideas and information without interference. The right to the freedom of expression cannot be judiciously exercised without adequate information at the disposal of the citizen. This is hinged on the Latin maxim *nemo dat quod non habet* meaning no one can give that which he has not¹⁴⁸⁹. Interestingly, the provision provides that a person has the freedom to hold an opinion. The opinion certainly cannot be held effectively if the requisite information is not accessed.

The Constitution being the grundnorm serves as the bedrock for the promulgation of the freedom of information law in Nigeria because it encapsulates that every person has the freedom to receive, impart ideas and information without interference. It is the opinion of this research work that ordinarily even without any other law this provision should suffice in seeking for information from public institutions. According to Yakubu¹⁴⁹⁰, this provision is in line with the universal conception that freedom of the press and freedom of expression are so fundamental that any law that tends to obstruct any of the two ideas cannot be law properly so called. At the international level the United Nation has made considerable efforts towards promoting access to information. The effort was to encourage and compel member states to actively participate by enacting and allowing the implementation of the law on access to Information. It is enshrined in Article 10(a)¹⁴⁹¹ thus:

Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due

¹⁴⁸⁷ Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended), Cap. C23, Laws of the Federation of Nigeria, 2004.

¹⁴⁸⁸ Ibid.

¹⁴⁸⁹ Nchi S. I., (2000) The Nigerian Law Dictionary, Greenworld Publishing Company Limited.

¹⁴⁹⁰ Yakubu J. A., (2003) Press Law in Nigeria, Demyaxs Press Ltd, Ibadan, p. 12.

¹⁴⁹¹ United Nations Convention Against Corruption, 2003.

regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public.

This is one of the measures adopted by the United Nation to enhance access to information at the disposal of state party's public administration. This Convention allows members of the general public where appropriate to obtain information on the organization, functioning and decision-making processes of public institutions. The process for obtaining information from Nigeria Communication Commission, especially where it is refused at first instance, is quite cumbersome. Article 10(b) provides thus, "simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities".¹⁴⁹²

On the strength of the above provision public institutions are expected and required to make the procedure easier for accessing information. This is aimed at simplifying the administrative procedures by eliminating administrative bottlenecks that inhibit the ease of obtaining public information. It will also facilitate public access to the competent decision-making authorities and it will inspire confidence of the general public in the process of governance. Public institutions are statutorily expected to publish information which may include periodic reports on the risks of corruption within its system.

Freedom of information law is one of the legislations that helps in fighting corruption in Nigeria because it gives the citizenry the opportunity of checkmating the excesses of government. Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.¹⁴⁹³ In an attempt to ensure compliance with the desire goal of granting access to

¹⁴⁹² Ibid.

¹⁴⁹³ Article 10 of the United Nation Convention Against Corruption, 2003.

information certain procedural steps are laid down. One of such initiative into public access to documents held by Community institutions and bodies has resulted in the adoption of rules on public access by the institutions and bodies concerned¹⁴⁹⁴. Some of the procedural steps tends to suffocate the original philosophy behind the enactment of the law for accessing public information.

It is of interest to state at this juncture that the provision on the freedom of information is encapsulated in Article 19¹⁴⁹⁵ that everyone has the right of freedom of opinion and expression. The right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. It is expected that there should not be interference in a person's effort to seek, receive and impart information. The right to seek and receive information is also enshrined in Article 9(1)¹⁴⁹⁶ that every individual shall have the right to receive information. Despite the provisions of Section 39¹⁴⁹⁷ and other sundry Articles the application or request for information from public institutions through this section has met stiff resistance.

1.3.1 Legal Regime on Access to Court

The provisions of the Nigeria Communications Act lays down procedures in accessing information and the court. It is enshrined in section 88(1)¹⁴⁹⁸ that aggrieved person may appeal to the court for judicial review of the Commission's decision or other action. The use of the word appeal to the court for the purpose of judicial review suggest that the Commission makes a decision and review its decision. This ought not to be so. The judicial powers in Nigeria to adjudicate over disputes is vested in the courts¹⁴⁹⁹. The adjudicatory power of the court

¹⁴⁹⁴ Parpworth, N. Constitutional & Administrative Law, Oxford University Press, 5th Edition (2007) p. 386.

¹⁴⁹⁵ Universal Declaration of Human Rights, 1948.

¹⁴⁹⁶ African Charter on Human and Peoples' Rights, Cap. 10, Laws of the Federation of Nigeria, 1990.

¹⁴⁹⁷ Constitution of the Federal Republic of Nigeria, 1999 (as Amended), Cap. C23, Laws of the Federation of Nigeria, 2004.

¹⁴⁹⁸ Nigerian Communications Act, 2003.

¹⁴⁹⁹ Section 6(1) of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended), Cap. C23, Laws of the Federal Republic of Nigeria, 2004.

extends to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person¹⁵⁰⁰. Access to court is a right guaranteed by the constitution when it stipulates that in the determination of his civil rights and obligations, including any questions or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality¹⁵⁰¹. In order to protect a legal right or interest an individual has a right to access the court which is constitutionally guaranteed. The legal right to institute any proceedings in the court to compel a government or any of its public institution with a view to accessing information is guaranteed under the law. It is encapsulated thus:

Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this act.¹⁵⁰²

The right to institute an action is available to everybody who is entitled to the information required. In the case of *Umeh v. Iwu*¹⁵⁰³ it was held that parties are permitted to air their grievance at the law courts as when there is a right, there must be a remedy. Freedom of Information Act plays an important role in keeping government transparent and accountable, and has been used to expose a wide range of government misconduct and waste, along with threats to the public's health and safety.¹⁵⁰⁴ A right of access to information helps to ensure that public authorities are held to account and thus limits the risks of complacency and maladministration¹⁵⁰⁵. Granting access to government held information has

¹⁵⁰⁰ Section 6(6)(b) Ibid.

¹⁵⁰¹ Section 36(1) Ibid.

¹⁵⁰² Section 1(3) of the Freedom of Information Act, 2011

¹⁵⁰³ (2007) 6 NWLR (Pt. 1030) 416 p. 428, paras E-F. See also *Falobi v. Falobi* (1976) 9-10 SC 1.

¹⁵⁰⁴ History.com Editors, Freedom of Information Act (2018) <https://www.history.com/topics/1960s/freedom-of-information-act> Accessed on 14th November, 2022

¹⁵⁰⁵ Wadham, J., Griffiths, J. and Harris, K. Blackstone's Guide to The Freedom of Information Act 2000, Oxford University Press, 3rd Edition, 2007, p. 2.

the tendency of promoting the citizens interest in government activities. Citizens accessing important information held by government helps in checkmating the excesses of government officials in the performance of their duties by ensuring adherence to the laid down policies, guidelines, principles and the laws.

The Freedom of Information Act¹⁵⁰⁶ was enacted to specifically clothe Nigerians with the adequate legal backing to request and access information from public institutions, private companies using public funds to run it affairs. This law was made irrespective of the provisions of any other Act, law or regulation. The right is granted to any person to apply and access information which is stored or kept in the custody of a public official, agency or institution.

The law also empowers the applicant the right to apply for the information without stating the rationale for the request¹⁵⁰⁷. This guarantees the applicant some level of leverage to decide what to do with the information. In other words, it does not gag the applicant to state the reasons for the application because he may seek for the information to acquire the knowledge for personal use or to seek for the information to impart on others or to use it to beckon on the government or any of its institution to comply with the extant law where it is in breach.

1.4 Factors Inhibiting Access to Information Under the Nigerian Communications Act

The Nigeria Communication Commission¹⁵⁰⁸ was established in 2003 with a view of providing regulatory framework and to ensure that telecommunication network providers are regulated to operate within the ambit of the law. It is also saddled with the responsibility for the regulation of the communications sector in Nigeria. This law as enacted by the National Assembly is aimed at limiting and frustrating access to information from the Commission. The procedural requirements laid down in the law in the event of an applicant being aggrieved

¹⁵⁰⁶ 2011.

¹⁵⁰⁷ Section 1(2) Ibid.

¹⁵⁰⁸ Section 1 Nigerian Communications Act, No. 19, 2003.

against the decision for the refusal of the request will delay justice. In the legal palace the principle is that justice delay is justice denied. Section 86¹⁵⁰⁹ limit access to justice.

- 1.4.1 Factors Inhibiting Access to Court Under the Nigerian Communications Act
- Accessing court is sometime faced with challenges. Some of the challenges are corruption, complex legal rules and procedure, cost of litigation, lack of access to documentary information, delays in granting access to information and herculean regulatory measures among others. One of the prerequisites of a well-established democracy is a liberated, strong, impartial and well-motivated judiciary. The Judicial systems in flourishing democracies, besides being the custodian of constitutional governance and democracy, should be independent in every sense of the word and well equipped to dispense justice to all and sundry without hindrance or prejudice. It should inspire belief of citizens that justice shall be done in all cases¹⁵¹⁰. Nigerian Communications Act, 2003¹⁵¹¹ (hereinafter referred to as NC Act) provides for the requisite pre-condition before a party can exercise a right of action against the decision(s) of the NCC and that failure to comply with the condition precedent robs court of jurisdiction. The NCC Act¹⁵¹² also provides for administrative procedure for venting grievance(s) against decisions of the NCC prior to instituting an action against it. The provisions shall be discussed in detail subsequently. In the decided case of *Orakul Resources Ltd. and 1 Or. vs Nigerian Communications Commission & 4Ors*¹⁵¹³ where the court held that the provision of Section 88(3) of the Act, prescribes that compliance with the procedure and steps set out in Sections 86 and 87, is a condition precedent to be satisfied and fulfilled before resort can be had to a legal action by way of application for judicial review. As demonstrated in the judicial authorities cited earlier on the point, failure to satisfy or fulfil a statutory condition of or to an action in court, renders any such action taken or initiated

¹⁵⁰⁹ Ibid.

¹⁵¹⁰ Ani, C. C, Access to Justice in Nigerian Criminal and Civil Justice Systems www.legalpediaonline-com.cdn.ampproject.org Accessed on 30th October, 2023.

¹⁵¹¹ See Section 88.

¹⁵¹² See Section 86 and 87 Ibid.

¹⁵¹³ [2022] 1 SCNJ

incompetent thereby depriving the court of the requisite jurisdiction to entertain and adjudicate over the action since one of the essential requirements for the assumption of jurisdiction, has not been met.

The facts of this case are that the appellants had a grouse with some decisions of the NCC and sued at the High Court claiming declaratory and injunctive reliefs against the respondents herein. The respondents filed objections to the appellants' action on the ground that the conditions precedent under sections 86, 87 and 88 of the Nigerian Communications Act, 2003 provides that before any action could be instituted against the NCC the prospective plaintiff must have first exhausted all other remedies provided under the NCC Act and this provision was not complied with. The respondent argued that the administrative remedies provided for by Sections 86 to 88 of the NCC Act should have been resorted to firstly by the appellants before approaching the court. The trial court upheld the objections, struck out appellants' action on the ground that the action did not comply with a condition precedent needed to clothe the court with jurisdiction.

The decision of the court in the above matter under reference was rather to the extreme. The court gave more priority to the interest of Commission than the appellant. It is the Constitution that clothes the Nigerian courts with jurisdiction not the Nigerian Communications Act. The Nigeria Communications Act cannot oust the provisions of the Constitution. The Nigerian Communications Act cannot confer jurisdiction where the Constitution provides otherwise. The provisions of the Nigerian Communications Act should not be allowed to thrive in the midst of hindered access to court. For example, if Mr. A being an aggrieved person applies for the statement of the reasons for a decision by the Commission via the instrumentality of the Freedom of Information Act, the Commission should not insist on its sixty days timeframe. The Commission as a public institution should comply with the seven days

period stipulated under the Freedom of Information Act¹⁵¹⁴ for granting or refusing application. The Constitution created the courts and clothed them with jurisdiction to entertain matters emanating from aggrieved persons. The judicial powers of in Nigeria have been conferred and vested in the courts.¹⁵¹⁵ Section 6(6)¹⁵¹⁶ provides thus:

The judicial powers vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;

(b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The judicial powers conferred on the courts extend to all matters between persons, government, authority and to any persons in Nigeria. The courts' jurisdiction also includes all actions and proceedings for the determination of the civil rights and obligations of Nigerians. In this context a person includes individual and corporate entity. On the attitude of the court to statutory provisions limiting a citizen's right of access to court it was held thus:

...a legitimate regulation of access to Courts should not be directed at impeding ready access to the Courts. There is no provision in the Constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the Court of its constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of Section 6(6)(b) of the Constitution ...¹⁵¹⁷

The provision of the Constitution is clear that government or authority including NCC is to subject all actions, decisions and proceedings for the

¹⁵¹⁴ Section 4, Freedom of Information Act, 2011.

¹⁵¹⁵ Section 6(1), Constitution of the Federal Republic of Nigeria, 1999 (As Amended) Cap. C23, Laws of the Federation of Nigeria, 2004.

¹⁵¹⁶ Ibid.

¹⁵¹⁷ Per Karibi-Whyte, J.S.C in *Amadi vs NNPC* (2000) LPELR-445 (SC) (Pp. 50 paras. A)

determination of any civil rights or obligations before the courts not otherwise, that is, without heaping statutory impediments for accessing the court to ventilate grievance. The intension of the provisions of the NCC Act is to obviate the rights of aggrieved persons from accessing the courts easily. The provision of the constitution on the other hand has given Nigerians unhindered access to court to ventilate their grievances. The NCC Act is a legislative attempt to usurp the constitutional provisions that guarantees easy accessibility to the court of law by all aggrieved persons.

The provisions of the NCC Act particularly Sections 86, 87 and 88 cannot by any stretch of imagination oust, whittle down or override the provisions of the constitution. This principle has secured judicial blessing by the Supreme Court in the case of *Global Excellence Communications Ltd & Ors. vs Duke*¹⁵¹⁸ where it was held that access to court is a constitutional right which can only be taken away by a provision in the Constitution. It cannot be taken away by implication or speculation by the courts.

The law provided a platform for all and sundry to be accorded equal rights and opportunity before the law without protecting one and exposing the other. The court as the shelter of justice and fairness accommodates all citizens without discrimination or giving one party advantage over the other. The law does not support the situation where the checking point being the gate that leads to justice creates different yardsticks for access. In tune with this Section 17¹⁵¹⁹ provides as follows:

- (1) The state social order is founded on ideals of Freedom, Equality and Justice
- (2) In furtherance of the order –
 - (a) every citizen shall have equality of rights, obligations and opportunity before the law.

¹⁵¹⁸ (2007) LPELR – 1323 SC

¹⁵¹⁹ Constitution of the Federal Republic of Nigeria, 1999 Cap. C23, Laws of the Federation of Nigeria, 2004.

(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

Flowing from the above, the law creates an equal platform for the parties that seek to access the fruit of justice irrespective of whether you are a private person, company or public institution. The courts over the years have decided that the provisions of the NCC Act only set administrative processes for an aggrieved person to exhaust. This was illustrated in the case of *Blue-Chip Communication Co. vs NCC*¹⁵²⁰ where the Court of Appeal held thus:

The simple purport of Section 88 of the Act is that an aggrieved person shall not apply to Court for a judicial review unless that person has first exhausted all the administrative processes of remedies set out under the Act. This is the interpretation that the learned trial Judge gave to the Section and rightly too. The provisions of Sections 86, 87 & 88 are not ouster clauses aimed at shutting an aggrieved party out of the Court. Rather, they are meant to regulate the access of an aggrieved party to the Court.

It is worrisome that a law such as the Nigeria Communications Commission Act will seek to regulate the access of an aggrieved person to the court. Where the constitution has granted an aggrieved person unfettered accessibility of the court of law to vent his grievance no any other law can regulate or restrict such access.

It is expected that all parties enjoy freedom, equality and justice being the ideals of state social order. It is improper for any statute to lay down mountainous conditions on the Plaintiffs' path before accessing the court. See the case of *Orakul vs NCC*¹⁵²¹ where it was held thus:

The unnecessary statutory roadblocks on the way of the Plaintiffs, as mounted by Section 86, 87 and 88 of the NCC Act, when viewed against the background of equality of rights and obligations of litigants before the law and the

¹⁵²⁰ (2008) LPELR-3882 CA.

¹⁵²¹ [2022] 1 SCNJ

court are manifestly designed to deny the Plaintiffs their rights to be equally treated in law and before the law court qua their rights to approach the court of law without restraint to seek reliefs against the NCC, a statutory corporation.

Ordinarily, placing the parties on the weight scale the Respondent, that is, the Nigeria Communication Commission is more enveloped with the garment of protection being a government establishment than the appellant which is a private company. It is unfair that the Act¹⁵²² mounted speed bumps that eventually lead to the delay of justice delivery in Nigeria on the path of the aggrieved party seeking redress. It was held in the case of *Amadi vs NNPC*¹⁵²³ thus:

The right to easy access to the law court for the citizen to vent grievances i.e in pursuit of the determination of his civil rights or obligations against the other including individuals, government, or authorities, means the approach (or access) to the court of law without constraint. Such constraints include unnecessary and cumbersome statutory roadblocks as Sections 86, 87 and 88 of the NCC Act have actually sought to or do mount on the way of the litigants like the instant plaintiffs.

All citizens appearing before the law have the same standing as to equal rights, obligations and opportunity which ensure equality between litigants. The constitution creates an easy accessibility to the court for all litigants. When delivering a dissenting judgment in the case of *Orakul vs NCC*¹⁵²⁴ per E. Eko, JSC held thus:

uninhibited or unhindered access to court of law, that is, the direct and “easy accessibility thereto” guaranteed by Section 17(2)(e) of the Constitution is a major aspect of the Rule of law. Any provision of a municipal law or statute purporting to restrict “easy accessibility” to the law courts for citizens to ventilate their grievances must be subjected to strict interrogation or interpretation.

¹⁵²² Sections 86, 87 and 88 of the Nigerian Communications Act, 2003.

¹⁵²³ [2000] 10 NWLR (pt. 874) 72 at 76.

¹⁵²⁴ Op. cit.

There is plethora of authorities that frowns at any legislation that hampers or deters easy accessibility to the courts by the citizens. In the case of *Cotecna Int. Co. Ltd vs Churchgate Nigeria Limited*¹⁵²⁵ where the Supreme Court held thus:

Unhindered accessibility to the court of law by the citizens of this country, like any other, that operates under the rule of law for the citizens to vent their grievances is a hallmark of civilization. Hence, any statutory provision tending to regulate or restrict the constitutional right of easy access to the court of law by citizens must be viewed very seriously and strictly too.

It is important to note that in the determination of civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such matter as to secure its independence and impartiality.¹⁵²⁶ The NCC Act has no power to confer and cannot usurp the jurisdiction of the court. This is hinged on the fact that the law abhors sacrificing the merit of a case on the altar of technicalities.

1.4.2 Inhibitory Legislative Factors

Legislations are expected to promote and protect the best interest of the people without creating huddles that makes the rights unrealisable for the citizens. Any law that laid down cumbersome requirements for asserting a right will defeat or weaken its potency. The provisions of Section 86(1)¹⁵²⁷ provides thus:

A person who is aggrieved or whose interest is adversely affected by any decision of the Commission made pursuant to the exercise of the powers and function under this Act or its subsidiary

¹⁵²⁵ (2010) 18 NWLR (pt. 1225) 346.

¹⁵²⁶ Section 36(1) Constitution of the Federal Republic of Nigeria, 1999 (As Amended) Cap. C23, Laws of the Federation of Nigeria, 2004.

¹⁵²⁷ Nigerian Communications Act, 2003.

legislation (“aggrieved person” may request in writing to the Commission for a statement of the reasons for the decision.

One of the factors is deliberate decision(s): A person is expected to request for the statement of the reason for the decision that made him aggrieved or adversely affected his interest by the commission. A point of note here is that there are circumstances where the decisions may be made deliberately because the applicant is in political opposition. It could also be that the decision which caused the applicant grievance is made due to mistake. Where the decision is made deliberately the statement of the reasons for the decision would either be delayed, refused or frustrated.

Another factor is written request: The above provision further requires an applicant to request for the information in writing. On the other hand, freedom of information law does not make it mandatory for the application to be in writing¹⁵²⁸. In the event that the applicant is an illiterate and indigent he might forfeit the right except providence provides him with pro bono services. Upon receipt of a written request by an aggrieved person the Commission shall make a copy of the statement of the reasons for the decision and any relevant information taken into account in making the decision.¹⁵²⁹

The Commission shall upon such written requests by an aggrieved person, provide a copy of a statement of reasons for the decision and any relevant information taken into account in making the decision.

There are exceptions to the general provision of the law on the provision of the statement of reason to an aggrieved person. The Commission¹⁵³⁰ is not under obligation to disclose or publish a statement of reason to the aggrieved person where it would disclose a matter that is of confidential character in the opinion of the commission. The Act needs to categorically make it clear on what would amount to confidential character so that the standard is not left at whims and caprices of the commission. Another exception is that the commission would not disclose the reasons for its decision where

¹⁵²⁸ Section 3(4), Freedom of Information Act, 2011.

¹⁵²⁹ Section 86(2) of the Nigerian Communications Act, 2003.

¹⁵³⁰ Section 86(3)(a) Ibid.

it would be prejudicial to the fair trial of a person or involve the unreasonable disclosure of personal information about any individual including a deceased person.¹⁵³¹ The Commission is not required to publish, or to disclose to the aggrieved person, a statement of reason or a part of a statement of reasons if the publication or disclosure would:

- (a) Disclose a matter that is, in the opinion of the Commission, of a confidential character;
- (b) Be likely to prejudice the fair trial of a person, or
- (c) Involve the unreasonable disclosure of personal information about any individual (including a deceased person).
- (d) In this Chapter, “decision” includes any action, order, report direction.

An aggrieved person in this work refers to an applicant who seeks access to information but he is denied or refused. The NCC Act stipulates timelines for the application by an aggrieved person and equally provided for the timeframe for responses. It is enshrined in Section 87(1)¹⁵³² that upon receipt of the Commission’s statement of reasons any person aggrieved with the decision should not later than 30 days request in writing for a review of the Commission’s decision and the reason and basis must be specified. ¹⁵³³ Section 87 provides thus:

An aggrieved person may at any time within but not later than 30 days after the date of the receipt of the Commission’s statement of reasons specified in section 86(2) of this Act request the Commission in writing for a review of the Commission’s decision and specify therein the reasons and basis for his request.

The requirement for specifying the reasons is quite baffling. Does it mean that where a person did not specify the basis and reasons the request will not be granted? Should a requester of access to information from the commission specify the reasons and basis for the application? Where the applicant is subjected to stating his reasons for

¹⁵³¹ Section 86(3)(b) & (c) Ibid.

¹⁵³² NCC Act, 2003.

¹⁵³³ Ibid.

the application before it is accepted and granted would it not amount to the contravention of the freedom of information act?

An applicant for access to information is not required to specify his reasons for the application¹⁵³⁴. Once the applicant requests for information it behooves on the public institution to oblige him the required details without demanding for the rationale. The requirement for specifying reasons and basis for the request under the Nigeria Communication Commission is contrary to and in conflict with the provision of the Freedom of Information Act. The contradiction is supposed to be resolved in favour of the Freedom of Information Act. It is the opinion of this research that if the applicant is subjected to stating his reasons for requesting for an information will amount to the contravention of the freedom of information law in Nigeria. The law stipulates thus “subject to subsection (1) of this section, upon receipt of the aggrieved person’s written submissions the Commission shall meet and review its decision taking into consideration the submissions of the aggrieved person under subsection (1) of this section”.¹⁵³⁵

The legislation arrogated the commission excess power which is susceptible to be abused. Is it proper that the commission should be allowed to take a decision and have the power to review the same decision? It is inappropriate for the commission to take a decision over an application or any other issue and will sit over it to review its decision. This is against the principle of *nemo judex in causa sua* meaning *that you cannot be a judge over your case*. This principle is one of the cardinal rules of natural justice. A decision in this context includes any action, order, report direction¹⁵³⁶. It creates an impression as if the commission would likely not be fair in arriving at its decisions that is why the clause was included in the legislation.

The commission¹⁵³⁷ is granted latitude of discretionary powers to be exercised at the course of reviewing its decision and that it can use or exercise any of its powers. The

¹⁵³⁴ Section 1(2) Freedom of Information Act, 2011.

¹⁵³⁵ Section 87(2) Nigerian Communications Act, 2003.

¹⁵³⁶ Section 86(3)(d) Ibid.

¹⁵³⁷ Section 87(3) Ibid.

Commission may, in carrying out the review of its decision under this part, use and exercise any of its powers under this Chapter.

Whenever an aggrieved person submits his written submission challenging the decision, the commission has sixty days period for the review of its decision. It is after the sixty days duration that the aggrieved person will be informed in writing of the commission's final decision. This is encapsulated in Section 87(4)¹⁵³⁸ thus "the Commission shall not later than 60 days from the date of receipt of the aggrieved person's written submissions, conclude its review of the decision and inform the aggrieved person in writing of its final decision thereon and the reasons therefore".

The length of time for the review is quite worrisome and it can make an aggrieved person lose interest in pursuit of his right. This provision which cumulatively provides for three months unsettles the mind of an aggrieved person. An area that keeps the mind thinking is that there are no consequences for failure on the part of the Commission to conclude its review of the decision. The law should have provided a penalty in the event of default on the part of the Commission failing or refusing to conclude its review within the stipulated sixty (60) days.

An aggrieved person has the right to challenge the decision of the commission in the court of law for a judicial review.¹⁵³⁹ Despite the action that is instituted in the court the decision being challenged shall remain binding until it is set aside.¹⁵⁴⁰ Section 88(3)¹⁵⁴¹ stipulates that 'a person shall not apply to the court for a judicial review unless that the person has first exhausted all other remedies provided under this Act'. This provision is aimed at robbing an aggrieved person of access to court for ventilating his grievances. It was held in the case of *Alabi vs The Olubadan in Council*¹⁵⁴² that the right of a citizen to have access to Court is constitutionally guaranteed. No other law can subtract from it or derogate from it¹⁵⁴³. Any legislative attempt or style of laying

¹⁵³⁸ Ibid.

¹⁵³⁹ Section 88(1) Ibid.

¹⁵⁴⁰ Section 88(2) Ibid.

¹⁵⁴¹ Ibid.

¹⁵⁴² (2021) LPELR-56294 CA

¹⁵⁴³ The cases of *Fidelity Bank Plc vs Monye* (2012) 10 NWLR (Pt. 1307) 1; *Global Excellence Communications Ltd. vs Duke* (2007) 16 NWLR (Pt.1059) 22; *Ugwu vs Ararume* (2007) 12 NWLR (Pt. 1048) 365 and *Amadi vs Nigerian National Petroleum Corporation* (2000) 10 NWLR (Pt. 674) 76.

herculean internal remedies in a law against an aggrieved person should be discouraged and not promoted.

1.5 Conclusion

There is no part of the constitution that authorizes the national assembly to promulgate a law that is anti-people. Legislature is not expected to enact laws that promote impunity and abuse of power by public officers, authorities and statutory corporations. The Constitution and Freedom of Information Act provides for direct access to information. On the other hand, Nigerian Communications Act encourages delay access to information and justice.

Enacting legislature that promotes openness and easy accessibility to information and court will bring about good governance in the best interest of the citizenry. It will also secure the trust and confidence of the people in the ability of the public institution to deliver on its mandate.

Findings

In view of the issues discussed in this paper, the following findings are made:

- a. The Nigerian Communications Act requirement for application to review decision laid a procedural and technical hitch defeating justice.
- b. Internal mechanisms of sixty days before responding to application is unreasonably prolonged therefore inhibiting access to information.
- c. Lack of punitive measures where the Commission fails to conclude the review of its decision within the stipulated period.

Recommendations

It is recommended pursuant to the above findings as follows:

- a. There is need to remove the requirement for application to review decision constituting procedural and technical hitches that defeats the course of justice in Nigeria.
- b. The Nigerian Communications Act should be amended to eliminate the Internal mechanisms requiring the commission to review its decision which inhibits access to information and court.
- c. There is need for severe punitive measures against the Commission and any staff that fails to conclude the review of its decision within the stipulated time.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

CONSTITUTIONALITY OF EXECUTIVE ORDER IN NIGERIA: EFFICACY AND
CHALLENGES

Nafagha Okiefete Bernard*

Department of Public Law, Ahmadu Bello University, Zaria.

nafagha@yahoo.com. 08037860203.

Abstract

In modern democracies, the executive arm performs quite extensive functions as a result of growing complexity of modern days political system. Sometimes these functions are so broad that it becomes difficult to separate the legislative and judicial functions from the formulation and implementation of policies which the executive arm carries out. Democratic ethos created three branches of government; Executive, Legislature and the Judiciary to perform specific functions and even though these branches are autonomous, administrative convenience creates room for relaxing the rules and permits granting of limited powers to the other branches to make slight incursions into the functions of the other arms and this is the premise upon which the power to make Executive Order by the Executive arose. Executive Order is an Order issued by the President or State Governors to direct actions of government officials. A key element of Executive Order is that it carries the force of law. This paper gives a general appraisal of the constitutionality, efficacy and challenges of Executive Order in Nigeria. It ends with a finding that Executive Orders are constitutional with a recommendation that there is the strong need for vigilance to ensure that the executive do not use Executive Orders as an instrument of abuse of power. The research methodology adopted for the study is doctrinal relying on existing legislation, literature and decided cases.

* Nafagha Okiefete Bernard Esq, LL. B, BL, LL.M, is a Ph.D. student in the Department of Public Law, Ahmadu Bello University, Zaria. He is also a Private Practitioner in Abuja, Nigeria, nafagha@yahoo.com. 08037860203.

1.1 Introduction

The exploration of the concept of Executive Order as an expression of executive power is a critical pillar in the constitutional design of freedom and effective governance in a democratic system of government. In this exploration, the United States constitutional jurisprudence of Executive Order shows that it is designed to strike a balance between commitment to effective governance measured in the capacity of the state to intervene and solve urgent critical problems and the protection of freedom measured in the quality of restraint imposed on exercise of presidential power.

Democracy is a constitutional political system that creates three separate organs of government to wit; Executive, Legislative, and Judicial arms at the national and sub-national levels. The concept of Separation of Power is at the fore in the interaction of these three organs of government in any democratic setting and guides their interactions in the performance of their duties even as they tolerate overlaps of function for administrative convenience. Administrative convenience creates room for relaxing the rules on autonomy and grants limited power to other branches to make slight incursions into the functions of other arms and this is the umbilical cord of Executive Order.

However, the concept of Executive Order and the doctrine of Separation of Power that is associated with federalism and democracy as a system of government needs clarification before any meaningful discussion on the subject can be carried out. What then is Executive Order and how does it originate? Does Executive Order tilt the delicate balance in the power dynamics of constitutional democracy? Is Executive Order constitutional? How efficacious has it being in addressing implementation of government policies and what are the challenges of Executive Order in Nigeria?

It is against this contextual background that this paper sets out to examine the concept of Executive Order, with the objective of exploring its constitutionality and how it has been used and still being used to implement government policies which has been beneficial to the Country. It should be noted at the onset that Executive Order has its origin in the United States of America (USA) and for that reason, a robust discussion of the subject cannot be done without constant reference to the United States legal jurisprudence where the concept originated. On the whole, Executive Orders treated in this paper are limited to those issued by the President, however the generality of issues

and analysis, for the most part may also be applicable to Executive Orders issued by Governors of the States of the Federation.

1.2 Conceptual Background and Definition of Terms

The *Oxford Advanced Learner's Dictionary*¹⁵⁴⁴ defines a concept as an idea or a principle that is connected with something. The expression 'Executive Order,' is neither defined in the constitution of the United States of America (USA) where the concept originated nor that of Nigeria which adopted the America democratic system of government pursuant to the 1979 Constitution. The term is also not interpreted in any law made by the USA Congress and though mentioned in the Nigerian Interpretation Act,¹⁵⁴⁵ the term was neither defined by the Act nor by any other law of the National Assembly of Nigeria. In situations like this where there is no executive, legislative or judicial definition, a researcher has no alternative than to turn to the academia for guidance. The Black's Law Dictionary¹⁵⁴⁶ defines an Executive Order as:

An order or regulation issued by the President or some administrative authority under his direction for the purpose of interpreting, implementing, or giving administrative effect to a provision of the Constitution or of some law or treaty. To have the effect of law, such orders must be published in the Federal Register.

Apart from the dictionary definition, various scholars have also put forward several definitions of the term. Dave Roos¹⁵⁴⁷ defines Executive Order thus:

Executive Order, also known as a proclamation, is a directive handed down directly from a President (the executive branch of government) without input from the legislative or judicial branches. Executive orders can only be given to federal or state agencies, not to citizens, although citizens are indirectly affected by them.

¹⁵⁴⁴Honby, A. S. (1948) *Oxford Advanced Learner's Dictionary (9th Edition)* Oxford University Press, London p. 312

¹⁵⁴⁵ Section 37 of the Interpretation Act, CAP 123, LFN 2004.

¹⁵⁴⁶Black, H. C.; (1990) *Black's Law Dictionary* (Sixth Edition), West Group Publishers, MN, p.569

¹⁵⁴⁷ Dave Roos: "How Executive Orders Work" <https://people.howstuffworks.com/executiveorder.htm> accessed on the 27/07/2024

The American Bar Association on its part defines Executive Order as follows¹⁵⁴⁸;

An Executive Order is a signed, written, and published directive from the President of the United States that manages operations of the Federal Government. They are numbered consecutively, so executive orders may be referenced by their assigned number, or their topic. Other Presidential documents are sometimes similar to Executive Orders in their format, formality, and issue, but have different purposes...

It has also be defined as “Presidential policy directives to the federal bureaucracy”.¹⁵⁴⁹ Another definition, “A Presidential Directive that requires or authorize some action within the executive branch”.¹⁵⁵⁰ In Nigeria, the term was defined by Ladan¹⁵⁵¹ as; ‘A set of presidential directives or guidance issued to an executive branch of government for the purpose of executing or implementing the provision of any existing federal law or policy and enforcing the provisions of the Constitution’. Nigerian Scholars have also proffered some definition of the term. Okebukola and Kana defined the tern in their paper, *Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools*¹⁵⁵²as:

A command directly given by the President to an executive agency, class of persons or body under the executive arm of government. Such a command is in furtherance of government policy or Act of the legislature. The Executive Order may require the implementation of an action, set out parameters for carrying out specific duties, define the scope of existing legislation or be a subsidiary instrument within the contemplation of Section 37 of the Interpretation Act.

A community analysis of the conglomerate definitions above, one can authoritatively asserts that Executive Order is a command directly given by the President or Governor to an executive agency, class of persons or body under the executive arm of government, such a command is in furtherance of government policy or an Act of the legislature. A

¹⁵⁴⁸ The American Bar Association “what is an Executive Order” https://www.americanbar.org/groups/public_education/publications/teachinglegal-docs/What-is-an-executive-order-/Acceised on the 30/5/ 2021.

¹⁵⁴⁹ Raven-Hanson, P. (1983) Making Agencies Follow Orders; Judicial Review of Agency violations of Executive Order of 12,291 *Duke Law Journal*, p.285,

¹⁵⁵⁰ Mayer, K.R., (1999) Executive Orders and Presidential Power 61 *The Journal of Politics* 445-466,p.445.

¹⁵⁵¹ Ladan, M.T., (2018) “*The Legal Effect and Limit of Presidential Executive Orders in Nigeria and the USA: A Review of Executive Orders1-6 of 2017-2018 in Nigeria*. DLSS Law Information Brief No. 5, September, 2018. <http://nis.gov.ng> Accessed 2/8/2024.

¹⁵⁵² Elijah, O.O. and Abdulkarim A. K., (2003) Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools, *African Journals Online website* (www.ajol.info) accessed 18/8/2023.

common characteristic of Executive Order is that it does not give room for choice to obey.

I.3 The Concept of Separation of Power

The term Separation of Power is a hallowed constitutional principle associated with democratic governance. According to Nwabueze¹⁵⁵³,

Separation of powers is a hallowed constitutional principle of the democratic government of Nigeria for the three arms of government to stay in their assigned tracks to avoid arbitrary excesses by any of the arms. The idea is that the legislature makes the law; the executive executes the law, while the judiciary interprets the law. Where the functions are co-mingled, the result is disastrous.

According to Danladi,¹⁵⁵⁴ Separation of Powers means division of powers into three organs of government; namely Executive, Legislature and Judiciary. The concept of Separation of Power commenced under the premise that government is a creation of law and is limited by law. Thus, governmental power is not *ad infinitum* and that power should not be too concentrated in one arm of government. For this reason, democratic ethos makes for devolution of power to three tiers of government namely, the Executive, Legislative and Judiciary. Each of these three arms are constitutionally assigned specific responsibilities with each arm to also act as check and balance on the others within the permissible scope allowed by the constitution or other enabling laws. The argument states that the executive is expected to focus on implementation of laws and policies, the legislature should be busy with the enactment of laws while the judiciary should solely be concerned with interpreting the laws. The principle of Separation of Power came into existence to dissuade men from the temptation to grasp the power of making laws and at the same time be the one to execute such laws. This is to assuage the fear of such men putting such power to their private advantage. It should be noted early that while the legislative and judicial functions are vested in institutions, the Executive power is vested on an individual - the President.

¹⁵⁵³Nwabueze B. O. (1985), *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (Longman Group Ltd), Hong Kong, p. 62

¹⁵⁵⁴Danladi, K.M, (2017), *Outline of Administrative Law and Practice in Nigeria*. Ahmadu Bello University Press, Zaria. p. 48

This principle of Separation of Power occupies a pride of place in the Nigeria's Constitution where each of the Country's three organs of government is expected to adhere within its designated limits in order to ensure that governmental powers are not concentrated in the hands of a few persons, but rather distributed amongst the three institutions. In *Inakoju v. Adeleke*,¹⁵⁵⁵ Hon. Justice Niki Tobi captured the entire essence of Separation of Power and the organs acting as checks and balances on each other in his characteristic manner when he puts it lucidly that:

The legislature is the custodian of a Country's Constitution in the same way the executive is the custodian of the policy of government and also in the same way that the judiciary is the custodian of the construction or interpretation of the Constitution. One major role of a custodian is to keep under lock and key the property under him so that it is not desecrated or abused. The legislature is expected to pet the provisions of the Constitution like the way the mother pets her day old baby. The legislature is expected to abide by the provisions of the Constitution like the way the clergyman abides by the Bible and the Imam abides by the Koran. And, so, when the legislature, the custodian, is responsible for the desecration and abuse of the provisions of the Constitution in terms of patent violation and breach, society and its people are the victims and the sufferers; and in this particular context, the Oyo State society and the respondents, particularly the 3rd respondent. Furthermore, society and its people are not totally helpless as the judiciary, in the performance of its judicial functions under Section 6 of the Constitution, is alive to check acts of violation, breach and indiscretions on the part of the legislature. That is what I have done in this judgment. I do hope that the judgment will remove the apparent wolf in the Appellants as members of the House of Assembly of Oyo State¹⁵⁵⁶.

However, the point should be made that in real life, it is not possible that each arm should remain totally independent and supreme in its sphere of authority without some blending or any check and balance. Therefore, the doctrine does not equate to rigidity of power amongst the three arms of government. To be meaningful, power must create room for overlapping, co-operation and co-ordination amongst the arms, so that government business will not come to a halt due to rigidity and opposition as the three organs of government are interrelated and independent. The organs are partners in good government as strict Separation of Powers will hamper

¹⁵⁵⁵ (2007) All FWLR (Pt. 353) p.17

¹⁵⁵⁶ Ibid. p. 123

the smooth working of government. As Justice Robert H. Jackson of the U.S. Supreme Court explained it in *Youngstown Sheet and Tube Co. v. Sawyer*¹⁵⁵⁷

While the constitution diffuse power, the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon the branches of government separateness, but interdependence, autonomy, but reciprocity.

This position was also the view expressed by Ojo¹⁵⁵⁸ when he rightly pointed out:

A complete Separation of Power is neither practicable, nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on anyone person or body, and the check of one power by another.

Thus, it is this flexibility in the doctrine that accommodates the birth of Executive Order. It is my candid opinion that the doctrine of Separation of Power and Executive Order strictly speaking, are not strange bedfellows as Executive Orders are issued pursuant to delegated powers which are expected to be monitored by the donee of the power in order to conveniently achieve good governance.

1.4 Delegation of Power

Delegation of power is the transfer of authority by one branch of government to another to exercise such authority like the transferor itself. Like stated earlier, the 1999 Nigerian Constitution divides the organs of government into three; the Legislature, the Executive and Judiciary with specific functions assigned to them. However, through delegation of power, an organ can concede part of its functions to another organ to exercise. Therefore, technically, we can say that delegation of powers is the transfer of authority either by the legislature to the executive or the judiciary or vice-visa. Onu, puts it aptly in his article *Delegated Legislation in Nigeria; Taming the Wild dog while it's still early*¹⁵⁵⁹ when he defines the term thus;

Delegation of Power is the transfer of authority by one person to another person to empower that other person to perform a task on behalf of the

¹⁵⁵⁷ *Youngstown Sheet and Tube Co. v. Sawyer*, (1952) 343 US 579, 635

¹⁵⁵⁸ Ojo, A. (1981), Separation of Powers in a Presidential Government. *Public Law Journal*, p. 105

¹⁵⁵⁹ Onu, K. O. N. (2022) Delegated Legislation in Nigeria Taming the Wild dog While it's still early. *Institute of Natural Resources Law*, Adeleke University, Ede, Osun State, Volume 11, No. 3 pp. 1539-1545.

donor of the power. For instance, a landlord may delegate to his agent such as a caretaker the authority to collect rents, make rules and regulations for the maintenance and cleanliness of the premises and to exercise his other rights and obligation with respect to the tenants occupying his property.

Most Executive Orders are issued based on delegated power by the legislative arm of government to the executive. This will be discussed in details in the work.

1.5 Brief history of the Origin of Executive Order

Executive Order has its origin in the United States of America. It is further traceable to President George Washington, the first President of the United States of America. He became President of the United States on 30th April, 1789.¹⁵⁶⁰ He issued the first Executive Order on June 8, 1789 by which he directed heads of department “*to impress me with a full, precise, and distinct general idea of the affairs of the United States*”¹⁵⁶¹ and he issued many more of such orders while he was in office. Though Washington is adjudged by many writers as one who tried not to abuse his powers, he however issued some controversial Orders with the most controversial one being the Order issued in 1793, popularly referred to as the *Neutrality Order*.¹⁵⁶² The said Order proclaimed the neutrality of the United States in the war between England and France. The Order is seen as a controversial Order because it sparked off reactions amongst citizens when it was issued.¹⁵⁶³ Congress has to intervene in 1794 to salvage the situation by enacting the Neutrality Act of 1794 which gave legitimacy to the Executive Order on neutrality.¹⁵⁶⁴

All other Presidents that came after Washington used Executive Order conservatively until Abraham Lincoln became the President of the United States. Abraham Lincoln became the President of the United States in an unusual time. It was during his time as President that the United States experienced a Civil War. When the

1560 <https://www.whitehouse.gov>.accessed.23.1.2024

1561 Thomas, V. (2014). *George Washington had a pen, but no phone for Executive Orders*. The Washington Times retrieved October 3rd, 2018 from <http://www.washingtontimes.com/news/aug/14/dibacco-the-frist-President-had-a-pen-but-no-phone>.accessed on 7/2/2024.

1562 Ibid. p. 38

1563 Ibid.

1564 Ibid.

war started, Lincoln fought it for three months through Executive Orders before his action was ratified by the Congress.¹⁵⁶⁵

After the Civil War and the assassination of Abraham Lincoln, many other Presidents made use of Executive Orders until President Harry S. Truman. He issued over 905 Executive Orders while in office.¹⁵⁶⁶ Truman was the first American President that issued an Executive Order that was overturned in its entirety by the Court in the case of *Youngstown Sheet & Tube Co vs. Sawyer*.¹⁵⁶⁷ In the said case, the US Supreme Court opined, “*The President’s power to issue the Order if any, must stem from either an Act of Congress or from the Constitution.*” The facts of the case are simple and straightforward but quite interesting. President Truman in 1953 acting in time of national emergency, issued Executive Order 10,340 which empowered the then Secretary of Commerce to forcefully take possession of and operate most of the Nation’s Steel Mills. The steel mills were owned by companies and operated by employees who had threatened an industrial action. The US government had made efforts to avert the strike at all cost but it could not succeed. The government seeing that the operation of the Steel Mills was critical to the success of the war it was fighting in Korea, ordered that the steel industries be seized and operated by the government. The steel companies were furious and sued the Secretary of Commerce challenging the validity of the Order. Justice Robert H. Jackson in his supporting judgment argued forcefully that although the US President is the Commander-in-Chief of the Armed Forces, he is not the Commander-in-Chief of the Country, its industries and its inhabitants.

Interestingly, the Court for the first time, in the said case laid down the test for determining the validity of an Executive Order. Justice Robert Jackson in the concurring judgment formulated the standard test now being used to gauge the validity of an Executive Order. According to him:

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge his powers, and by distinguishing roughly the legal consequences of this factor of relativity as follows:

¹⁵⁶⁵ Ibid.

¹⁵⁶⁶ Ibid

¹⁵⁶⁷ (1952) 343, US, 579, the overturn Executive Order No. 10, 340 directed the seizure of US Steel Mills to prevent a threatening steel workers strike.

- i. When the President acts pursuant to an express or implied authorisation of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
- ii. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
- iii. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the entire matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

This test propounded by Justice Jackson has since remained pivotal as it provides an intelligible framework for understanding Executive Orders issued by the President and has been applied in subsequent cases and shall severally be referred to as this paper progresses.

1.6 History of Executive Order in Nigeria

Executive Orders crept into Nigeria's political lexicon upon the adoption of the American Presidential Constitutionalism in 1979, though no President made use of Executive Order since 1979 hence some have argued that the Nigeria Constitution, Unlike the US Constitution, has no place for Executive Order. It was in 2018 that the

President Mohammadu Buhari's administration decided to use Executive Order to align his administration's policy goals relating to diluting the bureaucratic rigours associated with doing business in Nigeria, combating corruption and abuse of power, economic recovery and diversification of the economy, and national security.

While the President of Nigeria has made use of Proclamation to declare a State of Emergency in Western Region of Nigeria far back 1966, Plateau State in 2005 and Adamawa, Borno and Yobe States in 2013, the word Executive Order first resonated in the political landscape of Nigeria under President Mohammadu Buhari regime when Acting President Yemi Osibanjo issued the first three Executive Orders on 8th of May, 2018. The first of the three Orders ordered Ministries, Departments and Agencies of Government to employ measures to promote transparency and efficiency in the business environment in the Country.¹⁵⁶⁸ Since then, more Executive Orders have been issued by the President and State Governors. To start with, Executive made laws are not completely strange to Nigeria's legal jurisprudence. This is because Nigeria has in time past experienced military regimes where the executive and legislative arms of government were fused and the two roles were performed by the then military rulers who ruled by Decrees. However, upon returned to democratic government in 1999, decrees became anachronistic. The National Assembly was inaugurated and saddled with the responsibility of making laws for the good governance of the Country, and laws made by the legislature are known as Acts of Parliament. Through some of these Acts of the legislature, the President have been granted discretion to use Executive Orders to implement or set out the extent and scope of certain Acts¹⁵⁶⁹.

1.7 Constitutionality of Executive Order in Nigeria.

Constitutional powers of a President to issue Executive Order is the primary and most reliable source of powers to make an Executive Order.¹⁵⁷⁰ Justice Jackson referred to this source as; '*... authority ...at its maximum...*' This is because, according to him, '*....it includes all that the President possesses in his own right...*' Where a President exercises

¹⁵⁶⁸Levinu, N. (2017). Osinbajo signs 3 Executive Orders on ease of doing business. *Vanguard Newspapers* May 19th, 2017

¹⁵⁶⁹ For example, Section 1(1) & (2) Visiting Forces Act, CAP VA, LFN, 2004, Section 1 (3) Transfer of Convicted Offenders (Enactment & Enforcement) Act, T16, LFN, 2004.

¹⁵⁷⁰Branum , T.L.. (2016) President or King- "The Use and Abuse of executive Order in Modern-Day America" *Journal of Legislation*, Vol. 2, Article 9, p. 33

his powers pursuant to this source, he is said ‘...to personify the federal sovereignty...’¹⁵⁷¹ Such Presidential Order cannot or would hardly be held by the court to be *ultra vires* or unconstitutional when exercised pursuant to this source.

In Nigeria, the President's primary source of power to issue Executive Orders under the Constitution can be found within the prism of Sections 5, 32, 175 and 315 of the Constitution.¹⁵⁷² Section 5 of the Constitution provides:

Subject to the provisions of this Constitution, the executive powers of the federation;

- a. Shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation; and
- b. Shall extend to the execution and maintenance of the constitution, all laws made by the National Assembly and to all matters with respect to which the national assembly has, for the time being, power to make laws.

While Section 5 (c) states that the power;

Shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws”

The said Section 5, as can be seen, identify two limbs of the President's powers namely:

- i) Execution and Maintenance of the Constitution
- ii) Execution and Maintenance of all laws made by the National Assembly

In addition, the President, as an “appropriate authority”¹⁵⁷³ is empowered by section 315 (1) (2) and (4) (a-c) of the Constitution to modify any existing law, at any time by Order, as he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. By such Order, the President may make such “modifications, including addition, alteration, omission or repeal”¹⁵⁷⁴ any law, or enactment or instrument whatsoever in force before the coming into force of the Constitution on 29th May, 1999.

¹⁵⁷¹ Ibid.

¹⁵⁷² Section 5 of the 1999 Constitution

¹⁵⁷³ Ibid, Section 315 (4)(a).

¹⁵⁷⁴ Ibid, Section 315 (4)(b) and (c) of the 1999 Constitution.

The President power of ‘*execution and maintenance of the Constitution*’ has been the most controversial and ambiguous limb of the powers of a sitting President as contained in the Constitution. This is because the said section does not define ‘*execution and maintenance of the Constitution*’. This then leaves us with the questions what does the Section mean by the ‘*Execution*’ and ‘*Maintenance of the Constitution*’? the vagueness of this provision can be abused and in fact has been abused in the past. For example, President Olusegun Obasanjo, in the case of *Attorney General of Lagos State v. Attorney General of the Federation*¹⁵⁷⁵ argued in his defence to the suit challenging the validity of the President's Order to the Accountant General of the Federation not to pay the Local Governments in Lagos State their monthly allocations until the Lagos State Government abolished the then newly created Local Government Areas and revert to the constitutionally recognised local governments in the State. He argued that he was justified under Section 5 of the Constitution on the Oath he took as President on the ‘*execution and maintenance of the Constitution*’. The said argument as reproduced in the judgment was that:

...the defendant's brief of argument contends that by the Oath of Allegiance in the Schedule to the Constitution, to which the President subscribed, he is obliged to "preserve, protect and defend the Constitution of the Federal Republic of Nigeria." By Section 5(1)(a) of the Constitution the executive powers of the Federal Republic of Nigeria are vested in the President, and by Section 5(1)(b) of the Constitution "the executive powers extend to the execution and maintenance of the Constitution." It is, therefore, argued that the claim by the plaintiff against the defendant is an invitation to the defendant to commit a breach of the provisions of the Constitution which the latter had sworn to uphold.

Though the Court held that the President's withholding of the funds of the Local Governments was unconstitutional, the court failed to define the “*execution and maintenance*” of the Constitution’ within the meaning of Section 5 of the 1999 Constitution.

Executive Orders issued for the execution and maintenance of the constitution can hardly be faulted when it is *intra vires* the power of the President. Under this limb,

¹⁵⁷⁵ (2004) 11-12 SC. 85

the President can validly issue Executive Order and such orders will be regarded as obtaining their validity from the Constitution.

The second limb of Section 5 of the Constitution gives the President power to execute and maintain all laws made by the National Assembly. It's elementary¹⁵⁷⁶ knowledge that the basis for the principle of Separation of Powers in democratic government is that it is the primary function of the executive to execute all laws made by the legislature. This source of power agrees with the first validity test lucidly canvassed by Justice Jackson in *Youngstown case*.¹⁵⁷⁷ Presidents have, pursuant to this power executed a good number of enactments made by the National Assembly through Executive Orders. It is under this power that acting President Yemi Osinbanjo issued the first three Executive Orders in 2017 and other Executive Orders were issued by President Mohammadu Buhari.¹⁵⁷⁸ Recently in April 2024, President Ahmed Tinubu issued Executive Order 1, 2, and 3 of 2024 pursuant to Section 100 of the Nigerian Oil and Gas Industry Content Development Act (NOGICDA) 2010. There are various legislations of the National Assembly that give the President powers to make Executive Orders.¹⁵⁷⁹

Apart from the provisions of Section 5, the President is also granted wide powers by Section 32 of the Constitution to make regulations on Citizenship in Nigeria.¹⁵⁸⁰ The section provides;

- i. The President may make regulations, not inconsistent with this chapter, prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this chapter, and for granting special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship.
- ii. Any regulations made by the President pursuant to the provisions of this section shall be laid before the National Assembly.

¹⁵⁷⁶Executive Orders No.1-3 of 18th of May, 2017.

¹⁵⁷⁷ *Youngstown Sheet & Co (Supra)*

¹⁵⁷⁸*Ibid*

¹⁵⁷⁹ For example, section 1 (5) Armed Forces Act, CAP A20, LFN 2004; section 134 (3) Customs and Excise Management Act, CAP F18, LFN, 2004, section 33 Firearms Act, CAP F28, LFN 2004; section 44 (2) NDLEA Act, CAP N30 LFN,2004; section 44, Ahmadu Bello University Act (Transitional Provision) Act, CAP A14, LFN, 2004.

¹⁵⁸⁰ *Ibid*, Section 32 to give effect to the provisions of Chapter 3 of the 1999 Constitution.

The President is therefore authorized under this Section to issued executive legislation which can come out in the form of Executive Order. The Supreme Court has severally been called upon to determine the constitutionality of such ‘*executive legislation*’. One of such cases is *Att.-General of Abia State and Ors. v. Att.-General of the Federation*,¹⁵⁸¹ where the Supreme Court accepted that the President can validly alter the law to bring it to conformity with the Constitution. Reacting to the submission that such exercise violates the doctrine of Separation of Power, Hon. Justice Eso JSC, argued that:

It is true that Separation of Power is essential to a healthy democracy, the power given the President and also to State Governors in existing law of the state by the Constitution is not an abuse of the principle or doctrine of Separation of Powers, it is essential to giving meaning to an existing law so that the Constitution itself is not abused.¹⁵⁸²

In *Ohaji v. Umwamka*¹⁵⁸³ the court held that where there is a statutory provision for making an Order and the making of same is reposed in the President of the Federal Republic or Governor of a State, such function cannot be usurped by the court. The furthest a court can go is to declare as to the validity or otherwise of that order; but the court has not got the jurisdiction to take over the functions of such public officer by making its own order.”¹⁵⁸⁴

It is evident from the nature of legislative function of the executive and executive power explained above, that in terms of scope, the executive power extends to the execution and maintenance of the constitution; execution of all laws made by the legislature; execution of all matters with respect to which the legislature has powers to make laws. This power extends to the execution of treaties entered into by the President /executive on behalf of the government and people of Nigeria all of which the President can do through the instrumentality of Executive Order.

So, it is safe to conclude that through delegated power by the legislature, the

¹⁵⁸¹ Ibid.

¹⁵⁸² [1993] NWLR (Pt.309) 58.

¹⁵⁸³ (2003) 4 NWLR (Pt. 809) p. 124

¹⁵⁸⁴ *Ajakaiye v. Idehai* (1994) 8 NWLR (Pt. 364) P. 504 at Pp. 525-526.

Executive can make regulations, issues statutory orders, guidelines and rules necessary to meet changing circumstances in society anytime the need arises all of which could be done be done through Executive Order. The language of the Section 5 of the Constitution certainly places the President in a situation that enables him to act as an 'elected monarch' as well as 'a delegated representative of the people'. Nwabueze himself agrees that the *"Executive power is difficult of precise delineation. Its limits are obscure"*.¹⁵⁸⁵ Thus, the executive power of the federation donated to the President *singularly* and *personally* is wide-ranging and awesome. It is like the powers donated by Article 2 of the US Constitution, which grants Executive power singularly and personally to the US President. It also empowers the US President to *"take care that the law is faithfully Maintained"*

It should be noted that the power granted the President by Section 5(b) covers all those matters that are under the legislative competence of the National Assembly even when not legislated upon. Thus, the limb contemplates a situation where there is no law by the National Assembly on a matter within its legislative competence and time is of the essence. The law permits a President to make an Executive Order in the interim pending when the national Assembly will wake up from its inertia. The question that follows is what are those matters that are within the legislative competence of the National Assembly? To understand these matters, one must have recourse to section 4 of the Constitution which empowers the National Assembly to make laws with respect to matters in the Exclusive Legislative List and Concurrent List to the extent as prescribed in the second Column and any other matter in any part of the Constitution as the said Constitution empowers the National Assembly to make laws thereon. This then means that a President has the power to make an Executive Order on any matter on the Exclusive Legislative List and any matter on the Concurrent List to the extent prescribed in the First Schedule of the Constitution and any other matter that the Constitution shall expressly empower the National Assembly to make law on. Furthermore, Since the Constitution also empowers the National Assembly to make laws on other matters that are incidental and supplemental to the matters listed in the Exclusive List, the President too can make an Order in respect of those matters that are incidental and supplemental to the items in the exclusive legislative list.

¹⁵⁸⁵ Nwabueze, Op. Cit p. 88

The powers to make an Executive Order under this limb of Section 5(b) appears to be concurrent with the powers of the National Assembly hence similar to “*the zone of twilight*” as stated by Justice Jackson. This then means that the Court will be guided by the inaction and acquiescence of the National Assembly as well as “*the imperatives of events and contemporary imponderables rather than on abstract theories of law*” in determining the validity of such an order as stated by Justice Jackson.

Again, the Nigerian President has independent constitutional authorization to grant Pardon pursuant to Section 175 of the Constitution. This power is personal and cannot be delegated. Thus, he often rely on this provision to make Executive Order to grant a pardon from time to time.

Furthermore, Section 315 of the Constitution confers wide discretionary power on the President to issue Orders and modify existing laws to come in conformity with the provisions of the Constitution. In essence the President is granted the discretion to first determine which aspects of an Act that predates the Constitution are inconsistent with the Constitution and thereafter he has the further discretion to amend the text of the law in such a manner that will align the Act with the provision of the Constitution.¹⁵⁸⁶

In *A-G., Abia State v. A-G., Federation*,¹⁵⁸⁷ the Supreme Court stated that the two tests for determining constitutionality of modification to an existing law are whether the modification order brings the relevant Act into conformity with the provisions of the Constitution or whether there has been an infraction of the Constitution by the Order.¹⁵⁸⁸

1.8 Efficacy of Executive Order in Nigeria

The use of Executive Order no doubt has greatly aided consistence in implementation of government policies in ministries and agencies under the executive arm of government

¹⁵⁸⁶ Apart from this this provision of the Constitution, there are several other Acts that permit modification by the executive. For example, section 1 (5) Armed Forces Act, CAP A20, LFN 2004; section 134 (3) Customs and Excise Management Act, CAP F18, LFN, 2004, section 33 Firearms Act, CAP F28, LFN 2004; section 44 (2) NDLEA Act, CAP N30 LFN, 2004; section 44, Ahmadu Bello University Act (Transitional Provision) Act, CAP A14, LFN, 2004.

¹⁵⁸⁷ *A-G., Abia State v. A-G., Federation* (2003) 4 NWLR (Pt.809) p.124 at 177.

¹⁵⁸⁸ *Ibid.* p220 paras B-C.

ultimately adding value to the Nigerian economy. It results in increase productivity and result-oriented administration aimed at achieving government goals and policies. This can be seen through analysis of some Executive Orders.

In times of national emergencies, Executive Order comes in handy when dealing with situations that will not wait for the rigors and time wasting period associated with legislation. For instance, President Mohammadu Buhari has to rely on Executive Order to declare lockdown and restrict movement of persons during the time of Covid 19 epidemic in 2022. This is because apart from the long period it will take to pass a legislation on the subject, members of the National Assembly who will pass the law where themselves in hiding in fear of the epidemic.

Executive Orders have been deployed to enhance the fight against corruption in Nigeria. The primary focus of Executive Order 6 was to preserve assets suspected to be connected with corruption, money laundering, fraud, and other relevant offenses. By preventing the dissipation or disposal of such assets by suspects undergoing trials, the Order aimed to support anti-corruption efforts, strengthen asset recovery mechanisms, and deter individuals from engaging in illicit activities thus, enhancing the fight against corruption. The Order mandated the Attorney-General and Minister of Justice of the Federation as the Chief Law Officer to take steps including obtaining relevant orders of court for the preservation of suspicious assets connected with corruption and other relevant offences. Using the Order, the government has been able to recover billions of Naira through interim forfeiture of properties obtained through corruption as the Order deprives suspect from having access to the properties pending the determination of legal proceedings against them. When these properties are confiscated, many of the suspects never bother to come back for them knowing the crooked manner they got them.

Executive Orders have also been used to direct or enhance implementation of technology transfer to Nigerians. This was the focal point of Executive Order 2 which was reinforced by President Bola Tinubu in February, 2024 when he signed three Executive Orders on Oil and Gas regime in Nigeria. The Orders were predicated on transfer of technology by directing that Nigerians must work under and under study expatriates employed for technical jobs for the purpose of acquisition of such technology.

Executive Orders create jobs and additional incomes to the government. For instance, the three Executive Orders on Oil and Gas were projected to create over a hundred thousand jobs in the oil and gas sector in their implementation. By creating additional jobs, the Orders are also creating additional income by way of taxation. For instance, the Executive Order 4 of 2018 which created Voluntary Assets and Income Declaration Scheme goes beyond financial gain and has the potential of expanding the tax net in reducing the incidence of illicit financial flows, aggressive tax avoidance and outright tax evasion. In the interim implementation of the Order, the Federal Inland Revenue Service reported, that the tax amnesty scheme provided under the Order has, as at July 1st 2017, an impact in the following areas: promoting voluntary compliance that is unquantifiable and the outcome of the Scheme is the growth of the national tax payer database from fourteen million people pre-2016, to over nineteen million in June 2018. This later translated into a positive growth in the country's tax revenue to GDP ratio for 2017/2018 official percentage. The Scheme under Order 4 raked in about three hundred billion (300 billion) naira from previous tax defaulters both individual and corporate entities. FIRS collected 90% of the amount, while the States collected the balance of 10%¹⁵⁸⁹.

Executive Order on the Promotion of Transparency and Efficiency in the Business Environment brought about improvement in the business environment in Nigeria by addressing issues related to transparency, efficiency, and ease of doing business. This Executive Order is economic-based with the main objective of establishing a single interface or portal for all government agencies involved in the issuance of business-related permits and approvals. The Executive Order diluted governmental bureaucracy and introduced transparency by mandating government agencies to reduce bureaucratic bottlenecks, and make it easier for businesses to navigate frustrating regulatory requirements. This promoted accountability as it made it easier to track the performance of agencies in processing business-related permits and approvals. This Order has been a huge success if one bears in mind the steady rise of Nigeria in the World Bank's Ease of Doing Business Ranking having been recognized as

¹⁵⁸⁹FIRS Chairman Report, Thursday, June 7, 2018, at P.17. 183 Ibid, FIRS Chairman reported.

one of the top ten reformers (though still 31 places below her projection) to be within the first 100 on the ranking by 2020.¹⁵⁹⁰ This success can be attributed to the high-level political support Executive Order 1 has received through the Presidential Enabling Business Environment Council (PEBEC)¹⁵⁹¹ as well as the dedication of the Secretariat i.e. Enabling Business Environment Secretariat (EBES) to drive the Executive Order as well as other reforms aimed at making Nigeria more business friendly.

From the above, one can say that Executive Order has been of tremendous advantage to Nigeria and its efficacy in using it to drive government goals policies have been incremental.

1.9 Challenges

Despite the numerous positive impacts of Executive Order in Nigeria, there are also serious challenges associated with the concept many of which are quite visible in the country. For example, stiff bureaucratic resistance, lack of coordination among agencies, and capacity constraints hindered the smooth execution of Executive Order 1 of 2018. In some cases, Executive Order may not always be Constitutional as leaders, very often overstep their powers by using Executive Orders to bypass legislative functions. This was the case in Nigeria with Executive Order 10 where the supreme Court held that the Order creating financial autonomy for the legislative and judicial arms of government in the states of the Federation is *ultra vires* the power of the President and the apex court nullified and set it aside.

Another worrisome aspect of Executive Order is that they are unilateral decisions of the President and Governors and have no input from the citizens. These Orders, sometimes go against the interest and wishes of citizens since they do not weigh on the people's ideas before being issued. This has a great potential of causing confusion in the public service or agencies targeted by the Order. These unilateral decisions on centralized issues can result in into serious frictions and authoritarianism.

Again, Executive Orders could easily be deployed for personal or selfish interest such as rewarding political allies and punish political rivals as played out

¹⁵⁹⁰ PEBEC's 2018 Annual Report at p. 7. Accessed on 5th July 2024.

¹⁵⁹¹ <https://youtu.be/m8mEV58e52k.p.15,20>.accessed on 5th July, 2024

and is still playing out in Kano State, Nigeria immediately after the election and the swearing in of the elected Governor in 2023, Executive Orders were issued to demolish buildings of perceived political opponents and the Emir perceived to be loyal to the past Governor was dethroned.

Another glaring challenge to implementation of Executive Orders in some cases is failure of government to put the right structures in place before issuing the Orders. This was the case with Executive Order 2 of 2017, also known as “Promotion of Made in Nigeria Products.” While the intention to promote made in Nigeria products was laudable, the implementation of the Executive Order faced serious challenges. These challenges included lack of availability of quality local products, pricing competitiveness compared to imports, capacity constraints of local industries, and enforcement mechanisms to ensure compliance with procurement preferences. Similar challenges were also faced by Executive Order 4 which has to do with Voluntary Assets and Income Declaration Scheme (VAIDS). The expected impact of VAIDS is that it will boost the nation's revenue base through payment of (required) taxes particularly by High-Network Individuals. It is noteworthy that Executive Order 4 on VAIDS,¹⁵⁹² was issued against alarming tax avoidance and evasion data. The success of this Order depended largely on addressing challenges, raising awareness, providing incentives for compliance, ensuring confidentiality and data security. However, the awareness and other factors were missing in the implementation of the Order leading to strong resistance from tax payers.¹⁵⁹³

Lack of adequate consultation with those to be affected by an Executive Order is another serious challenge to the acceptability of an Executive Order. No doubt the implementation of Executive Order 10 faced this challenge because the States Governors to be affected by this Order seems not to be carried along and this led to strong resistance from them. They insisted on maintaining control over their States’ budgetary allocations. The legal dispute, as stated earlier, eventually led to the nullification of the Order by the Supreme Court.

¹⁵⁹² VAIDS-Voluntary Assets and Income Declaration Scheme – was signed on 29th June, 2017.

¹⁵⁹³ Quoted in the Press release, Office of the Acting President, Yemi Osinbajo, dated 30th June, 2017: “How Taxpaying Nigerians can curb corruption, make governments Responsible.” Speech Delivered at the Banquet Hall, State House, Abuja, on Thursday, June 29, 2017, at pp. 1-9.

Addressing these challenges require not only strong political will but also comprehensive institutional reforms and capacity-building efforts across government agencies Executive Orders are targeted.

1.10 Conclusion

Whereas it is still debatable as to the usefulness of Executive Order in constitutional democracies, its foundation in practice of democracies is sure. In Nigeria, like many constitutional democracies around the world, Executive Order has come to stay as its constant resort is gradually holding sway as a convenient instrument of governance and its usefulness cannot be down played. It is presently being employed to address myriads of issues. Although not expressly mentioned in the Constitution, its relevance in the third Republic constitutional democracy has been consistently incremental. However, issues surrounding the propriety of some Executive Orders as well as the constitutionality of the changes they target, technical details as to why and how they are made, and the possibility of being *ultra vires* has left the instrument mired in controversy. No doubt, Executive Orders have many benefits for constitutional governance as they are geared towards improving the effectiveness of presidential power and not to aggrandize power or encroach on the constitutional responsibilities of other branches of government.

It is the findings of this work that the President power to issue Executive Order is constitutional and surmised that the making of Executive Orders have not infringed on the hallowed doctrine of the Separation of Powers, rather those Orders have accentuated the beauty of the Presidential system of government. However, care must be taken to ensure that these Orders do not encroach into the lawmaking functions of the legislature. It is also a finding that in most cases, there is no wide consultation especially amongst stakeholders before issuing Executive Orders and such orders appear to encroach into the domain of other organs of government. This was the case with Executive Order 10 which was eventually set aside. It is in the light of these findings that it is recommended that there should be wider consultation especially with stakeholders before Executive orders are issued. Also, where the subject of any Executive

Order relates to matters that are contrary to the express provisions of the law, usurp the functions of another branch of government or violate the guaranteed rights of citizens, the court should strike down such Executive Order as was done by the US Supreme Court in the *Youngstown's* case and the Supreme Court of Nigeria in *Attorney-General of Abia State v. Attorney-General of the Federation*.¹⁵⁹⁴

BIBLIOGRAPHY

1. A-G., *Abia State v. A-G., Federation* (2003) 4 NWLR (Pt.809) p.124 at 177.
1. Ajakaiye v. Idehai (1994) 8 NWLR (Pt. 364) P. 504 at Pp. 525-526.
2. Amadi, S., (2018) “President’s exercise oversight over administrative agencies by use of Executive Orders.”
3. Black, H. C.; (1990) *Black’s Law Dictionary* (Sixth Edition), West Group Publishers, MN, p.569.
4. Branum, T. L. (1987) ‘President or King-The Use and Abuse of Executive Orders in Modern-Day America’ *Journal of Legislation*: Vol. 2: ISSP. 1, Art. 9, p.23
5. Constitution of the Federal Republic of Nigeria, 1999
6. Danladi, K.M, (2017), *Outline of Administrative Law and Practice in Nigeria*. Ahmadu Bello University Press, Zaria. p. 48
7. Dave Roos: “How Executive Orders Work”
<https://people.howstuffworks.com/executiveorder.htm> accessed on the 27/01/2024
8. Elijah, O.O. and Abdulkarim A. K., (2003) Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools, *African Journals Online website* (www.ajol.info) accessed 18/8/2024.
9. FIRS Chairman Report, Thursday, June 7, 2018, at P.17. 183 Ibid, FIRS Chairman reported.
10. Honby, A. S. (1948) *Oxford Advanced Learner’s Dictionary* (9th Edition) Oxford University Press, London p. 312.
11. Kayode Eso, JSC, [1993]NWLR (Pt.309) 58.

¹⁵⁹⁴ Sura

12. Levinu, N. (2017). Osinbajo signs 3 Executive Orders on ease of doing business. Vanguard Newspapers May 19th, 2017
13. Mayer, K.R., (1999) Executive Orders and Presidential Power; 61 *The Journal of Politics* 445-466, p.445.
14. Nwabueze B. O. (1985), *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (Longman Group Ltd), Hong Kong, p. 62
15. Ojo, A. (1981), Separation of Powers in a Presidential Government. *Public Law Journal*, p. 105
16. Onu, K. O. N. (2022) Delegated Legislation in Nigeria Taming the Wilddog While it's Still Early. *Institute of Natural Resources Law*, Adeleke University, Ede, Osun State, Volume 11, No. 3 pp. 1539-1545.
17. Raven-Hanson, P. (1983) Making Agencies Follow Orders; Judicial Review of Agency violations of Executive Order of 12,291 *Duke Law Journal*, p.285,
18. Interpretation Act, CAP 123, LFN, 2004.
19. The American Bar Association "What is an Executive Order?" https://www.americanbar.org/groups/public_education/publications/teachinglegal-docs/what-is-an-executive-order- /Accessed on the 30/5/ 2024.
20. Thomas, V. (2014). 'George Washington had a Pen, but no Phone for Executive Orders.' The Washington Times retrieved October 3rd, 2018 from <http://www.washingtontimes.com/news/aug/14/dibacco-the-first-President-had-a-pen-but-no-phone>. Accessed on 7/2/2024.
21. (1952) 343, US, 579, the overturned Executive Order No. 10,340 directed the seizure of US Steel Mills to prevent a threatening steel workers strike.
22. For example, Section 1(1) & (2) Visiting Forces Act, CAP VA, LFN, 2004, Section 1 (3) Transfer of Convicted Offenders (Enactment & Enforcement) Act, T16, LFN, 2004.
23. PEDEC's 2018 Annual Report at p. 7. Accessed on 5th July 2024 <https://youtu.be/m8mEV58e52k>.p.15,20 accessed on 5th July, 2024



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

TELEMEDICINE IN NIGERIA: NAVIGATING THE LEGAL AND ETHICAL
FRAMEWORKS IN HEALTHCARE DELIVERY

Razaq Justice Adebimpe

Department of Public Law, Faculty of Law, University of Ilorin, Nigeria;
+2348067817945; adebimpe.rj@unilorin.edu.ng.

ABSTRACT

Although telemedicine has been available in Nigeria with advancements in medical and telecommunication technologies, the outbreak of infectious diseases like Ebola and the 2019 coronavirus pandemic has significantly increased its awareness and usage. This heightened recognition and uptake are largely due to social distancing measures aimed at reducing the risk of transmission. As a result, telemedicine plays a crucial role in legitimising remote medical consultations and is poised to revolutionise healthcare delivery in Nigeria by addressing the long-standing accessibility gap in medical services. However, its adoption raises various legal and ethical concerns that need to be addressed for seamless integration into Nigeria's healthcare system. Employing a doctrinal research approach, this paper examines Nigeria's current legal and ethical frameworks concerning telemedicine. The analysis reveals a critical void: Nigeria lacks tailored legislation to regulate the telemedicine process and a specific body to monitor its practice. These are imperative to mitigate uncertainty among healthcare providers and patients. Therefore, the recommendations advocate for the enactment of comprehensive and tailored legislation and guidelines that harmonise with international standards while accommodating local contexts. Furthermore, it is recommended that there be investment in telemedicine infrastructure and continuous training for healthcare professionals. By proactively addressing these issues, stakeholders can optimise the benefits of telemedicine while upholding patient rights and ensuring quality healthcare services.

Keywords: Telemedicine, legal frameworks, ethical standards, healthcare delivery, Nigeria.

1. INTRODUCTION

Developments in technology have impacted every aspect of modern life, including healthcare. One notable development is the advent of telemedicine, which significantly improves access to healthcare. In Nigeria, although telemedicine had already been implemented, the COVID-19 pandemic, which required social distancing, greatly propagated its adoption among healthcare providers and patients. Specifically, telemedicine offers a practical solution to many challenges in healthcare delivery, such as the need for improved access to care for those with chronic conditions requiring sustained management, and those residing in underserved areas. By enabling distant consultations, diagnosis, and treatment, it effectively bridges gaps in the healthcare system.

However, the adoption and integration of telemedicine into Nigeria's healthcare system bring about intricate legal and ethical issues that need to be addressed through clear, comprehensive, and specific legislation and regulatory guidelines to avoid risks to patients' rights and well-being. In light of the above points, and adopting a doctrinal method of research, this paper examines Nigeria's current legal frameworks on telemedicine, evaluates its adequacy, and explores the ethical considerations associated with telemedicine.

Furthermore, the paper addresses the need for tailored legislation that aligns with international standards while addressing Nigeria's specific needs and calls for the establishment of a specific regulatory authority to oversee telemedicine. The paper is divided into five parts including this introduction. Part 2 explains the concept of telemedicine and its usage in various medical specialities. Part 3 appraises the provision of current legislation, guidelines, and ethical principles relevant to telemedicine in Nigeria, and pinpoints gaps in the regulatory frameworks. Part 4 discusses the legal and ethical concerns arising from the use of the procedure. Finally, part 5 concludes with a summary of the findings and recommendations from the study.

1. UNDERSTANDING TELEMEDICINE

Telemedicine, which means 'healing at a distance,' lacks a generally accepted definition. However, the World Health Organisation (2019 & 2021) describes telemedicine as "the

delivery of healthcare services, where distance is a critical factor, by all healthcare professionals, using information and telecommunication technologies for the exchange of valid information for diagnosis, treatment and prevention of diseases and injuries, research and evaluation and for the continuing education of healthcare providers, all in the interests of advancing the health of individuals and their communities.” Similarly, the American Telemedicine Association (2018), defines telemedicine as the “the remote delivery of health care services and clinical information using telecommunications technology.”

At its core, telemedicine leverages information and telecommunication technologies (ICTs) to provide medical care and general health services remotely (Norris 2001, Hydar & Razzak, 2020). It is utilised when healthcare professionals and patients are in different locations, thereby enabling the provision of healthcare services across distances and bridging the gap between providers and patients, regardless of geographical barriers. This definition covers a wide array of healthcare services, such as consultations, diagnosis, treatment, monitoring, and education. These services are conducted remotely via various technological platforms such as video conferencing, mobile apps, remote monitoring devices, and secure messaging systems.

Moreover, telemedicine services can be provided either synchronously or asynchronously. Synchronous services occur in real-time interactive sessions between healthcare providers and patients via the Internet, using methods like video-conferencing or telephone consultation, requiring both parties to be present simultaneously (Munte *et al.*, 2020; Smith, n.d.). Conversely, asynchronous delivery, otherwise known as store-and-forward telemedicine, occurs when the interaction is not in real-time, meaning both parties are not present at the same time. For example, patient records, lab reports, and medical images (e.g., x-ray results) are transmitted electronically to a healthcare practitioner, typically specialists, who review and provide expert opinion outside of real-time interaction (Munte *et al.* 2020; Smith, n.d.). Diagnosis relies on documented information rather than a physical examination.

In addition, telemedicine may also involve remote patient monitoring, which entails continuously monitoring vital signs, symptoms, and health parameters using various remote technological devices such as wearable sensors and home monitoring equipment. These devices enable healthcare providers to track patients' health status

remotely and intervene as necessary. This is particularly useful in managing chronic conditions like diabetes mellitus, asthma, cardiovascular disease, and joint disease (Munte *et al.*, 2020; Smith n.d.).

Furthermore, telemedicine is utilised across a variety of medical fields. For example, to address the shortage of neurologists, hospitals may adopt tele-neurology measures, allowing neurologists to remotely diagnose and treat patients, especially in underserved areas. Pathology and radiology have benefited significantly from telemedicine, as many radiology examinations generate digital images like X-rays, CT scans, and MRIs, which can be sent over the internet for remote interpretation by specialists. Specialists in telecardiology can provide care and opinions by remote interpretation of ECGs and other cardiac tests online.

Similarly, psychiatry services can be delivered using tele-mental health or telepsychiatry in underserved areas (Hydar & Razzak, 2020). In addition, telemedicine is utilised in other specialities such as nursing (telenursing), dermatology (teledermatology), pharmacy (telepharmacy), ophthalmology (teleophthalmology), and dentistry (teledentistry) for consultations, patient care, and public health initiatives. Telerehabilitation and tele-trauma allow patients in trauma or disaster situations to receive rehabilitation and expert healthcare remotely, especially where immediate physical access to specialists may be limited.

2. LEGAL AND ETHICAL FRAMEWORKS FOR TELEMEDICINE

Ensuring responsible and effective telemedicine practice in Nigeria necessitates an understanding of both the legal framework and ethical principles that regulate it. This section explores the legal and ethical aspects of telemedicine in Nigeria, assessing the legislative provisions and guidelines that impact telemedicine practices. Moreover, it evaluates relevant ethical principles, some of which have been incorporated into law, and discusses their implications for healthcare delivery in the digital age.

To begin with, it is important to emphasise that, currently, Nigeria's legal framework for telemedicine is still developing, and there is no specific legislation addressing the unique requirements and issues of telemedicine. Nevertheless, various existing laws and guidelines offer some level of regulations and directions for the practices of telemedicine. These include:

i. The National Health Act, 2014

To begin with, this legislation establishes the national health system, providing a framework for standards and regulations of health services, which encompasses provisions pertinent to telemedicine (Section 1). Specifically, Section 2 mandates the Federal Ministry of Health to formulate guidelines and regulations aimed at improving healthcare services (Section 2(1)(a)). This mandate necessarily involves advancing the use of technology, such as telemedicine, to enhance access to healthcare, particularly in underserved areas.

Section 2 directs the Federal Ministry of Health to develop guidelines and regulations to improve access to healthcare services (Section 2(1)(a)). This directive inherently involves advancing the use of technology, such as telemedicine, to enhance healthcare accessibility, particularly in underserved regions.

Moreover, while the Act does not explicitly reference telemedicine, it addresses relevant issues. For instance, Section 26 (1) imposes a legal obligation to maintain the confidentiality of all patient health information, including details about health status, treatment, or stay in a health establishment. Consequently, telemedicine practitioners ensure the confidentiality and security of patients' data obtained in the course of consultations (However, see Sections 26(2)(a) -(e), 27, and 28(1) for exceptions to the confidentiality rule).

Furthermore, Section 29 mandates that the administrator of a healthcare facility implement measures to safeguard patient records and the storage facility in which, or system by which, patients' records are kept from unauthorised access. This requirement applies whether those records are maintained online or offline. Failure to perform this duty constitutes an offence and is liable on conviction to imprisonment for a period not exceeding two years or to a fine of ₦250,000 or both. Consequently, healthcare service providers and telemedicine platforms must implement measures to prevent unauthorised access to patients' health records.

ii. Medical and Dental Practitioners Act 2004

The Medical and Dental Practitioners Act, Cap. M8 Laws of the Federation of Nigeria 2004, includes provisions that can guarantee responsible and efficient telemedicine practice in Nigeria. To begin with, Section 1 of the Act establishes the Medical and Dental Council (hereafter the Council), which is the regulatory body responsible for overseeing medical practice, including dentistry and telemedicine. The Act mandates the Council to ensure that only credentialed practitioners are registered, thus ensuring that those offering telemedicine services are duly qualified. It also defines

the requisite standards of knowledge and proficiency for medical practitioners (Section 8).

Furthermore, the Act established a tribunal to investigate any case where a registered person misbehaves as a medical practitioner (Section 15). It also specifies disciplinary measures and procedures for addressing cases of professional misconduct (Section 16). This provides a framework for sanctioning practitioners who violate professional standards, including infractions related to telemedicine, such as unlawful practice and failure to maintain patient confidentiality.

By integrating these provisions, the Act ensures that telemedicine practice in Nigeria is conducted responsibly, ethically, and effectively, safeguarding both patients and healthcare providers.

iii. Code of Medical Ethics in Nigeria, 2008

The Code of Ethics in Nigeria (2008), issued under the Medical and Dental Practitioners Act, incorporates specific provisions directly relevant to the practice of telemedicine. Focusing on telemedicine in Appendix 5, the Code acknowledges its potential to enable a large number of widely dispersed patients in underserved areas “to access the expertise of the few specialists concentrated in urban locations”. Telemedicine is defined as the use of telecommunications technology to provide clinical attention to patients in locations remote from the doctor, enabling healthcare providers from different parts of the world to “simultaneously exchange clinical views as if they were at the same location”.

Moreover, the Code recognises that the transmission of clinical information entails the risk of interception by unauthorised individuals, potentially compromising confidentiality. Consequently, it requires telemedicine practitioners to encrypt their communications so that they can only be accessed by authorised individuals with the appropriate decryption devices. Furthermore, the Code mandates practitioners to ‘make appropriate arrangements for the security of personal information when it is stored, sent, or received by fax, computer, e-mail, or other electronic means’. In addition, it stipulates that “the information must be kept secure before connecting to a network; practitioners should ensure that the data sent cannot be intercepted or seen by anyone other than the intended recipient” (Appendix 5).

In addition to these provisions, other regulations in the Code are relevant to telemedicine. For example, the Code delineates the ethical obligations of medical practitioners, including obtaining informed consent, preserving confidentiality and personal health information, and delivering care with competence. These principles are crucial in telemedicine to ensure that remote consultations and treatments adhere to the same ethical standards as in-person interactions.

Furthermore, the Code requires healthcare providers to “ensure that the appropriate written and signed consent is obtained” from patients before delivering medical services (Rule 21). In telemedicine, this necessitates explaining the nature of the remote consultation, including potential risks and benefits, as well as any limitations compared to in-person visits. Securing informed consent before engaging in telemedicine is fundamental for ethical practice.

In addition, the Code underscores the importance of maintaining patient confidentiality and protecting the secrecy of personal health information. This includes data transmitted through digital platforms during telemedicine, as telemedicine involves the exchange of patient information via such platforms. According to Rule 44, “any information about the patient that comes to the knowledge of the practitioner in the course of the patient-doctor relationship constitutes secret and privileged information which must in no way be divulged by him to a third party”.

Overall, these provisions provide a commendable framework for Nigerian medical practitioners who choose to offer healthcare services electronically.

iv. National Information Technology Development Agency Act, 2007 (NITDA Act)

The NITDA Act is essential for the development and oversight of telemedicine services in Nigeria. Specifically, Section 1 of the Act establishes the National Information Technology Development Agency (NITDA) and charges it with creating a framework for the regulation of Information Technology (IT) practices, activities and systems. This includes providing universal access to Information Technology and promoting systems penetration in rural, urban, and under-served areas (Section 6(a)). In addition, it involves formulating guidelines for electronic governance and monitoring the use of IT and electronic data interchange, as well as other forms of electronic communication transactions where such use may enhance the exchange of data and information (Section 6 (c)).

Although the NITDA Act does not directly govern telemedicine, it authorises NITDA to establish regulations and set standards for IT infrastructure and services used in telemedicine. Since telemedicine involves the delivery of healthcare through digital systems, it falls within the regulatory scope envisioned by the NITDA Act. By providing a framework for safeguarding patient data, and ensuring the reliability and quality of telemedicine services, the NITDA Act promotes the responsible and effective practice of telemedicine in Nigeria.

v. **Nigeria Data Protection Act 2023**

The Nigeria Data Protection Act 2023 (NDPA 2023) is the foremost data protection law in Nigeria. The Act establishes rules for safeguarding personal data and provides standards for its collection, processing, storage, and transfer (Section 1(1)(b)-(c)). Also, Section 1(e) of the Act highlights the responsibilities of data controllers and processors toward data subjects.

Moreover, Section 2 applies to the processing of personal data, whether automated or not. Specifically, Section 2(2)(b) states that the Act applies to data controllers or processors domiciled, resident, or operating in Nigeria; processing personal data within Nigeria; or controllers and processors, outside Nigeria handling data of Nigerian subjects (Section 2(2)(a)–(c)). Thus, healthcare providers and telemedicine platforms handling patients' data must comply with the Act. Also, Section 2(1)(e) extends the Act to foreign data controllers or processors handling data of Nigerian subjects. This provision addresses the involvement of foreign telemedicine providers.

Furthermore, data subjects have the right to access their information, and request rectification or erasure of their data and data controllers must comply promptly (Section 34(1)(v)). In addition, data subjects can withdraw consent to the processing of their data at any time, and withdrawal must be as easy as giving consent (Section 35 (1)-(2)). Section 37 of the Act requires data collectors and processors to implement appropriate technical and organisational measures to ensure the security, integrity and confidentiality of personal data.

Consequently, the Act is essential for telemedicine as it provides a legal framework for securing patients' data. Telemedicine providers or platforms must use secure communication channels and data storage solutions to protect patients' data (Section 39). It mandates transparent data processing, regulates the cross-border transfers of personal

data, and ensures accountability among practitioners. Therefore, adherence to the Act is crucial for the ethical use of technology in healthcare.

vi. The Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria 1999, while not explicitly addressing telemedicine, establishes a fundamental legal framework conducive to responsible telemedicine practice. Notably, it intersects with citizens' right to privacy, which includes their correspondence, telephone conversations, and other communications, as enshrined in section 37(c). This underscores the constitutional recognition that the protection of health records is an inherent and fundamental right.

Consequently, this provision mandates healthcare providers to uphold the confidentiality of medical records and health information. Therefore, they are responsible for maintaining the security and privacy of all transmitted data. To comply with this mandate telemedicine practitioners must implement organisational and technical safeguards to protect data. These measures may encompass encryption, firewalls, pseudonymisation, and restricted access.

3. LEGAL, REGULATORY, AND ETHICAL CONCERNS IN TELEMEDICINE

The adoption of telemedicine raises various legal, regulatory, and ethical concerns that require careful consideration for safe and effective implementation. These concerns mostly involve legal and regulatory frameworks, patient privacy, and data security. In addition, telemedicine prompts inquiries into the doctor-patient relationship, informed consent, and equitable access to healthcare.

However, certain issues such as data privacy, span multiple domains, intersecting with legal, regulatory, and ethical realms. Similarly, matters related to informed consent, confidentiality, and security of patient information necessitate navigating complex legal, regulatory, and ethical considerations.

Given these interconnections, this paper addresses the issues collectively, recognising their overlapping nature and emphasising the need for a comprehensive strategy to manage these challenges.

i. Current Legal and Regulatory Framework for Telemedicine

Currently, Nigeria's legal and regulatory framework for telemedicine is fragmented and not fully developed. It lacks the comprehensive nature of regulations found in traditional medical practices. Unlike countries with specific telemedicine laws, Nigeria does not have legislation directly addressing telemedicine practices. Existing laws, such as the Medical and Dental Practitioners Act, provide a general framework for medical practice but do not adequately cover the unique aspects of telemedicine, such as remote diagnosis, treatment, and cross-border consultations.

In addition, the Nigeria Data Protection Act, enacted in 2023, serves as the primary legal instrument for data protection, though sets guidelines for handling personal data, its telemedicine application is insufficiently detailed. Given that telemedicine involves the collection, storage, and transmission of sensitive patient data, robust measures are essential to ensure privacy and security.

Therefore, there is a critical need for further development of both the legal and regulatory frameworks to establish clear, comprehensive guidelines addressing the specific challenges posed by telemedicine. This development is crucial to enable the safe and effective practice of telemedicine, ensuring adequate protection for patient privacy and data security.

ii. Data Privacy and Security in Telemedicine

During medical consultations, patients share personal information. In telemedicine, providers obtain these details via the Internet, where security cannot be fully guaranteed. Consequently, telemedicine data are vulnerable to interception by unauthorised third parties, increasing the risk of data breaches.

Although the Nigeria Data Protection Act provides a foundation for data privacy, its enforcement in telemedicine is inadequate. The Act mandates data controllers to protect personal data, but healthcare settings, particularly in telemedicine, face significant challenges. For instance, many providers lack the resources and expertise to fully comply with these requirements.

To address these gaps, Nigeria must adopt international best practices. This includes using advanced encryption for data transmission, ensuring secure storage, and conducting regular security audits. In addition, continuous training for healthcare providers on data protection

and cybersecurity is crucial. By enhancing legal and regulatory frameworks and improving data protection measures, telemedicine in Nigeria can be practised safely, ensuring patient data privacy and security. Therefore, providers must implement robust measures to secure data during telemedicine sessions, preventing unauthorised access and data breaches.

iii. **Informed Consent in Telemedicine**

Informed consent is crucial in both traditional and telemedicine contexts. Before any consultation, healthcare providers must obtain informed consent from patients (Rule 21.0 Medical Ethics 2008). Informed consent involves a patient's agreement to a recommended medical procedure or intervention with comprehensive knowledge of its nature, benefits, risks, and alternatives (Mohammed 2001; Gbobo & Oke-Chinda 2018).

Specifically, the process must ensure that patients understand the specifics of remote consultations, including the benefits, limitations, and risks associated with telecommunication technologies. In addition, consent is required even when seeking an expert opinion during telemedicine sessions (World Medical Assembly, 1991). Legally, healthcare providers must secure the patient's consent before treatment to avoid legal repercussions; for instance, failure to obtain such consent can result in medical malpractice claims (Gbobo & Oke-Chinda 2018).

However, obtaining informed consent in telemedicine is more complex than in traditional settings due to the absence of direct interaction and potential technological barriers. Therefore, it is crucial to establish clear guidelines and standardised procedures for obtaining informed consent in telemedicine. These guidelines should utilise plain language, culturally sensitive communication, and multiple channels for information dissemination to ensure thorough understanding. In addition, providers must ensure that consent is properly documented and that patients are aware of their rights and responsibilities.

This strategy addresses the challenges posed by the lack of direct interaction in telemedicine, ensuring that informed consent is validly obtained and sustained.

i. **Confidentiality in Telemedicine**

Confidentiality is fundamental in medical ethics, obliging healthcare providers to protect patient information unless the patient consents to its release. This duty, embedded in the Physicians' Oath and reinforced by Rule 44 of the Nigerian Code of Medical Ethics, is paramount in telemedicine as well. Specifically, digital platforms in telemedicine make patient data particularly vulnerable to interception and breaches, necessitating secure digital channels for information exchange.

In Nigeria, a major concern with telemedicine is the vulnerability of data transmitted online. This concern is exacerbated by gaps in the legal framework, such as the Nigeria Data Protection Act, of 2023, which is currently insufficient for telemedicine needs. Moreover, many healthcare providers lack the necessary technological infrastructure and expertise to implement robust security measures, thereby exposing patient data to cyber threats. In addition, the absence of standardised procedures for ensuring confidentiality further increases the risks of unauthorised access to patient information.

Therefore, addressing these concerns requires enhancing legal frameworks to provide clear, comprehensive guidelines tailored for telemedicine and updating the NDPA 2023 to explicitly cover telemedicine. Moreover, implementing advanced security technologies, such as encryption and regular security audits, can help mitigate vulnerabilities. Ultimately by strengthening legal protections, improving technological infrastructure, and standardising practices, telemedicine in Nigeria can be practiced safely and effectively.

v. The Relationship between the Parties Involved in Telemedicine

The relationship between parties involved in telemedicine in Nigeria presents unique challenges that impact trust, communication, and legal responsibilities. Specifically, a doctor-patient relationship is established when a patient seeks the services of a doctor and the doctor accepts the patient, thereby creating duties, including the duty of care and confidentiality (Longpoe & Otor, 2020). Despite the absence of physical meetings in telemedicine, the duties and rights inherent in this relationship remain intact. However, the virtual nature of interactions in telemedicine raises uncertainty

and concerns. For instance, maintaining trust, ensuring effective communication, and fulfilling legal responsibilities without face-to-face contact become crucial issues.

Firstly, building trust and rapport between healthcare providers and patients is more challenging in telemedicine. The absence of face-to-face interaction may undermine patients' confidence in their provider's ability to deliver quality care. Trust is essential for patient satisfaction and adherence to medical advice, and its erosion can significantly affect the effectiveness of telemedicine.

Secondly, effective communication is critical in any medical relationship. Telemedicine introduces new obstacles such as technical issues, poor internet connectivity, and malfunctioning equipment, which can hinder clear communication. In addition, non-verbal cues, crucial for understanding and empathy, are less perceptible in virtual consultations, further complicating the communication process.

Furthermore, telemedicine raises complex questions about the legal responsibilities and liabilities of healthcare providers. Jurisdictional issues may arise when the provider and patient are in different locations, leading to uncertainties about which laws apply. This can complicate malpractice claims and the enforcement of professional standards, creating a legal grey area that requires careful navigation.

Therefore, addressing these concerns requires comprehensive guidelines, robust legal frameworks, and continuous training for providers. Enhancing legal frameworks, improving technological infrastructure, and standardising practices will help ensure that telemedicine in Nigeria is secure, accessible, and ethically sound. By doing so, the integrity of the patient-provider relationship and the quality of care delivered can be maintained, allowing telemedicine to reach its full potential in improving healthcare access and outcomes.

vi. Equitable Access to Telemedicine Services

Equitable access to telemedicine is critical in Nigeria due to disparities in infrastructure, technology, and socio-economic status, which significantly impact

healthcare delivery. Therefore, ensuring fair access for all is essential for the effectiveness of this service.

To start with, many rural and underserved areas in Nigeria struggle with poor internet connectivity and inadequate technological infrastructure, which are crucial for telemedicine services. Consequently, this further widens the healthcare disparities, making it harder for telemedicine to reach those who need it most. In addition, low-income individuals may not be able to afford the devices or internet connectivity needed for telemedicine, leading to further health inequalities.

To address these challenges, concerted efforts are necessary. Improving broadband infrastructure and making internet access more affordable in underserved areas are critical steps to enable more people to benefit from telemedicine. Moreover, targeted initiatives to provide devices and support to low-income individuals can help bridge the gap.

Ultimately, by addressing the infrastructure, technological, and economic barriers, Nigeria can improve equitable access to telemedicine. This will ensure that all citizens, regardless of their socio-economic status or location, can benefit from the advancements in telemedicine and receive quality healthcare services.

5. CONCLUSION

Telemedicine is gaining acceptance in Nigeria, offering the potential to transform healthcare delivery by overcoming access gaps and enhancing health outcomes. However, realising its full potential requires addressing current legal, regulatory, and ethical challenges. This paper has analysed the current legal framework and ethical considerations pertinent to telemedicine services in Nigeria. The analysis reveals gaps in legal and regulatory coverage, underscoring the urgent need for a tailored legal framework that includes precise guidelines for telemedicine.

Ethical concerns also pose critical challenges that demand attention. To effectively regulate and ethically deploy telemedicine, it is imperative to establish a robust legal framework with clear regulations and specific guidelines. Therefore, it is

recommended that enacting comprehensive legislation tailored to telemedicine and establishing a dedicated regulatory body to oversee telemedicine are crucial steps.

By implementing these recommendations, Nigeria can create a comprehensive framework for telemedicine that meets international standards while addressing local requirements. This approach will ensure that telemedicine can be practised safely, effectively, and ethically, ultimately enhancing healthcare access and outcomes for all Nigerians.

REFERENCES

American Society for Health Care Risk Management. (2018). *Telemedicine risk management considerations* Chicago.

American Telemedicine Association. (2018). About telemedicine. Retrieved from <http://www.americantelemed.org/main/about/about-telemedicine/telemedicine-faqs>

Code of Medical Ethics in Nigeria, 2008

Gbobo, P. I., & Oke-Chinda, M. (2018). An analysis of the doctrine of informed consent Nigeria's health care services. *Journal of Law, Policy and Globalization*, 69(1), 1.

Gusarova, A. (2012). *Data protection in telemedicine*. EDP Sciences.

Hydar, M. A., & Razzak, J. (2020). Telemedicine in the United States: An introduction for students and residents. *Journal of Medical Internet Research*, 22(11), 2.

Longpoe, W. W., & Otor, E. I. (2020). Doctor-patient relationship: A basis for liability and burden of proof. *Journal of Contemporary Research*, 17(1), 85-104.

Medicaid & Medicare. (n.d.). Store-and-forward. Retrieved February 19, 2022, from <https://www.cchpca.org/topic/store-and-forward/>

Medical and Dental Practitioners Act, Cap. M8, Laws of the Federation of Nigeria, 2004.

Mohammed, S. (2001). Informed consent to medical treatment/operation: The Nigerian experience. *UNILORIN Journal of Public Law*, 1(1), 30-50.

Munte, P. A., Eze, T. N., Tankwa, J. M., Angum, A. B., & Leon, A. (2020). A review of the development of telemedicine in selected African countries in Sub-Saharan Africa (Cameroon, Ghana, Kenya, and Nigeria). *Greener Journal of Epidemiology and Public Health*, 8(10).

National Information Technology Development Agency Act, No. 8 of 2007.

Nigeria Data Protection Act, No. 37 of 2023

Norris, A. C. (2001). *Essentials of telemedicine and telehealth*. John Wiley & Sons, Ltd.

Smith, Y. (n.d.). Types of telemedicine. Retrieved June 17, 2024, from <https://www.news-medical.net/health/types-of-Telemedicine.aspx>

The Constitution of the Federal Republic of Nigeria, 1999 Cap. C23, Laws of the Federation Nigeria, 2004.

The Medical and Dental Practitioners Act, Cap. M8 Laws of the Federation of Nigeria 2004.

The National Health Act, 2014.

The National Health Act, no. 8 of 2014.

World Health Organisation. (2021). *Global strategy on digital health 2020-2025*. Geneva: World Health Organisation.

World Health Organization. (2019). *WHO guideline: Recommendations on digital interventions for health system strengthening*. Geneva: World Health Organisation.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

REASSESSING THE CRIME CONTROL SYSTEM OF NIGERIAN POLICE FORCE:
TOWARDS ENSURING EQUITY AND JUSTICE

Mercy Bolade Adewusi-Bakare

Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Nigeria.

bolaadewusibakare@gmail.com; +2347030361594

Abstract

Security is crucial to human survival as the numerous socio-economic activities which form the bedrock of human survival all depend on public safety and protection of life and property. However, it is observed that reckless disregard for human dignity by the Nigeria police is a great challenge to the indigenes and contravenes the 'rule of law'. The enquiry in this regard is: Who will investigate crimes allegedly committed by the police themselves? Using data from primary and secondary sources of Law including case law, and relevant internet materials, this paper evaluated the adequacy of the Nigeria Police as agency of crime control within the context of universal standard for protection of indigenes in line with the Constitutional Right to Life and Human Dignity, and highlighted the flaws inherent in Nigeria law enforcement system, in advocating having in place efficient legal framework on policing, designed to salvage the current systems.

Keywords: Nigerian Police Force; Crime Control Policy; Human dignity; Legal Framework.

1. Introduction

This paper investigates the crime control system of Nigeria Police Force (NPF)¹⁵⁹⁵ in relation to the statutory and Constitutional provisions on the citizens' Right to Life and Human Dignity, and highlights the shortcomings embedded in policing and the devastating effect on security and socio-economic development in Nigeria. Theoretically, the government have adopted various frameworks for policing, however, there is no adequate provision in the Nigeria Constitution regarding citizens' right to human dignity and effective crime control by the police. The paper concluded that unlawful killings constitute a violation of the right to life hence, the government is expected to take adequate measures to prevent arbitrary killing of human beings by individuals or law enforcement agents, and must

¹⁵⁹⁵ Hereinafter referred to as NPF unless the context otherwise suggests.

conduct effective and speedy investigation in such instances, also, the government must strategically restructure the police force towards effective realization of its duty.

1.2. Statement of the Problem

Though Nigeria has adopted a series of legislative mechanisms in curbing crime rates, gross disregard for human dignity, and incessant killings of human beings remain unabated and thus threaten the socio-economic development in the country. Considering the reported criminal cases and the conviction rates, it is evident that there is a disjuncture between the cases reported and the cases prosecuted.¹⁵⁹⁶ For this reason, the paper evaluates the legislative framework as well as the crime control techniques applied by the police officers, in establishing any shortcomings that may contribute towards reckless disregard for the Constitutional Right to Life and human dignity in Nigeria, whilst also recommending the best practices methods in possibly reducing crime rates, and revamping citizens' right to human dignity in Nigeria.

1.3. Objective of the paper

Nigeria have high crime rates, and despite the legislative frameworks, it appears that there is a shortcoming in terms of the crime control system that has impacted the current criminal investigation processes in Nigeria. Accordingly, the paper evaluates the crime control techniques to identify the shortcomings and thereafter establish strategic initiatives towards effective control of crime.

1.4. Methodology

The research involves using primary and secondary sources such as Constitutions, treaties, legislation, law reports, currently published articles, conventions, case laws, and relevant information from newspapers and internet sources to profound explanations for the set objective of this study. this involves exploratory, descriptive, and comparative analysis.¹⁵⁹⁷ The research involves using primary and secondary sources such as Constitutions, treaties, legislation, law reports, currently published articles, conventions, case laws, and relevant information from newspapers and internet sources.

¹⁵⁹⁶ Fagbemi (SAN), *Bola Ige, Assassination, Political Killings and Nigeria's Justice System*".

¹⁵⁹⁷ Mohd Yunus, Abdul Malek, ' *Essentials of Research Method*', (2013) 7-8.

2. The Legal Framework and In terms of section 215 (3) -(5) of Nigeria Constitution (1999) the primary duty of the Nigeria Police Force is the preservation of national security through maintenance of law and order, and in terms of the Nigeria Police Force (Establishment) Bill, 2020, the Nigeria Police Force Criminal Investigation and Intelligence Department (FCIID) is the highest investigating unit charged with detection and investigation of crimes in Nigeria.¹⁵⁹⁸

Crime Control System of Nigerian Police

It has been revealed that the crime control system of Nigerian police involves a gross disregard for fundamental human rights ranging from unlawful killings and arbitrary detention of innocent citizens.¹⁵⁹⁹ The Fulani Herdsmen, Boko Haram Insurgents, and gangs of kidnappers have terrorized Nigeria for several years, consequently, these challenges have drastically affected socio-economic development.¹⁶⁰⁰ In an attempt to curb incessant killing of human beings in Nigeria, the Nigeria Legislature enacted the Terrorism Prevention Act of 2011 which was later amended by the Terrorism (Prevention) (Amendment) Act of 2013. However, in November 2013 when the Nigeria Inspector General of Police was interrogated as to why the police failed to prosecute the numerous terrorists that were apprehended and detained, his response was that there were no enabling legislation in that regard.¹⁶⁰¹ In this regard, Sebastine said “*This act of ignorance on the part*

¹⁵⁹⁸ Nigeria, Police Act 2020; Guardian (The) Nigeria, “*Debate over new police Act and implications for criminal prosecution*”, 20 October 2020,

¹⁵⁹⁹ “*Unlawful detention of a Monarch*” The Guardian Newspaper 20 Further16; *Alade v. Federal Republic of Nigeria*: Open Society Foundation, 2015

¹⁶⁰⁰ See Ndubuisi-Okolo & Theresa Anigbuogu, “*Insecurity in Nigeria: The Implication for Industrialization and Sustainable Development*” *International Journal of Research in Business Studies and Management*, Vol. 6, Issue 5, 2019, p. 7-16, ISSN 2394-5931 (Online).

¹⁶⁰¹ Sebastine “*A Critical Review of Relevant Security Laws in Nigeria Vis-à-vis Current Security Realities in the West African Sub-Region*, Feb.2, 2015. American Society for Industrial Security Conference, 25-26 Feb.2014, Port-Harcourt: sebastinehon.com/a-critical-review-of-relevant-security-law-in-nigeria-vis-à-vis-current-security-realities-in-the-west-african-sub-region/. Accessed on August 2, 2017

*of the highest ranking Police Officer depicts the insensitivity and nonchalant attitude of Nigerian Police*¹⁶⁰².

In most cases, in the course of unwarranted investigation activities, the police have allegedly murdered innocent citizens of Nigeria.¹⁶⁰³ In another instance, some policemen on illegal checkpoint along Okene-Abuja highway were reported to have invaded a passenger bus and having robbed the passengers of millions of Naira, set the vehicle with the passengers ablaze, however, one of the passengers escaped and alerted other motorists and the policemen were promptly arrested.¹⁶⁰⁴ According to Tarry Odisu,¹⁶⁰⁵ the police has lost its dignity due to its corrupt practices and disregard for fundamental human rights. Consequently, most of the police have been murdered. According to Usman Ojedokun,¹⁶⁰⁶

*“The calculated actions of some ‘bad eggs’ within the Nigeria Police Force (NPF) occasionally results in the killing of their colleagues. In Nigeria, it is not uncommon for personnel of the NPF to be involved in criminal activities such as engaging in armed robbery and / or collaborating with armed robbery gangs, as well as having an allegiance with terrorist organisations.”*¹⁶⁰⁷

Another report of violent attitude of Nigerian police was the case of Faith Edema who was arrested and tortured violently by some police officers on the ground that she was the last known person seen in the company of her deceased friend, and she was alleged to have poisoned the deceased. The officers applied bottles to her private part and used needles on

¹⁶⁰² Ibid. Sebastine.

¹⁶⁰³ ‘Two brothers and friend killed by a drunken policeman in Ketu, Lagos: The Punch Newspaper, 2015

¹⁶⁰⁴ “Will Nigeria’s “Apo six” ever get justice?” BBC .News (2005): www.omicsonline.org/open-access/law-enforcement-in-nigeria-by-the-police-force-and-the-travails-of-ruleof-law-2016 .

¹⁶⁰⁵ Tarry Odisu, “Law Enforcement in Nigeria by the Police Force and the Travails of Rule of Law” Journal of Civil & Legal Sciences (2016) Vol. 5 Issue 5: [www.law-enforcement-in-nigeria-by-the-police-force-and-the-travails-of-rule-of-law.-2169-0170-1000204\(1\)-pdf/](http://www.law-enforcement-in-nigeria-by-the-police-force-and-the-travails-of-rule-of-law.-2169-0170-1000204(1)-pdf/)

¹⁶⁰⁶ Usman Ojedokun, “Contributing Factors to Police Homicide in Nigeria” : Police Journal Theory, Practice and Principles, Vol. 87 (2014) 41-48: <https://www.researchgate.net/publication/273.86.80> .

¹⁶⁰⁷ See also Editorial, allafrika This Day: *Police Killing of Femi Best*: allafrica.com/stories/201012230267.html. (Accessed on May 20, 2017).

the nipples of her breast. However, it was later discovered through a post mortem examination that the deceased died of hepatitis.¹⁶⁰⁸

Other impediment to effective control of crime in Nigeria is corruption within the police force as well as lack of professionalism, poor training, and indiscipline.¹⁶⁰⁹ According to Amnesty International,¹⁶¹⁰ the Nigeria Police is responsible for hundreds of extrajudicial killings in Nigeria, and most of such cases are neither investigated nor prosecuted, and where investigation is conducted, it is at variance with international standard, and any police officer suspected thereby, are promptly transferred to other states instead of being prosecuted. One of such incidents was the 1986 case of a Nigerian Assistant Superintendent of Police, George Iyaamu who was sentenced by the court for aiding a Nigerian notorious armed robber Lawrence Anini, who was alleged to have killed scores of Nigerians.¹⁶¹¹

The nonchalant and humiliating attitude of Nigerian police towards victims of violence, was succinctly narrated by Adekoya as follows:¹⁶¹²

“The police in most cases demonstrate insensitivity to the plight of victims when they lodge complaints with them, by subjecting them to ridiculous questions... and laughing at the victims and jesting as the victim recounts her harrowing experience. Other police officers present often join in this seeming fun, thereby trivializing a very sensitive and vital matter. This and other nonchalant attitudes often displayed towards victims at the police station, discourage the report of cases....”ⁱ

¹⁶⁰⁸ Asagwah, Ugwu and Odom: *“A Report on the use of Torture by Nigeria Police”*: Climate of Impunity, Civil Liberties Organisations (Nigeria), 2005, 50; Felix “Police Kill driver at checkpoint” Online Nigeria Community Portal: news2: www.onlinenigeria.com/headline/56999-police-kill-driver-at-checkpoint.html. (Accessed on June 10, 2017)

¹⁶⁰⁹ Ethelbert Lawrence, *“Nigeria and Incidences of Homicide”* American International Journal of Social Science, Vol. 4, No. 5, October 2015. 102-114.

¹⁶¹⁰ “Killing at Will: Extrajudicial Executions and Other Unlawful killings by the Police in Nigeria” Amnesty International.De.2009, Index: AFR: 44/038/2009, 1 -2.

¹⁶¹¹ “Anini was aided by inspector George Iyamu in areas of intelligent information ” [www.https://ng.opera.news/tags/George-iyamu](https://ng.opera.news/tags/George-iyamu). .

¹⁶¹² ” Using Law to serve the purpose of Women in the 20th Century” Akungba Law Journal Vol. 1, No.2, January, 2008.

Furthermore, inadequate resources and lack of modern technological infrastructures has contributed largely to crime control in Nigeria, particularly, shoddy investigation process which usually culminate in prosecutorial failures. For instance, the murder case of Bola Ige (a former Attorney General of the Federation of Nigeria) where the prosecution could not present any forensic evidence.¹⁶¹³ In line with this, Ladapo ¹⁶¹⁴ conducted a survey of prosecutors in the Oyo State Ministry of Justice (Ibadan, Nigeria) to find out the perception of the prosecutors on the quality of investigations carried out by the police, and he discovered that the outcomes of police investigations negatively affected the criminal prosecutions. Ladapo further noted that the current practice in Nigeria is that the police investigators take personal custody of their investigation files, and when the officer is transferred to another department or other part of the country, or retires or dies. the investigation case files which contain the statements of witnesses, statements of the accused persons, police investigation reports and other vital documents required for criminal prosecutions usually get missing and consequently suspects are arbitrarily detained in prisons indefinitely.

The former Nigeria Inspector General of Police, Sunday Ehindero, in the press conference in January, 2005, stated that:

“the era where neophytes would be assigned to investigate criminal offences is gone....we are not going to put a tailor to go and investigate, we must have the census of all those people with professional knowledge,...we will make use of them and nobody will be routinely posted to CID (Criminal Investigations Department) unless he has something to offer.”¹⁶¹⁵

However, the Nigeria crime control and investigating system has not improved till date.

¹⁶¹³ Fagbemi SAN, :” *Bola Ige, Assassination, Political Killings And Nigeria’s Justice System*” www.gravelinternational.org/bola-ige-assassination-political-killings-nigeria-justice-system/sthash.pell2N8Qz.dpbs (Accessed on July 31,2017).

¹⁶¹⁴ Ladapo, “*Effective Investigations, A Pivot to Efficient Criminal Justice Administration: Challenges In Nigeria*”, African Journal of Criminology and Justice Studies: AJCJS, Vol.5, #s1 & 2, ISSN 1554-3897:

¹⁶¹⁵ This Day. Wednesday, January 19, 2005. www.odili.net/news/source/2005/jan/19/207.html (Accessed 19/01/2017)

3. Conclusion:

It is discovered in this study that the crime control policy of the Nigerian police is inadequate and regular violation of the constitutional rights of indigenes to life and human dignity, remain unabated. Thus, the paper contended that the Constitution lack the impetus required for effective regulation of policing and crime control. Consequently, a large percentage of perpetrators were undetected and unpunished.

3.1. Summary

This paper outlined and recommended series of legal rules that must be considered by the police officers in the law enforcement process, and further highlighted the strategies that must be adopted by police investigating officers. Accordingly, the Human Rights Committee and the Inter-American Commission on Human Rights stated that the right to a fair trial before an independent, impartial, and competent court is an absolute right that cannot be the subject of exception or suspension.¹⁶¹⁶ Hence, the law requires that all those who exercise public power must act in accordance with the law and the Constitution, hence, the police officers have duty towards the society to ensure that an innocent person is not arrested or incarcerated

3.2. Findings

In the light of the aforementioned, it is expedient the government embark on recruitment of competent law enforcement officers dully trained and well equipped to perform the crime control duty efficiently. The most important duty of the government is the protection of the lives and constitutional rights of the citizens through effective crime deterrent policy. Every indigene deserves to be treated with human dignity regardless of his race, gender, ethnic origin, religion or political affiliation. However, the citizens / inhabitants must

¹⁶¹⁶ Human Rights Committee, General Comment No. 32, para. 19; and *Gonzalez del Rio v Peru*, Human Rights Committee Communication 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para. 5.2; and Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights", 2002, para. 261; see also ICJ, *Trial Observation Manual for Criminal Proceedings*, Practitioners' Guide No. 5, p. 38.

observe the laws with due regard to the dignity, rights and liberty of others. To enhance socio-economic development in any community, the safety of the indigenes and foreign investors is a paramount factor hence, the international treaties and conventions on the rights and security of human beings across the world. Nigeria is a party to the various international treaties and conventions, and thus subject to the provisions and obligations. Furthermore, the principal religions in Nigeria are Christianity and Islam. Hence the laws in this country are founded on these religions. It is viewed that the Biblical and Quaranic injunctions on criminal offences should form the basis of the legislations in this country.¹⁶¹⁷ In the Holy Bible and Holy Quaran,¹⁶¹⁸ God forbids unlawful killing of a human being.¹⁶¹⁹

3.3. Recommendation

1. In order to strengthen the criminal justice system, and regulate the unethical practices of the police, particularly, the investigating officers, it is necessary to establish efficient, independent investigating agencies. In this regard, the “Open Society Justice Initiative”: *Who Polices the Police?*,¹⁶²⁰ identified certain regions that established Independent Investigative Agencies (IIA) and enjoins the regions to ensure that justice is done by empowering the IIA.¹⁶²¹

¹⁶¹⁷ Suleiman Ikpechukwu Oji “*Offence of Murder: A Critical Appraisal*” sfami 2007@yahoo.com. Justice Journal, 2nd ed. 66.

¹⁶¹⁸ Dr. Masuma Pervin, Assistant Professor, Department of Law, Northern University, Bangladesh (NUB).

¹⁶¹⁹ Sura Nissa, verse 92, Holy Quran translated by .A. Yusuf Ali, 209, and Lixodus 30 verse 13, New World Translation of the Holy Scripture, 93.

¹⁶²⁰ Open Society Justice Initiative, “Who Polices the Police? *The Role of Independent Agencies in Criminal Investigations of State Agents*”: Executive Summary and Main Recommendations

Open Society Foundations, Justice Initiative: New York, NY 10019, USA : www.opensocietyfoundations.org ; <https://www.justiceinitiative.org/publications/who-polices-the-police-the-role-of-independent-agencies-in-criminal-investigations> May 07, 2021

¹⁶²¹ Ibid. *Who Polices the Police?* identifies 11 examples in different regions and legal systems. These are: Canada, Ontario, Special Investigations Unit (SIU), Republic of Georgia, State Inspector’s Service (SIS), Republic of Ireland, Garda Síochána Ombudsman Commission (GSOC), Israel, Police Internal Investigations Department (Machash or PIID), Jamaica, Independent Commission of Investigations (INDECOM), Kenya, Independent Policing Oversight Authority (IPOA), Norway, Bureau for Investigation of Police Affairs, South Africa, Independent Police Investigative Directorate (IPID), Trinidad and Tobago, Police Complaints Authority

2. Regular supply of modern technological infrastructures and adequate resources would contribute largely to successful profiling of criminal cases in Nigeria, particularly, establishment of a forensic laboratory in each state in Nigeria, and improvement of the working conditions and remuneration of the police in order to motivate them.
3. It is crucial that the police work closely with the various security groups and community leaders so that the people living within a community are sensitized towards protection of lives and identification of criminals in their domain.
4. It is paramount that the government rehabilitate the police through regular trainings on how to utilise CCTV surveillance system and forensic evidence for effective investigation of criminal cases.
5. There is an urgent need to improve on the collation of physical evidence pertaining to criminal matters. According to Adegbite,¹⁶²² the regular failures in criminal investigation in Nigeria is largely due to incompetent investigators and lack of modern DNA investigating facilities. It is viewed that computerized record management system be adopted by the various investigating units for efficient maintenance of investigation case files.
6. Policing the society cannot be effectively performed by a single agency, **Accordingly,** European Asylum Support Office, 2021 (EASO)¹⁶²³ **observed that “*the Nigeria Police Force is ineffective, underfunded, untrained, susceptible to endemic corruption, increasing the burden on the military to take on internal security operations.*”** Thus, it is expedient the Government promote police-public cooperation, community policing, private security outfits, and embark upon effective funding of the security outfits. Hence, it is important to introduce enabling laws to back up and regulate the activities of the various vigilante and security groups.

(PCA), United Kingdom, England and Wales, Independent Office for Police Conduct (IOPC), United Kingdom, Northern Ireland, Police Ombudsman for Northern Ireland (PONI).

¹⁶²² Ibid. Kehinde Adegbite, “*Learning the Law in Nigeria*” 2015 Ed. 13-16.

¹⁶²³ European Asylum Support Office, 2021 “*Nigeria Security Situation*” Country of Origin Report June 2021, p. 59. CFR, “*The Prospect of Local Policing amid Security Breakdown in Nigeria*”, [Blog], 14 July 2020, <https://www.cfr.org/blog/prospect-local-policing-amid-security-breakdown-in-nigeria>.

7. This paper proposes that the various investigating departments be supervised by experienced and legally trained officers who should be responsible to testify in court concerning investigations conducted. The German¹⁶²⁴ French/Swedish systems are good examples as to how the procedures can be effectively performed.¹⁶²⁵

8. Where police officers are involved in the unlawful killing of an innocent person, it behoves the Government, where appropriate, to compensate the dependants of such victims in order to alleviate their sorrow.

It is expected that the findings of this research will serve as a veritable tool in reinforcing the criminal investigating sector in Nigeria as well as aiding the legislators in policy formulation towards reducing the crime rate.

¹⁶²⁴ Julia Broder, “How Public Prosecutors Work in Germany”: [www.deutshland.de/en/topic/politics/how-public-prosecutors-work-in-germany-text-But%20they%20mainly%20work%](http://www.deutshland.de/en/topic/politics/how-public-prosecutors-work-in-germany-text-But%20they%20mainly%20work%20) 20-05-2019.

¹⁶²⁵ “The Public Prosecutor, its Role, Duties and Powers in the Pre-trial Stage of the Criminal Justice Process –A Comparative Study of the French and the Swedish Legal Systems” CAIRN –INFO, Revue Internationale De Droit Penal 2011/3 (Vol. 82), Editor: ERES: <https://www.Cairn.Info/revue-Internationale-de-droit-penal-2011-3-page-532.htm>. Page 532-540 (Accessed on May 20, 2017).



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

ANALYSIS OF SOME DEFECTS IN THE CONSTITUTION OF THE FEDERAL
REPUBLIC OF NIGERIA, 1999: GOVERNANCE AND DEMOCRATIC EXPERIENCE.

^{1*}Suleiman Musa Abdullahi, ²Ibrahim Mohammed, ³Najahatu Abdullahi Ra'is

^{1,3}Ahmadu Bello University, Zaria

²University of Maiduguri

*musasuleimano4@gmail.com +234-8069389833,
ibrahimmohammed992000@gmail.com +234-8036605636,
najahatuabdullahi@gmail.com +234-9032633665

Abstract

Nigeria before and after independence had experienced constitutional modifications from Clifford in 1922, Richard in 1946, Macpherson in 1951 down to 1960 independence constitution, Republican constitution in 1963, 1979, 1989 and 1999 constitution. Nigerian constitution was a replica of 1979 constitution. The 1999 constitution focused how we are governed based on a stipulated guide of a document to rule the country. The objective of the paper is to dispose some loopholes of the constitution and enabling favourable environment for amendment. The study assesses the role of traditional rulers in the constitution on a democratic dispensation of our beloved country (Nigeria). It determines the stand of our religious creed as stipulated in the 1999 constitution. The study assesses the constitutional immunity clause assigned to the president, vice-president, governor and the deputy governor according to the constitution and quest of full autonomy of the local government in the country. Data were obtained from secondary sources from magazines, administrative and social science journals, law journals, black law dictionary, textbooks, newspapers, students' theses and other relevant materials. The study employed qualitative content analysis for validity of the data. The research findings indicated that there was low level of integration of the roles of traditional rulers in democratic governance. The perception of the study on the state of religion from the perspective of religious angle. Immunity clause did not allow for fair trial for holders of the office of President, Vice president, Governor or Deputy Governor in the country. The governors are at the brink of influence to allow approval for full autonomy of the local government in the country. The

study recommended that there is the need for amendments of some sections to go along with the present democratic dispensation we witnessed from the Nigerian context.

Keyword: Constitution, Democratic governance, Immunity, Local government, Traditional rulers.

Introduction

The 1999 constitution was a replica of the 1979 constitution. The 1979 had its root from a constitution Drafting Committee (CDC) in September 1975, by Gen. Murtala Mohammed regime. The CDC was chaired by a constitutional guru Chief Rotimi Williams. It consisted of 50 intellectual men, until Chief Awolowo declined as a member that made it 49 members. The constitution stated the type of constitution Nigerians needed. It brought about a federalism based on presidential system that is based on democracy, rule of law, guaranteeing fundamental human rights; establishment of Corrupt Practice Tribunal, Public Complaints commission among others. It was the promulgation Decree No 24, of May 5th 1999, Gen. Abdulsalam Abubakar set up a Constitutional Debate Co-ordinating Committee (CDCC) headed by Justice Jiki Tobi, to seek opinion of the stakeholders for a constitution. The constitution remained presidential system government just like 1979 constitution under a federation of 36 states. The local government had 299 in 1970, 301 in 1979, 449 in 1987, 587 in 1991 to 781 in 1981 and 774 local governments in 1996 and Federal Capital Territory. It has bicameral legislature at the centre and unicameral in the state levels.¹⁶²⁶

The constitution was a man-made constitution. It is subject to changes as human beings are always dynamic, so alteration can take place at any time if it warranted. The constitution had been altered on 1st, 2nd, 3rd alterations in (2010), the 4th alteration was in (2017) and finally, the 5th alteration was in (2023). The constitution had issues and some of these challenges which the paper focus on was the constitutional immunity clause, local government autonomy, the roles of traditional rulers according to the constitution and the stand of religion as entrenched in the constitution. It is accepted by Nigerians that the 1999 constitution is supreme against any other laws, it means it is

¹⁶²⁶ Akon, A, O. (2004) Nigeria and A People's Constitution: The Imperative of Democracy and Change. *The Constitution*, No: 1, Vol 4. *Constitution of Federal Republic of Nigeria 1979*.

binding on all authorities and persons throughout the Federal Republic of Nigeria, section 1 (1). Also, section 1 (3) gave that any law inconsistent with the provisions of the constitution; it should be regarded as void to its inconsistency¹⁶²⁷.

It is accepted upon the fact that the constitution was a guide to all stakeholders in Nigeria whether the law makers, law interpreters, law implementers, private sectors, international communities, the citizens among others. In spite of all the functions it provided, it is subject to amendment considering issues that must be taken care of. For instance, in 2009, the former president Yar'adua was ill and the function of the president cannot be done by the Vice-president until it was amended when the vice-president can become acting-president by virtue of section 145 of the constitution as amended. Therefore, this instance needs urgent response as matter of national importance.

Democratic governance in a country setting like Nigeria can never function without a mainframe work which guides the activities in the process of formulation, legislation, interpretation or implementation government decisions unless a constitution is drafted to befit the country by intellectual constitutional experts. So, it spells out the fundamental rights, rule of law, separation of powers, public policy, elections, ombudsman, removal of an office holder, tribunal, federal commissions, citizenship, exclusive functions for the centre, concurrent functions for both the central government and the state governments, residual functions for the state governments, tenure of office, (executive, legislative, judicial powers) etc.

Statement of the Research Problem

The 1999 constitution of Federal Republic of Nigeria had been altered for cogent reasons as a phenomenon ranging from quantum of amendment that would befit the lives of Nigerian citizens in the country. This constitutional amendment witnessed the updated version with the 1st, 2nd, 3rd alterations in (2010), the 4th alteration in (2017) and 5th alteration in (2023). Some of the alteration made by the constitutional reviewers encompass; section 254 A, B, C, D, E and F (cc) the National Industrial Court, section 6 (5) in Act 2010, section 16A 1 a, b, c, and section 16 (2) on food security inserted in the

¹⁶²⁷ *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

constitution, section 54 (1A) inserted two-third majority on the senate and house of representative to form quorum in their various chambers. Section 65 (1) b. indicated that House of Representatives member should attain 25 years of age. Section 76 (1) it stated election of National assembly should be in accordance with Electoral act.

However, section 81 (3) indicated that the amount of money should be paid from consolidated revenue fund to the (a) Independent National Electoral Commission, (b) National Assembly, and (c) Judiciary, section 106 (b) gave the qualification of election of house of assembly to be 25 years, section 116 (1) indicated the time of election for house of assembly member, altered by an Act in 2010, section 131 (b) stated qualification for election of a president to be 35 years, by an Act in 2017, section 132 (1) election of a president by the INEC should be in accordance with Electoral act, by an Act 2010, section 137 (3) it indicated that a person who was sworn-in as President to complete the term for which another person was elected as President shall not be elected to such office for more than a single term, section 145 provided that the vice-president can be Acting President during temporary absence of President, by an Act in 2010, Section 147 (2) it shows that evidence of declaration of assets and liabilities of ministerial nominee, by an Act 2023 among others¹⁶²⁸. The constitutional immunity clause assigned to the president, vice-president, governor and deputy governor promoted a culture of impunity among legal practitioners, civil servants, criminal prosecutors and other members of the society.

Therefore, we attested upon the fact that it made it clear that the restriction was based on civil, criminal or arrested or even appearance of such a person before the court of law. It has vividly shown that the person holding the office of President or Vice-President, Governor or Deputy Governor shall not be prosecuted whatsoever; he or she must enjoy his stay in office till his tenure expires. In spite of the fact even if he or she happens to have corruption case before the Economic Financial Crime Commission (EFCC).

¹⁶²⁸ *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

It is absolutely detrimental upon the fact that it entirely exonerates executive officials for any wrongdoing committed throughout the stay in office. This is one of the cogent reasons why it emboldened politicians vying for offices covered by immunity to dastardly plunder public funds as they will be exempted from application of the full exercise of the law to any occupant of those offices.

Investigation while in office if found liable for any civil or criminal offences ultra vires their official functions, could be handled after their terms of office.¹⁶²⁹ It is very important to consider constitutional divergence on constitutional immunity of the president or prime minister as compare to other jurisdictions. The constitution of United State did give civil immunity to the president not on criminal matters. He can be prosecuted if he contravenes the constitution on criminal issues unlike where section 308(1)(a). of the Nigerian constitution stated that where the president had full civil and criminal protection from prosecution in any court of law. Likewise, The Irish Republic is a parliamentary democracy. The Prime Minister does not have absolute immunity; he or she can be impeached for misdeed according to the Constitution of the Federal Republic of Ireland, (Art 12).¹⁶³⁰ The story is totally different from the Nigerian perspectives where the section 308 (1) a, b, & c gave the assertion that he cannot appear before the court of law, prosecuted on any civil or criminal proceedings. In the British constitution, there is parliamentary immunity of all members of the two houses. The Prime minister had immunity as the crown had immunity as well but they can be prosecuted in any criminal proceedings for example war crimes. In the case of 1999 constitution, section 308 prevented any form of prosecution, arrest or appearance before the court of law.¹⁶³¹

Local government according to 1999 constitution, section 7(1) provided the establishment, structure, composition, finance and functions of the councils. Section 2(2) of the Constitution provides for the constituents of Nigeria that; Nigeria shall be a Federation consisting of States and a Federal Capital Territory. The constitution did not

¹⁶²⁹ Ukoh, F. N & Ngwoke, R. A (2021) Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. *Journal of Politics and Law*; Vol. 14, No. 2; doi:10.5539/jpl.v14n2p47

¹⁶³⁰ Panizza R., & Pavy E. (2020). European Parliament: *Handbook on the Incompatibilities and Immunity of Members of the European Parliament*. Directorate – General for internal policies. PE 621.936

¹⁶³¹ *The Constitution of the Federal Republic of Nigeria 1999* Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023).

cite local government from the above constitutional provision. It gives a clear indication that Local government was a third tier of government but without constitutional backing whatsoever. This overtly provided the fact that constitutional reviewers had ignored the local government independent and autonomy as the third tier of government with reference to this section. The Supreme Court recently assigned financial autonomy to the local government councils. There is still remnant of not having full autonomy as election will be conducted by the state independent electoral commission. A good case was on *A.G.F v 36 Governors* (2024), see section 7 subsection (4) of the 1999 constitution.¹⁶³²

Section 7 (4)(a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and (b) The House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State. Also, Section 162(5) assigned money allocated to local government to the states for their benefit. It gave also a clear indication the states had indirect power over the local government as enshrined in the Nigerian constitution with reference to section 162(6) which stated that; each State shall maintain a special account to be called “the State Joint Local Government Account” into which shall be paid all allocations to the local government councils. The local government did not have financial autonomy as the amounts given to local units are vehemently control by the states. The Supreme Court had abrogated section 7(4), and section 162(6)(b). that assigned financial control by the state governments.¹⁶³³

The local government chairman, his deputy as well as their councilors are elected on the instruction of the state government. Though, state governments still have a say indirectly to the local government as they will use their influence to manipulate a flag bearer of a particular party and decide who to win the election to their own favour. It is very important to note that the local councils in U.S.A are created by the constitution. The local government had full constitutional power as an independent third tier of

¹⁶³² Premium Times (2024, July 11th) *Supreme Court Affirms Local Governments’ Financial Autonomy, Declares Caretaker Committees Illegal*.

¹⁶³³ *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

government unlike in Nigeria where the states indirectly control and supervises the affairs of the local government.¹⁶³⁴

The local governments in Great Britain had complete independence and autonomy and are subject to the Ministry of Housing and Local government. They are conferred by the Act of parliament but interference of the central authorities. Local government in Ghana is controlled by the district commissioner who is responsible to the regional commissioner.¹⁶³⁵ The local government did not have full autonomy like her counterpart that claimed semi-autonomous in nature. The constitution on the aspect of religion, there is brink of curiousness as section 10 of the constitution prohibited state religion to the government of the federation and all the states. Chapter VII Part 1 E. Section, 260, determined the establishment of the Sharia Court of Appeal of the Federal Capital Territory Abuja and Part II, Section 275, provided establishment of Sharia Court of Appeal in a State. It is to focus the fact that section 38(1) posited that every person shall be entitled to freedom of thought, conscience and religion. The constitution provided Sharia court as we can see from the chronological order of the court in section 6(5) f, & g of the constitution. Yet, the constitution did not elevate Islam as state religion. The constitution should give utmost priority to religion as Nigerians are highly religious.¹⁶³⁶

It is not farfetched that fiscal federalism is one of the contentious issues that is bedeviling Nigerians. Section 162(2) stated that the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density as well as principle of derivation not less than thirteen per cent of the revenue accrued to the federation account. This is an issue which provided for different revenue allocation formula in the past, yet, agitation of different regions on increase of revenue from the federation account prevails till today.

¹⁶³⁴ Mike Bilcoms: Local government in the United State of America

¹⁶³⁵ Ibrahim, A. (2010) *Lectures Notes on Comparative Local government Administration in Nigeria* Department of Public Administration, Faculty of Administration, A.B.U, Zaria.

¹⁶³⁶ *The Constitution of the Federal Republic of Nigeria 1999* Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)

Objectives of the study

The main objective of this paper is to ensure that the constitution needs amendment suit for good democratic governance. Other specific objectives of the study are;

1. To determine the power of constitutional immunity clause assigned by section 308 of the constitution.
2. To investigate on full autonomy of the local government as a third tier of government.
3. To assess the stand of religion as enshrined by the 1999 constitution
4. To assess the role of traditional rulers in the 1999 constitution.

Methodology

The suitable method adopted for the study is explanatory in nature. The method for the conduct of the research is content analysis. Secondary source of data collection for the study are; administrative and social science journals, law Journal, Black law Dictionary, textbooks, newspaper, handbooks, students' thesis and other relevant materials.

Conceptual Clarification

Immunity Clause

The origin of executive immunity can be traced to the immunity given to the sovereign and his dominion on his members of the society. It is very important to note that it was practiced by the Church and the Papacy (Peace Treaty of Westphalia, 1648; Gross, 1948) when it had the dominion over all nations, but when these nations began to stand against it, the supremacy of the kings over their respective domains became more prominent.¹⁶³⁷

Immunity in the parlance of law refers to the exemption from performing duties, which the law generally requires other citizens to perform, or from a penalty or burden that the law generally places on other citizens. This implies that abstaining from civil and criminal prosecution or arrest even if such a person had remnant of corruption in such

¹⁶³⁷ Ukoh, F. N. & Ngwoke, R. A (2021) Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. *Journal of Politics and Law*; Vol. 14, No. 2; doi:10.5539/jpl.v14n2p47

a person. That particular individual can never appear in any court of law for any form of legal proceedings.¹⁶³⁸ This further attested to the fact that constitutional immunity prevented an individual from any form of arrest, detention, or prosecution against such a person.

According to Black's Law Dictionary, the term immunity means an exemption from a duty, liability, or service of process, especially such as exemption granted to a public official.¹⁶³⁹ The immunity clause enshrined in the 1999 Constitution does not ensure equality, fairness and justice. It safeguarded or shielded the president or vice-president, governor or deputy governor from equity and justice and it does not encourage the culture of impunity. In order to ensure transparency and accountability in governance, section 308 should be altered to ensure fairness and justice.¹⁶⁴⁰

Section 308 of the 1999 provided the restrictions on legal proceedings (Constitutional Immunity Clause) of the person holding the office of President, Vice-President, Governor or Deputy Governor on any circumstances whatsoever. It stated as thus;

1 (a) No civil or criminal proceedings shall be instituted against a person to whom this section applies during his period of office; (b) A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and (c) No process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party. (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to “**period of office**” is a reference

¹⁶³⁸ Fabamise., S. (2017) Constitutional Immunity Clause and the Fight against Corruption in Nigeria. Afe Babalola University: *Journal of Sustainable Development. Law & Policy* Vol. 8: 2 DOI: <https://dx.doi.org/10.4314/jsdlp.v8i2.8>

¹⁶³⁹ Black's Law Dictionary, 8th Edition (Thoins on West-USA, 2004) Pg.1438; Oxford Dictionary of Law, 6th Edition (Oxford University Press) 265 merely defines immunity as freedom or exemption from legal proceedings.

¹⁶⁴⁰ Fabamise., S., Op. cit. p. 158.

to the period during which the person holding such office is required to perform the functions of the office.¹⁶⁴¹

Basically, the application of executive immunity had benefited immensely from the medieval perception of sovereignty residing in the crown absolutely. i.e. (An Absolute Monarchical Rulers) In certain jurisdictions, this has translated to mean that the executives who are the president, the vice President, state governors or deputy governors enjoy immunity in their official capacity.¹⁶⁴² A case of *Fawehinmi v. I.G.P.* (2002, 640) where Chief Gani Fawehinmi sought an order of mandamus against the Inspector General of Police at the Federal High Court to compel him to investigate the allegations of crime against Bola Ahmed Tinubu, of a sitting Governor of Lagos state. The trial court dismissed the summons and Chief Gani appealed to the Court of Appeal. At the Court of Appeal, the court held, 'inter alia' that is among other thing.¹⁶⁴³

Traditional Rulers

The Bendel State Law (Traditional Rulers and Chiefs Law, 1979, cited in Yusuf (2006, p.62) defines traditional rulers as the traditional head of an ethnic unit or clan who is for the time being the holder of the highest traditional authority within the ethnic unit or clan and whose title that is recognized as a tradition ruler by the government of the State. The traditional holders are those who lead as fathers of the community who perform traditional roles for the growth and development of the society.¹⁶⁴⁴

Dr G.O Orewa of University of Offa defined traditional rulers as an Oba, Emir, Obi or a paramount chief who before the advent of the colonial government in Nigeria, had complete sovereignty over his territory and was not subject to any other higher authority within or outside his domain. They are traditional leaders who are paramount

¹⁶⁴¹ *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

¹⁶⁴² Tajudeen, I. O. (2013) Executive Immunity in Nigeria: Putting Off Old Garments. *Journal of Politics and Law*, 6(3). <https://doi.org/10.5539/jpl.v6n3p189>

¹⁶⁴³ Chief Gani Fawehinmi v I.G.P (2002) Law Global Hub Lead Judgment Report (LLJR)-SC

¹⁶⁴⁴ Bendel State of Nigeria (1979) *Traditional Rulers and Chiefs Edict*. Benin City: Government Printers.

chiefs whose functions were judicial, legislative and administrative for stability and continuity of their society.¹⁶⁴⁵

The Roles Traditional Rulers under 1979 constitution was stated in the third schedule Part II. of the constitution. The functions of traditional rulers constitutionally are;

3. (B) A State council Chiefs shall comprise Chairman and such number of persons may be prescribed by the law of the house of assembly of the state.

4. The council shall have power to advise the Governor on any matter relating to customary law or cultural affairs and inter-communal affairs and chieftaincy matters.

5. The council shall also have power to advise the Governor whenever requested to do so (a) The maintenance of the public order within the state of any part thereof (b) Such order matter as the Governor may direct.¹⁶⁴⁶

Bendel State Legislation (now Edo and Delta States) specifies the role of traditional rulers at local government level. It is stated that section 47 Part VIII of the Traditional Rulers and Chiefs Edict, 1979 specifies the following functions:

(a) Formulation of general proposals by way of advice to the Local Government or to all local governments in the area. (b) Harmonisation and co-ordination of development plans of such local governments by joint discussions and advice. (c) To assist in the maintenance of law and order.¹⁶⁴⁷ It specified significant position of the traditional rulers unlike in the case of the 1999 constitution.

The traditional rulers are those authorities which are patrimonial or matrimonial in nature that steer the activities of the people in the country. They are the fathers of the community. The traditional rulers should not only perform advisory role but perform different functions in the 1979 constitution but restrained the functions of the traditional rulers on advisory role as can be seen in section 7 (b) ii of the 1999 constitution as the supreme guard for the country.

¹⁶⁴⁵ Yusuf, A. H (2006) An Evaluation of the Role of Traditional Rulers in Nigerian Local Government Administration. *The Nigerian Journal of Administrative Studies*, A.B.U Zaria. Vol. 4, No, 1.

¹⁶⁴⁶ *Constitution of Federal Republic of Nigeria 1979*

¹⁶⁴⁷ Bendel State of Nigeria (1979). Ibid

Democratic Governance

It is very paramount to give the meaning of democracy and governance before dwelling into the concept of democratic governance.

It is investigated that the concept of Democracy is historically traceable to the ancient Greeks and specifically the city-state of Athens in the fifth century B.C. The word democracy is derived from the Greek words ‘demos’, which means the people, and ‘Kratos’ means to rule. Democracy therefore means ‘rule by the people’, although originally the Greeks used it to mean the poor or the masses. It means it is the people that rule among themselves. They practiced direct democracy at the time. It is a situation where the people in the community participated in the governing activities through direct election.¹⁶⁴⁸

Democracy is people-centered governance, and no wonder, the 16th President of the United State of America Abraham Lincoln (1809-1865), defined democracy as the “government of the people by the people and for the people. It is the government that decides who and how to rule them based on the consent of the people. The people vote and be voted for who will represent them in governance. It is to note that majority of the people participated in the country based on rule of law and the doctrine of separation of power as well as theory of check and balance as accepted by the constitution of the land.

According to Konrad-Adenauer-Stiftung (2011p, 3) perceived democracy as a form of government in which power and civic responsibility are exercised by all adult citizens, directly or indirectly through their freely elected representatives. It means that people are rule by their representative either by themselves or some who will represent them on their behalf. It means, it is representative governance. It is the people to assign someone on their behalf them to rule them in government.¹⁶⁴⁹

Powley & Anderlini (2004p, 37) argued that democracy is a system of government in which power is vested in the people (the population) and exercised through

¹⁶⁴⁸ Konrad-Adenauer-Stiftung (2011) *Concepts and Principles of Democratic Governance and Accountability. A Guide for Peer Educators*. Action for Strengthening Good Governance and Accountability in Uganda.

¹⁶⁴⁹ Konrad-Adenauer-Stiftung (2011) Op. cit. p. 3

representatives chosen in free and fair elections. It made it clear that people choose who they want to represent them through the ballot boxes who will represent them in the time fixed (Tenure of Office) according to the stipulated law of the land.¹⁶⁵⁰

Powley & Anderlini (2004p, 36) stated that “governance” refers to the process of decision-making and the ways in which decisions are implemented (or not). This is to say what government wishes to do or decided not to do is governance. In any given system, the government is the major actor though we have citizens (participatory governance), financial bodies, religious organisations, pressure groups the influence government policies among others. They carry out activities in terms of performing regulatory activities, security activities, infrastructural function, recurrent and fixed functions, implementing functions etc.¹⁶⁵¹

Downer (2000) cited in Adesote (2018. p,2) argued that good governance is a process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights. In the view of Downer, he maintains the fact that the government performs the function of rule of law as ordained by A.V Dicey in which he emphasized about the supremacy of the law, equality before the law by all the citizen on any issues and fundamental human right of the citizens as entrenched in the constitution. Separation of powers, infrastructural development, ensures utilization of capital and recurrent expenditure, penalise the offenders on embezzlement or siphoning of funds and ensures socio-cultural, administrative, economic and political development of the people in the country.¹⁶⁵²

Features of Good Governance

Some of the characteristics of good governance.¹⁶⁵³ They include;

¹⁶⁵⁰ Powley, E., & Anderlini, N. S. (2004) *Democracy and Governance Justice, Governance and Civil Society. Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action*

¹⁶⁵¹ Powley, E., & Anderlini, N. S. (2004) Op. cit. p. 36

¹⁶⁵² Adesote., G. A. (2018) The Challenges of Democratic Governance in Nigeria Since 1999. *Identity, Culture And Politics, Vol 19, N1-2.*

¹⁶⁵³ Audi, A.A., Salisu, I.I., & Zakari, M. (2021) Democracy, Good Governance and development in Nigeria: a survey of Karu local area. *KIU Interdisciplinary Journal of Humanities and Social Sciences*, 2(2), 95-112

- **Effective Service Delivery:** Access to important social services such as education, provision of health facilities, electricity, construction of roads are prerequisite for effective human development for the betterment of the citizenry.
- **Employment:** Employment is one of the mechanisms that measure development of a given nation. This is by considering the working population and the dependent ones in the country.
- **Rule of law:** The Legal frameworks that ensure everything should be done according to the dictate of the law and right of the citizens.
- **Responsiveness:** Institutions and processes try to serve all stakeholders in the country.
- **Equity:** All men and women have golden opportunities for well-being of the populace.
- **Effectiveness and efficiency:** Processes and institutions produce desired results that meet needs and aspiration of the people and harnessing the human and material resources.
- **Accountability:** Decision-makers in the government, the private sector and civil society organizations are accountable to the public on all issues of development.

Constitution

Blerton Sinani (p, 2445) conceived constitution as a unique legal act, written and codified, with the highest legal force, approved by the highest organ or special state body, according to the special procedure that differs from the procedure of enacting laws and other legal acts. It is the constitution which contains the fundamental principles that give the purpose, principles, norms, values, structure on how the people should be governed.¹⁶⁵⁴ It gave the mandate on how citizens of the country are rule according to the enabling law of the land.

Constitution is a system or body of fundamental rules and principles of a nation, state or body polity that the power and duties of the government are governed and guarantees certain right to the people. It is the body of rules, laws, conventions or practices which

¹⁶⁵⁴ Blerton Sinani (p, 2445) *A Critical-Legal Overview of the Concept of Constitution as the Highest Legal-Political Act of The State in The Light of Constitutional-Juridical Doctrine.*

defines the powers and functions of the state vis-a-vis other social institutions; prescribes the institution and structures through which the power and functions of the state are exercised and establishes relationship among the institutions and structures of state power. It is an enabling principle everyone obeys.

Nigerian constitution is generally known as written and rigid in nature which embodies federal structure. It is written because it is written in an identifiable document called 1999 constitution which is a replica of 1979 constitution. It is rigid, due to the fact that it has to follow constitutional procedure and process before it can be altered or amended.¹⁶⁵⁵ See section 9 (2) & (3) the process of altering at least to have 2/3 or 4/5 majority of the houses before it occurs.¹⁶⁵⁶

Local Government Autonomy

The United Nations Office for Public Administration defines local government as a political subdivision of a nation or in a (federal system) state which is constituted by law and has substantial control of local affairs including the powers to impose taxes or to exact labour for prescribed purposes. The governing body of such an entity is elected or otherwise locally selected. It is a body exercised to institute a control over local affairs for their benefit.¹⁶⁵⁷

The Guidelines for Local Government Reform (1976) defined local government as government at the local level established by law to exercise specific powers within defined areas. These powers should give the council substantial control over local affairs as well as the staff and institutional and financial powers to initiate and direct the provision of services, to determine and implement so as to complement the activities of state and federal government in their areas and ensure that local initiatives and response to local needs and conditions are maximized.¹⁶⁵⁸ It shows it is a government at the grassroots level to provide the people just as it is stipulated in the fourth schedule of the 1999 constitution the fundamental function of the local government.

¹⁶⁵⁵ *Constitution of Federal Republic of Nigeria 1979*

¹⁶⁵⁶ *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

¹⁶⁵⁷ *United Nations Office for Public Administration*. March 2015 <https://www.un.org/>

¹⁶⁵⁸ *The 1976 Guidelines for Local Government Reform, Federal government of Nigeria*, Lagos Government Publishers.

Local government simply means government at the local level or local government at the lowest tier of administration within a country. It is a political sub-division of a nation state which is constituted by law and possesses substantial control of local affairs including the power to impose taxes or to exact labor for specified purposes. From the perception of Amah, the local government at the local level enacts law, provide efficient services needed for the populace and impose tax on the people to steer their local affairs growth and development of the country.¹⁶⁵⁹

Local government autonomy 'refers to the attribute that allows the local government substantial freedom and independence to function without undue, indiscriminate and unbridled interference from an internal or external authority and still remain accountable.¹⁶⁶⁰ It is to note that the 1976 reform failed to achieve its objectives, and Dasuki Committee came with a report in 1984 to strengthen the autonomy of the local government. The recommendation of the committee attested for the issues of autonomy of local government at the grass-root level.¹⁶⁶¹

Section 7(1) gave the existence of local government under a law that provides for the establishment, structure, composition, finance and functions of such councils.

2) The person authorized by law to prescribe the area over which a local government council may exercise authority shall (a) define such area as clearly as practicable (b) To the extent to which it may be reasonably justifiable, that in defining such area regard is paid to (i) the common interest of the community in the area (ii) traditional association of the community and (iii) administrative convenience. (3) It shall be the duty of a local government council within the State to participate in economic planning and development of the area referred to in subsection (2) of this section and to this end an economic planning board shall be established by a law enacted by the House of Assembly of the State.

¹⁶⁵⁹ Amah, E. I. (2018) Devolution of Power to Local Government: Appraising Local Government Autonomy under Nigerian Federation. *Beijing Law Review*, 9, 275-293.

¹⁶⁶⁰ UD Ikoni and Felicia Anyogu, (2014) 'The Jurisprudence of Local Government Administration and the Challenges of Rural Development: The Nigerian Experience Vol 3, *EBSU Journal of International and Juridical Review*, 137.

¹⁶⁶¹ Dolo, A.W., Ahmed, A., & Umar, A. (2018) Local Government Autonomy in Nigeria: Struggles and Challenges. *Advances in Social Science Research Journal* 5(5) 44-5. DOI:10.14738/assrj.55.4498.

(4) The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to House of Assembly shall have the right to vote or be voted for at an election to a local government council. (5) The functions to be conferred by Law upon local government council shall include those set out in the Fourth Schedule to this Constitution. (6) Subject to the provisions of this Constitution (a) the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation; and (b) The House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the State.

The 1999 constitution in section 7 (1) provided the establishment, structure, composition, finance and functions of such councils. In reality, the constitutional provision was something made in written as the state governments had an indirect influence over the administrative control over all the 774 local government in Nigeria. Section 162 (5) gave the fact that money allocated to local government shall be given to the states for their benefit. Section 162 (6) maintain a special account to be called “the State Joint Local Government Account” into which shall be paid all allocations to the local government councils of the State from the Federation Account. We can totally agree upon the fact that local governments have no financial autonomy but not administrative control. The fourth schedule of the Constitution, provided for the functions of local government in the country.

The 1999 constitution is a man-made constitution as it is subject to amendment since it is not divinely written. This is one of the cogent reasons why it must be altered as it will be suitable for good governance of the people. The country had witnessed series of alterations ranging from 1st, 2nd, 3rd alterations in (2010), 4th alteration in (2017) and 5th alteration in (2023). Yet, it needed modification in one place or the other. Nigerians had been clamouring for alteration in section 308 of the constitution that provided constitutional immunity clause of the president, vice-president, governor and deputy-governor in Federal Republic of Nigeria. The local government in Nigeria did not have

full autonomy, considering the fact that they are indirectly controlled by the state government administratively not financially.¹⁶⁶²

However, Religion in Nigeria plays a tremendous role in democratic governance. The constitution had not shown its strength constitutionally as Nigerians value religion more than everything. The traditional rulers perform functions without recognition of the constitution. Nigerian history had regarded the position of traditional rulers in the law of the land. Authur Richard constitution of 1946, Macpherson constitution of 1951, Lyttleton constitution of 1954, and the constitutional conference of 1957, 1963 first republican constitution and 1979 Second Republican constitution regarded tradition rulers as important member of the society.¹⁶⁶³ The 1999 constitution assigned advisory role to the traditional rulers only. The traditional tussle in Kano, Sokoto state was a case on board which is intensifying tension in the state. This is a spectacular example that can affect traditional institutions in the whole country.

Conclusion

The 1999 constitution had a great concern since it called for amendment as a man-made law. The constitutional immunity clause bestowed upon the office holders of the president, vice-president, Governor or Deputy Governor according to section 308, does not favour democratic governance in the country. The Supreme Court had granted financial autonomy to the local government but the structure, composition, election was still in the hand of the governors. It means there is remnant of state government control as they conduct election and decide the flag-bearer of a political party to his own interest. Nigerians are very religious. They value religion more than any other thing. There are other loopholes which the constitution had such as fiscal federalism, revenue allocation, creation of states, boundary disputes among others. The constitution provided for sharia court and also section 38 provided for freedom of religion yet, Islam was not approved as state religion in fact, section 10 abolished state

¹⁶⁶² *The Constitution of the Federal Republic of Nigeria 1999 Updated with the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023)*

¹⁶⁶³ Suberu., R (2019) Nigeria's Permanent Constitutional Transition: Military Rule, Civilian Instability and 'True Federalism' in a Deeply Divided Society. *Occasional Paper Series* Forum of Federation. Number 34.

religion in its entirety. The constitution served as a mirror for executive, legislative and Judiciary to ensure democratic governance to the people of federal Republic of Nigeria.

Summary

The constitution of federal republic of Nigeria was not divinely ordained, so it is subject to amendment, alteration and abrogation. It is a study that devotes attention to the constitutional immunity clause, local government autonomy, religious stand according to the constitution and the role of traditional leaders as entrenched in the constitution. The constitutional immunity of the holder of the office of the president, Vice-president, Governors and Deputy Governors had rendered a golden opportunity for a lot of people vying for such political position so that even if they are convicted of a crime so far, they are protected by virtue section 308 of the constitution. The local government autonomy has been a subject of debate in the National Assembly, private enterprises, companies and the citizens of the country. The Supreme Court had awarded financial autonomy to the local government. The point to note basically is that there is still remnant of Governors' control since they are the one to conduct election not the local government service commission. However, Nigerians are very religious. The constitution based on section 38 assigned freedom for religion in the country. It has been testified that section 231 & 238 of the constitution provided the establishment of Chief Justices, judges and president and judges of court of appeal of the federation. In fact, Islam was not elevated as state religion. The traditional rulers in the constitution did not provide relevant roles to the traditional institutions. The constitution gave advisory roles to the traditional rulers as referenced in section 7(b) ii of the constitution.

Research Findings

The study took into account of the analysis of some of the defects of 1999 constitution on a peculiar focus of democratic governance in Nigeria. There was clamouring about the defects of the constitution since it is a man-made constitution. Hence, it could be subject to alteration at any time if the need arises. The research was centered on constitutional immunity clause according to the constitution, religious stand based on

the constitutional provisions, the role of traditional rulers in the constitution and local government autonomy as spell out in section 7 of the constitution.

Basically, the constitution provided that section 308 of the constitution gave the immunity against the holders of the constitution. It protected the president, Vice president, Governor and Deputy Governor from any civil or criminal proceedings in any court of the land. The section assigned a mandate of not compelling the appearance of any holder of any office, according to 308 of the constitution. A person can never be prosecuted whatsoever he or she does by an occupier of the office. The section attested the fact that holder of an office based on section 308, he or she cannot be arrested or imprisoned during the period by him or her who occupies the office based on the section. The constitution does not ensure equality, fairness and justice since exempting some classes of citizens from a duty, liability, or service of process, especially such exemption granted to a public official.

It is very important to note that according to US constitution, the president had civil immunity but does not have criminal immunity. The president can be prosecuted from criminal proceeding especially war issues. However, The British Constitution granted parliamentary and crown immunity according to the constitution. The constitution of the Federal Republic of Ireland practiced parliamentary democracy. It did not give the Prime Minister absolute immunity, he or she can be impeached for misdeed or wrongdoing according to the Constitution. This is totally different in the constitution of federal republic of Nigeria where it gives the absolute immunity to the holders of the office of the president or vice-president, governor or deputy governor. Section 308 prevented any form of arrest, criminal, civil, or appearance before the any court in the land.

The local government was a tier of government according to the 1999 constitution. The constitution had assigned section 7 to be a back up to the autonomy of a local government. It was noticed that local government was constituted by law to control over the local affairs in order to provide local needs and their aspirations to the local populace. The section 7(1) of the constitution provided for the establishment, composition, structure and finance of local government in the local level. It gave that the house of assembly the provision of statutory allocation of local revenue to the local

government. Though, the Supreme Court abrogated the section. The house of assembly shall have the right to vote or be voted for at an election to a local government council. It is noted that the State Independent electoral commission was in charge of local government councils not the Independent Local government Service Commission. Section 162(6) provided for the State Joint Local Government Account in which the allocation of local government councils came from the Federation Account. Though, the Supreme Court had assigned financial autonomy to the local councils. The local government had financial autonomy but there is remnant of state control as they conduct election and decide the flag bearer of a party expected to win for the election. There was agitation by past administrations on local government autonomy but since there is the need for amendment of section 9 of the constitution, the state governors did not allow the autonomy of the local government in the country. Section 2(2) provided the fact that Nigeria shall be a Federation consisting of States and a Federal Capital Territory. It vividly shows the local government was not stated in the in this section. Therefore, it means the local government was not regarded as a third tier of government unless local government is out of the shackle of Governors' influence in controlling the government at the grass root level.

The Nigerian citizens were very religious. It was realized that Part 1 E. section 260 enabled the establishment of the Sharia Court of Appeal of the Federal Capital Territory Abuja and Part II, Section 275, provided the establishment of Sharia Court of Appeal in a State. It is also noted that section 38, (1) posited that every person shall be entitled to freedom of thought, conscience and religion. The constitution provided Sharia court from the chronological order of the court in section 6(5) f, & g of the constitution. Yet, the constitution did not elevate Islam as state religion. According to the 1979 constitution in section 252 (1) stated the appointed of chief justice and other justices of the Supreme Court and justices of the court of appeal shall have a person who is a learned in Islamic personal law and a person learned in customary law. This is contrary to 1999 constitution where the chief justice of the Supreme Court shall be a legal practitioner in Nigeria and has been so qualified for a period of not less than 15 years. So also, the president of the court of appeal shall be a legal practitioner for a period of 12 years. The position of religion on the ground of our beloved constitution does not

value religious sanctity to the citizens in spite of the fact that, religion played an integral role on influencing policies of government in the country and it is very powerful in decision making in the local level, state and federal level in the country

The traditional rulers are one of the key figures that play important role in influencing government policies. They were not regarded in the constitution ideally. They only give advisory role in governance in the country. It is seen that section 7 (b) indicated that in defining such area regard is to be paid to (ii) traditional association of the community. It made the traditional rulers irrelevant in the conduct of affairs made in democratic governance of the country. No wonder this is one of the cogent reasons why the traditional ruler became a tool of democratic manipulation as they are appointed, control and replace by the governance as seen in the residual power given by the governor to the chieftaincy affairs. The 1979 constitution in the third schedule Part II 3(B) indicated that the state council Chiefs shall comprise chairman and number of persons in the councils as may be prescribed by the law of the house of assembly of the state. Also, the council had power to advise the Governor on any matter relating to customary law and inter-communal affairs and other chieftaincy matters. The traditional institution was not given regard whatsoever in the constitution. They became a tool for political manipulation especially by the politicians most importantly the Governors in the country. It was noticed that if a Governor had a political battle with an Emir or chief, immediately he assumes office, he does whatever it takes, to find him faulty that will give genesis for his removal. For instance, the tussle of traditional institutions in kano, removal of chairman of chiefs by Governor Fabura in Rivers State.

Summary of Research Findings

In order to simplify comprehending of the research findings, summary of research provides a way for easy identification of the research entirely. They include:

1. It is seen that section 308 overtly gave the mandate of not compelling the appearance of any holder of the office, according to provision of the constitution. A person can never be prosecuted whatsoever he or she does by an occupier of the office. The section attested the fact that holder of an office cannot be arrested or imprisoned during the period by him or her who occupies the office based on the section. The constitution

does not ensure equality, fairness and justice since exempting some classes of citizens from a duty, liability, or service of process, especially such exemption granted to a public official.

2. The local government was a tier of government according to the 1999 constitution. The section 7 sub (1) of the constitution provided for the establishment, composition, structure and finance of local government in the local level. It is stated that section 7 (6) b. gave that the house of assembly the provision of statutory allocation of local revenue to the local government. Also, section 162 (6) provided for the State Joint Local Government Account was abrogated by the decision of the Supreme Court. The house of assembly shall have the right to vote or be voted for at an election to a local government council. It is noted that the State Independent electoral commission was in charge of local government councils not the Independent Local government Service Commission. Section 2 (2) provided the fact that Nigeria shall be a Federation consisting of States and a Federal Capital Territory. The local government was not included in the section.

3. It was realized that Part 1 section 260 enabled the establishment of the Sharia Court of Appeal of the F. C.T Abuja and Part II, Section 275, provided the establishment of Sharia Court of Appeal in a State. It is also noted that section 38, (1) posited that every person shall be entitled to freedom of thought, conscience and religion. The constitution provided Sharia court from the chronological order of the court in section 6(5) f, & g of the constitution. Yet, the constitution did not elevate Islam as state religion. According to the 1979 constitution in section 252 (1) stated the appointed of chief justice and other justices of the Supreme Court and court of appeal shall have a person who is a learned in Islamic personal law and a person learned in customary law. This is contrary to 1999 constitution where the chief justice of the Supreme Court shall be a legal practitioner in Nigeria for a period of not less than 15 years and the president of the court of appeal shall be a legal practitioner for a period of 12 years

4. The traditional rulers only give advisory role in governance in the country. It is seen that section 7 (b) indicated that in defining such area regard is to be paid to (ii) traditional association of the community. The 1979 constitution in the third schedule Part II 3(B) indicated that the state council Chiefs shall comprise chairman and number

of persons in the councils as may be prescribed by the law of the house of assembly. Also, the council had power to advise the Governor on any matter relating to customary law and inter-communal affairs and other chieftaincy matters. They became a tool for political manipulation especially by the politicians most importantly the Governors in the country. It was noticed that if a Governor had a political battle with an Emir or chief, immediately he assumes office, he does whatever it takes, to find him faulty that will give genesis for his removal. For instance, the tussle of traditional institutions in kano, removal of chairman of chiefs by Governor Fabura in Rivers State.

Recommendations

Based on the research findings obtained, the study recommends the following which if used, it would assist tremendously in changing the lives, social justice, fairness, sustainability and progress in the country. They are as follows;

1. There is the need for law makers and other stakeholders involved who are at the brink of constitutional affairs, to amend section 308 of the 1999 constitution in order to ensure social justice, equity and fairness in the course of conducting the affairs of democratic governance in the country. Countries such as U.S.A, British etc., they have constitutional immunity but on civil matters not on criminal issues. The leaders in those kinds of countries could be prosecuted for criminal proceedings.
2. The local government should have full autonomy if they are out of any form of control whatsoever by the house of assembly of the state. The Supreme Court assigned financial autonomy to the local government. The local governments should conduct their election by the Local government Service Commission not State Independent Electoral Commission. The chairmen and councilors should perform their function without interference of the state government.
3. The constitution granted right for religion as seen in section 38 of the constitution. Nigerians as we know are very religious since they have sharia court existing in the country then Islam should be elevated as state religion with the features givens by the religion in the existence of section 6(5) f & g of the 1999

constitution. The constitution needs amendment on the aspect of religion as it plays an important role on democratic governance in the country.

4. The traditional rulers were not given regard as before and after independence. As they are the fathers of the community, the constitutional reviewers should amend the constitution so that the traditional institutions will have immunity in the conduct of their affairs without interference of anybody. The governors should appoint the traditional rulers under certain principles as they cannot be used as political tools for manipulation whatsoever in the conduct of their affairs. The appointment, punishment, discipline or dismissal from throne should adhere to stiff conditions for them to conduct their affairs freely without intimidation or harassment.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

ENDOWMENT (WAQF) AND THE SUSTAINABILITY OF RELIGIOUS INSTITUTIONS

Sa'ad Musa Abubakar
Centre for Islamic Legal Studies
Ahmadu Bello University, Zaria
asimsaadabubakar@gmail.com, +2347032949839

Abstract

Waqf institution is one of the greatest and unique instruments for socio-economic independence especially in favour of the religious institutions, once regularly embarked upon and prudently managed. Endowment in its general perspective is regarded more effective and more influential than mere gratuitous sacrifices. In fact, it has exclusive peculiarities that differentiate it from other gratuitous contracts. Now a day, endowment has been brought up again to brighten all fields of human endeavor in the Muslim world after the lofty period of its disappearance, despite its immense contribution to sustainability in general. The objective of this paper is to examine the role of endowment (waqf) in the sustainability of religious institutions under the Sharia. Thus, it is aimed at the right upholding to the endowment, and a struggle to return to its actual practice as it was during the glorious time of our predecessors. The method used in this research is basically doctrinal. The major finding of the paper is that endowment is one of the workable tools for eliminating or, at least, reducing poverty to the barest minimum in the Muslim society. Similarly, it is a well-designed scheme for the sustainability and independence of religious institutions. The paper recommends that, there is a great need for reviewing our current endowment systems, the enabling laws in the country and prospective dispute resolutions forum, with a view to studying and working out viable modalities which will conform to the general principles and philosophy of Islamic law, in struggle for going back to the practices of our predecessors and for universal social and economic benefit to be easily attained.

1.0 Introduction

The institution of *waqf* is a known practice that is peculiar to Islamic law since early centuries. Scholars, at different epochs, have attached much importance to *waqf* for its numerous benefits to the society in both public and private endeavours. Thus, Islamic endowments have contributed immensely to the development and sustainability of

religious institutions and have positively impacted on the educational, social and economic growth during various developmental stages of the Islamic state. This has been achieved through the institution of various schemes of *waqf* such as; the endowment of mosques, schools, colleges, universities, Islamic centers, libraries, hospitals and orphanages. Notably, many scholars, jurists and other professionals of different fields of specialty graduated from the above institutions, therefore, *waqf* has immensely contributed to the educational and cultural development of the Islamic state.

Waqf institution is one of the greatest and unique instruments for socio-economic independence especially in respect of the religious institutions, once regularly embarked upon and prudently managed. Endowment in its general perspective is regarded more effective and more influential than mere gratuitous sacrifices. In fact, it has exclusive peculiarities that differentiate it from other gratuitous contracts. Namely; unlimited nature, broad fields, dynamism in its application among others. These are just some parts of the numerous examples of Muslim societal schemes, which ensures mercy and mutual love among its followers over the centuries, regardless of their differences in political, social and economic status in more than fourteen centuries ago. Thus, the institution of endowment is a vital source for societal development and sustainable growth under Islamic system of governance. Now a day, endowment has been brought up again to brighten all fields of human endeavor in the Muslim world after the lofty period of its disappearance, despite its immense contribution to sustainability in general.

Certainly, the unique and authentic move to return or revert endowment to its effective position, is to create general awareness, prompt activeness and vigor in the minds of respective Muslims, by refreshing their minds with clear functions and significant roles played by the endowment in the past and present, which will indeed, manifest the good and viable impact in the future.

Therefore, this modest research seeks to examine the role of endowment (*waqf*) in the sustainability of religious institutions under the *Sharia*. Thus, it is aimed at the right upholding of the endowment, and a struggle to return to the actual practice of

endowment as it was during the glorious time of our predecessors. These will be -as usual-preceded by the concept of this unique instrument, its varieties, nature and scope, peculiarities, principles and procedures, modern approach for its successful conduct, and the challenges of its viability in our contemporary religious institutions.

1.2 Concept of *Waqf*

Al-waqf known in English language as endowment, literally means: detention or stoppage. When you say: “*Waqaftu al-Daabah*” it means: detaining an animal and preventing it from movement.¹⁶⁶⁴

Thus, *al-waqf*, *al-hubus*, and *al-tasbil* are synonyms in terms. It is named *al-waqf*, and *al-hubus* because the corporeal property of the endowment is detained. Similarly, it is called *al-tasbil* because its dividends, fruits or services are given out in the way of Allah.¹⁶⁶⁵

However, jurists have differed regarding the extent of the technical meaning of *waqf* as a result of their divergent views concerning the modalities of *waqf* which paved a way to their further disagreement on some rules guiding the conduct of *waqf*. For instance, the question as to whether *waqf* is binding or not and their disagreement regarding the conditions to be stipulated therein. Therefore, the different definitions of *waqf* were made in reference to the chosen and appropriate method of each jurist in line with the above guiding rules.¹⁶⁶⁶

Thus, technically, *waqf* refers to: detention of source and sacrificing the fruits¹⁶⁶⁷. (Services)

1.3 Historical Antecedents of *Waqf*

No wonder, the greatest turn out by the Muslim individuals (leaders and subjects) on endowment. They have endowed a huge amount of their property in different charitable projects. The noble model of Muslims in this regard is the Holy Prophet (S.A.W), going

¹⁶⁶⁴ Ibn Faris, A. Z, (1999) *Mu'jam Maqayis al-Lughah*, Dar al-Tali'ah, Beirut, 1st edition, v:6, p. 139

¹⁶⁶⁵ Ibn Mandhur, M, B, (nd) *Lisan al-Arab*, Dar al-Siyad, Beirut, 3rd edition, v:9, pp. 359-361.

¹⁶⁶⁶ Salih, S, (1999), *Al-Awqaf wa Dauruha fi Taqaddum al-Ummah al-Islamiyyah*, Dar al-Shabab al-Jami'ah li al-Nashr, Cairo, 1st edition, p. 23.

¹⁶⁶⁷ Ibn Qudamah, A, (1401) *Al-Mughny li Ibn Qudamah*, Maktabat al-Riyadh al-Hadith, Riyadh, v: 5, p.597.

by the *hadith* of *Mukhaireeq*. Next are his dignified companions, as well a group of *Sahabah* who have engaged in the *waqf* during their life time, such as: Abubakar, Umar, Uthman, Ali, al-Zubair bin al-Awam, Mu'adh bin Jabal, Zaid bin Thabit, Aisha, Ummu Salamah, Safiyyah (the wives of the Holy Prophet), others are Asma'u bintu Abi-Bakr, Sa'ad bin Abi Waqqas, Khalid bin al-Waleed, Jabir bin Abdallah among others.¹⁶⁶⁸ After them came the *Tabi'un*, and the *Tabi'u Tabi'in* with good examples of endowment practices.

Endowment was equally embarked upon by the general Ummah, may be the best example in this respect is that of the great Muslim's commander (Salah al-Deen al-Ayyuby) who sacrificed all that he possessed for societal philanthropic assignments. And made Syria and Egypt full of charitable schemes such as; Mosques, Schools, Hospitals, and barracks, without naming one of these works after his name. This is a high position of piety that one attains regarding the execution of charitable works, as well as, abstinence from material things of this world¹⁶⁶⁹.

The quantity and magnitude of endowment rose and dropped in different occasions, in accordance with the political and economic circumstances witnessed by variant periods of Islamic development. Perhaps, what assisted much to its wide spread is the simplicity of its execution. Because *waqf* needs only commitment from one party to provide an offer, it does not require a second party for its acceptance, validity and enforceability. Thus, its simple nature of entering, executing and concluding, lead and prompted for the mass accomplishment of *waqf* in the Muslim world. Above all, Muslims are encouraged to fully participate in these wonderful practices in order to acquire spiritual excellence which is ensured and guaranteed upon whoever causes happiness for his fellow brother and abolishes hardships from him. The authority to this effect provides:

“The most loved and admired person in the sight of Allah is he who benefits people much, and the most admired act in the sight of Allah

¹⁶⁶⁸ Al-Munee', A, S, (1420) *Al-waqf min Mandhurin Fihi*, Nadwat al-Maktabaat al-Waqfiyyah, Madinah, p. 4.

¹⁶⁶⁹ World Arabic Encyclopedia, (1416) *Mu'assasatu A'amal al-Mausoo'a'h*, Riyadh, v: 27, p. 126.

is happiness or joy brought about to a Muslim, or hardship and anxiety that which is abolished from him”¹⁶⁷⁰.

The most important endowment which was given great concern by Muslims, and indeed, the first endowment ever in Islam, relating to the construction and maintenance of mosque, is the *Masjid Quba'* in the city of Madina, which was made upon migration of the Holy Prophet (S.A.W) to Madina. Perhaps, the most conspicuous evidence to this assertion is Muslims' endowment in respect of the two sacred mosques (Makka and Madina), the mosque of al-Azhar in Egypt, Omayyad's Mosque in Damascus, Qaraween in Morocco, and Zaitunah in Tunisia, e.t.c.

Next in pecking order, in terms of quantity and magnitude are the schools. By the rapid expansion of the Muslim world, the number of schools established through *al-waqf* increased in thousands. These numerous schools played a vital role in providing free access to education for children and immensely supported the advancement of knowledge among the general Ummah.

Furthermore, among the prominent projects of fostering orphans are the establishment of schools in order to provide them with equal access to education as other members of the society. In this context, it was narrated that among the legacies left by Salah al-Deen al-Ayyuby, was the order for construction of bureaus for study specifically for the children of poor and the orphans, and provided both the teachers and students with sufficient funding for smooth running of the program¹⁶⁷¹.

Similarly, among those who proffered highest concern to orphans through *al-waqf* for their nurture and protection is, al-Dawashy Zaheer Mukhtar (one of the Emirs in Damascus in 7th century A.H). He endowed an exclusive bureau for orphans adjacent to the fortress of Damascus, with enough clothing, feeding, e.t.c.¹⁶⁷²

Endowment projects have generally played a significant role in realizing absolute societal protection for strangers and disabled persons. There was no school established by endowment scheme without constructing an exclusive apartment for strangers,

¹⁶⁷⁰ Al-Tabrany, (nd) *Al-Mu'jam al-Kabeer*, Maktabat Ibn Taimiyyah, Cairo, v: 12, p. 453.

¹⁶⁷¹ Ibn Jubair, M, A, (nd) *Rihlatu Ibn Jubair* Dar al-Sadir, Beirut, p. 27.

¹⁶⁷² Ibn Kathir, A, I, (nd) *Al-Bidayah wa an-Nihayah*, Maktabat al-Ma'arif, Beirut, v: 14, p. 78.

where they were given all they needed to eat¹⁶⁷³. Thus, it is not surprising to find this humanitarian development subsisting in villages and cities worldwide, purposely to search for knowledge under endowment schemes. There was no hindrance and obstacle to the pursuit of knowledge. Roads were safe and schools were accordingly established with specific rooms for strangers.

The trip of Ibn Jubair has depicted its great surprise for the care rendered to strangers, more especially if they are students in search for knowledge. This attitude has been generally witnessed in the eastern Islamic cities, and specifically in Egypt. These strangers were given a highest position of care and protection by the monarchs who endowed a wide *Waqf* exclusively for them¹⁶⁷⁴. In full description of this homage Ibn Jubair states: “The immigrant from far regions finds favorable accommodation and a teacher who teaches him whatever profession he needs...”¹⁶⁷⁵

An obvious example in this regard is the work of Salah al-Deen al-Ayyuby, where he specifically provided the mosque of Ibn Doloown in Egypt for strangers arriving from morocco, and offered them with means of living (livelihood) every month. Correspondingly, in Damascus, Sultan Nuru al-Deen al-Zanky singled out the Maliki corner in Omayyad mosque for strangers from Morocco, and additionally, gave them enough endowment.¹⁶⁷⁶

In another development, garrisons were converted through the change of time to permanent refuge or asylum for people lacking care and protection, especially handicaps, aged persons, and divorcees¹⁶⁷⁷. They were given allowances for food and pocket money. Al-Maqrizi states concerning a garrison (garrison of beybrys al-Jashinkir) that; “It is exclusively for hundred soldiers and the sons of those who retired from work or become destitute”. This system continued gradually until it became a policy that divorcees or women who ran away from their husbands for one reason or the other, are

¹⁶⁷³ Ameen, M, (1980) *Al-Awqaaf wa al-Hayat al-Ijtima'iyyah fi Misra*, Dar al-Nahdhah al-Arabiyyah, Cairo, p. 275.

¹⁶⁷⁴ Ibid

¹⁶⁷⁵ Ashoor, S, (1987) *Al-Mu'assasat al-Ijtima'iyyah fi al-Hadharah al-Arabiyyah*, Al-Mu'assasat Al-Arabiyyah Li-dirasat wa al-Nashr, Beirut, v: 3, p. 367.

¹⁶⁷⁶ Ameen, Op cit, p. 206.

¹⁶⁷⁷ Ashoor, Op cit, v: 3, p. 367.

to be kept under these garrisons till marriage. This program subsisted until ninth century A.H.¹⁶⁷⁸.

Endowment in its meaning as *sadaqatun jariyah* (continuous sacrifice), played a vital role in the field of public protection and insurance, it has provided this kind of gesture to a reasonable number of Muslim societies. More especially the contribution of the government in respect of the poor, is regarded limited, and was complemented by the generosity of the rich persons in the society. Whoever glances through the written documents on endowments will find that; majority of these documents discussed the huge assistance rendered to the poor and the needy through the endowment schemes; perhaps, it is considered a fundamental element in the conduct of endowment. Only that the assistance took different forms and varieties, sometimes it involves monetary endowment, or corporeal property (food, clothes, e.t.c), and life essential commodities, particularly, during the period of high inflation of commodities that visits the Ummah from one time to another.

One of the high-flying examples in this regard is, the endowment of Sultan al-Zahir beybrys, where he directed for daily purchase of bread for distribution to the needy... the endowment in this regard covers total care of the poor up to death, including their funeral expenses. The most prominent *Waqf* in this nature is; “Al-Darha’a endowment”, which was officially declared by Sultan Beybrys for the funeral services of Muslim corpses¹⁶⁷⁹.

Among the examples given in this direction i.e. the assistance of poor is the one rendered by *al-Waqf* mentioned in *Waqf* document of al-Shiekh Abu-Umar Muhammad Bin Ahmad Bin Qudamah al-Maqdisy, in the Palestine in sixth century A.H, an excerpt of that document reads: “Endowment for a thousand loaf of bread to be distributed on daily basis... and endowment for daily food which is of different varieties, among which crushed grains are served in wintertime, animal sacrifice during the *Eid al-Kabeer*, sweetmeats in festivals (*Rajab and Sha’aban*), endowment of Zabeeb on Friday nights,

¹⁶⁷⁸ Ibid

¹⁶⁷⁹ Junaid, Y, M, (1417) *Al-Waqf wa al-Mujtama’ Namadhij wa al-Tatbeeqaat min al-Tarikh al-Islamy*, Mu’assasat al-Yamamah al-Sahfiyyah, Riyadh book’s series, No. 39, p. 37.

another sweetmeats during the last ten days of *Ramadhan*, and endowment of clothes to be distributed yearly...”¹⁶⁸⁰

Similarly, there were philanthropic schemes responsible for the maintenance of the families of prisoners, with full provisions of food, cloth and other basic needs until their release. In the same way, there were other charitable bodies specially, catering for marriage expenses in respect of those who are incapable of shouldering that responsibility.¹⁶⁸¹

It may be a good innovation in this regard, the *Waqf* of Salah al-Deen al-Ayyuby, where he initiated what is named “*Waqful Mizaab*” (endowment of spout). It was fixed in one of the gates of Damascus, a spout that flows milk and another of liquefied sugar water, purposely for poor women who used to come after every two days to get milk and sugar for their children.¹⁶⁸²

In the same vein, *al-waqf* recorded great successes in Providing Care to Sick Persons. Psychiatric hospitals are regarded as the most apparent and noticeable aid in the history of Islamic civilization in the past centuries. It is obvious that their foundation and establishment was premised solely on endowment, be it initial, developmental and training of the workers therein. Many psychiatrics appeared in this foundation, outstanding among them are:

- Al-Adhdy Psychiatric in Baghdad
- Al-Noory Psychiatric in Damascus
- Al-Mansoori Psychiatric in Egypt

Patients in these hospitals were provided with adequate health services. Apart from food and cloth given to the patients, there were additional public services rendered to them. Interestingly, there was an exclusive psychiatric hospital for the poor only, where they were provided with free health care. This is equally what was established by Nuru al-deen Zanki in Damascus, which clearly implies the move and struggle towards the attainment of general objective of the *waqf* institution.

¹⁶⁸⁰ Ameen, Op cit, p. 134- 135.

¹⁶⁸¹ Al-Saba’iy, M, (nd) *Min Rawa’i’i Hadharatina*, World Muslim Students’ Society, Kuwait, p. 181- 182.

¹⁶⁸² Ashoor, Op cit, v: 3, p. 342-353.

Among the vital services offered by these hospitals, were catering for patients even after their discharge from the hospital, every patient was given enough livelihood to assist him before he fully regains back his strength. This is peculiar to the hospital of al-Mansoori. In fact, their care for patients extends even after death. It was stated in one of endowments document: “The *nazirul waqf* (endowment administrator) is to dispose of in what becomes necessary, such as shrouding who ever dies among the patients and taking care of the mentally defective persons both men and women, thus, these include fare for bathing, clothing, perfume, grave digging and the total funeral services, according to the dictates of the sharia”.¹⁶⁸³

1.4 Legality of *Waqf*

According to majority of the jurists, *waqf* contract is valid, thus, it is permissible and is among the benevolent meritorious practices. According to Shiekh Abdurahman bin al-Qasim, narrating from the statement of al-Qurtuby: “There is no disagreement among the jurists regarding the validity of endowment of *al-Qanateer* (gold and silver) and Mosques, however, they differ on its validity over other subject matters (properties)”¹⁶⁸⁴. Similarly, Ibn Qudamah al-Maqdisy states that; many scholars among the righteous predecessors and those after them upheld that; *waqf* contract is lawful and valid.¹⁶⁸⁵ The origin upon which the legality of *waqf* is based in Islam is the *Qur'an*, *hadith*, and *ijma*:

In the *Qur'an*: *Qur'an*: The Holy *Qur'an* has, in different occasions, urged and exhorted the believers to carry out good deeds, kindness and benevolence to the general Ummah, which is exactly what *al-Waqf* is advocating for, some of these provisions are:

It is not righteousness that you turn your faces towards east or west;
but it is righteousness to believe in Allah and the last day, and the
Angels, and the Book, and the messengers; to spend of your
substance, out of love for him, for your kin, for orphans, for the

¹⁶⁸³ Ameen, Op cit, p. 177.

¹⁶⁸⁴ Qasim, A, (1403) *Hashiyat al-Raudh al-Murabba'*, v: 5, p. 530.

¹⁶⁸⁵ Ibn Qudmah, op cit; v: 8, p. 204.

needy, for wayfarer, for those who ask, and for the ransom of slaves...¹⁶⁸⁶

“...But if you remit it by way of charity that is best for you if you only know”¹⁶⁸⁷

“...whatever good you give, shall be rendered back to you and you shall not be dealt with unjustly”¹⁶⁸⁸

“By no means shall you attain righteousness unless you give (freely) of that which you love: and whatever you give Allah know it well”¹⁶⁸⁹

“...of the good that they do nothing will be rejected of them for Allah knows well those that do right”¹⁶⁹⁰

The above invoked Quranic authorities have categorically explained the directives of Almighty Allah upon his servants to give out *sadaqah* from their lawful, best and most liked wealth or property in order to please Him and to attain spiritual excellence. This involves the obligatory *sadaqah*, such as *zakah* and expiation (*kaffarah*), and the meritorious *sadaqah*, such as the various ways of charitable sacrifices which includes the endowment. Thus, the above verses of the holy *Qur'an* have provided for the legality of *waqf* in the generic form.¹⁶⁹¹

In the *Hadith*: There are numerous theoretical and practical traditions of the Holy prophet that legitimize the institution of *waqf* under Islamic law, to mention but few we invoke the following:

Umar has gotten a piece of land in *Khaibar*, he then informed the Holy Prophet thus: I have gotten a land in *khaibar*, I never had money (property) precious like it. What will you command me to

¹⁶⁸⁶ Qur'an; 2:188

¹⁶⁸⁷ Qur'an; 2: 280

¹⁶⁸⁸ Qur'an ;2: 272

¹⁶⁸⁹ Qur'an; 3:92

¹⁶⁹⁰ Qur'an ;3: 115

¹⁶⁹¹ Ibn Kathir, A. A, (1989), *Tafsir al-Qur'an al-Azeem*, Al-Matba'ah al-Imiyyah, Beirut, 2nd edition, v:1, p.348.

do? He answered: “if you like you detain its source and sacrifice it (the fruits)” thus, Umar gave it out as *sadaqah*, and stipulated a clause that the source shall not be sold, nor shall it be given out as gift, and shall not be inherited. It shall be used by the poor, relatives, slaves, in the cause of Allah, stranger, and the wayfarer. No harm on whoever becomes in charge of managing this property to justly and reasonably use it and feed his poor intimate (not rich)¹⁶⁹².

Another *hadith* reads:

“If the son of Adam dies, his deeds (upon which he earns reward) are suspended except in three issues; *Sadaqatun Jariyah* (continuous *sadaah*), or beneficial knowledge (that he taught others), or an upright son who prays for him”¹⁶⁹³

In his comments on this *hadith*, Imam al-Nawawy states that: *waqf* is *sadaqatun jariyah* (the continuous *sadaqah*), and the *hadith* indicates the validity of the institution of *waqf* and its enormous reward.

One of the practical *sunnah* of the Holy Prophet (SAW) in this regard is his action concerning the property of *Mukhaireeq*, which are the seven fenced gardens in the city of Madinah. Where he (the *Muhaireeq*) bequeathed that: if he dies in the battle of Uhud, the property in question shall be vested in the hands of Muhammad (SAW); he shall dispose it of in accordance with Allah’s guide. Eventually, *Mukhaireeq* was killed on that day while embracing the Jewish faith. The Holy Prophet (SAW) then said: “*Mukhaireeq* is the best Jew”. He thereafter, collected the seven gardens and endowed it for the sake of Allah, and that was the first endowment that took place in Madinah¹⁶⁹⁴.

In the *ijma’*, Umar bin al-Khattab endowed, and then, many companions did endow. According to Jabir (RA): There is no one, capable of endowing among the *Sahabah* who has not endowed. This amounts to an express consensus since it was not opposed or

¹⁶⁹² Al-Bukhari, M. A, (1401) *Sahih al-Bukhari*, Dar al-Qalm, Beirut, v: 3, p. 1019. See also Al-Nawawy, M. A, (1414) *Sahih Muslim*, Dar al-Khair, Beirut, v: 4, p. 254

¹⁶⁹³ Ibid

¹⁶⁹⁴ Ibn Kathir, A. I, (1410) *Al-Seerah al-Nabawiyah*, Dar al-Fikr Beirut. See also Al-Asqalaany, I. H, (1407) *Fath al- Baary*, Dar Al-Rayyan Li-Turath, Cairo (1407) v: 6, p. 234.

rejected by one of them¹⁶⁹⁵. Furthermore, many scholars have reported a consensus regarding the legality of *waqf*, thus, Ibn al-Muflih says: “This is considered as the consensus of the companions may Allah be pleased with them”¹⁶⁹⁶

1.5 Pillars of *Waqf*

Al-Waqf as other gratuitous contract requires elements for its successful conduct. The pillars are:

- a) ***Al-Waqif (the endower)***, who is the owner of the endowed property; jurists have stipulated that he should be adult, sane, free, in full possession of the endowed property and of prudent judgment. Similarly, he should not be subjected to legal interdiction for being feeble minded or as a result of his neglect over the ruling of the judge, he should be acting on free will, he should not be bankrupt, he should not be attacked by death sickness and should not be an apostate.
- b) ***Al-Mauquf, the endowed property***; that is the endowed property upon which the rules of endowment apply. Similarly, jurists have stipulated that; the endowed property should be valuable (*maal mutaqawwim*), it should be an endowed property that which the *sharia* has permitted, it should be owned by the donor during the conduct of the endowment, and it should be communal not separated.
- c) ***Al-Mauquf alaihi, Jihaatul muntafi’a (the beneficiary)***; Jurists have also stipulated here that; the beneficiary should be capable of possession, he should be known and should be one of the charitable institutions and should be upright.
- d) ***Al-Sighah, the formula***, or the *Aqd* which is only *Ijaab* (an offer) in this case. This offer is valid whenever the endower expresses considerable legal statement, whether with clear wordings, i.e, express or implied statement, so long as it is expressed with an indication that refers to *waqf*¹⁶⁹⁷.

1.6 The Unique Nature of *Waqf*

¹⁶⁹⁵ Ibn Qudamah, Op cit, v: 6, p. 599.

¹⁶⁹⁶ Ibn al-Muflih, I. M, (1996) *Al-Mubdi’ fi Sharh al-Muqni’* Al-Dar al-Ilmiyyah, Beirut, 1st edition, v:5, p. 204.

¹⁶⁹⁷ Al-Zarqa’, M, (1418) *Ahkam al-awqaaf*, Dar al-Ammaar, Oman, p.38- 41.

Institution of *waqf* is a philanthropic project that existed long ago in different forms. Although there is a sort of controversy, whether it is in the same form and manner as it was in the past civilizations? What is important is to apparently state that; endowment with its current mode is a unique system and shall forever remain an exclusive credit to Islam, which cannot be compared with other civilizations or other systems. This is attributed to some reasons namely:

- a) Its relevance and connection to the populace, and the extensiveness of its open gallery to matters that closely and directly affect and touch lives of humanity.
- b) In the past civilizations, *waqf* was not urged and supported with detailed legal exertion, in such a way that it governs and protects the general conduct of *waqf*, as it is beautifully enshrined under Islamic law¹⁶⁹⁸.
- c) Unrestricted nature of *waqf* to cater for only worship places, as it was in the past religions. But in Islamic law, its benefit transcends to all charitable schemes.
- d) Universalism of the benefits of *waqf* to include even non-believers (free non-Muslims enjoying Muslims protection). It is legally right for a Muslim to give endowment to *dhimmi*. The authority to this is contained in the statement of Safiyyah (the wife of the Holy Prophet, SAW) where she said: "I endowed to a brother of mine who is a Jew"¹⁶⁹⁹.

1.6 Distinct Features of Islamic Endowment (*Al-Waqf Al-Islamy*)

Al-waqf under Islamic law or system is well distinguished from other philanthropic projects with many peculiarities and merits, that are not found in other benevolent schemes. These peculiarities conferred a continual energy and vigor to the existence and effectiveness of Islamic *waqf* in the past centuries. Some of these distinctions are:¹⁷⁰⁰

- a) **The institution of endowment is divine not man made;** it is a unique system that is peculiar to Islam, it was not known during the periods of *jahiliyyah* and as

¹⁶⁹⁸ Zareeq, B, (1410) *Nizaam al-Waqf khususiyyatun Islamiyyah*, Al- Faisal Journal, p. 14.

¹⁶⁹⁹ Ibn Qudamah, A, Op cit, v: 5, p. 646.

¹⁷⁰⁰ Al-Najjar, W, (2008), *Athar al-Waqf fi Tanmiyat al-Mujtama'* Al-Hai'ah al-Misriyyah li al-Kitab, 1st edition, pp. 34-39.

such it is a bestowed distinguished practice for Muslims. According to al-Shafi'iy: the people of *jahiliyyah* did not engage in any endowment relating to significant subject matter such as house or other landed property, thus it is exclusively for the Muslims. For this, the Islamic endowment is regarded as distinguished divine system that actualizes numerous benefits to the society.

- b) **Endowment is generic in nature;** Islamic endowment encompasses all forms of philanthropic activities, whether religious or worldly affairs. Thus, it contemplates; mosques, schools, universities, hospitals and other charitable institutions. Others include; the construction of well, roads and bore holes. Similarly, its effects are generic in nature because it affects the poor, the needy, scholars, students, and the *mujahideen*. Thus, it covers areas of life; political, economic, educational, social, and medical etc.
- c) **Islam has given and provided a full freedom to the *waqif*** (donor) on how to dispose of his endowed property according to the stipulations and conditions inserted therein, In order to attain and actualize his objectives and ambitions in respect of the endowed property, however, it must be in conformity with the provisions of sharia in that respect.¹⁷⁰¹ This is compatible to the juristic principle that affirms: “*Shurutul Waqif kan-Nusus al-Shari*” (The conditions stipulated by the donor (*al-Waqif*) are like the legal textual wordings). But it must not contradict the textual wordings (*Nusus*), otherwise, as averred by Ibnul Qayyim: “it is lawful, and even preferable to contradict and abolish the conditions of *Waqif* in the course of upholding what is beneficial for him.
- d) **Continuity and constancy;** a distinct feature of endowment under Islamic law is that it is permanent continuous and not to be vitiated or destroyed. This will go a long way in providing of services and benefits to the present and forthcoming generations. Thus, perpetuity is one of the conditions of endowment as it is for the attainment of reward in this world and the hereafter. However, jurists have argued on the validity of temporary endowment in which

¹⁷⁰¹ Abu-Sulaiman, A, (1420) *Al-Waqf mafhoomuh wa-Maqasiduh*, Nadwat al-Maktabaat al-Waqfiyyah, Madinah, p. 17.

some, including the Maliki School, have subscribed to its permissibility upon fulfilment of some conditions. furthermore, the reward of endowment is perpetual without any obstruction provided the benefit of the endowed corporeal property subsists. The reward may even be multiple if the *Nazirul Waqf* (manager of the endowment) does well in developing and investing it according to the changing circumstances of every epoch.

- e) **Independence;** Islamic endowment is an independent system different from other gratuitous contracts. Thus, there is a great limitation in the management of the endowed property, it is not to be sold, gifted or inherited. Its source of income and benefits shall be prudently managed and shall not be subjected to any form of negligence.
- f) ***Al-Waqf* under Islamic law is distinctive in regard to the flexibility of its rules;** which gives right to the endower to terminate the endowment at unstipulated period (as it is valid in Maliki School of Law) because of the circumstantial family problems encountered by the donor, which shall necessitate such a termination of the *Waqf*. Especially, what is stated in the *Sunnah* concerning *Waqf* is general rule which is generic in nature, i.e. to detain the origin of *waqf* and sacrifice the fruits". But the detailed rules concerning endowment promulgated in the books of *Fiqh* are virtually matters of exertion and analogical deduction; thus, it is open for further juristic views and opinions. Except that jurists have unanimous agreed that *Waqf* must be conducted based on sacrifice for the sake of Allah¹⁷⁰²
- g) **Growth and benefit;** it is imperative for endowment to device means for increase and growth in order to widen its benefits and services and to support its continuity and perpetuity. Thus, whenever institution of *waqf* increases automatically the benefits and services will increase to accommodate the needs of the Ummah and as such, the chances for its perpetuity would be guaranteed.

1.7Types of *Waqf*

¹⁷⁰² Al-Zarqa', M, Op cit, p: 19.

Jurists have classified *waqf* into various divisions in accordance with the perspective or dimension upon which the classification is made. However, the popular method of the classification is as follows

- a) ***Al-Waqf al-Diny (Religious endowment)***; this is the endowment made purposely for the acts of worship in its specific meaning. Such as the endowment of mosque and other worship places.
- b) ***Al-Waqf al-dhury or al-Ahly (Family endowment)***; it is the endowment that dedicates its fruits, services or dividends to the family members of the donor such as his wives, children, grandchildren and other family members and relatives or for both of them, or that which is dedicated to a specific person and thereafter to one of the charitable institutions. The objective of this endowment is to safeguard properties from being sold or from being subjected to a wrong disposition by the legal heirs.
- c) ***Al-Waqf al-Khairiy al-Aam (General charitable endowment)***; it is the endowment that dedicates its dividends, services or fruits to charitable institutions of perpetual nature. It is named charitable because its benefits are limited to the scope and intents of charitable institutions, such as; the poor, the needy and students.
- d) ***Al-Waqf al-Mushtarak (Joint endowment)***; it is the endowment that dedicates some part of its benefits to the family members and other dividends to the charitable institutions.¹⁷⁰³

From the foregoing, it is construed that; endowment regardless of its class; whether charitable, family or joint *waqf*, it encompasses all types of charities (*Sadaqat*) and righteous deeds. Thus, it ensures and accomplishes the noble objective of the *sharia* regarding the actualization of the public insurance in the society, and as such it strengthens the cordial relationship and fosters Islamic brotherhood.

1.8 The Philosophy and Wisdom of *Waqf*

¹⁷⁰³ Hasheesh, A, (1435), *Al-Wasayah wa al-Waqf*, Al-Matabi' al-Su'udiyyah, Riyadh, 1st edition, p. 32.

Endowment as a gratuitous contract has benefits, objectives, and various wisdoms. In the first instance, it is an act of worship of Allah offered by servants. So also, the *waqf* institution has positively contributed to the development the Islamic society over the years in different ramifications. The benefits and wisdoms of *waqf* may be summarized as follows:¹⁷⁰⁴

- a) Endowment opens the door for closeness to Almighty Allah, earning more reward from Him, and obedience to Allah through giving out *sadaqah* in various facets of charitable institutions.
- b) It is an endless way for the acquisition of reward by the believer even after his death and the stoppage of his deeds on the earth.
- c) Actualization of numerous interests of the Muslim community from various schemes of endowment which have direct effect to the public interests, such as; the construction of mosques, schools and other educational places.
- d) Endowment has contributed to the development of medical services rendered to the general public. This is attained through the specific endowments dedicated for hospitals and clinics as well as the funding of researches which are relevant to the medical practices.
- e) Endowment is one of the best insurance schemes that synergizes the cordial relationship among the members of the public. This has been attained through the exclusive endowment given to the poor and needy.
- f) Endowment has also contributed to the maintenance of social justice through the family endowment that which is made in favour of relatives and other vulnerable group of persons, such as; the widows and orphans.
- g) Endowment has a positive effect to the infrastructural development of the state through the compliments of the endowment capital projects, such as; the construction of roads, bridges, wells, bore holes, etc. just like the effect of the endowment dedicated for the security and defense of the state.

1.9 Challenges of the Institutions of *Waqf* in the Contemporary Time

¹⁷⁰⁴ Shafi'iy, Z, (2001) *Nahw Tatweer Siyagh al-Waqf al-Islamy*, Dar al-Shuruq, Cairo, 3rd edition, p. 62.

Contracts are generally confronted with numerous challenges by the change of time, nature and place. Endowment as a gratuitous contract is not exempted from these general challenges. Thus, this segment seeks to examine some important challenges affecting the conduct and smooth running of the institution of *waqf* in our contemporary time:

- a) **Lack of adequate knowledge regarding the concept of *waqf* among the general public.** Many people do not differentiate between normal *sadaqah*, *zakah* and *waqf*. That is why the practice is yet to have the deserved popularity among the general public
- b) **Violation of the Islamic principles and procedures governing the conduct of *waqf*.** For instance, the sale, gift or inheriting the endowed property. However, jurists have permitted the sale of the endowed property whenever its benefits ceased to exist upon the fulfilment of certain conditions.
- c) **Mismanagement of the endowed funds and properties.** This may occur as a result of the absence of piety and integrity among the general ummah as well as neglecting the rules and regulations for the establishment and management of *waqf* institution. For instance, the registration, etc.
- d) **Lack of adequate subsidiary legislation;** It is argued that, the provision of the constitution of Nigeria 1999 (as amended), subjecting *waqf* to the jurisdiction of the Sharia Court of Appeal without any further regulation in form of an Act does not really cater for the needs of Nigerian Muslims and the economy of the country. In fact, the so-called Muslims states in the country are still groping in the darkness of colonial laws of trusts.
- e) **Poor documentation of the contract of *waqf*;** Sharia students and lawyers are not trained on precedents under Islamic law even though legal drafting exists and there are peculiar precedents provided in various books of Islamic jurisprudence. Thus, in a survey conducted on the practice of Nigerian lawyers on drafting *waqf* deeds about 80% of the respondents disclosed that they have never prepared such a document and as such they lack the necessary knowledge and expertise of the drafting.

- f) **Inadequate support and patronage from the Government**; it is quite disheartening to note that the patronage giving to the general practice of endowment by the local, state and federal governments is negligible compared to the practice in other advanced jurisdictions. If not of the Sokoto state, Zakkah da *Waqafi*, the Zamfara state Zakat and Endowment Board, Kano and some other little ones, the term *waqf* would have not heard talk less of its popularization in the country.

1.10 How to revive the utmost functions of *Al-Waqf* for societal development

Vivid concern in respect of *al-Waqf* has been developing rapidly and continuously. We consider *al-waqf* as the driver of massive and generic growth and advancement for Muslim Ummah in the nearest future *insha'Allah*. Some of the glad tidings already at hand are; establishment of ministries for endowments in many Islamic states, creation of *waqf* registry in the Sharia Court of Appeal, FCT, Abuja, and Kaduna, enactment of *waqf* laws by the Sokoto State house of Assembly, so also organizing seminars and conferences on the necessity, significance and effects of endowments in general development of the society. Only that a heavy rain commences by a mere drop. Perhaps, one of the steering organs is the involvement of government in these activities.

It is pertinent to promulgate here that; it is high time for massive call towards reviving endowment to its natural position in the Muslim world generally and in Nigeria specifically.

The following are some humble suggestions on how to revive the real functions of endowment in the field of societal care, they are:

- To embark on a sort of guidance campaign and public enlightenment aimed at exhibiting and exposing values of charity and the rewards of spending for the sake of Allah. Especially the *Sadaqah Jariyah* (*al-Waqf* in this context). These will no doubt assist in reviving the *waqf* institution so much so that it fully performs its role in the society as it was during the glorious epochs.
- Organizing educational seminars and conferences on endowment in order to publicize it in a broad, successive, and progressive manner, in such a way that participation will include all Muslim states and not limiting it to the local levels.

- Designing programs on the functions and roles of societal endowment in Islamic law to be broadcasted through mass media, with much emphasis on the pressing need for varieties in disbursed areas of *al-Waqf* according to the societal pressing demands, which will accommodate and fill the societal gaps that are not covered by government or even not touched at all. By so doing, Muslim society will be motivated or induced to embrace this kind gesture for its good effects in the general development of the society.
- Reproduction of the conference's materials on *al-Waqf*, and publishing them in journals periodicals, magazines and even in form of books, to be distributed and made available in the market for sale, not only restricting on free distribution.
- To enact adequate subsidiary laws to regulate the management of *awqaf* properties. It is concluded that, the economic benefits of *awqaf* can only be harnessed when there is effective legal regulation in the country, and by that, the economic benefits of the institution will be felt and enjoyed by all. Similarly, it is important to educate the learned judges on the general contemplation the constitution Sections 262 (2) (c) and 277 (2) (c), which expressly listed *waqf* as an Islamic personal law matter and conferred it a constitutional legality in the country, can be further interpreted to contemplate all matters revolving the *waqf* and other public institutions. That is to say, the disputes involving general management of mosques and other endowed properties shall be heard and determined by the Sharia Court of Appeal to the total exclusion of other courts (The court shall be competent to decide: any question of Islamic law regarding *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim).
- Mosques, religious centers and other public institutions should follow the modern nomenclature and procedures in its establishment, management and execution of its policies. Issues like the registration with CAC, provision of an official bank account, purchase of shares in relevant companies, collaborations with local and international organizations and proper utilization of the media outfits should not be alien to the Islamic institutions in this digital era.

- The Committee of Grand Kadis in Liaison with the National Judicial Institute and other relevant institutions, such as the CILS should develop a plan of training lawyers on waqf and develop and implement a mentoring system where Nigerian lawyers may be mentored by lawyers from other jurisdictions on how to prepare and manage waqf to engender the practice so that the system will be well entrenched in the country.
- Looking at the possibility of establishing private sector on endowment enjoys a high level of independence and autonomy, plus a wide range of flexibility. It should be established in such a way that it does not solely depend on government and not relying on the populace. Such kinds of endowment systems enjoy a higher degree of administrative and financial flexibility, through administrative and executive councils directly. And thus, this sector will actualize a sort of independence. Endowment's services are the services that care for people's interests and happiness in property's acquisition and disposal, be it buying and selling, lease, construction and rehabilitation, and distribution of endowment's fruits to legal beneficiaries. And this will be attained through discarding the administrative routine which may hinder and obstruct these liberal disposals, and as such, chances for realizing people's benefits and joy will be missed¹⁷⁰⁵.
- Solid investment regarding endowment fund with sincere and honest running and supervision, in order to save the source and benefit and ensure increase of profits continuously and justifiably.

1.11 Conclusion

From the above vivid discussions on the role of endowment (*waqf*) in the sustainability of religious institutions under the *Sharia*, it becomes apparent that endowment is one of the workable tools for eliminating or, at least, reducing poverty to the barest minimum in the Muslim society. Similarly, it is a well-designed scheme for the sustainability and independence of religious institutions. The question of good

¹⁷⁰⁵ Ibid

administration and prudent management is a pre-requisite to the actualization of this goal, as far as the *waqf* contract is concerned.

Therefore, there is a great need for reviewing our current endowment systems, the enabling laws in the country and prospective dispute resolutions forum, with a view to studying and working out viable modalities which will conform to the general principles and philosophy of Islamic law, in struggle for going back to the practices of our predecessors and for universal social and economic benefit to be easily attained. Any attempt to gain from this contract without critical study of the past, present and developing the future upon that will prove in vain and will return with a negative impact and repercussion to the general society.

May Almighty Allah guide us to the right path and may He protect us from evil acts. Allah knows best.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

A CRITICAL REVIEW OF RESTITUTION UNDER THE NIGERIAN ARMED FORCES
ACT: TOWARDS A BROADER AND MORE EFFECTIVE FRAMEWORK

Al-Ameen Abubakar

Yusuf Bala Usman College of Education and Legal Studies Daura, Katsina State.

alamintek@gmail.com; 08036188757

Abstract;

This paper offers a doctrinal analysis of restitution under Section 174 of the Nigerian Armed Forces Act, situating it within broader theories of victim compensation and restorative justice. The study identifies four principal limitations: the section's narrow restriction to theft-related offences; ambiguous legislative language that excludes other property crimes; reliance on the physical recovery of assets; and the complete omission of restitution for victims of non-property crimes, including assault, murder, and rape. It advances the argument that restitution should apply to all crimes with identifiable victims, drawing on restorative justice theory, Aristotle's corrective justice to demonstrate the legitimacy of restitution in non-restitutable offences. Comparative insights from civilian criminal procedure and international victim rights frameworks underscore the need for reform. The paper recommends amending the Armed Forces Act to provide a broader statutory definition of restitution, extend coverage to non-property crimes, strengthen asset recovery mechanisms, and embed a victim-centred approach in military justice. Such reforms would align Nigeria's military legal system with contemporary global standards on victims' rights and ensure that restitution delivers both symbolic and practical redress.

Keywords: Restitution; Nigerian Armed Forces Act; Military Justice; Victim Compensation; Restorative Justice.

1.0 INTRODUCTION

Restitution is an integral part of the criminal justice system. Its aim is to restore victims, as far as possible, to their position before the offence. Section 174 of the Nigerian Armed Forces Act¹⁷⁰⁶ addresses restitution in cases involving theft and related offences. However, a critical analysis reveals that the scope of this provision is limited and fails to address the broader spectrum of criminal acts that harm victims including serious non-

¹⁷⁰⁶ CAP A20 The Laws of the Federation of Nigeria 2004

property offences such as assault, murder, and rape. This paper examines these limitations and proposes an expanded approach to restitution in military justice, drawing on legal theory, comparative law, and victim rights principles. This paper examines these limitations and proposes an expanded approach to restitution in military justice.

1.1 Statement of the Research Problem

The research problem addresses the inadequacies of Section 174 of the Nigerian Armed Forces Act in addressing a broader range of criminal acts that harm victims, beyond theft-related offenses. The absence of provisions for non-property crimes, limits the law's capacity to meet the needs of victims. This limitation hinders the effectiveness of restitution in military justice and often leaves ordinary victims wondering the purpose of the Justice System. This shortcoming undermines confidence in the military justice system.

1.2 Objective of the Research

1. To identify the limitations of Section 174 of the Nigerian Armed Forces Act in addressing restitution for victims of both property and non-property crimes.
2. To propose reforms that will widen the scope of restitution within the Nigerian Military Justice system to ensure comprehensive victim compensation.
3. To evaluate the implications of these proposed reforms on enhancing the effectiveness of the restitution framework under the Nigerian Armed Forces Act.

1.3 Methodology of the Research

This paper employs a doctrinal research methodology, analyzing legal provisions, judicial interpretations, and scholarly literature related to restitution under the Nigerian Armed Forces Act. Case law analysis and comparative legal studies are also utilized to assess the efficacy of existing restitution frameworks.

2.0 HISTORICAL DEVELOPMENT OF RESTITUTION

The concept of restitution has its roots in various ancient legal systems from time immemorial. Restitution used to be the primary form of justice and almost the only

purpose. In these early societies, the focus was on compensating victims rather than punishing offenders. We will briefly evaluate the historical development of Restitution within these laws.

- 1.1 Code of Hammurabi (circa 1754 BC):** One of the oldest recorded legal codes, the Babylonian Code of Hammurabi, included numerous provisions for restitution. For example, if someone stole property, they were required to repay the value of the stolen goods multiple times over under the code.¹⁷⁰⁷
- 2.2 Mosaic Law (circa 1200 BC):** The laws of the ancient Israelites, as recorded in the Torah, also emphasized restitution. For instance, Exodus 22:1-4 prescribes that a thief must pay back double what was stolen or, in some cases, up to five times the value of the stolen animal. This not only compensated the victim but also served as a deterrent against theft.¹⁷⁰⁸
- 2.3 Roman Law (circa 450 BC - 500 AD):** Roman law included provisions for restitution, particularly in cases of theft and property damage. The Twelve Tables, Rome's earliest legal code, required thieves to repay multiple times the value of stolen goods. Under later Roman law, victims could claim restitution through a legal process known as "actio furti" (action of theft).¹⁷⁰⁹
- 2.4 Islamic Law:** Islamic Law has strict guidelines on restitution especially for bodily crimes a concept of blood money known as 'Diya' has guidelines for Manslaughter/Murder and even the loss of limbs or mere injuries as provided in Quran 2:178. It also recognizes restitution in property related offences such as theft, Property Damage or any unjust enrichment.¹⁷¹⁰
- 2.5 Medieval Europe:** Restitution remained significant during this period, particularly in Germanic and Anglo-Saxon law. Early Germanic tribes had a system of "wergild" (man-price), where offenders were required to pay a fixed sum to the victim or their family as compensation for injury or death. This was intended to prevent blood feuds

¹⁷⁰⁷ B, E. H., & Harper, R. F. (1904). The Code of Hammurabi. *the American Law Register*, 52(9), 598. <https://doi.org/10.2307/3306854>

¹⁷⁰⁸ Lightner, C. A. (1911). The Mosaic Law. *Michigan Law Review*, 10(2), 108. <https://doi.org/10.2307/1276488>

¹⁷⁰⁹ Stein, P. (1999). *Roman Law in European History*. <https://doi.org/10.1017/cbo9780511814723>

¹⁷¹⁰ Absar, A. A. (2020). Restorative Justice in Islam with Special Reference to the Concept of Diyya. *Journal of Victimology and Victim Justice*, 3(1), 38–56. <https://doi.org/10.1177/2516606920927277>

by providing a formal method of compensation. In England, prior to the Norman Conquest, Anglo-Saxon legal traditions emphasized compensatory justice. Offenders were required to pay "bot" (compensation) to victims for various types of harm, including theft, injury, and death. This system was designed to maintain social order and avoid personal vendettas.¹⁷¹¹

2.6 Transition to State-Centric Justice: Gradually the concept of supremacy of the State began to get traction across the world. Centralized states began to formalize their legal systems especially in Europe. Criminal justice system shifted its focus from compensating victims to punishing offenders. States gradually replaced restitution with penalties, such as fines and imprisonment. Rendering victims of crimes hopeless and without interest in the outcome of criminal trials in which they are victims.¹⁷¹²

2.7 Early Modern Period: By the 17th and 18th centuries, European legal systems increasingly focused on retributive justice. Restitution was made subordinate to fines, imprisonment, and other state-centric punishments. However, certain legal theorists, such as Cesare Beccaria, advocated for more humane and rational approaches to criminal justice, which included elements of restitution.¹⁷¹³

2.8 Modern Developments In the 20th and 21st centuries, there has been a resurgence of interest in restitution, driven by the rise of restorative justice and victim rights movements. Modern legal systems now recognize the importance of compensating victims alongside punishing offenders.¹⁷¹⁴ Towards the end of the 20th century, there are movements of restorative justice that are emphasizing on repairing the harm caused by criminal behavior. The aim is to bring victims, offenders, and the community together to facilitate healing and restitution. This approach has been influential in shaping contemporary restitution practices.

2.9 Nigerian Laws; In Nigeria the Penal Codes of various northern states, the Criminal Codes of various southern states, Advance Fee Fraud Act and many other penal legislations have made provisions towards compensating victims of crimes.

¹⁷¹¹ Barnett, R. E. (1977). Restitution: A New Paradigm of Criminal Justice. *Ethics*, 87(4), 279–301.
<https://doi.org/10.1086/292043>

¹⁷¹² *ibid*

¹⁷¹³ *ibid*

¹⁷¹⁴ *ibid*

However, whether these provisions are adequate is a separate discuss on its own. The recent massive overhaul of Criminal Justice Administration with the advent of Administration of Criminal Justice Act and Laws in various states has given much emphasis on restitution and compensation though still subservient to the interest of the State to punish offenders.¹⁷¹⁵ The Armed forces Act is not so lucky to enjoy these reforms as, the Administration of Criminal Justice Act is not applicable to court martial proceedings.

3.0 RESTITUTION UNDER THE NIGERIAN ARMED FORCES ACT

The principle of restitution has been long established in legal systems as a means to ensure justice by compensating victims for their losses. In military law, restitution serves the dual purpose of compensating victims and maintaining discipline within the armed forces. Section 174 of the Nigerian Armed Forces Act provides specific procedures for restitution but is restricted to property unlawfully obtained through theft or related offences. An Overview of Section 174 of AFA will reveal the following;

Section 174 of AFA detailed the procedure for handling situations where a Person subject to service Law is convicted by a court-martial for stealing, receiving or retaining it knowing or having reason to believe it to have been stolen, fraudulently misapplied or otherwise.¹⁷¹⁶ If the unlawfully obtained property is found in the possession of the offender, the court-martial may order that it be returned to the person who appears to be its rightful owner.¹⁷¹⁷

In cases where the property obtained unlawfully has been converted or exchanged into another form, the property found in the offender's possession that resulted from such conversion or exchange may also be ordered to be delivered to the rightful owner of the originally stolen property.¹⁷¹⁸ When money is found in the possession of the offender, the court-martial may order that a specified amount be paid from this money to the

¹⁷¹⁵ See Section 319-328 Administration of Criminal Justice Act 2005

¹⁷¹⁶ 174(1) of Armed Forces Act

¹⁷¹⁷ Ibid 174(2)

¹⁷¹⁸ Ibid 174(3) & (6)

person appearing to be the owner of the unlawfully obtained property, as compensation for their loss.¹⁷¹⁹

Furthermore, if the unlawfully obtained property has been sold or pawned to a person who did not know it was stolen, an order can be made to compensate this person from any money found in the offender's possession, while ensuring the original owner receives restitution of their property. Similarly, if the property was given in exchange to an unsuspecting person, the order may include returning the exchanged property to this person, subject to the original owner receiving their property back.¹⁷²⁰

The authority to issue such orders lies with the court-martial that convicted the offender, the confirming authority, or any reviewing authority. However, an order made by a court-martial requires confirmation to take effect, and the processes for confirmation and review apply to these orders just as they do to sentences.¹⁷²¹ Which means a reviewing authority may lessen the amount of compensation ordered by the court martial but it cannot increase it.

If an Appeal is filed, the execution of such orders is suspended until the period for lodging an appeal expires. The suspension continues until the appeal is resolved. Should the conviction be overturned on appeal, the restitution order does not take effect. The Court of Appeal may also annul or modify the order even if the conviction is upheld. During the suspension period, measures must be taken to ensure the safe custody of the property or money involved.¹⁷²²

In some cases, the court may direct that the property be delivered to its rightful owner immediately if there is no dispute over ownership. The order does not prevent others, except the offender or those claiming through them, from recovering property delivered or paid under the order.¹⁷²³

¹⁷¹⁹ 174(4)

¹⁷²⁰ Ibid 174(6)

¹⁷²¹ Ibid 174(7)

¹⁷²² Ibid 174(9)

¹⁷²³ Ibid 174(10)

The term "appearing" in the section refers to what reasonably seems to the court-martial, confirming authority, or reviewing authority making the order to be the case regarding ownership of the property.¹⁷²⁴

The Section was interpreted in the case of *OLUFEMI v. NIGERIAN ARMY* (2022) LPELR-58041(CA), the appellant challenged a restitution order made against him by a General Court Martial. Justice Tobi, J.C.A held;

"The Appellant is challenging the consequential order to retribute. The General Court Martial gave the consequential order pursuant to Section 174 (1) & (7) of the Armed forces Act. The side note reads restitution and compensation for theft. The impression created is that a person convicted for theft may be asked to refund the money by way of restitution. I will quote the provisions under which the Court martial made the consequential order. Section 174 (1) provides thus;

"The following provisions of this section shall have effect where a person has been convicted by a Court-martial of unlawfully obtaining a property, whether by stealing, receiving or retaining it knowing or having reason to believe it to have been stolen, fraudulently misapplied or otherwise."

The next relevant provision is subsection 4 which provides thus:

"Where money is found in the possession of the offender, then whether or not it appears to have been unlawfully obtained, an order may be made that there shall be paid out of that money to the person appearing to be the owner of the property unlawfully obtained such sum as may be specified in the order as or towards compensation for the loss caused to the person by the offender, in so far as not otherwise made good under this Act or by recovery of the property unlawfully obtained."

Subsection 7 of the same Section 174 of Armed Forces Act provides thus:

"An order under this section may be made by the Court-martial by which the offender is convicted or by the confirming authority or any reviewing authority, but an order under this section made by a Court-martial shall not have effect until it is confirmed by the confirming authority and the provisions of this part of this Act as to the confirmation and review of the proceedings of a Court-martial shall apply to an order under this section as they apply to a sentence."

I have looked at those provisions again and again I am unable to see where the Court martial derived its power to make an order of restitution. By Section 174 (1), the order can only be made against the Appellant if he has been convicted of obtaining a property by stealing. This does not apply here as the Appellant was not convicted for obtaining a property by stealing. Subsection 4 which relates specifically to money will be restituted if the offender is in possession of the money.

¹⁷²⁴ Ibid 174(12)

There is no such evidence in the lower Court. Subsection 7 cannot be read in isolation as the conviction must be in relation to the matters stated in Subsections 1-6. I cannot seem to agree with the General Court Martial in making an order of restitution and the confirmation of the order by the confirming authority." Per TOBI, J.C.A in OLUFEMI v. NIGERIAN ARMY (2022) LPELR-58041(CA) (Pp. 55-58 paras. F)

4.0 REVIEW OF SECTION 174 OF THE ARMED FORCES ACT

Section 174 of AFA made an attempt to cater for victims of property crimes. The section is short of achieving this objective for at least four main reasons;

The section emphasizes theft-related offenses, while downplaying other property-related offenses such as fraud and breach of trust. The phrase "*fraudulently misapplied or otherwise*" is mentioned casually in the section. This introduces ambiguity. Perhaps it is this ambiguity that led to Justice Tobi's interpretation in the case of Olufemi v. Nigerian Army¹⁷²⁵. He overlooked or ignored this part of the act, leading him to conclude that only theft and offenses directly related to theft fall within the scope of this section. Though it maybe argued that fraudulent misapplication of property has been used in section 66 and 67 of the Act to probably imply misappropriation, the term does not have a categorical definition under the Act.

Justice Tobi's ruling highlights a critical issue with the language used in the section. The casual mention of "*fraudulently misapplied or otherwise*" does not adequately clarify the range of offenses covered. As a result, Justice Tobi focused solely on theft and its incidental offenses, excluding other forms of property-related crimes that could reasonably be considered under the scope of the section.

This oversight brings to fore the need for more precise legislative language to ensure comprehensive coverage of various property-related offenses, including fraud and breach of trust. Clearer wording would eliminate ambiguity and ensure that all relevant offenses are appropriately addressed under the law.

Secondly, another problem with the section is its emphasis on the requirement that money or property must be found in the possession of the convicted service personnel before it can be returned to the victim or an innocent purchaser without value. This

¹⁷²⁵ Supra

stipulation inherently means that if the perpetrator is adept at concealing their assets, the victim may be left without any restitution.

Practically, this means that the efficacy of the restitution process is dependent on the ability of investigators to locate the unlawfully obtained property or funds even if it has been proven that he is responsible for the victim's loss. If the convicted person manages to hide these assets successfully, the law offers no remedy for the victim, leaving them without compensation and in perpetual pain despite the finding that the perpetrator is guilty. This loophole undermines the objective of restitution, which is to make the victim whole again by ensuring he/she receives compensation for the losses incurred.

Therefore, the section's heavy reliance on the physical presence of assets in the convict's possession poses a substantial barrier to achieving justice and fairness for the victims. This highlights the need for reforms that would allow for more effective means of asset recovery and victim compensation, even when the perpetrator has concealed their ill-gotten gains. The recent Administration of Criminal Justice System has made novel provision in this regard by providing that order of restitution or compensation may be enforced as though it is a fine. That means, the convict may be sent to additional prison term in lieu of restitution or compensation. Thus, even if the assets are hidden, there is a strong possibility that the perpetrator will rather forfeit it than go for additional prison term.

Thirdly, the section or even the entire Act has completely ignored compensation to other victims of crimes under the Act. Particularly, those that suffered body-related crimes, such as Assault, Murder, Rape etc. These crimes are on the increase. Nigeria being a party to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁷²⁶ presupposes that every criminal legislation in Nigeria will put into consideration the need to provide succor to victims of crime in Nigeria.

A common criticism against expanding restitution to offences such as Assault, Murder, Rape etc is that such harm cannot be "undone" in the way stolen property can be

¹⁷²⁶ UNGA (1985), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985

returned. While no legal process can reverse the trauma of these crimes, this should not preclude measures aimed at restoring victims, as far as possible, to a state of dignity and stability.

An advocate of restorative justice theory Howard Zehr argues that justice must address “Who was harmed, what do they need, and whose obligation is it to meet those needs?”¹⁷²⁷ Restitution here is not limited to returning property; it extends to financial compensation, medical and psychological care, and public acknowledgment of the harm.

Aristotle’s Corrective justice theory seeks to restore balance between the wrongdoer and the victim through what he called ‘proportionate remedies’.¹⁷²⁸ When literal restoration is impossible, equivalent or substitute compensation serves as the next-best corrective mechanism. This reasoning supports restitutionary measures in non-restitutable offences to mitigate ongoing harm and prevent secondary victimisation.¹⁷²⁹

Excluding offences like Assault, Murder, Rape from the restitution framework effectively denies victims any tangible acknowledgment of harm. The Armed Forces Act should instead provide for comprehensive restitution packages combining monetary compensation, healthcare, counselling, and rehabilitative assistance. This approach recognises that full restoration is impossible but affirms that the justice system’s obligation to victims remains.

Fourthly, even within the scope of property offences the Act has not taken into consideration other damages or loss to property that other persons may suffer in the process of committing offences that may not have direct bearing on the property. For example, dangerous flying and low flying under sections 70 and 71 of the Act respectively may result in loss to a third party, and the Act made no provision for his compensation.

¹⁷²⁷ Zehr, H. (2002). *The Little Book of Restorative Justice*. Intercourse, PA: Good Books.

¹⁷²⁸ 3 Aristotle. (2000). *Nicomachean Ethics* (R. Crisp, Trans.). Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511802058>

¹⁷²⁹ Barnett, R. E. (1977). Restitution: A New Paradigm of Criminal Justice. *Ethics*, 87(4), 279–301. <https://doi.org/10.1086/292043>

Restitution must go beyond theft-related offences and even beyond the ‘fraudulently misapplied or otherwise’. The entire philosophy of making the victim whole again must be embraced. This principle should apply universally to all crimes that have identifiable victims. Limiting restitution to theft-related offences overlooks other major harms that may even go beyond property related offences.

5.0 Conclusions

5.1 Summary:

Restitution is a sine qua non component of the criminal justice system, aiming to redress the harm caused to victims by offenses. However, the existing framework under Section 174 of the Nigerian Armed Forces Act is grossly inadequate in addressing the diverse range of crimes and their impacts on victims within the military law context. This critical review identifies several deficiencies in the current system, necessitating urgent reforms to ensure a more equitable and effective approach to restitution.

5.2 Findings:

- 5.2.1** The language used in Section 174 lacks clarity and specificity, particularly regarding non-theft-related offenses. This ambiguity led to faulty judicial interpretations and negates the coverage needed for victim compensation. Thus, leaving victims with Justice without relief.
- 5.2.2** The requirement for assets to be physically found in the possession of the convicted personnel poses significant challenges to effective asset recovery and victim compensation. This limitation unfairly burdens victims or investigators thus further stunting the principle of making victims whole again.
- 5.2.3** The current framework overlooks victims of non-property crimes, such as assault, murder, and rape. Failing to provide avenues for compensation and restitution in these cases neglects the feelings and rights of victims and their desperate need for redress. The fact that the harm cannot be undone does not remove the obligation to make restitution where possible. Restitution in such cases can take the form of financial compensation, medical care, psychological support, and public acknowledgment. Restorative justice seeks to meet the needs

of the victim as far as possible, while corrective justice supports remedies that restore balance when full restoration is impossible.

- 5.2.4 Indirect victims, such as those affected by collateral damage or losses resulting from offenses, are not considered under the existing restitution framework. This omission further exacerbates the inequities in victim compensation and fails to address the broader impact of criminal acts.

5.3 Recommendations:

- 5.3.1 Section 174 should be amended to provide clear and comprehensive definitions of restitution, expanding its scope to cover a wider range of criminal acts beyond theft-related offenses. This includes incorporating provisions for restitution in non-property crimes and considering the impact on indirect victims.
- 5.3.2 Introduce mechanisms that facilitate asset recovery and victim compensation, even in cases where assets are concealed or difficult to trace. This may involve empowering courts with broader authority to ensure fair restitution such as the powers to give extra-punishments that will compel the convict to work towards giving succor to the victim.
- 5.3.3 Adopt a victim-centric approach to restitution, prioritizing the rights and needs of victims in the military justice system. This includes establishing specialized victim support services and ensuring access to legal remedies for all victims, regardless of the nature of the offense. And also, to allow for full participation of victims in the trial.
- 5.3.4 Provide comprehensive training and guidance to Judge Advocates, legal practitioners, and military personnel involved in court martial cases. This is crucial for fostering a consistent, mathematical and fair application of restitution principles and ensuring that victims receive timely and adequate redress.
- 5.3.5 Promote public awareness and advocacy initiatives to highlight the importance of restitution in military criminal justice system and advocate for reforms that prioritize victim rights and equitable compensation.

By implementing these recommendations, the Nigerian Armed Forces can establish a more robust and victim-centered restitution framework that upholds principles of fairness, equity, and accountability within the military justice system.

6.0 REFERENCES

- 1 Absar, A. A. (2020). Restorative Justice in Islam with Special Reference to the Concept of Diyya. *Journal of Victimology and Victim Justice*, 3(1), 38–56.
<https://doi.org/10.1177/2516606920927277>
- 2 Administration of Criminal Justice Act 2015
- 3 Armed Forces Act, CAP A20 The Laws of the Federation of Nigeria 2004.
- 4 Barnett, R. E. (1977). Restitution: A New Paradigm of Criminal Justice. *Ethics*, 87(4), 279–301. <https://doi.org/10.1086/292043>
- 5 B, E. H., & Harper, R. F. (1904). The Code of Hammurabi. *The American Law Register*, 52(9), 598. <https://doi.org/10.2307/3306854>
- 6 CAP A20 The Laws of the Federation of Nigeria 2004.
- 7 Lightner, C. A. (1911). The Mosaic Law. *Michigan Law Review*, 10(2), 108.
<https://doi.org/10.2307/1276488>
- 8 Stein, P. (1999). Roman Law in European History.
<https://doi.org/10.1017/cb09780511814723>
- 9 UNGA (1985). Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly resolution 40/34 of 29 November 1985.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN APPRAISAL OF THE ADMINISTRATION OF CRIMINAL JUSTICE LAW OF
KADUNA STATE, 2017 AND ITS IMPACT ON THE NIGERIA'S CRIMINAL
JURISPRUDENCE

Dalhat A. Idris¹⁷³⁰ and Abubakar Ishaq¹⁷³¹
Faculty of Law, Ahmadu Bello University, Zaria.

Abstract

The Kaduna State Administration of Criminal Justice Law, 2017 is a comprehensive legal framework that guides the criminal justice system in the state, ensuring fair and efficient proceedings. The law emphasises the timely resolution of criminal cases, reducing delays and ensuring justice is administered swiftly. It upholds the fundamental rights of the accused, such as the presumption of innocence, right to legal representation, and protection against unreasonable searches and seizures. The law also encourages the use of mediation and other Alternative Disputes Resolution methods to resolve cases, reducing the burden on the courts. It prioritises the rights and needs of victims, providing them with support and protection throughout the legal process. The law further streamlines case management procedures, facilitating effective coordination among stakeholders and reducing unnecessary adjournments. The problem however, is that there are challenges in implementing the provisions of the law, such as lack of proper capacity building, insufficient resource allocation and lack of public awareness. Using doctrinal method of research, this paper appraises the Kaduna State Administration of Criminal Justice Law, 2017, exploring its key provisions, challenges in implementation, and its impact on the Nigeria's criminal jurisprudence. This paper finds that the law has revolutionised criminal justice administration in the state. The paper recommends the need to address implementation challenges of the law and calls for replication of its success nationwide.

Key words: Administration, Criminal, Justice, Law and Jurisprudence

1730 LL.B, LL.M, PhD, BL, Lecturer and Associate Professor of Law, Faculty of Law, Ahmadu Bello University, Zaria.

1731 LL.B, LL.M, PhD, BL, Lecturer and Associate Professor of Law, Faculty of Law, Ahmadu Bello University, Zaria.

1.1 INTRODUCTION

In 2015, the National Assembly enacted an Act to make provision for the Administration of Criminal Justice to be in operation in the Federal Courts in Nigeria and Courts of the Federal Capital Territory. This legislation officially referred to as the Administration of Criminal Justice Act, 2015 has no doubt introduced new mechanisms in the Nigeria's criminal justice framework. It repealed the Criminal Procedure Act which was applicable in all Federal Courts and Courts in the Federal Capital Territory, Abuja. But more than just regulating criminal procedure, the Act covers essentially, the entire criminal justice process from arrest, investigation, trial, custodial matters and sentencing guidelines. The entire provisions of the Act are focused towards ensuring that the system of administration of criminal justice in Nigeria promotes efficient management of all criminal justice institutions, speedy dispensation of justice, and protection of the rights and interests of the suspects and the victims of crime.

The enactment of this Act ushered in a more positive and progressive dispensation for the criminal justice system in Nigeria, however, the law is only operative at the National level and each State would have to domesticate the law for it to be operative at the State level. The criminal justice system prescribes that each state in Nigeria adopts their law.

Following the trend of the ongoing reforms in the Criminal Justice system, Kaduna State adopted the Administration of Criminal Justice Act and repealed its Penal Code on the 29th May, 2017. The Law is cited as the Kaduna State Administration of Criminal Justice Law, 2017 and it is to provide for the administration of Criminal Justice in the Courts of Kaduna State and for related matters. While the Penal Code is cited as the Kaduna State Penal Code Law 2017 and it is to penalize crimes prescribed under the

Law and other matters connected thereto. These Laws contain innovative provisions that requires the attention, obligation and commitment of criminal justice actors and institutions.

The aim of this paper, therefore, is to appraise the Kaduna State Administration of Criminal Justice Law of 2017 and its impact on the Nigerian criminal jurisprudence. In achieving this aim, the paper examines the innovative provisions of the law and what can be done to make the law more meaningful and enhance the credibility of Nigerian Criminal jurisprudence.

1.2 An Appraisal of Some Innovative Provisions of Kaduna State Administration of Criminal Justice Law, 2017

Kaduna State promulgated the Administration of Criminal Justice Law, 2017 and Penal Code Law 2017 to address some of the critical challenges bedeviling the administration of criminal justice in the State. What then are the core provisions of the law and what can done to actualize the intendment of the law? An overview of some of the innovative provisions are provided below.

1.2.1 Day to Day Trial

The Kaduna State Administration of Criminal Justice Law, 2017 has addressed the issue of delays which is characteristic of criminal justice delivery in general and this is where lawyers have exploited in practice by tactically seeking unnecessary adjournments where it favors their case.¹⁷³² Delay is one of the key objectives the law seeks to address and it has resolved it, in principle at least, by providing, among others, that day to day trial method should be adopted. It has also put restrictions on stay of

¹⁷³² Section 403 of the Kaduna state Administration of Criminal Justice Law, 2017

proceedings and the number and interval of adjournments to five on each side and 14 days apart. Thus, prolonged delays of trial may remain a thing of the past.

Section 403 of the Law provides thus:

1. The defendant to be tried on a charge shall be arraigned in accordance with the provisions of this law relating to the taking of pleas and the procedure on it.
2. After the plea has been taken, the defendant may raise any objection to the validity of the charge at any time before judgement provided that such objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment.
3. Upon arraignment, the trial of the defendants shall proceed from day to day until the conclusion of the trial.
4. Where day to day trial is impracticable after arraignment, no party shall be entitled to more than five adjournments from arraignment to final judgment provided that the interval between each adjournment shall not exceed 14 working days.
5. Where it is impracticable to conclude a criminal proceeding after the parties have exhausted their five adjournments each, the interval between one adjournment to another shall not exceed seven days inclusive of weekends.
6. In all circumstances, the court may award reasonable costs in order to discourage frivolous adjournments.

1.2.2 Stay of Proceedings

Another area worth mentioning which the Law has looked into in order to ensure speedy trial is the issue of stay of proceedings which is directed at eliminating delays often occasioned by interlocutory appeals. The Law¹⁷³³ states: “An application for stay of proceedings in respect of a criminal matter before the Court shall not be entertained.”

This is a revolutionary move that is unprecedented given the delays occasioned to the trial process by interlocutory applications to stay proceedings pending appeal on preliminary matters even when the substantive issues are yet to be tried on the merit. What the law has done is to amplify the provisions of the Constitution of the Federal

¹⁷³³ Ibid, Section 317

Republic of Nigeria 1999 to ensure speedy dispensation of justice. This new law is very progressive, timely and in conformity with international best practices.

1.2.3 Investigations to be conducted by the Police in Conjunction with Law Officers

Section 24(2) of the Law mandates the Commissioner of Police to ensure that the investigation of offences is conducted in conjunction with designated Law officers from the Ministry of Justice of the State and sub section (3) states that upon request by the Police, the Attorney General shall, not later than 3 days of receiving such request assign a Law Officer to work with the Police in the investigation.

This is a laudable innovation of the Kaduna State Administration of Criminal Justice Law that may address a long standing issue of haphazard investigation by untrained Investigating Police Officers. It is common knowledge that the criminal justice system has suffered setbacks as a result of shoddy investigation and criminals are therefore recycled back into the society as they find it difficult to obtain conviction in the Court.

1.2.4 Notification of Cause of Arrest and Rights of the Suspect

The Law¹⁷³⁴ provides that a Police Officer or a person making an arrest is to inform the arrested person of the reasons for the arrest except where he is being arrested in the course of commission of the offence. This upholds the fundamental rights to fair hearing enshrined in the 1999 Nigerian Constitution. The Section also mandates the Police Officer or any other person making the arrest to inform the suspect of his right to:

1734 Ibid, Section 28

- (a) Remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.
- (b) Consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest.
- (c) Free legal representation by the Legal Aid Council of Nigeria where applicable.

It must be stressed that the proviso to section 28(2) is quite laudable since the suspect will have the benefit of not only being informed of the offence he has committed but also an additional advantage of counsel assisting in securing his immediate release on bail and ensuring that trial is expeditious. This would in turn prevent prolonged detention of suspects and hopefully bring about decongestion of the prisons.

It is also pertinent to note that the proviso to Section 28 of the Law amplifies the provisions of Section 35 (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). These are salutary provisions upholding the liberty, dignity and fundamental rights of suspects in ensuring that no one under any guise is deprived of legal representation.

One other salient innovative provision of the law is the one dealing with unlawful arrest of the citizen. Unlawful arrest is one of the major problems of our criminal process and it is one of the reasons why police stations and prisons are overcrowded. Arrests are sometimes made on allegation that are purely civil in nature or on a frivolous ground. Before this law, the police could arrest without a warrant, any person who has no ostensible means of sustenance and who cannot give a satisfactory account of himself. This particular provision has been greatly abused by the police who use it as grounds to arrest people indiscriminately. The Law has deleted this provision and this is highly commendable.

1.2.5 Abolition of Arrest Lieu

There have been several instances where the police arrested relations or friends and close associates of a crime suspect in order to compel the suspect to give himself up, even though that person is not linked in any way to the crime the suspect is being accused of¹⁷³⁵. Section 29 of the Law specifically prohibits arrest in lieu. Apart from the police, other agencies vested with power of arrest have abused this power to arrest and detain relatives and close associates of criminal suspects in lieu of the suspects, where they have challenges in apprehending the suspects.¹⁷³⁶

This provision prohibiting the arrest of a person in lieu of a suspect may, at the surface level, appears plausibly humane and a respect for the dignity of all citizens before the law. Yet in practical reality, it presents a very difficult roadblock for the Police to the effective investigation of criminal activities in Nigeria, given the tendency by many families to protect and screen members who are offenders in their folds.

By this provision, the house wife who knowingly ate of the husband's loot cannot be arrested during investigation by the Police and search for her absconding husband. The wisdom for the effective investigating Police Officer is to invite such a wife to the station who must not neglect to aid in arresting her suspected husband.

Be that as it may, the law reiterates the dignity of the human person as encapsulated in the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Section 30(1) of the Law provides that a suspect shall: (a) be accorded humane

1735 Adebayo, A.M (2012) Administration of Criminal Justice System in Nigeria, Princeton Publishing Co., Lagos, p. 21

1736 Ibid

treatment, having regard to his right to the dignity of his person. (b) Not be subjected to any form of torture, cruel, inhuman or degrading treatment.

1.2.6 Abolition of Arrest on Purely Civil Matters

Section 30(2) of the law deals with the longstanding problem whereby people employ the machinery of criminal justice wrongly for civil matters. It is not uncommon for people to maliciously instigate the arrest and detention of others for a breach of contract, failure to pay debt owed or for other civil wrongs. This provision that “a suspect shall not be arrested merely on a civil wrong or breach of contract”¹⁷³⁷ is a laudable one. It is believed that it would check arbitrary arrest of persons and torture by law enforcement and security agencies. It is important to note that this provision states that a suspect shall be accorded humane treatment, having regard to his right to the dignity of his person and shall not be subjected to any form of torture, cruel, inhuman or degrading treatment. This ensures civility, decency and decorum in the treatment of suspects during the investigative process in line with the requirement of presumption of innocence as obtains in civilized societies adopting best practices and international standards.

1.2.7 Taking of Inventory of Property recovered from the Suspect

The Law¹⁷³⁸ mandates investigating police officers to take inventory of property recovered from suspects. The inventory must be duly signed by the police officer and the suspect. However, where the suspect refuses to sign, it shall not invalidate the inventory. A copy of such inventory shall be given to the suspect, or his legal practitioner

¹⁷³⁷ Section 30(2) of the Kaduna State Administration of Criminal Justice Law, 2017

¹⁷³⁸ Ibid, Section 32

or such other person as the suspect may direct. This ensures that assets and personal belongings of suspects are not looted by law enforcement agents and provide a platform for dealing with erring police officers who may want to unduly enrich themselves hiding under the cover of the investigative process.

It is equally stated in the Law that the police shall release such property upon request by either the owner of the property or parties having interest in the property, pending the arraignment of the suspect before a Court. However, where a Police Officer refuses to release the property to the owner or any person having interest in the property, the police officer shall make a report to the Court of the fact of the property. This promotes transparency and accountability in the investigative process.

1.2.8 Record of Personal Data of an Arrested Suspect

Section 37(1) provides for mandatory record of personal data of an arrested person. Such data of the suspect shall include:

- a. The alleged offence
- b. The date and circumstance of the arrest
- c. Name, occupation and residential address of the suspect
- d. The suspect's identification such as his height, photograph, fingerprint impressions or such other means of identification.

Section 37(2) of the Law provides that the process of recording personal data of the suspect shall be concluded within a reasonable time and not exceeding 48 hours. This is to check the prolonged pre-trial detention by the police or other law enforcement agencies.

1.2.9 Video Recording of Confessional Statement of an Arrested Suspect

Section 37(4) of the Law also provides for electronic recording of confessional statement of the suspect on a retrievable video compact disc or such other audiovisual

means. This ensures that violence is not unleashed on suspects during interrogation and will show whether any particular extrajudicial statements are voluntary or involuntary.

It is respectfully submitted that the above provision, as sound as it may be, is still problematic. Firstly, beside the economic cost and practicability problems associated with this onerous responsibility foisted on the Police, the provision is unclear as to whether or not the arrested person must first of all be brought to the Police Station before he confesses. Secondly, it is doubtful if all the Police Stations in Nigeria are well equipped with the infrastructures to electronically record confessional statements of suspects.

Section 39 of the Law provides for recording of Statement of suspects and states that where a suspect is arrested on allegation of having committed an offence, his statement shall be taken but such statement may be taken in the presence of a legal practitioner of his choice, Officer of the Legal Aid Council or a Civil Organisation or anyone of his choice.

Again, this provision is not clear as to whether the Legal Practitioner must be the one representing the arrested suspect or any Legal Practitioner. It is equally inconclusive what the law intends to do with the presence of a Legal Practitioner at the writing of the confessional statement, since his mere presence would not alter the validity or otherwise of its voluntariness. Does the presence of a legal practitioner at the scene of an event translate to its genuineness or truthfulness any more than the presence of another person at the event? Is the Legal Practitioner to be believed any more than the Police in a trial within trial for the challenge of such confessional statement?

It is humbly submitted that the answers to the above questions may be in the negative, especially with the current decline of integrity of legal practitioners in the Country. A case in point is that of Ricky Tarfa (SAN) who was accused of bribing Justice Yunusa of the Federal High Court Lagos to the tune of Two Hundred and Twenty Five Thousand Naira Only.¹⁷³⁹

In a separate case of *FRN v. Ricky Tarfa*,¹⁷⁴⁰ the Accused, a Senior Advocate of Nigeria was arraigned before a Lagos High Court sitting in Igbosere by the Economic and Financial Crimes Commission (EFCC) on the allegation of obstruction of justice and attempt to pervert the course of justice. The charge alleged that on February 5th 2016 the Accused hid two suspects, Nazaire Sorou Gnanhoure and Modesti Finagnon, both citizens of Benin Republic in his Mercedes Benz Sport Utility Car thereby shielding them from being arrested and unlawfully perverting the course of justice. The case is ongoing.

It is respectfully submitted that a legal practitioner who unlawfully perverted the course of justice may be capable of undermining a confessional statement obtained during investigation where it does not favour his client.

Furthermore, this provision has, by implication, jettisoned the Common Law “Judges Rule” with its attendant tests for measuring the civility on the part of the Police and the voluntariness on the part of the suspect in the taking and making of confessional statements respectively. This practice apparently adopted by the Evidence Act,¹⁷⁴¹ was

1739 “Shocking: Rickey Tarfa Bribed Justice Yunusa with N225,000; habitually manipulates Judges – EFCC.” Retrieved from www.premiumtimesng.com February 18, 2016 at 8.35 pm

1740 Unreported Charge No. LD/2417C/2016

1741 See Sections 28 and 31 of the *Evidence Act* Cap. E4, LFN 2004 (as amended in 2011).

commended by the Court of Appeal in the case of *Okeke v. The State*¹⁷⁴² when it held, *inter alia*, that:

....the requirement that caution must be administered to one suspected of committing a crime before his statement is made to or recorded by one who is accredited to do is a procedural device in aid of administration of justice as part of administrative directions to the Police and Kindred Organisations that are vested with the powers to investigate crime.

1.2.10 Establishment of State Criminal Records Registry

The Law¹⁷⁴³ equally provides for the establishment of State Criminal Records Registry in State Command of the Nigeria Police Force. This will ensure that vital records and information in aid of investigation, prosecution and adjudication are available to speed up the trial process and provide avenue for future references. It also provides that a Criminal Records Registry is to be established at every Area Police Command which shall keep and transmit all criminal records to the State Criminal Records Registry and Central Criminal Records Registry, Abuja. This promotes coordination and control including accountability particularly in the keeping of records.

The State Police Command shall transmit the decisions of the Court in all criminal trials to the State and Central Criminal Records Registries within 30 days after delivery of judgment. This will assist speedy compilation of records of proceedings and by implication lead to quicker dispensation of justice.

1.2.11 Monthly Report of Arrest to the Attorney - General

1742 (2000) FWLR (pt. 29) 2453.

1743 Ibid, Section 38

Section 47, also mandates the Commissioner of Police and the head of Agency authorized to make arrest within the state to remit monthly to the Attorney General a record of all arrests made with or without warrant in relation to offences or arrests within the state.

Despite subjugating the State Commissioner of Police to a supposed superior wisdom of the Attorney-General of a State on issues of criminal justice administration, it appears that the above provisions rob away the powers, functions and command structure of the Police Force as prescribed under the Constitution¹⁷⁴⁴ and the Police Act.¹⁷⁴⁵

While not doubting the Constitutional powers of the Attorney-General of the State as contained in Section 211 of the Constitution of the Federal Republic of Nigeria 1999, it is respectfully submitted that such powers do not extend to pre-trial administrative and command directives or decisions of the Nigeria Police Force in respect of suspects held in their custody within the Constitutional limits.

1.2.12 Returns by Controller of Prisons

Section 124 (1) of the Law mandates the Controller of Prisons to make returns every 90 days to the Chief Judge and to the Attorney-General of all persons awaiting trial held in the custody in the prisons in the State for a period beyond 180 days from the date of arraignment and the returns made shall be in a prescribed form and shall include:

- a) The name of the Suspect held in custody or Awaiting Trial Persons;
- b) Passport photograph of the Suspect;
- c) The date of his arraignment or remand;

1744 See the combine effect of Sections 214(2) and 318 of the 1999 CFRN (as amended).

1745 Sections 24 and 25 of the *Police Act*, Cap. P19 LFN 2004.

- d) The date of his admission to custody;
- e) The particulars of the offence with which he was charged;
- f) The Courts before which he was arraigned;
- g) Name of the prosecuting agency;
- h) Name of the Prosecutor; and
- i) Any other relevant information.

Sub section (3) of the Law provides that Upon receipt of such return, the recipient shall take such steps as are necessary to address the issues raised in the return in furtherance of the purpose of this Law.

1.2.13 Duty of the Police to Report all Cases of Arrest and Remit Files to the Nearest Magistrate

The Law¹⁷⁴⁶ further mandates the Police or any agency authorized to make arrest to give a report of all suspects arrested without warrant to the nearest Magistrate on the last working day of the month. And the Magistrate on receipt of the report shall forward same to the Administration of Criminal Justice Monitoring Committee which shall analyze the report and advice the Attorney General. Where there is failure by the Police to forward such report, the Magistrate shall forward a report to the Chief Judge for appropriate remedial action.

Without holding brief for who should rank higher in the Civil Service scheme between the Magistrate and the Officer in charge of a Police Station, the above statutory provision apparently portends many administrative problems in the command structure of criminal justice dispensation in the State. By law and by administrative structure, the Police, though physically carrying out civil duties in the States, do not come under the command and administration of the State's governments.

1.2.14 Chief Magistrate to Conduct Monthly Inspection of Police Stations

¹⁷⁴⁶ Ibid, Section 51

Section 52 of the law also mandates the Chief Magistrate to conduct monthly inspection of police stations or other detention centers within his jurisdiction to inspect record of arrest, direct the arraignment of a suspect and where bail has been refused, and grant bail to any suspect where appropriate if the offence for which the suspect is held is within his jurisdiction. The Officer in charge shall make available to the visiting Magistrate the full record of arrest and record of bail, applications and decisions on bail made within the period and any other facility the Magistrate requires in the exercise his powers. Failure to so supply shall be treated as misconduct and shall be dealt with in accordance with the relevant Police regulation under the Police Act or pursuant to any other disciplinary procedure prescribed by any provision regulating the conduct of the Officer or official of the agency. This will promote accountability and transparency of Security Agencies; it will also curb unnecessary detention by the Security agencies.

1.2.15 Quarterly Returns of Particulars of all Cases to the Chief Judge

Section 123 (5) of the Law provides that a Court seized of criminal proceedings shall make quarterly returns of particulars of all cases, including charges, remand and other proceedings commenced and dealt with in his Court within the quarter, to the Chief Judge and in reviewing the returns made by a Court under subsections (4) and (5) of section 123 of the Law, the Chief Judge shall have regard to the need to ensure that:

- a) Criminal matters are speedily dealt with;
- b) Congestion of cases in Courts is drastically reduced;
- c) Congestion of prisons is reduced to the barest minimum and
- d) Persons awaiting trial are, as far as possible, not detained in prison custody for a length of time beyond that prescribed in Section 308 of the Law

Furthermore, by the provisions of section 123 (7) of the Law, the Administration of Criminal Justice Monitoring Committee, shall have power to consider all returns made to the Chief Judge under subsections (4) and (5) of the Section for the purpose of

ensuring expeditious disposal of cases, and the National Human Rights Commission set up under the National Human Rights Commission Act shall have access to the returns on request to the Chief Judge.

1.3 Challenges in Implementing the Law

The following are some of the challenges of implementation of the law:

1.3.1 Lack of proper Capacity Building

Lack of proper capacity building constitutes one of the challenges in implementing the law. Ensuring all justice sector stakeholders are adequately trained to effectively implement the law and its procedures is crucial to the success of the law.

1.3.2 Insufficient Resource Allocation

Insufficient allocation of resources constitutes a stumbling block for the implementation of the law. Allocating sufficient resources to support the implementation of the law, including infrastructure, personnel, and equipment is also vital for the attainment of the objectives of the law.

1.3.3 Lack of Adequate public Awareness

Lack of adequate public awareness is one of the factors militating against proper implementation of the law. Creating awareness and educating the public about the law's provisions, rights and responsibilities is equally vital for the success of the law.

1.4 Impact of The Law on Nigeria's Criminal Jurisprudence

The Kaduna State Administration of Criminal Justice Law, 2017 has made an impact on the Nigeria's criminal jurisprudence in the following ways:

1.4.1 Judicial Transformation

The law has transformed the criminal Justice System in Nigeria, setting a precedent for other states to modernise their legal framework. The state is among the first to modernise its criminal justice administration in Nigeria.¹⁷⁴⁷

1.4.2 Restorative Justice

The law promotes restorative justice approaches, fostering reconciliation between offenders, victims, and communities.

1.4.3 Advocacy and Reform

The law has further spurred a national conversation on criminal justice system reform and galvanised advocacy groups to push for positive changes in the Nigeria's criminal justice administration.

1.5 Conclusion

There is no doubt that the Kaduna State Administration of Criminal Justice Law, 2017 is a revolutionary departure from the old order of things that have more or less brought the administration of criminal justice to disrepute. The law is forward looking and conforms to international best practices. It is now up to the stakeholders to ensure that this laudable law is given full effect to the benefit of the citizens and the society at large. The law has as one of its purposes, the speedy dispensation of justice and calls on the courts and law enforcement agencies and other authorities and persons involved in criminal justice administration to ensure compliance with its provisions so as to ensure the realisation of its purposes.

¹⁷⁴⁷ Lagos State is actually the first state in Nigeria to modernise its criminal justice, when it enacted the Administration of Criminal Justice law in 2009.

However, there are critical issues in the Law that must be borne in mind as the full implementation of the law begins. This paper, therefore finds as follows:

1. The law is replete with and repeats an overdose of constitutional provisions. It must be pointed out that the Administration of Criminal Justice Law of Kaduna State is not in the same pedestal with the Constitution of the Federal Republic of Nigeria, 1999(as amended). It is axiomatic that by the doctrine of covering the field, no State Assembly is permitted to legislate in an area where the Constitution has covered the field. The law cannot add or subtract from constitutional provisions. The provisions of the law are inferior to constitutional provisions and are therefore of no consequence.¹⁷⁴⁸
2. The provisions of the law cannot be fully realised unless the State decides to fund the law Enforcement Agencies, the Ministries of Justice and the Judiciary. The video recording of the statement of witnesses involves funding and logistics. Proper investigation of cases involves highly knowledgeable and well trained investigators with the right attitude and the right motivation. The investigator must therefore be conversant with the crimes of today, the emerging crimes and crimes that are in mutation.
3. The realization of the intendment of the law involves logistics for the payment of witnesses. It involves the timely disposal of cases which presupposes adequacy of judicial officers, state of the art gadgets in Court and well trained and motivated judicial staff.

1748 INEC VBS MUSA, (2003) 3 NWLR(Pt. 806) 72 at 158

4. The proper investigation of cases and according suspects their constitutionally protected rights involves a change of attitude and stepping back from the old ways of doing things. After all, the rights have always been there and have always been observed in the breach.
5. The critical stakeholders in the administration of criminal justice must be open to new ways of doing things and amendable to new thinking and conform to international best practices and only people with the right attitude and openness to learn will arrive at the destination.

For Kaduna State to derive maximum benefits from the Law thereby impacting positively to the Nigeria's criminal jurisprudence, the paper recommends as follows:

1. The Ministry of Justice must be fully computerised and all State Counsel must be computer literate and be provided with working personal computers. The State must therefore fund computer literacy programs and continuing computer literacy programs for State Counsel. In the same vein, every law officer must be versed in the use of the internet, email and other tools of modern communication technology.
2. Security agencies must be adequately funded to enable them apply technology and innovation in the investigation of crimes. Criminals and criminal activities have become sophisticated and only highly knowledgeable investigators are required in this area. The State must provide adequate funding for the security agencies.
3. The Judiciary must be adequately funded, staffed and equipped to respond to the challenges of the modern era. The Judges and the supporting staff must

constantly keep abreast of modern trends in case management and undergo continuous training in modern areas of the law.

4. All the critical stakeholders must be ready to learn and to change from the old way of doing things. This will also entail the strengthening of our democratic and regulatory institutions and the sanctioning of those that step out of the line.
5. All repetitive provisions of the law that have already been covered by the constitutional provisions should be abrogated for being inferior and of no consequence.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

PERCEPTIONS OF EASE OF USE AND USEFULNESS OF ARTIFICIAL INTELLIGENT
CHATGPT AMONG UNDERGRADUATE LAW STUDENTS OF AHMADU BELLO
UNIVERSITY, ZARIA

^{1&2*}Sadiq Buhari Bello, ²Zubairu A. Suleiman, ³Muhammad Sani Abdurrahman,

⁴Abubakar Bashar ⁵Jamilu Argungu Ibrahim

¹Department of Computer Engineering, Waziri Umaru Federal Polytechnic, Birnin
Kebbi

²Department of Educational Foundation and Curriculum, Ahmadu Bello University,
Zaria

³Department of Mathematics, Waziri Umaru Federal Polytechnic, Birnin Kebbi

⁴Centre for Information Technology, Waziri Umaru Federal Polytechnic, Birnin Kebbi

⁵Department of Computer Science, AACOE Argungu

*sbbello@wufpbk.edu.ng, +2348036806774 , abdurrahman@wufpbk.edu.ng

Abstract

The use of Artificial Intelligent Chatbot, ChatGPT (Chat Generative Pre-trained Transformer) has grown larger popularity among students. This study used a descriptive survey design to explore the perceptions of ease of use and usefulness of the ChatGPT among undergraduate Law students of Ahmadu Bello University, Zaria, in their academic activities. The global integration of AI into various sectors, including education and law profession has shown it's potential to transform the professional practices, and also raises concerns about job displacement and the overall impact on human interactions. The study employs the Technology Acceptance Model (TAM) to evaluate the students' perceptions, focusing on the variables of perceived usefulness and perceived ease of use. A total of 1,799 Law students constitute the population of the study, while simple random sampling technique was adopted to obtain sample size. Data were collected through both printout and online Google form questionnaire, was used to obtain data from the respondents. Also research questions were answered using descriptive statistics (Mean and Standard Deviation-SD) using a decision mean value of 2.50. The results showed that the majority of the students (79.4%) are aware of ChatGPT, even though, its level of usage varies significantly among them. However, the perceived ease of use of ChatGPT among the students was a generally positive. Furthermore, the students perceived ChatGTP usefulness as moderately in their academic tasks. This suggest its potential for broader application into both legal education and other academic fields.

Keywords: *Perceived ease of use, perceived usefulness, artificial intelligence (AI), ChatGPT, law students*

Introduction

The artificial intelligence (AI) has experienced advancement in the recent years, with a potential of influencing several aspects of human social interactions, ranging from its integration into the field of education, banking, legal system and its capacity to transform those fields. Although AI shows great potential in the various fields, it also gives rise to fears regarding the possibility of job displacement. This study aims to discover the perceived ease of use and perceived usefulness of specific AI Chatbot called ChatGPT. AI has emerged as a significant development in the field of education, with its potential to generate innovative teaching and learning approaches (Annuš, 2023; Bello, Samaila, Bashir & Muhammad, 2023; UNESCO, 2019). These novel solutions are currently being evaluated in many educational settings. According to Robinson (2018), the concept of intelligence can be described as the capacity to effectively retain, retrieve, and employ information. There are others who also perceive the advancement of AI as a potential threat to the well-being of humanity.

The historical origin of chatbots may be traced back to the early days of artificial intelligence (AI) research. In the year 1950, Alan Turing put up the proposal of the Imitation Game as a potential alternative to the question “*can machine think?*”. According to Turing’s prediction by the year 2000, advancements in technology would lead to the development of computing machines with a logarithmic capacity of bits. He further hypothesised that with such advanced equipment, a computer programme would have the capability to deceive an average questioner for a duration of 5 minutes, achieving a success rate of approximately 70%. However, Bello, Muhammad, Umar and Idina (2023) further describes a ChatterBot as a robot TinyMud player primarily designed to engage in conversation. In instances where there is a limited number of players actively engaged in the game, certain individuals perceive conversing with an artificial intelligence entity as a more favourable alternative to experiencing a lack of interpersonal communication.

Pérez et al. (2020) define a chatbot as a technological tool that integrates artificial intelligence (AI) and natural language processing, allowing it to engage in text or voice-based conversations with human users to a certain extent. In contemporary times, chatbots, referred to as conversational agents, conversational tutors, or simply bots, are increasingly being utilised throughout a wide range of scientific domains (Bii et al.,

2018). Currently, a chatbot refers to a software application that engages in natural language conversations with individuals. ChatGPT is an artificial intelligent chatbot model trained by OpenAI using Reinforcement Learning from Human Feedback (RLHF) in November 2022, which can interact in a conversational manner and can also respond to a follow-up questions (OpenAI, 2022). The GPT stands for Generative Pre-trained Transformer, with different versions of ChatGPT (GPT-3.5, GPT-4 and GPT-4o). GPT-4o was the current latest version ChatGPT released on 13 May, 2024 and was design towards more natural human computer interaction. It can accept input of both image, audio and text. Similarly, it can generate an output of both image, audio and text (Muhammad & Abubakar, 2019). It became the fastest-growing consumer software application in history with over 100 million users in just three months (Raman et al., 2024).

OpenAI also introduce ChatGPT-Edu which was design for universities to responsibly leverage Chatbots to students and educators. ChatGPT-Edu falls under ChatGPT-4o categories with a special feature of reasoning across text and vision, advanced tools for data analysis, web browsing, and document summarisation (OpenAI, 2024a). The ChatGPT-Edu was built due to the success rate of ChatGPT Enterprise recorded by institutions like University of Oxford, University of Texas at Austin, Columbia University, Arizona State University and Wharton school of the University of Pennsylvania. It also has a feature and ability to design a custom versions of ChatGPT, it can be shared publically and support over 50 languages (OpenAI, 2024b). In the field of adoption of technology, Technology Acceptance Model (TAM) proposed by Davis in the year 1986 is one the most commonly and widely use theory due its simplicity and understanding ability. According to Taherdoost (2018), TAM comprises of two dependant variables (i.e. perceived usefulness and perceived ease of use). However, the variables that can influence system use can be determine by the extent to which people use or not use a technology depends on their believe that the particular application can assist them to perform their work better. Similarly, the prospective user needs to believe that the application is not difficult to use.

According to Bashar, Muhammad and Bello (2023), perceived usefulness is the extent to which a person has a believe that adopting a particular application would improve their work performance. Similarly, he defines perceives ease of use as the extent to

which a person considers that using a specific application would be easy or free of effort. Therefore, in case of similar application the easier to use application will be more likely to be accepted by prospects. This topic is significant because law students were known by their engagement with bulky texts that requires critical thinking. Identifying their user acceptance is important for any for any technological implementation and continue use. To assess information system users' acceptability, researchers have created many models, such as the Technology acceptability Model (TAM) model. Bashar et al. (2023) claims that the TAM model, which incorporates perceived usefulness and perceived ease of use, is considered while building an ICT. Perceived usefulness is defined as the extent to which a person thinks that utilizing a certain system would be able to enhance their performance and productivity at work. According to Momani and Jamous (2017), perceived ease of use is a technology that is used as a standard for people who think technology is simple to understand and utilize. Therefore, technology acceptance model (TAM), stipulates that perceived usefulness and perceived ease of use are fundamentals of determining technology acceptance or rejection. This paper aims to investigate the perceived usefulness and perceived ease of use of ChatGPT among law students of Ahmadu Bello University, Zaria (ABU, Zaria). However, both the developers and educational stakeholders can use the identified factors of perceived usefulness and perceived ease of use to improve it to adopt complex legal language and legal writings towards leveraging it into legal education. ChatGPT can be useful in providing quick access to legal information and summarizing them by allowing the law students to have more time for deep learning and critical thinking.

Objectives of the Study

The objectives of this study are:

1. To determine the level awareness and usability of ChatGPT among undergraduate law students in ABU Zaria.
2. To examine the perceived usefulness of ChatGPT among undergraduate law students in ABU Zaria.
3. To ascertain the perceived ease of use of ChatGPT among undergraduate law students in ABU Zaria.

Research Questions

The research questions for this study are:

1. What is the level of awareness and usability of ChatGPT among undergraduate law students in ABU Zaria?
2. What is the extent of perceived usefulness of ChatGPT among undergraduate law students in ABU Zaria?
3. What is level of the perceived ease of use of ChatGPT among undergraduate law students in ABU Zaria?

Methodology

A descriptive survey research design was used for this study, as the research was interested in both the idea and attitudes of respondents (Sani, 2017). The population of this study are all the undergraduate law students of Ahmadu Bello University, Zaria as shown in Table 1. A multi-stage simple random sampling technique was employed in selecting the samples of the study as the selected approach allows representativeness of the population (Abdullahi, 2015).

Table 1: Population and samples of the study

S/N	Students' level	Population of the study	Samples selected
1	100	246	-
2	200	381	-
3	300	356	119
4	400	400	-
5	500	416	141
	Total	1,799	260

The instrument used for the study was a 4-point Likert-scale questionnaire labelled “perceived usefulness and perceived ease of use of ChatGPT questionnaire” comprising of 17-items. Experts confirmed the content validity of the instrument. Data were collected through both printout and online Google form questionnaire, being a 4-point Likert-scale questionnaire, a decision mean value of 2.50 was used. Mean and standard deviation (SD) were used in answering the research questions.

Analysis and Results

RQ1: What is the level of awareness and usability of ChatGPT among undergraduate law students in ABU Zaria?

Table 2: Level of awareness of ChatGPT among undergraduate law students in ABU, Zaria

S/N	Items	Responses	Percentage (%)
1	Yes	206	79.4
2	No	27	10.3
3	Maybe	27	10.3
	Total	260	100%

Table 2 shows the level of awareness of ChatGPT among undergraduate Law students in ABU, Zaria. The majority of the students (79.4%) are aware of ChatGPT. A smaller percentage of students are either not aware (10.3%) or uncertain (10.3%) about their awareness of ChatGPT. The result is further elaborated and presented in Figure 1 below:

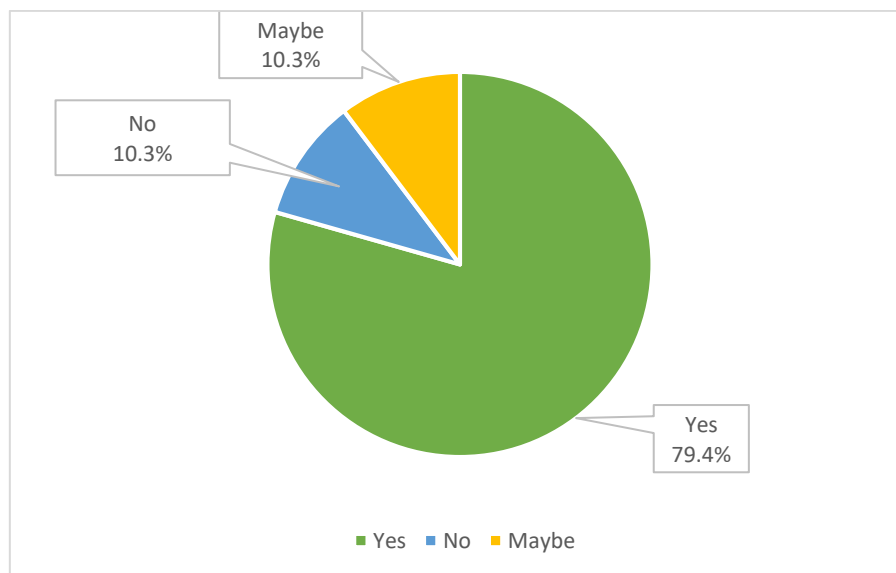


Figure 1: Level of awareness of ChatGPT among undergraduate law students

Table 3: Level of usability of ChatGPT among undergraduate law students in ABU Zaria

S/N	Items	Responses	Percentage (%)
1	Daily	26	10.2
2	Several times a week	66	25.4
3	Once a week	31	11.9
4	Rarely	110	42.4

5	Never	27	10.2
	Total	260	100%

Table 3 indicates the level of usability of ChatGPT among undergraduate Law students in ABU, Zaria. Only 10.2% of the students use ChatGPT daily, while 25.4% use it several times a week. A smaller group of students (11.9%) use it once a week. The largest group, 42.4%, use ChatGPT rarely, and 10.2% of the students have never used it. This shows a varied level of usage among the students, with the majority either rarely using or not using ChatGPT at all. The result is further elaborated and presented in Figure 2 below:

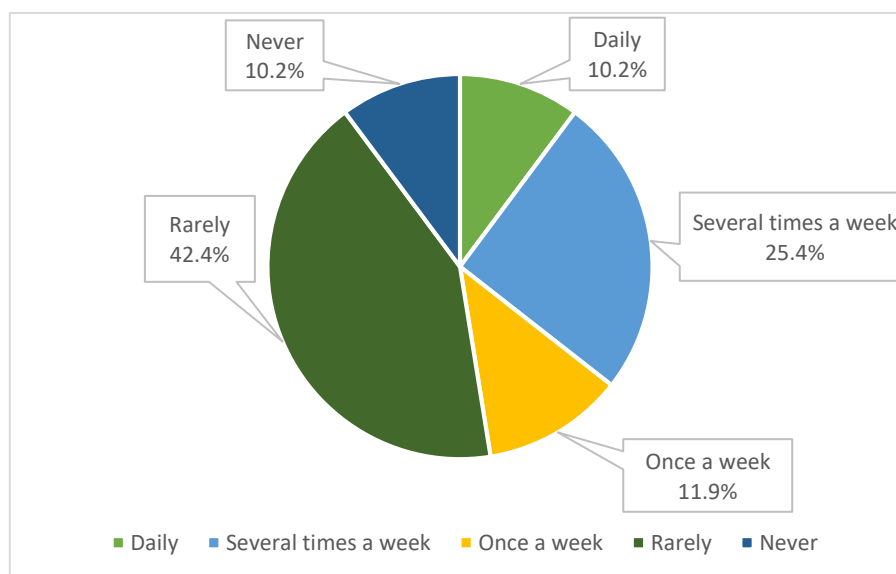


Figure 2: Level of usability of ChatGPT among undergraduate law students

RQ2: What is the extent of perceived usefulness of ChatGPT among undergraduate law students in ABU Zaria?

Table 4: Perceived usefulness of ChatGPT among undergraduate law students in ABU, Zaria

S/ N	Items	Mean	SD	Decision
1	My academic task would be difficult to perform without ChatGPT	2.42	0.86	Rejected
2	Using ChatGPT in my work would enable me to accomplish tasks more quickly	3.30	0.54	Accepted
3	Using ChatGPT improves my academics performance	3.04	0.68	Accepted
4	The ChatGPT addresses my school curricular-related needs	2.75	0.76	Accepted

5	Using ChatGPT reduces the time I spend on unproductive activities	2.98	0.77	Accepted
6	Using ChatGPT would make it easier to do my curricular activities.	3.13	0.59	Accepted
7	Overall, I find the ChatGPT system useful in my curricular activities	3.21	0.74	Accepted
	Overall mean Accepted if mean score is ≥ 2.5	2.98	0.71	Accepted

Table 4 shows the perceived usefulness of ChatGPT among undergraduate Law students in ABU, Zaria. The respondents indicated a moderate level of difficulty in performing academic tasks without ChatGPT (Mean=2.42; SD=0.86). They strongly agreed that using ChatGPT in their work enables them to accomplish tasks more quickly (Mean=3.30; SD=0.54) and improves their academic performance (Mean=3.04; SD=0.68). The students also perceived that ChatGPT addresses their school curricular-related needs to a moderate extent (Mean=2.75; SD=0.76) and helps reduce the time spent on unproductive activities (Mean=2.98; SD=0.77). Additionally, they found that using ChatGPT makes it easier to perform curricular activities (Mean=3.13; SD=0.59) and overall, they find the ChatGPT system useful in their curricular activities (Mean=3.21; SD=0.74). The overall mean of perceived usefulness of ChatGPT among the students was 2.98 (SD=0.71), indicating a generally positive perception of ChatGPT's usefulness. The result in Table 4 demonstrates that the overall mean scores (2.98) of all items is above the 2.50 benchmark.

RQ3: What is level of the perceived ease of use of ChatGPT among undergraduate law students in ABU Zaria?

Table 5: Perceived ease of use of ChatGPT among undergraduate law students in ABU, Zaria

S/N	Items	Mean	SD	Decision
1	Learning to operate ChatGPT would be easy for me	3.40	0.57	Accepted
2	I would find it easy to get ChatGPT to do what I want it to do	3.30	0.61	Accepted
3	My interaction with ChatGPT would be clear and understandable	3.32	0.61	Accepted

4	I would find ChatGPT to be flexible to interact with	3.32	0.64	Accepted
5	It would be easy for me to become skilful at using ChatGPT	3.19	0.87	Accepted
6	Overall, I find the ChatGPT system easy to use	3.49	0.54	Accepted
	Overall mean Accepted if mean score is ≥ 2.5	3.34	0.64	Accepted

Table 5 above shows that the respondents generally perceive the ease of use of ChatGPT positively. The highest mean score (Mean=3.49; SD=0.54) indicates that overall, students find the ChatGPT system easy to use. Similarly, students find learning to operate ChatGPT relatively easy (Mean=3.40; SD=0.57). They also believe it would be easy to get ChatGPT to do what they want it to do (Mean=3.30; SD=0.61). The interaction with ChatGPT is perceived as clear and understandable (Mean=3.32; SD=0.61), and ChatGPT is considered flexible to interact with (Mean=3.32; SD=0.64). However, becoming skilful at using ChatGPT has a slightly lower mean score (Mean=3.19; SD=0.87), indicating some students might find this aspect more challenging. Overall, the mean score for the perceived ease of use of ChatGPT among undergraduate Law students in ABU, Zaria is 3.34 (SD=0.64), suggesting a generally positive perception. The result in Table 5 demonstrates that the overall mean scores (3.34) of all items is above the 2.50 benchmark.

Discussion of Results

The data presented in Table 2 indicates a high level of awareness of ChatGPT among undergraduate law students at ABU, Zaria, with 79.4% of students acknowledging their awareness. However, a minor percentage, 10.3%, indicated they were not aware of ChatGPT, and another 10.3% were uncertain about their awareness. The high level of awareness shows that ChatGPT has gained significant recognition among the student population, which align with the findings of Strzelecki et al. (2024); Raman et al. (2024). This is likely due to its growing presence in academic and technological discussions (Niloy et al., 2024). This awareness is essential for the adoption of technological tools into educational settings as it forms the foundation for subsequent acceptance and utilization.

However, Table 3 shows a diverse level of usage of ChatGPT among the students. Minor percentage (10.2%) use ChatGPT daily, a larger group (25.4%) use it several times a week. Notably, 42.4% of students reported using ChatGPT rarely, and 10.2% have never used it. This difference in usage frequency could be attributed to varying levels of awareness with AI tools, perceived usefulness, or confidence in using such technologies (Gonzalo et al., 2024). The data suggests that while awareness is high, regular usage is limited, possibly due to some barriers such as lack of training or anxiety about the privacy and reliability of AI-generated content. Further studies are needed to identify these possible barriers.

Furthermore, as shown in Table 4, students perceived ChatGPT usefulness as moderately in their academic tasks, with an overall mean score of 2.98 (SD=0.71). They agreed that ChatGPT helps them accomplish tasks more quickly (Mean=3.30; SD=0.54) and also improves academic performance (Mean=3.04; SD=0.68). Nevertheless, the perceived usefulness in addressing school curricular-related needs and reducing time spent on unproductive activities was moderate (Mean=2.75; SD=0.76 and Mean=2.98; SD=0.77, respectively). These findings of the study was in line with Emmanuel Mensah & Daniel, (2023); Sallam et al., (2024); Abdaljaleel et al., (2023). The recognition of ChatGPT has potential to enhance efficiency and performance but also gives room for further studies to point out areas where its integration could be improved to meet specific academic needs more effectively.

Similarly, Table 5 demonstrates a generally positive perception of ChatGPT's ease of use among students, with an overall mean score of 3.34 (SD=0.64). Students found learning to operate ChatGPT relatively easy (Mean=3.40; SD=0.57) and believed it would be easy to get it to perform desired tasks (Mean=3.30; SD=0.61). The interaction with ChatGPT was perceived as clear and understandable (Mean=3.32; SD=0.61), and ChatGPT was considered flexible to interact with (Mean=3.32; SD=0.64). However, becoming skilful at using ChatGPT had a slightly lower mean score (Mean=3.19; SD=0.87), indicating some challenges in mastering the tool. Overall, these findings suggest that while students find ChatGPT easy to use, these findings are consistent with Abdaljaleel et al., (2023); Raman et al. (2024); Sallam et al. (2024); Sallam et al., (2024). There is room for

further support and training to enhance their skills and confidence in using the AI chatbots and ChatGPT in particular.

Conclusion

The findings of this study reveals that undergraduate law students of ABU, Zaria, are generally aware of ChatGPT, even though, its level of usage varies significantly among them. Their perceived usefulness and ease of use of ChatGPT are positively assessed, indicating potential for enhancing academic activities and future utilisation in their Law care of service. However, there is need for further studies to identified barriers that will improved regular usage and mastery among others. Similarly, it was recommended that further training and proper integration of ChatGPT into the curriculum that could foster greater adoption and utilization, maximizing its potential benefits in the legal education and overall academic environment.

References

- Abdaljaleel et al. (2023). Factors influencing attitudes of university students towards chatgpt and its usage: A multi-national study validating the TAME-ChatGPT survey instrument. *preprints.Org*. <https://doi.org/10.20944/preprints202309.1541.v1>
- Abdullahi, M. I. (2015). *Basic concepts in educational research*. Sunjo A.J global links ltd.
- Annuš, N. (2023). Chatbots in education: The impact of artificial intelligence based ChatGPT on teachers and students. *International journal of advanced natural sciences and engineering researches*; 7(4), 366-370. <https://doi.org/10.59287/ijanser.739>
- Bashar, A., Muhammad, S. A. & Bello, S. B. (2023). Meta-analysis on the effect of perceived usefulness and perceived ease of use of zoom classroom in teaching and learning among Nigerian institutions of higher learning. *Journal of mathematical sciences & computational mathematics*; 5(1), 90-103
- Bello, S. B., Samaila, K., Bashar, A. & Muhammad, S. A. (2023). An empirical investigation of computer literacy among students of college of health sciences and technology in Kebbi state. *Journal of mathematical sciences & computational mathematics*; 4(3), 47-58
- Bello, S. B., Sani, M., Umar, Z. & Idina, M. M. (2023). A historical analysis and pedagogical implications of artificial intelligence and chatbots. *Proc. of the international conference on computing and advances in information technology (ICCAIT 2023)*, November, 21-23.
- Bii, P. K., Too, J. K. & Mukwa, C. W. (2018). Teacher attitude towards use of chatbots in routine teaching. *Universal journal of educational research*; 6(7), 1586-1597. <https://doi.org/10.13189/ujer.2018.060719>
- Emmanuel, M. B. & Daniel, B. K. (2023). From the consumers ' side : determining students ' perception and intention to use chatgpt in Ghanaian higher education. *Journal of education society & multiculturalism*, 1-29. <https://doi.org/https://doi.org/10.2478/jesm-2023-0001>
- Gonzalo, B., Enriquez, A., Agustín, M., Ballesteros, A., Jordan, O. H., Roca, C. L. & Tirado, K. S. (2024). Analysis of college students ' attitudes toward the use of ChatGPT in their academic activities: Effect of intent to use, verification of information and responsible use. *BMC Psychology*, 1-18. <https://doi.org/10.1186/s40359-024-01764-z>
- Momani, A. M. & Jamous, M. M. (2017). The evolution of technology acceptance theories. *International journal of contemporary computer research*; 1(1), 51-58.
- Muhammad, S. A. & Abubakar, B. (2019). Effective mathematics teaching and learning through information and communication technology (ICT). 2nd AREWA conference of Mathematics Association of Nigeria (MAN) held at Waziri Umaru Federal Polytechnic Birnin Kebbi, from 1st -4th April 2019
- Niloy, A. C., Bari, M. A., Sultana, J., Chowdhury, R., Raisa, F. M., Islam, A., Mahmud, S., Jahan, I., Sarkar, M., Akter, S., Nishat, N., Afroz, M., Sen, A., Islam, T., Tareq, M. H. & Hossen, M. A. (2024). Computers and education: Artificial intelligence why do

- students use ChatGPT ? Answering through a triangulation approach. *Computers and education: artificial intelligence*; 6(9), 1002-1008. <https://doi.org/10.1016/j.caeai.2024.100208>
- OpenAI (2022). *Introducing ChatGPT*. <https://openai.com/index/chatgpt/>
- OpenAI (2024a). *Hello GPT-4o OpenAI*. <https://openai.com/index/hello-gpt-4o/>
- OpenAI (2024b). *OpenAI for education OpenAI*. <https://openai.com/index/introducing-chatgpt-edu/>
- Pérez, J. Q., Daradoumis, T. & Puig, J. M. M. (2020). Rediscovering the use of chatbots in education: A systematic literature review. *Computer applications in engineering education*; 28(6), 1549-1565. <https://doi.org/10.1002/cae.22326>
- Raman, R., Mandal, S., Das, P., Kaur, T., JP, S. & Nedungadi, P. (2024). University students as early adopters of ChatGPT: Innovation Diffusion study. *Human Behavior and emerging technologies*, 1-32. <https://doi.org/https://doi.org/10.1155/2024/3085910>
- Robinson, R. N. (2018). Artificial Intelligence: Its Importance, Challenges and Applications in Nigeria. *Direct research journal of engineering and information technology*; 5(5), 36-41. <https://doi.org/10.26765/DRJEIT.2018.4780>
- Sallam, M., Elsayed, W., Al-Shorbagy, M., Barakat, M., Khatib, S. EL, Ghach, W., Alwan, N., Hallit, S. & Malaeb, D. (2024). ChatGPT usage and attitudes are driven by perceptions of usefulness, ease of use, risks, and psycho-social impact: A study among university students in the UAE. *Research square*, 1-17. <https://doi.org/https://doi.org/10.21203/rs.3.rs-3905717/v1>
- Sani, M. A. (2017). *Introduction to research methodology and statistics: A guide for students & supervisors*. abu press ltd. Ahmadu Bello University, Zaria.
- Strzelecki, A., Cicha, K., Rizun, M. & Rutecka, P. (2024). Acceptance and use of ChatGPT in the academic community. *Education and information technologies*. <https://doi.org/10.1007/s10639-024-12765-1>
- Taherdoost, H. (2018). A review of technology acceptance and adoption models and theories. *Procedia manufacturing*, 22, 960-967. <https://doi.org/10.1016/j.promfg.2018.03.137>
- UNESCO (2019). *Artificial intelligence in education: Challenges and opportunities for sustainable development*. <https://unesdoc.unesco.org/ark:/48223/pf0000366994>



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

MARITIME GOVERNANCE LAWS AND FINANCING OF BLUE ECONOMIES:
EVIDENCE FROM NIGERIA

Andrew Aondohemba Chenge
Department of Public Administration
Federal University Wukari, Taraba State, Nigeria.

Abstract

The blue (ocean) economy has grown in importance around the world. However, the ocean faces unprecedented risks due to emerging global threats such as climate change and man-made pollution. The pursuit of sustainability and conservation of the marine ecosystem, and resources aligned with economic growth, are increasingly recognized as global imperatives and are the core concept of the blue economy. When promoting the blue economy, there is a great necessity to establish appropriate financial mechanisms to secure stable financial resources input and attract new investment. The development of “blue finance” is critical as it supports and promotes this global transformation into economic growth aligned with ocean sustainability. The study aims to assess the impact of maritime governance laws on blue finance and blue economy in Nigeria. The theoretical framework of the study was the Eclectic Paradigm of John Harry Dunning. A documentary research design was used for the study. Findings of the study revealed that the legal framework for maritime protection in Nigeria includes the Constitution, statutes and government regulations, case law, which provides binding judicial precedents, and international maritime conventions. The study established that although these laws placed great emphasis on marine commerce and navigation, transportation at sea of persons and properties and marine affairs generally such as rules governing workers’ compensation claims, actions in contract and tort arising out of commerce on or over water, the laws placed less emphasis on blue finance for the promotion of blue economy. The study recommends the need for a review of maritime governance laws in Nigeria to reflect current global trends and international best practices anchored, not only on conservation of the marine environment, but on adequate financing of the blue economy for alleviating poverty and supporting climate resilience.

Keywords: Climate change, blue economy, blue finance, environmental pollution, marine ecosystem, maritime governance laws.

Introduction

The hydrosphere, including ocean ecosystems and resources, is one of the most interconnected and complex systems on our planet, they transcend national borders,

and 60% of the ocean lies outside the jurisdiction of individual states (Africa Europe Foundation, n.d.). Covering more than 70% of the planet's surface, 95% of the biosphere, serving as home to many complex ecosystems, and producing half of the planet's oxygen, the ocean and its well-being are crucial to our own well-being. Millions of people make their living from the ocean, be it as a source of income or food, or as a way of life (Thomson, 2022).

Globally, the Organisation for Economic Co-operation and Development (OECD) estimates that oceans contribute over \$1.5 trillion dollars in value add to the global economy. This is a conservative estimate and includes oil and gas exploration which accounts for roughly a third of this. According to World Wide Fund for Nature (WWF), the oceans are the world's 7th largest economy. Yet 64% of the oceans are in areas beyond national jurisdictions (what we call the 'high seas') and only 4% are in official 'protected' zones. It's easy to understand how the oceans have become just another vast economic area, ripe for harvesting, with little policy control over its development (Benzaken et al., 2024).

The policy and legal deficits across the globe in this area has resulted to anthropogenically driven climate change, acidification, warming, marine pollution, unsustainable fishing, and rapid, unsustainable coastal development which increasingly threaten these ecosystems (Thomson, 2022). Thus, the pursuit of sustainability and conservation of the marine ecosystem, and resources aligned with economic growth, are recognized as global imperatives and are the core concept of the blue economy (Shiiba et al., 2022). Global responsibility and coordinated international action are essential to the management of the oceans and to fostering sound and coherent international ocean governance (IOG) (Africa Europe Foundation, n.d.).

However, when promoting the blue economy, there is a great necessity to establish appropriate financial mechanisms to secure stable financial resources input and attract new investment. The development of “blue finance” is critical as it supports and promotes this global transformation into economic growth aligned with ocean sustainability (Shiiba et al., 2022). The blue economy has been identified as one potential pathway through which private finance might be incentivized and an acknowledgement of the historical ‘under-investment’ in the ocean, both as a natural asset for climate resilience, and as a source of future prosperity (Benzaken et al., 2024).

Objectives of the study

The study aims to assess the impact of maritime governance laws on blue finance and blue economy in Nigeria. Specifically, the study aims to:

1. Examine the maritime governance laws in Nigeria and their focal areas.
2. Assess the efficacy of maritime governance laws in promoting blue finance and blue economy in Nigeria.
3. Suggest legal and policy amendments to bolster the functionality of maritime governance laws for improved financing of blue economies in Nigeria.

Conceptual review

Maritime governance laws

Maritime governance laws encompass a comprehensive set of regulations, international conventions, and local statutes that regulate maritime activities. They cover areas such as shipping, maritime transportation and navigation, marine pollution, maritime contracts, carriage of goods, marine insurance, maritime liens and mortgages, personal injuries and wrongful death, maritime labour matters, salvage and towage, collision, pollution and environmental regulations, maritime regulation and

compliance and other crucial aspects of the maritime sector. By understanding these laws, stakeholders can ensure compliance, promote safety, and foster sustainable growth in the industry (Abdulahleem, 2023).

Blue finance

Blue finance, as an offshoot of green finance, describes the frameworks to support the financing of sustainable ocean-related projects (Thomson, 2022). It is an emerging area in climate finance with increased interest from investors, financial institutions, and issuers globally. It offers tremendous opportunities to help safeguard access to clean water, protect underwater environments, and invest in a sustainable water economy. Blue Bonds and Blue Loans are examples of financing instruments that raise and earmark funds for investments such as water and wastewater management, reducing ocean plastic pollution, marine ecosystem restoration, sustainable shipping, eco-friendly tourism, or offshore renewable energy (International Finance Corporation [IFC], n.d.).

Blue economy

According to the World Bank (cited in World Bank & UNDESA, 2017, p. 6), the blue economy is “the range of economic sectors and related policies that together determine whether the use of oceanic resources is sustainable”. Whisnant and Reyes (2015, p. 6) define the blue economy as “the set of environmentally and socially sustainable commercial activities, products, services and investments dependent on and impacting coastal and marine resources”. The Organisation for Economic Co-operation and Development [OECD] (2019) focuses on assessing the crucial role of innovative approaches for a sustainable ocean economy and argues that science and technology will enable economic growth and preservation of ecosystems in the blue economy. The

Economist Intelligence Unit [EIU] (2015, p. 5) also emphasizes the “industrialization” effect in the blue economy and argues that “alongside established ocean industries, emerging and new activities – offshore renewable energy, aquaculture, deep seabed mining and marine biotechnology are often cited – will bring new opportunities, growth and greater diversity to the ocean economy” (also cited in Huang & Morgan, 2015, p. 1).

Review of related literature

Inextricability of blue economy and blue finance in maritime governance

The blue economy has become a key determinant in ocean governance and increasingly plays a crucial role in shaping stated policy goals at national to global levels (Silver et al., 2015; Voyer et al., 2018). From the perspective of intergovernmental institutions, its broad aim is efficiently tapping the economic potential of ocean spaces as well as improving social equity and environmental sustainability in the maritime economy, thus building on the concepts of sustainable development and the “green economy” (United Nations Department of Economic and Social Affairs [UNDESA], United Nations Environment Programme [UNEP] & United Nations Trade and Development [UNCTAD], 2011; UNCTAD, 2014). The focus on normative goals of human and ecological well-being, as well as the integrated approach of governing across ocean industries, is what makes the blue economy distinct from the ocean economy in general, which is merely accounting for all economic benefits derived from oceans. Indeed, explicit attention to social equity has been identified as a key feature of a blue economy approach (Cisneros-Montemayor et al., 2019; Cisneros-Montemayor et al., 2022; Schutter et al., 2024; Voyer et al., 2018).

The growing influence of the blue economy as a governance and development concept has attracted attention from a variety of actors across the international,

national, and local scales due to its broad and flexible meaning, although this widening of the policy space also carries risks to achieving intended change (Bond, 2019; Louey, 2022; Schutter et al., 2021). Calls for a transformative approach to governing the blue economy can become buried under broad and diverging definitions of the concept; for instance, the United Nations Economic Commission for Africa (UNECA) and the African Union Commission use a very broad definition that “encompasses all activities developing or deriving from marine and aquatic ecosystems including oceans, coasts, seas, rivers, lakes and groundwater, and associated resources” (UNECA, 2018). In contrast, environmental non-governmental organizations (NGOs) tend to emphasize the protection of natural capital as a key feature of a blue economy (WWF, 2015). Moreover, notable discrepancies exist between resource availability and governance conditions needed to equitably distribute costs and benefits from these resources, meaning that the potential for developing equitable and sustainable blue economies can fail to materialize even if natural resources are physically available (Cisneros-Montemayor et al., 2021; Schutter et al., 2024).

Recognizing that financing and investment can strongly shape development pathways, there is increased attention paid to “financing the blue economy”, as exemplified by calls for closing the “funding gap” that exists between aims formulated in the Sustainable Development Goals (SDGs) and current levels of investment, including SDG 14, “life below water” (Sumaila et al., 2021). Calls for investment in the blue economy are often accompanied by explicit acknowledgment of the private sector as an important source of potential funding, for instance, in the form of impact investment (which, in addition to financial return, seeks social and/or environmental returns) and public-private partnerships (World Economic Forum [WEF], 2020). “Blue

finance” has been argued to be vital for the development of a sustainable ocean economy, through direct investment in sustainable activities and policies that can achieve a triple bottom line (Sumaila et al., 2021). However, the extent to which market-based financing and investment will specifically include social and/or environmental returns is unclear, and even if they do, there is a risk that these considerations will become lost in a need to increase returns or minimize risks for investors (Christiansen, 2020).

It is clear that this is a burgeoning time for ocean finance, with the group of actors involved in the “blue acceleration” of the ocean economy never having been this diverse and complex, ranging from governments and intergovernmental organizations to institutional investors and philanthropists, to the World Economic Forum publishing its Ocean Finance Handbook (Jouffrey et al., 2020; Wabnitz & Blasiak, 2019; WEF, 2020). However, it is unclear to what extent the blue economy – and indeed, which meaning of the term – is being invested in. Amid concern that the blue economy is drifting away from its original focus on equitable benefit sharing, and toward plain expansion of economic growth from the ocean economy, there is a need to explore the types of money flows associated with the blue economy discourse. This is only a first, but important, step-in improving transparency, coherence, and monitoring of ocean finance and blue economy commitments (Blasiak et al., 2019; Louey, 2022; Schutter et al., 2024; Voyer et al., 2021).

Role of maritime governance laws in the new energy transition era

Maritime governance regulations, in their holistic nature, cover a broad range of activities in the maritime sector. The primary objectives of these regulations are to ensure safety at sea, prevent human injury or loss of life, and prevent damage to the

environment, particularly the marine environment, as well as property (Joseph & Dalakis, 2021). In the modern era, marked by heightened global concerns over climate change and judicious resource utilization, the focus of maritime regulations has shifted towards facets crucial to the industry's sustainability (Gossling et al, 2021; Olaniyi et al., 2024).

Within the maritime industry, climate change results from human interactions with the environment, especially the oceans. These interactions further interwoven with global economies and geopolitics, introduce complexities (Bu et al, 2022) leading to both beneficial and detrimental consequences for the marine ecosystem, the broader environment, economies, and societies (Burge et al, 2014). Hence, the International Maritime Organization's (IMO) has projected diverse regulations initiatives to combat and minimize the effect of marine activities that include the ambitious regulations for emissions (Prause & Olaniyi, 2020), strategies for waste management, marine ecosystem conservation (Hamalainen et al, 2022), and noise reduction in ports and surrounding areas (Olaniyi et al, 2022; Olaniyi et al., 2024).

While environmental concerns are paramount, the sustainability discourse in the maritime realm fully encompasses economic and social aspects this is why marine regulations continuously evolve in response to emerging challenges, technological advancements, and shifting global priorities. As new sustainability challenges arise, these regulations adapt to address them, supporting the industry's long-term viability and responsibility. According to Gunningham & Sinclair (2017), integrating sustainable practices in the maritime sector is essential for mitigating climate change, conserving the environment and biodiversity, preserving resources, adhering to regulations, enhancing reputation, and achieving long-term economic benefits. Such a

transformative approach is vital for a sustainable and resilient global industry driven by technological progress, environmental needs, and evolving regulations. In this context, the IMO plays a crucial role in reducing the industry's environmental impact by standardizing practices, promoting compliance, and facilitating innovation and as suggested by Bu et al. (2022), smart regulation offers a flexible and proficient approach to address these prevalent challenges in the maritime industry (Olaniyi et al., 2024).

In the quest to regulate and refine industry practices, the emergence of smart regulations and sustainable strategies has been observed (Bloor et al, 2006) and they encompass avant-garde policies that harness technology and data to amplify operational efficacy and diminish environmental repercussions (Priadi, 2022). Within the maritime context, smart regulation aims to achieve policy goals efficiently and effectively, acknowledging the heterogeneity of the regulated entities (Quick & Bryson, 2016). It endeavours to strike an equilibrium between economic expansion and sustainability, promoting greener technologies and methodologies (Liu et al., 2020). Illustratively, smart regulation advocates for environmentally congenial fuels and autonomous navigation technology to mitigate human-induced mistakes (Ma & Li, 2021; Olaniyi et al., 2024).

Amidst the maritime industry's accelerated transformation driven by technological innovation, environmental imperatives, and global trade dynamics, comprehending the adoption of smart regulations is imperative for the industry's sustainability and competitiveness. This is why current research utilizes both survey methods and expert interviews to probe into the IMO's regulatory methodologies to address maritime climatic challenges, explore smart regulation and its ramifications,

and discern its influence on the maritime industry's imminent trajectory from the vantage point of diverse stakeholders (Olaniyi et al., 2024).

Theoretical framework

The eclectic paradigm was used as a theoretical basis for the study. Eclectic paradigm, also known as the ownership, location, internalization (OLI) model or OLI framework, is a three-tiered evaluation framework that entities can follow when attempting to determine if it is beneficial to pursue foreign direct investment (FDI). This paradigm assumes that institutions will avoid transactions in the open market if the cost of completing the same actions internally, or in-house, carries a lower price. It is based on internalization theory and was first expounded upon in 1979 by the scholar John H. Dunning (Chen, 2020).

The eclectic paradigm takes a holistic approach to examining entire relationships and interactions of the various components of a business. The paradigm provides a strategy for operation expansion through FDI. The goal is to determine if a particular approach provides greater overall value than other available national or international choices for the production of goods or services. Since businesses seek the most cost-effective options while still maintaining quality, they may use the eclectic paradigm to evaluate any scenario which exhibits potential (Chen, 2020).

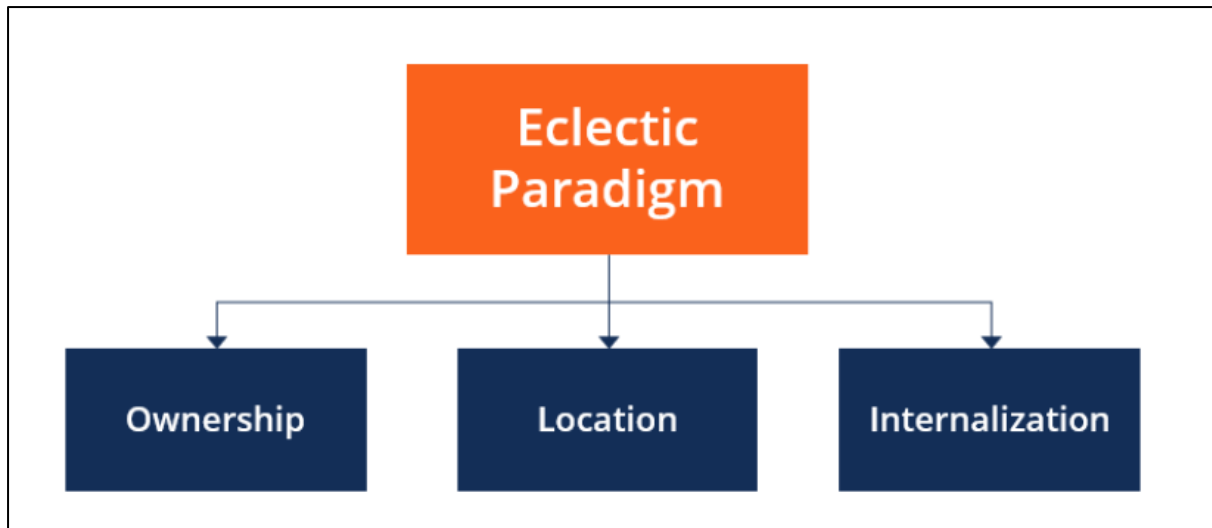


Figure 1: Eclectic paradigm

Source: CFI, 2024

In applying the theory, the study maintains that improving blue finance for blue economies requires consideration of the components of the eclectic paradigm as FDI for blue economies can only materialize when there are conspicuous ownership, location and internalization advantages for prospective entities.

Ownership advantage: The ownership advantage can also be seen as the competitive advantage that comes with the FDI. Ownership, in this instance, can be defined as the proprietorship of a unique and valuable resource that cannot easily be imitated, thereby creating a comparative advantage against potential foreign competitors.

Location advantage: The potential business host countries being considered for FDIs must present numerous competitive advantages; location is one of them. The location advantage focuses more on the geographic advantages of the host country or countries. An example of a geographic advantage can be access to the ocean (for sea freight or other purposes) versus a land-locked country.

Internalization advantage: In order for companies to choose which investment pathway or method is best suited for their needs, their management team must analyse

the internalization advantage. They normally need to consider whether it would be more sensible to get the value chain activity performed locally with their own team or outsource it to a foreign country (CFI, 2024).

Methodology

A documentary research design was used for the study. Thus, documentary/secondary sources were used for data collection. Data was derived from the various maritime laws as well as annual reports of government institutions in the maritime sector in Nigeria. Qualitative and quantitative content analysis were used for analysing collected data.

Discussions and findings

Nature of maritime governance laws in Nigeria

The sea is a crucial medium through which human trade and commerce is conducted; it is also a means of voyage, a valuable source for mineral extraction and power generation and an essential source of the blue economy (Ahmed, 2017). It is of vital importance for Nigeria, as a coastal state located strategically on the west coast of Africa in the Gulf of Guinea, to have an effective maritime legal regime for the regulation and protection of sea activities. The legal framework for maritime protection in Nigeria includes the Constitution, statutes and government regulations, case law, which provides binding judicial precedents, and international maritime conventions.

The Constitution

The Constitution, which is the supreme law in Nigeria, vests ownership of solid minerals, mineral oils and natural gas in the government of the federation. This extends beyond resources located in the land territory to those located in the territorial sea, including the Exclusive Economic Zone of Nigeria. The Constitution also charges the

state to improve and protect the air, land, water, forest and wildlife of Nigeria (Constitution of the Federal Republic of Nigeria [FRN], 1999). By this provision, it tasks the Nigerian government to make the environment safe and further prosecute any persons who pollute the environment through its activities, especially the oil and gas companies (Dike & Gininwa, 2019).

The Constitution confers jurisdiction on the Federal High Court to the exclusion of any other court in civil causes and matters relating to any admiralty jurisdiction, including: shipping and navigation on the River Niger or River Benue and their affluents; on such other inland waterway as may be designated by any enactment to be an international waterway; all federal ports (including the constitution and powers of the ports authorities for Federal ports); and carriage by sea (also cited in Aderoju, 2022).

Admiralty Jurisdiction Act

Further to the aforementioned provisions of the Constitution on the jurisdiction of the Federal High Court, the Admiralty Jurisdiction Act provides for the extent of the jurisdiction conferred on the court as follows:

1. jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Act;
2. any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Act;
3. any jurisdiction connected with any ship or aircraft that is vested in any other court in Nigeria immediately before the commencement of this Act;
4. any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with the shipping or operation of aircraft or other property;
5. any claim for liability incurred for oil pollution damage;
6. any matter arising from shipping and navigation on any inland waters declared as national waterways;
7. any matter arising within a Federal port or national airport and its precincts, including claims for loss or damage to goods occurring between the offloading of goods across space from a ship or an aircraft and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee;
8. any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer;

- | |
|--|
| <ol style="list-style-type: none">9. any cause or matter arising from the constitution and powers of all ports authorities, airport authority and the National Maritime Authority;10. any criminal cause and matter arising out of or concerned with any of the matters in respect of which jurisdiction is conferred (in items 1-9 above). |
|--|

The admiralty jurisdiction of the court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping, to the time the goods are delivered to the consignee or whoever is to receive them; it does not matter whether the goods were transported on land during the process or not (Admiralty Jurisdiction Act, 1991, s. 1[2]). Any agreement or purported agreement, monetary or otherwise connected with or relating to carriage of goods by sea, whether the contract of carriage is executed or not, shall be within the admiralty jurisdiction of the court (Admiralty Jurisdiction Act, 1991; also cited in Aderoju, 2022 & Abdulhaleem, 2023).

Merchant Shipping Act

The Merchant Shipping Act 2007 generally regulates merchant shipping issues and other labour related matters. The Act established an Agency for Maritime Safety Administration, responsible for maritime safety, administration and security. All ships operating commercially in or from the waters of Nigeria are required to obtain a certificate of licence under the Act. The Minister may by notice exempt generally or specifically from registration under this Act, a licensed Nigeria ship or a class of Nigerian ship when operating outside the waters of Nigeria. The Merchant Shipping Act is the principal legislation governing collision, including liabilities in collision cases in Nigeria (Merchant Shipping Act, 2007). Section 340 of the Act provides for rules as to division of loss as follows:

- | |
|---|
| <ol style="list-style-type: none">(1) Where, by the fault of two or more ships, damage or loss is caused to one or more of them, or to their cargo or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was at fault- |
|---|

- | |
|--|
| <ul style="list-style-type: none">(2) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;(3) nothing in this section shall operate so as to render any ship liable for any loss or damage to which her fault has not contributed; and(4) nothing in this section shall affect the liability of any person under a contract of carriage, or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.(5) This section shall apply to Nigerian Government ships as it applies in the case of other ships. |
|--|

The Merchant Shipping Act further provides for limitation of actions in Nigeria for maritime claims or lien against a ship or its owners in respect of any damage or loss. Proceedings in respect of such damage or loss are to be commenced within two years from the date when the damage or loss or injury was caused, or the salvage services were rendered.

Nigerian Maritime Administration and Safety Agency Act

The Nigerian Maritime Administration and Safety Agency (NIMASA) Act 2007 provides for the promotion of maritime safety and security, protection in the marine environment, shipping registration and commercial shipping, maritime labour, the establishment of the Nigerian Maritime Administration and Safety Agency and related matters. Its objective is to develop indigenous commercial shipping in international and shipping trade. The NIMASA Act applies to all ships, whether small ships or crafts that are registered in Nigeria, and to all other ships flying a foreign flag in the Exclusive Economic Zone, territorial and inland seas, inland waterways and the ports of the country. The NIMASA is given the right under the Act to make regulations with approval of the Minister with regards to dumping of ship or generated waste into the Nigerian waters (NIMASA Act, 2007).

Section 22 of the Act provides for the functions and duties of the NIMASA. These functions and duties include: administering the registration and licensing of ships;

regulating and administering the certification of seafarers; pursuing the development of shipping and regulatory matters relating to merchant shipping and seafarers; establishing maritime training and safety standards; regulating the safety of shipping as regards to the construction of ships and navigation; providing directions and ensuring compliance with vessel security measures; providing search and rescue services; carrying out air and coastal surveillance; controlling and preventing marine pollution; providing the direction on qualification, certification, employment and welfare of maritime labour; establishing the procedure for the implementation of conventions – the International Maritime Organisation, the International Maritime Labour Organisation and other international conventions to which Nigeria is a party on maritime safety and security, maritime labour, commercial shipping and for the implementation of codes, resolutions and circulars arising therefrom among others.

Coastal and Inland Shipping ('Cabotage') Act

The Cabotage Act 2003 regulates the activities of maritime transportation. The Act is established to: restrict the use of foreign vessels in domestic coastal trade; promote the development of indigenous tonnage; establish a cabotage vessel financing fund; and for related matters. The main purpose of the Act is to promote Nigerian ship ownership and delimit the honour and use of foreign vessels in the Nigerian marine trade while boosting the nation's economy through the ownership of ships and in the engagement of the business of carriage of goods and services on the Nigeria inland waterways domain. The Act empowers Nigerians involved in maritime activities to invest largely in domestic coastal trade, but it also allows Nigerians to manage vessels in collaboration with foreign partners (Cabotage Act, 2003).

Other maritime laws in Nigeria

Other maritime legislations include: the Territorial Waters Act; the Oil in Navigable Waters Act 2004; the Nigeria Port Authority Act 1999; the Petroleum Act 1969; the Petroleum (Drilling and Production Regulation) Act; the Inland Fisheries Act 1992; and the Sea Fisheries Act 2004. International conventions such as the United Nations Convention on the Law of the Sea (UNCLOS), Safety of Life at Sea (SOLAS), International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW), International Convention for the Prevention of Pollution from Ships (MARPOL), and Maritime Labour Convention (MLC) also guide the operations of the maritime industry in Nigeria (Abdulahaleem, 2023; Aderoju, 2022).

Efficacy of maritime governance laws for blue finance and blue economy in Nigeria

Nigeria stands to benefit immensely from blue economy. As stated earlier, the blue economy cuts across all maritime activities, which include shipping, tourism, fishing, maritime transportation, food production, ocean bottom extractive activities, marine biotechnology and bioprospecting, mineral exploration/extraction, etc. The potentials offered by the ocean are enormous, ranging from a sustainable “blue energy”, i.e., production of energy from wind, wave, tidal, thermal and biomass sources, to sustainable fisheries, etc. The ocean economy supports 90% of global trade and provides millions of jobs. About 95% of Nigeria’s international trade volume is transported through the waters (Anammah & Ezenyimulu, 2024; Igbozurike, 2020).

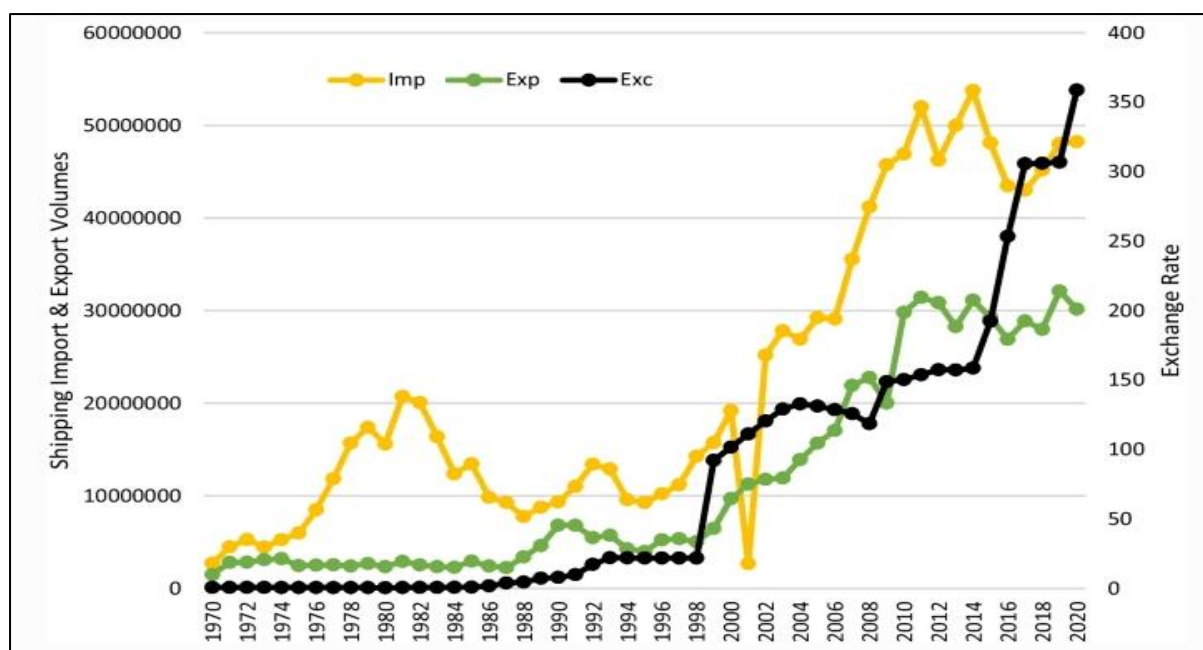


Figure 2: Shipping import and export statistics in Nigeria

Source: Nigeria Ports Authority (NPA) & Central Bank of Nigeria (CBN), 2020

On 17 January 2022, the Expanded Committee on Sustainable Blue Economy in Nigeria (ECSBEN) was inaugurated in Abuja. The inauguration marked Nigeria's formal step to actualising its blue economy quest. During the inauguration, the then Vice President, Professor Osinbajo, noted that the blue economy offered a new frontier for economic development and resource use through a focus on the aquatic ecosystem and that it will facilitate the achievement of the Sustainable Development Goals (SDGs), 2052 Africa Integrated Maritime Strategy (2052 AIM Strategy) and the United Nations 2030 Agenda (Jamo, 2022).

Nigeria has stepped up its commitment to actualising blue economy with the creation of a Ministry for Marine and Blue Economy. With the creation of the Ministry, it is obvious that Nigeria, like its counterparts in Africa and other parts of the world, has started taking practical steps for the exploitation of the wealth and opportunities in its aquatic ecosystems. Nigeria's maritime sector income is mainly focused on shipping and fisheries. While blue economy presents economic development and opportunities that

transcend these traditional established practices to Nigeria, it also places an obligation on Nigeria to implement measures that will protect its aquatic ecosystem for the sustainability of the blue economy. The emerging areas of interest in blue economy include tourism, ocean-bottom extractive activities, sea-bed explorations, blue energy, marine biotechnology, and bioprospecting.

Presently, there is no comprehensive policy or harmonised law for the implementation of blue economy in Nigeria. South Africa, which is one of the champions of the blue economy, has enacted an Ocean Act and implemented an integrated ocean governance regime to actualise her blue economy policy (Atakpa, 2017). Nigeria has set up the ECSBEN and has established a Ministry of Marine and Blue Economy but is yet to have a dedicated or harmonised policy or legislation that will cater to its blue economy vision. There are different legislations that deal with activities on its aquatic ecosystem. However, these laws place great emphasis on marine commerce and navigation, transportation at sea of persons and properties and marine affairs generally such as rules governing workers' compensation claims, actions in contract and tort arising out of commerce on or over water, with little or no emphasis on the promotion of blue economy (and its finances).

Also to note is that some of these laws have become obsolete and require amendments to reflect the emerging areas of maritime interest. For instance, the Sea Fisheries Act 1992 does not have a provision for Illegal, Unreported and Unregulated Fishing (IUUF) and other evolving fisheries sustainability principles which were not considered at the time of its enactment (Atakpa, 2017). Sustainable fisheries is an essential component of a prosperous blue economy, with marine fisheries contributing more than US\$270 billion annually to global GDP. Fish is a key source of food, income

and an important source of animal protein, essential micronutrients, and omega-3 fatty acids. Fish stocks are greatly affected by illegal, unreported, and unregulated fishing, which globally accounts for roughly 11-26 million tons of fish catch, or US\$10- 22 billion in unlawful or undocumented revenue. It is estimated that Nigeria loses, 600million dollars annually to IUUF done by foreign vessels as a result of inadequate manpower to police the country's vast coastline and spends 800 million dollars annually on fish importation (Anammah & Ezenyimulu, 2024; Yonmo & Asanebi, 2022). Therefore, the licensing and regular monitoring of foreign vessels operational in Nigerian waterways and oceans is very essential to prevent and curb the IUUF menace.

The Nigerian Coastal and Inland Shipping (Cabotage) Act ("Cabotage Act") has come into effect to ensure that only indigenous vessels and persons can conduct trade of any kind on Nigerian waters. It should be noted that indigenous vessels have also been implicated in IUUF on Nigerian waters. So, there is also the need to license and monitor them just like their foreign counterparts. Similarly, the legislations in Nigeria do not cater for the utilisation of ocean resources as a means of tourism/tourist attractions, even though Nigeria brags of viable waterways, lagoons and other aquatic ecosystem. Tourism is highlighted as becoming the largest global business and employs 1 out of every 11 persons globally. According to the World Travel and Tourism Council, travel and tourism's contribution to world GDP grew for the sixth consecutive year in 2015, rising to a total of 9.8 percent (US\$7.2 trillion) (World Bank & UNDESA, 2017). Areas in Nigeria that have been identified that can benefit from tourism and being developed as such, as a key component of blue economy, include Ibeju Lekki, Ogun waterside, Eti Osa, Akuku Toru Rivers, Nike lake, Oron, Ibeno, Degema etc. The Minister for Marine and Blue Economy, Gboyega Oyetola, had stated that the

government has created a roadmap towards a sustainable blue economy, but that is yet to be seen (Etuk, 2023).

Legal and policy amendments for improved financing of blue economies in Nigeria

While it is commendable that Nigeria has taken some practical steps towards the actualisation and enhancement of the blue economy, such as the inauguration of the ECSBEN and the creation of the Ministry of Marine and Blue Economy, the country needs to develop and implement a modern and comprehensive regulatory framework that prioritises the blue economy to enable it to maximise potentials of its blue economy. If the government can develop and implement a proper regulatory framework that reflects modern realities for the blue economy in Nigeria, the country will immensely gain in the areas of port and shipping, fisheries, aquaculture, sustainable blue energy, ocean mining, coastal tourism, oil and gas, blue carbon and other ecosystem services. In this regard:

- The Ministry of Marine and Blue Economy in collaboration with the ECSBEN and other industry stakeholders, should develop a draft Blue Economy Bill which will recognise and reflect; (a) the emerging maritime resource interests, and (b) modern ways of exploiting and protecting the aquatic ecosystem.
- The federal government should ensure that all the obsolete legislations with respect to the Nigerian maritime industry are either amended to reflect modern realities or repealed and re-enacted to enable Nigeria to maximise its blue economy potentials.

- The government should strive and ensure Nigeria exploits and explores the vast natural resources that are present within the extended continental shelf to boost the country's revenue generation.
- The government should ensure that all the benefits derivable from the respective maritime treaties that Nigeria is a party to are identified and harnessed because this will boost Nigeria's blue economy and improve the country's revenue generation (Anammah & Ezenyimulu, 2024).

In addition to the above, it is important to note that in order to have a sustainable ocean (or blue) economy, there is need for economic and financial policy reforms that can redirect financial flows into ocean-related activities. Banks, insurers and investors (private and nongovernmental stakeholders) all have a part to play in providing finance for a sustainable ocean economy. The Sustainable Blue Economy Finance Principles were launched in 2018 to provide guidance on how this can be done in a way that aligns with SDG 14, Life Below Water. The principles cover 14 characteristics that signatories endorse, including being protective of the marine ecosystem, transparent with information, and science-led by approach. The principles also provide guidance on how to finance a sustainable ocean economy (Grantham Research Institute [GRI], 2023).

The UN Blue Bond Initiative has developed practical guidance to issuing a blue bond that meets the UN Global Compact and Sustainable Ocean Principles, building on the principles and framework developed by the International Capital Markets Association (ICMA) for the issuance of green, social and sustainability-linked bonds. Green, social and sustainability-linked loans can also be applied to financing the blue economy (GRI, 2023). Nigeria should key into this approaches/ initiatives and tailor its

maritime governance laws and policies to reflect prescribed provisions so as to derive maximum benefits.

Summary of findings

1. The legal framework for maritime governance in Nigeria includes the Constitution, statutes and government regulations, case law, which provides binding judicial precedents, and international maritime conventions.
2. Existing maritime governance laws in Nigeria place great emphasis on marine commerce and navigation, transportation at sea of persons and properties and marine affairs generally such as rules governing workers' compensation claims, actions in contract and tort arising out of commerce on or over water, with little or no emphasis on blue finance for the promotion of blue economy.
3. There is urgent need for a review of maritime governance laws (and policies) in Nigeria to reflect current global trends and international best practices anchored, not only on the conservation of the marine environment but on adequate financing of the blue economy for alleviating poverty and supporting climate resilience.

Conclusion

The ocean is a key driver of global human and economic development and offers remarkable prospects for many nations. Although the maritime environment provides significant economic and financial opportunities, poor management and unchecked exploitation can cause major damage if it occurs in a lawless and ecologically fragile place. Therefore, proper ocean governance and environmental protection must always be considered while implementing and developing blue economy strategies and establishing or reinforcing partnerships. The blue economy approach seeks a balance

between the economic potential of ocean resources and the need to ensure ocean health, sustainability, and social equity. But the best ocean policies and practices can only be achieved with adequate finance and externalities that foster conservation and sustainable use.

References

- Abdulahleem, A. (2023). *Maritime law in Nigeria: Key provisions and impact on maritime industry*. Retrieved from <https://www.linkedin.com/pulse/maritime-law-nigeria-key-provisions-impact-industry-abdulahleem#:~:text=It%20promotes%20indigenous%20tonnage%20and,industry%20and%20protects%20local%20stakeholders>.
- Aderoju, T. (2022). *Legal framework for maritime law in Nigeria*. International Bar Association.
- Admiralty Jurisdiction Act, 1991. Federal Republic of Nigeria.
- Africa Europe Foundation (n.d.). *Ocean governance and blue economy: An emerging agenda for the Africa-Europe partnership*. Africa Europe Foundation.
- Ahmed, A. (2017). International law of the sea: An overlook and case study. *Beijing Law Review*, 8, 21-40. <https://doi.org/10.4236/blr.2017.81003>
- Anammah, R. & Ezenyimulu, L. (2024). *The regulatory framework of the Nigerian blue economy*. AELEX.
- Atakpa, S. D. (2017). *Blue economy legal and institutional frameworks: The Nigerian challenge*. Retrieved from <https://shipsandports.com.ng/blue-economy-legal-and-institutional-frameworks-the-nigerian-challenge>
- Benzaken, D. Adam, J. P., Viridin, J. & Voyer, M. (20204). From concept to practice: Financing sustainable blue economy in small island developing states, lessons learnt from the Seychelles experience. *Marine Policy*, 106072. <http://doi.org/10.1016/j.marpol.2024.106072>
- Blasiak, R., Wabnitz, C. C., Daw, T., Berger, M., Blandon, A., Carneiro, G., Crona, B., Davidson, M. F., Guggisberg, S., Hills, J., Mallin, F., McManus, E., Ould-Chih, K., Pittman, J., Santos, X., Westlund, L., Wetterstrand, H. & Wiegler, K. (2019). Towards greater transparency and coherence in funding for sustainable marine fisheries and healthy oceans. *Marine Policy*, 107, 103508.
- Bloor, M., Datta, R., Gilinskiy, Y., & Horlick-Jones, T. (2006). Unicorn among the cedars: On the possibility of effective 'smart regulation' of the globalized shipping industry. *Social & Legal Studies*, 15(4), 534-551. <https://doi.org/10.1177/0964663906069546>
- Bond, P. (2019). Blue economy threats, contradictions and resistances seen from South Africa. *Journal of Political Ecology*, 26, 341-362.
- Bu, Y., Li, H. & Wu, X. (2022). Effective regulations of FinTech innovations: The case of China. *Economics of Innovation and New Technology*, 31(8), 751-769. <https://doi.org/10.1080/10438599.2020.1868069>.
- Burge, C. A., Eakin, C. M., Friedman, C. S., Froelich, B., Hershberger, P. K., Hofmann, E. E., Petes, L. E., Prager, K. C., Weil, E., Willis, B. L. & Ford, S. E. (2014). *Climate change influences on marine infectious diseases: Implications for management*

- and society. Retrieved from <https://doi.org/10.1146/annurev-marine-010213-135029>.
- CFI (2024). *Eclectic paradigm*. Corporate Finance Institute.
- Chen, J. (2020). *Eclectic paradigm: definition, example, advantages*. Retrieved from [https://www.investopedia.com/terms/e/eclecticparadigm.asp#:~:text=What%20Is%20an%20Eclectic%20Paradigm,foreign%20direct%20investment%20\(FDI\)](https://www.investopedia.com/terms/e/eclecticparadigm.asp#:~:text=What%20Is%20an%20Eclectic%20Paradigm,foreign%20direct%20investment%20(FDI)).
- Christiansen, J. (2020). Fixing fictions through blended finance: The entrepreneurial ensemble and risk interpretation in the Blue Economy. *Geoforum*, 1-35.
- Cisneros-Montemayor, A. M., Croft, F., Issifu, I., Swartz, W. & Voyer, M. (2022). A primer on the “blue economy”: Promise, pitfalls, and pathways. *One Earth*. 5, 982-986.
- Cisneros-Montemayor, A. M., Moreno-Baez, M., Reygondeau, G., Cheung, W. W. L., Crosman, K. M., Gonzalez-Espinosa, P. C., Lam, V. W. Y., Oyinlola, M. A., Singh, G. G., Swartz, W., Zheng, C. & Ota, Y. (2021). Enabling conditions for an equitable and sustainable blue economy. *Nature*, 591, 396-401.
- Cisneros-Montemayor, A. M., Moreno-Baez, M., Voyer, M., Allison, E. H., Cheung, W. W., Hessing-Lewis, M., Oyinlola, M. A., Singh, G. G., Swartz, W. & Ota, Y. (2019). Social equity and benefits as the nexus of a transformative blue economy: A sectoral review of implications. *Marine Policy*, 109, 103702.
- Coastal and Inland Shipping (Cabotage) Act, 2003. Federal Republic of Nigeria.
- Constitution of the Federal Republic of Nigeria, 1999. Federal Republic of Nigeria.
- Dike, S. C. & Gininwa, P. G. (2019). *An appraisal of the Nigerian legislation and institutions governing maritime environment*. Retrieved from <https://ssrn.com/abstract=3514479> or <http://dx.doi.org/10.2139/ssrn.3514479>
- EIU (2015). *The blue economy: Growth, opportunity and a sustainable ocean economy*. Briefing Paper for the World Ocean Summit. The Economist Intelligence Unit.
- Etuk, P. (2023). *FG plans to revive national shipping line*. Retrieved from <https://punchng.com/fg-plans-to-revive-national-shipping-line>
- Gossling, S., Meyer-Habighorst, C. & Humpe, A. (2021). A global review of marine air pollution policies, their scope and effectiveness. *Ocean and Coastal Management*, 212, 105824 <https://doi.org/10.1016/j.ocecoaman.2021.105824>.
- GRI (2023). *Climate and the economy*. Grantham Research institute – London School of Economics and Political science.
- Gunningham, N. & Sinclair, D. (2017). Smart regulation. In P. Drahos (Ed.), *Regulatory Theory: Foundations and applications* (pp. 133-148). The Australian National University. <https://doi.org/10.22459/RT.02.2017.08>
- Hamalainen, E., Inkinen, T. & Olaniyi, E.O. (2022). Low emission choices in freight transport: comparing land and short sea shipping alternatives. In M. Freitag, A.

- Kinra, H. Kotzab, & N. Megow (Eds.), *Dynamics in logistics*. Springer.
https://doi.org/10.1007/978-3-031-05359-7_17
- Huang, M. & Morgan, P. J. (2022). Overview of the blue economy and blue finance. In P. J. Morgan, M. C. Huang, M. Voyer, D. Benzaken & A. Watanabe (Eds.), *Blue economy and blue finance* (pp. 1-7). Asian Development Bank Institute.
- IFC (n.d.). *Blue finance*. International Finance Corporation.
- Igbozurike, J. (2020). *Achieving the blue economy dream in the Nigerian maritime industry*. Retrieved from <https://ssrn.com/abstract=3603037> or <http://dx.doi.org/10.2139/ssrn.3603037>
- Jamo, B. (2022). *A step forward for blue economy-Part 1*. Retrieved from <https://guardian.ng/business-services/maritime/a-step-forward-for-blue-economy-part-1/>
- Joseph, A. & Dalaklis, D. (2021). The international convention for the safety of life at sea: Highlighting interrelations of measures towards effective risk mitigation. *Journal of International Maritime Safety, Environmental Affairs and Shipping*, 5(1), 1-11. <https://doi.org/10.1080/25725084.2021.1880766>.
- Jouffray, J. B., Blasiak, R., Norstrom, A. V., Osterblom, H. & Nystrom, M. (2020). The blue acceleration: The trajectory of human expansion into the ocean. *One Earth*, 2, 43-54.
- Liu, Y., Zhu, J., Li, E.Y., Meng, Z. & Song, Y. (2020). Environmental regulation, green technological innovation, and eco-efficiency: The case of Yangtze River economic belt in China. *Technological Forecasting and Social Change*, 155, 119993 <https://doi.org/10.1016/j.techfore.2020.119993>.
- Louey, P. (2022). The blue economy's retreat from equity: a decade under global negotiation. *Frontiers in Political Science*, 4, 999571. <https://doi.org/10.3389/fpos.2022.999571>
- Ma, H. & Li, L. (2021). Could environmental regulation promote the technological innovation of China's emerging marine enterprises? Based on the moderating effect of government grants. *Environmental Research*, 202, 111682 <https://doi.org/10.1016/j.envres.2021.111682>.
- Merchant Shipping Act, 2007. Federal Republic of Nigeria.
- Nigerian Maritime Administration and Safety Agency (NIMASA) Act, 2007. Federal Republic of Nigeria.
- OECD (2019). *Rethinking innovation for a sustainable ocean economy*. OECD Publishing. <https://doi.org/10.1787/9789264311053-en>
- Olaniyi, E. O., Solarte-Vasquez, M. C. & Inkinen, T. (2024). Smart regulations in maritime governance: Efficacy, gaps and stakeholder perspectives. *Marine Pollution Bulletin*, 202, 116341. <https://doi.org/10.1016/j.marpolbul.2024.116341>

- Olaniyi, E.O., Prause, G., Gerasimova, V. & Inkinen, T. (2022). Clean cruise shipping: Experience from the BSR. *Sustainability*, 14(9), 5002. <https://doi.org/10.3390/su14095002>
- Prause, G. & Olaniyi, E.O. (2020). Building a sustainable and transferable sulphur emission free BSR. *Sustainability Management Forum*, 28, 21-27.
- Priadi, A.A. (2022). Optimalization of smart technologies in improving sustainable maritime transportation. *IOP Conference Series: Earth and Environmental Science*, 972, 012084
- Quick, K.S. & Bryson, J.M. (2016). Theories of public participation in governance. In J. Torbing & C. Ansell (Eds.), *Handbook on theories of governance* (pp. 249-262). Edward Elgar Publishing,
- Schutter, M. S., Cisneros-Montemayor, A., Voyer, M., Allison, E. H., Domarchuk-White, C., Benzaken, D. & Mohammed, E. Y. (2024). Mapping flows of blue economy finance: Ambitious narratives, opaque actions and social equity risks. *One Earth*, 7, 638-649.
- Schutter, M.S., Hicks, C.C., Phelps, J., and Waterton, C. (2021). The blue economy as a boundary object for hegemony across scales. *Marine Policy*, 132, 104673.
- Shiiba, N., Wu, H. H., Huang, M. C. & Tanaka, H. (2022). How blue financing can sustain ocean conservation and development: A proposed conceptual framework for blue financing mechanism. *Marine Policy*, 139, 104575. <https://doi.org/10.1016/j.marpol.2021.104575>.
- Silver, J.J., Gray, N.J., Campbell, L.M., Fairbanks, L.W., & Gruby, R.L. (2015). Blue economy and competing discourses in international oceans governance. *Journal of Environment and Development*, 24, 135-160.
- Sumaila, U. R., Walsh, M., Hoareau, K., Cox, A., Teh, L., Abdallah, P., Akpalu, W., Anna, Z., Benzaken, D., Crona, B., Fitzgerald, T., Heaps, L., Issifu, I., Karousakis, K., Lange, G. M., Leland, A., Miller, D., Sack, K., Shahnaz, D., ...Zhang, J. (2021). Financing a sustainable ocean economy. *Nature Communications*, 12, 3259-3311.
- Thomson, P. (2022). Forward I. In P. J. Morgan, M. C. Huang, M. Voyer, D. Benzaken & A. Watanabe (Eds.), *Blue economy and blue finance* (pp. xvi). Asian Development Bank Institute.
- UNCTAD (2014). *The oceans economy: Opportunities and challenges for small island developing states*. United Nations Conference on Trade and Development. https://unctad.org/en/PublicationsLibrary/ditcted2014d5_en.pdf.
- UNDESA, UNEP, UNCTAD (2011). *Transition to a green economy: Benefits, challenges and risks from a sustainable development perspective*. Retrieved from <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=131&menu=1515>.
- UNECA (2018). *Opportunities and challenges to bolster sustainable development and socioeconomic transformation*. United Nations Economic Commission for Africa. Retrieved from <https://>

nairobiconvention.org/clearinghouse/sites/default/files/Africa%27s%20Blue%20Economy%20Issues_Paper_UNECA.pdf

- Voyer, M., Allison, E. H., Farmery, A., Fabinyi, M., Steenbergen, D. J., van Putten, I., Song, A. M., Ogier, E., Benzaken, D., & Andrew, N. (2021). The role of voluntary commitments in realizing the promise of the Blue Economy. *Global Environmental Change*, 71, 102372.
- Voyer, M., Quirk, G., McIlgorm, A., and Azmi, K. (2018). Shades of blue: what do competing interpretations of the blue economy mean for oceans governance? *Journal of Environmental Policy and Planning*, 20, 595-616.
- Wabnitz, C. C., and Blasiak, R. (2019). The rapidly changing world of ocean finance. *Marine Policy*, 107, 103526.
- WEF (2020). *The ocean finance handbook*. Retrieved from <http://blue-finance.org/?p=3085>
- Whisnant, R., & Reyes, A. (2015). *Blue economy for business in East Asia: Towards an integrated understanding of blue economy*. Partnerships in Environmental Management for the Seas of East Asia (PEMSEA).
- World Bank & UNDESA (2017). *The potential of the blue economy: Increasing long-term benefits of the sustainable use of marine resources for small island developing states and coastal Least Developed Countries*. World Bank. <https://openknowledge.worldbank.org/bitstream/handle/10986/26843/115545.pdf?sequence=1&isAllowed=y>
- WWF (2015). *Principles for a sustainable blue economy*. Retrieved from https://wwfint.awsassets.panda.org/downloads/15_1471_blue_economy_6_pages_final.pdf.
- Yonmo, D. P. & Asanebi, D. H. (2022). Nigeria in the context of Illegal, Unregulated and Unreported (IUU) Fishing in West African coast” *ESCAE Journal of Management and Security Studies (EJMSS)*, 2(1), 1-17.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

EXPOSITORY ANALYSIS OF ACCESS TO MEDICAL TREATMENT
UNDER THE COMPULSORY TREATMENT AND CARE FOR VICTIMS OF
GUNSHOTS ACT, 2017

F.A. Kera* and Paul Abraham*

Department of Private Law, Ahmadu Bello University, Zaria.

09061918383; kerafarida69@gmail.com

Abstract

The practice of medicine has been part of human civilization from a time immemorial. Today, there is no gainsaying the fact that medical interventions have had a huge impact on human well being leading to less suffering and disability. Despite this, in Nigeria prior to 2017, access to medical care by the victims of gunshot was a source of concern in the country. This was due largely to the practice of rejecting such victims by hospitals for failure to obtain police report in order not to incriminate medical personnel for commencing treatment without clearance. In response to this unwholesome state of affairs however, in December 2017, the Compulsory Treatment and Care for Victims of Gunshot Act, was enacted to ensure that victims of gunshot wounds receive prompt and adequate medical treatment and care regardless of the reason for which they were shot. This paper therefore seeks to analyse the relevant provisions of this Act with the view to making recommendations to promote seamless treatment of gunshot victims in Nigeria. The paper adopts a doctrinal method of research, and accordingly analysed materials from primary and secondary sources. It is found that the requirement under Section 3 of the Act that hospital treating any person with gunshot wound must report such to the police within two hours or be liable to five years imprisonment or fine, may be difficult to implement by hospital in remote villages with limited personnel, especially where the medical personnel who needs to lodge such report is the one trying to resuscitate the patient. Furthermore, some remote villages in Nigeria do not have a police outpost or station. Couple with bad road network, it might be difficult for medical personnel to act within the confine of the law. In view of the problem identified above, the paper recommends among others that Section 3 of the Compulsory Treatment and Care for Victims of Gunshot Act need to allow any hospital treating victims of gunshot to report the matter to the police within 24 hours.

Keywords: Gunshot, Victims, Medical care, Hospital, volunteer.

1.1. Introduction

The practice of medicine has been part of human civilization from a time immemorial. Simply put, medicine is the science and art of diagnosing, treating, and preventing disease and injury. It encompasses a variety of health care practices evolved to maintain and restore health by the prevention and treatment of illness in human beings.¹⁷⁴⁹ Although while it can be conceded that today medical interventions have had a huge impact on human well being¹⁷⁵⁰ leading to less suffering and disability, Nigeria is still witnessing a rise in the loss of lives as a result of the refusal of some health facilities to attend to gunshot victims who do not present police reports. Strangely, this unfortunate practice persisted despite Section 20 (1) (2) of the National Health Act¹⁷⁵¹ which obliges health care providers to offer any person emergency medical treatment for any reason whatsoever, failing which they would be liable on conviction to a fine of ₦100, 000.00 or to imprisonment for a period not exceeding six months or to both.

The practice of demanding for a police report from victims of gunshot before they can be treated by medical personnel appears to be motivated by the erroneous interpretation of Section 4 (2) of the Robbery and Firearms (Special provision) Act¹⁷⁵² by the police and health care providers. For the record, this section states that: “It shall be the duty of any person, hospital or clinic that admits, treats or administers any drug to any person suspected of having bullet wounds to immediately report the matter to the police”. From the above provision, it is clear that hospitals or clinics were permitted to treat persons with gunshot wounds subject however to the condition that they must immediately report the incident to police after stabilizing the victim. Regrettably, during this time, health care providers simply interpreted this section to suite the assumption by the police that every gunshot victim in Nigeria was wounded as a result of engaging in criminal activities hence hospitals must not abate commission of crimes by treating such persons without first obtaining clearance.¹⁷⁵³

*PhD, B.L, Senior Lecturer, Department of Private Law, Ahmadu Bello University, Zaria. 09061918383.kerafarida69@gmail.com

*PhD, B.L, High Court of the Federal Capital Territory, Abuja. 08164314484. Email-bukab4lyf@gmail.com

¹⁷⁴⁹Babalola, A., (2013), “Legal Implications of Ethical Breaches in Medical Practice: Nigeria a Case Study”, *Asian Journal of Humanities and Social Sciences (AJHSS)*, Vol. 1—Issue 3,p.70.

¹⁷⁵⁰Adegboyega, K. & Hellandendu, J. M., (2015), “Nigerians and the quest for medical tourism”, *African Journal of Management, Social Sciences and Humanities*, 4 (2), p.152.

¹⁷⁵¹No. 8 2014.

¹⁷⁵²Cap R11 LFN, 2004.

¹⁷⁵³Kalu, U. C. and Ewelukwa, C. A., (2023), “An Appraisal of the Legal Framework for the Compulsory Treatment and Care for Gunshot Victims in Nigeria”, *Law and Social Justice Review (LASJURE)* 4 (1), p.20.

Unfortunately, the sweeping compliance with this obnoxious practice by health care providers has led to hardships and in some cases avoidable loss of lives. It was in response to this unwholesome state of affairs that in December 2017, the Compulsory Treatment and Care for Victims of Gunshot Act (CTCVG)¹⁷⁵⁴, was enacted to ensure that victims of gunshot wounds receive prompt and adequate medical treatment and care regardless of the reason for which they were shot. The Act aims to protect the rights of individuals who have been injured by firearms and to establish a framework for their access to medical services without unnecessary delays or financial barriers. However, despite this legislative intervention, it is arguable whether the Act is really achieving its underlined objective.

This paper therefore seeks to examine the relevant provisions of the CTCVG Act, and to identify the possible challenges with view to the making recommendations to promote seamless treatment of gunshot victims in Nigeria. In furtherance of this, the paper will adopt a doctrinal or library oriented method of research, through which materials from primary and secondary sources would be analysed toward achieving the above stated objective. The primary sources include the relevant domestic and international laws as well as judicial authorities, while the secondary sources include articles published in reputable journals, internet materials and newspaper publications on the subject matter.

2.1. Analysis of the Compulsory Treatment and care for Victims of Gunshots Act

Laws are enacted to address the yearnings and expectations of the citizens, hence a good law, must of necessity, conform to the demand of society. Undoubtedly, in Nigeria, the enactment of the CTCVG Act¹⁷⁵⁵ is a reflection of this reality as encapsulated in the citizens' desire for an enduring solution to the life threatening effects of gunshot injuries and the persisting controversy surrounding access to medical care by the victims such injuries. This segment of the paper therefore seeks to analyze the relevant provisions of the Act with a particular attention on the provisions that innovatively institutionalized the various rights, obligations and penalties under the Act.

2.1.1. Rights to Treatment

¹⁷⁵⁴CTCVGA, op.cit.

¹⁷⁵⁵Ibid.

Gunshot wound is a medical emergency, and being so, every second count. The CTCVG Act¹⁷⁵⁶ indeed appears to recognize and embrace this fact by clearly making provisions for the protection of the sanctity of the life of gunshot victims the top of its priority irrespective of whether or not the victims have committed any crime. Section 15 of the Act¹⁷⁵⁷, which is the interpretation section, defined the word “victim” as “a person who sustains injuries as a result of gunshot, powder burn and other injuries arising out of or caused by the discharge of a firearm”. In Nigeria today, gunshot victims may be criminal suspects, victims of stray bullets, or victims of gunshots from criminals or even trigger-happy security men. Interestingly, for this category of persons, Section 1 of the Act¹⁷⁵⁸ confers on them the right to “immediate and adequate treatment” from any health care facility in Nigeria, whether public or private, with or without police clearance. By virtue of Section 2 (2) of the Act, victims of gunshot are entitled to immediate treatment irrespective of whether or not they make initial monetary deposit, and shall not in the course of such treatment be subjected to inhumane and degrading treatment or torture by any person or security agents. In case of any loss sustained, such victims of gunshot also have the right to restitution through direct or indirect action of the person who caused the loss and the right to enforce the said order by the State High Court.¹⁷⁵⁹

The wisdom in this approach is predicated in the understanding that even if the victim of gunshot is a fleeing suspect, it is only when he is treated and alive that he can be brought to justice. In this wise, the CTCVG Act has no doubt marked an important step in the quest for unconditional access to medical care by victims of gunshot in Nigeria whose population seems to be increasing with each passing day due largely to the surge in terrorism, kidnapping, banditry, headers-farmers conflicts, Niger-Delta/IPOB militancy, armed robbery, unknown gunmen, cultism, political vendettas, ethno-religious conflicts, communal clashes and stray bullets, among others. As can be inferred from Section 1 of the CTCVG Act¹⁷⁶⁰ hospitals or clinics also have an obligation to treat victims of gunshot. So, while a victim of gunshot has unfettered right to be

¹⁷⁵⁶Ibid.

¹⁷⁵⁷Ibid.

¹⁷⁵⁸Ibid.

¹⁷⁵⁹S.14 (1) (2), Ibid.

¹⁷⁶⁰Ibid.

treated unconditionally, the hospitals or clinics on the other hand, have the obligation to render such services.

A logical corollary that follows the above obligation is that at the start of administration of medicine to full recovery, the welfare of the patient is the main responsibility of the medical personnel along with the entire team. The expectation is for medical personnel to pay very close attention to the victim, performing careful assessments and taking prompt nursing interventions in all aspects of the patient's care based on the nature and the type of medical process performed with the view to assisting the patient return to the optimal functioning state. Apparently, Section 1 of the CTCVG Act¹⁷⁶¹ has added another significant layer of legal support to the sanctity of life for victims of gunshot as enshrined in Section 33 (1) of the Constitution¹⁷⁶² which is in *pari materia* with the various international human right legal framework such as Article 3 and 5 of the Universal Declaration of Human Rights (UDHR);¹⁷⁶³ and Article 4 of the African Charter on Human and Peoples' Rights.¹⁷⁶⁴ Section 33 of the Constitution has been robustly elucidated in the case of in *IGP & Ors v. Ikpila & Anor*¹⁷⁶⁵ wherein the Court held that:

The right to life is both sacred and sacrosanct. It is the highest and most important of all the fundamental rights of the Citizen as constitutionally guaranteed by Section 33 (1) in Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 as amended, which provide thus: 33 (1): Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria." Every citizen of this Country is by law entitled to his life and which shall not save as permitted by law be deprived or snuffed out of him. In law therefore, every taking of or deprivation of the life of the citizen by another is illegal, unlawful and unconstitutional save if it is lawfully justified or excused by law within the exceptions expressly provided for in Section 33 (2) of the Constitution of Nigeria 1999 as amended, which provides thus: 33 (2): A person shall not be regarded as having been deprived of his life in contravention of this Section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary: (a) For the defence of any person from unlawful

¹⁷⁶¹Ibid.

¹⁷⁶² Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as amended).

¹⁷⁶³ UDHR, 1948.

¹⁷⁶⁴ 1981.

¹⁷⁶⁵ (2015) LPELR-40630(CA).

violence or for the defence of property; (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) For the purpose of suppressing a riot, insurrection or mutiny". The onus is therefore, on the person who has deprived another citizen of his life to show that the killing was justified or excused by law."

Similarly, in the case of *C.O.P. Taraba State & Anor v. Dapo & Anor*¹⁷⁶⁶ the Court held that the right to life is the most precious gift on earth which must be protected with all due diligence by all, and this include medical practitioners, irrespective of whether gunshot victims failed to make an upfront payment of the cost of treatment. It will therefore be stating the obvious that accepting to treat the victims of gunshot is akin to respecting the sanctity of their lives, conversely, turning such persons away is a huge threat to their lives, which could lead to physical and psychological damage to the victim or even death in some cases. It is perhaps for this reason that the World Medical Association's Guidelines for physicians against torture and other cruel, inhuman or degrading treatment provides that:

"The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedure is suspected, accused or guilty and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife"¹⁷⁶⁷

It follows that regardless of the reason for sustaining the gunshot wound, the primary need of any wounded person is unconditional access to medical care. Although for private health facilities, the requirement that they must commence treatment without satisfying themselves first that the patient has the capacity to pay the bills may create some operational challenges for them. The writers would address this concern at the appropriate time in the course of this discourse. But in the meantime, it would seem that the major concern of the provision of Section 1 of the Act is to save life. After all, that is the very essence of the Hippocratic Oath of physicians which demands that they

¹⁷⁶⁶(2019)LPELR-47215(CA).

¹⁷⁶⁷Declaration 1, Declaration of Tokyo – Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975. Available @<https://www.wma.net/policies-post/wmadeclaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degradingtreatment-or-punishment-in-relation-to-detention-and-imprisonment/>accessed on 19th June 2024. 2:11. P.M.

will apply, for the benefit of the sick, all measures which are required to assist them and that they will remember that they remain members of the society, with special obligations to all their fellow human beings, those sound of mind and body as well as the infirm. Quite clearly, it is not envisaged from this oath that failure to make an upfront payment of the cost of treatment will vitiate the undertaking they had made.

2.1.2. Duty to Assist

The duty of every hospital or clinic in Nigeria whether public or private to accept for immediate and adequate treatment of any person with a gunshot wounds with or without police clearance, can only be fully activated when the said person is before the hospital for treatment. In effect, access to medical care requires the collaborative efforts of two sides. Understandably, the law does not need to impose any obligation on the victim of gunshot to go to hospital for immediate and adequate treatment because it is naturally expected that this would be his immediate response to the situation. However, where the gunshot wound is fatal and the victim cannot carry himself to the hospital, Section 2 (1) of the CTCVG Act¹⁷⁶⁸ envisages two layers of assistance in this regard with the view to securing him access to medical care. By their very nature, these two modes of assistance may run concurrently or independently, depending on the prevailing circumstance at the material time. In the first place, the section requires any person, be it the spouse, relative or neighbor of the victim, passersby or co-travelers to render every possible assistance to any victim of gunshot wounds and ensure that the person is taken to the nearest hospital for immediate treatment.

In the second place, security agents such as the Police, Civil Defence, Soldiers, Navy or Air force, whether or not they are involved in the operation that resulted to the gunshot wound, are required upon coming in contact with such victim of gunshot, to render the necessary assistance toward taken the person to the nearest hospital for immediate treatment. Now, while it is clear under Section 2 (1) of the CTCVG Act that every person including security agents is enjoined to assist victims of gunshot with the view to taking them to the nearest hospital for immediate treatment, in practice, it would seem that the execution of this obligation rest predominantly on the police

¹⁷⁶⁸Ibid.

because they are mostly the first point of call at the scene of violent crimes. It is only when all efforts to reach the police prove abortive or the situation is so dire that the private persons at scene would provide the necessary assistance to the gunshot victim by ensuring that they are taken to the nearest hospital for treatment.

2.1.3. Notification of Police

In order not to lose sight on the need to support the government's drive to fight crime in the country, Section 3 (1) of the CTCVG Act¹⁷⁶⁹ obliges any hospital that receives or accepts any person with a gunshot wound for treatment to report the fact to the nearest police station within two hours of the commencement of treatment to enable the police commence investigating with a view to determining the circumstances under which the person was shot.¹⁷⁷⁰ It must be noted however that forwarding the said report to the nearest police station does not automatically translate into the fact that the police will swing into action and commence investigation. This will depend on whether or not the victim of gunshot is fit to go through the rigors of criminal investigation. In this connection, the police will have to rely on the hospital treating the patient for such certification. Accordingly, Section 4 of the CTCVG Act¹⁷⁷¹ imposes an obligation on the hospital to ensure that the victim is fit and no longer in dire need of medical care before the Chief Medical Director certifies him fit to be invited by the police for investigation. Of course this measure is put in place in order to protect victim's right to life as guaranteed under Section 33 of the Constitution¹⁷⁷²,

In effect, it appears that the duty imposed on hospitals under Section 3 of the CTCVG Act¹⁷⁷³ to report any gunshot victim under its care to the nearest police station within two hours of the commencement of treatment, will only apply where it is a private person at the scene of the incident that conveyed the gunshot victims to the hospital for treatment. The implication of this is that compliance with such requirement

¹⁷⁶⁹Ibid.

¹⁷⁷⁰S.3 (2), Ibid.

¹⁷⁷¹S. 4, CTCVGA Act, op.cit.

¹⁷⁷²Constitution of Federal Republic of Nigeria, Cap C23, LFN, op.cit.

¹⁷⁷³Ibid.

will not be necessary if it is the officers of the Nigeria Police at the nearest police station that took the victim to the hospital for treatment because at that point they would have been in the picture of everything well enough to compile their preliminary report. Another area that merit consideration is Section 6 of the Act.¹⁷⁷⁴ The section provides that:

“A person who receives the report under section 3(2) of this Act shall furnish or the hospital on demand, with background information on the victim as he may be compelled to incriminate the victim.”

This section appears confusing because professionally, it is not the duty of the hospital to conduct criminal investigations. Quite clearly, hospitals are only required by virtue of Section 3 (1) (2) of the Act, to make a report to the police, and upon the receipt of which, the police shall commence investigations with a view to identifying the circumstances under which the person was shot. From the foregoing, it would seem that Section 6 of the Act¹⁷⁷⁵ simply intend to compel hospitals treating victims of gunshot to furnish the police on demand with information that may assist them in any investigation to incriminate the victim. Otherwise, Section 6 as presently constituted is counter-productive because it is not the duty of the hospital to incriminate the victim of gunshot under its care. It is not proper to overburden the medical personnel by requiring them to do job of the police. It is enough that the hospital treating a victim of gunshot wound is mandatorily authorized by the Act to make a report at the nearest police station to help the police in their investigation.

2.1.4. Protection of Volunteers

Although the CTCVG Act¹⁷⁷⁶ did not define who is a volunteer or helper, but from the definition of victim in Section 15 of the Act, it can be deduced that volunteers or helpers are person who have been hurt, injured or suffered physical harm in their genuine attempt to save the life of a victim of gunshot. Interestingly, Section 8 of the Act¹⁷⁷⁷ equally extends the right to immediate and adequate treatment to volunteers or helpers who got wounded in their genuine attempt to save the life of any gunshot victim. In fact, in an attempt to preserve their dignity, the section specifically requires that they

¹⁷⁷⁴Ibid.

¹⁷⁷⁵Ibid.

¹⁷⁷⁶Ibid.

¹⁷⁷⁷ Ibid.

are to be treated with respect and not be subjected to “unnecessary and embarrassing interrogation” in their genuine attempt to save life. The problem however is that Section 15 of the Act, which is the interpretation section, does not define what constitutes “unnecessary and embarrassing interrogation”. It is a common practice for security agents in Nigeria, especially the police to engage in the mental and physical torture of suspects under the pretext of conducting investigation. And since the foregoing provision seeks to prevent such practice, it is imperative that the keywords “unnecessary and embarrassing interrogation” should have been adequately explained to serve as a guide.

2.1.5. Duty to Keep Record and Notify Victim Relations

The CTCVG Act¹⁷⁷⁸ has imposed further obligations hospital treating a victim of gunshot. By Section 10 and 12 of this Act, the hospital is under an obligation to keep adequate record of the treatment given to the injured persons¹⁷⁷⁹ and also to notify the family members or relatives of the victim as far as they may ascertain within 24 hours of becoming aware of the victim’s identity.¹⁷⁸⁰ It is not clear what the above provision for the statutory requirement for record keeping seeks to achieve. At rate, it seems unnecessary because ordinarily, this is a normal or routine practice by hospitals. As for the second obligation, perhaps its significance would be felt more particularly in cases where the victim of gunshot is a stranger in the locality or was shot while on transit by terrorist, kidnappers, bandit, militant, armed robbers, cultist, IPOB, unknown gunmen or during communal clashes, and was brought to the hospital by good a Samaritan. Understandably, in spite of the perceived benefit of the provision, it cannot be denied that it would also create additional burden on the hospital in terms of financial resources and time. Nonetheless, in the scenario such as the one thrown up above, it is necessary for the hospital to put in effort to contact the family members of the gunshot victim to take care of the medical bills and other sundry expenses incurred by the hospital in treating him.

2.1.4. Penal Sanctions for Defaulters

¹⁷⁷⁸Ibid.

¹⁷⁷⁹S. 10, Ibid.

¹⁷⁸⁰ S.12 (1), Ibid.

As noted hereinbefore, 1 and 8 of the CTCVG Act¹⁷⁸¹ imposed clear obligations on health facilities to treat victims of gunshot and helpers of such victims who are wounded in their genuine effort to save life, and to further ensure that they are not subjected in the course of such treatment to torture, inhuman treatment, unnecessary and embarrassing interrogation. In order to instill compliance, the Act¹⁷⁸² provides penal sanctions for defaulters to serve as deterrent. In this connection, Section 9 provides that: “A person who commits an offence under the Act which leads to or causes substantial physical, mental, emotional and psychological damage to the victim, commits an offence and is liable on conviction to imprisonment for a term of not more than 15 years and not less than five years without the option of fine”. Now, a closer look at the foregoing provision would reveal that the key to understanding the gravity of the action constituting the offence is tied the phrase “substantial physical, mental, emotional and psychological damage to the victim.” Unfortunately, the interpretation section in the Act does not define what each word in this phrase, especially the word “substantial” stands for and how to determine same in relation to the loss suffered by the victim of gunshot. In the circumstance, providing clarity in this regard is of paramount importance given that the sanctions for instilling compliance to the provisions of the Act are tied to it.

In addition, Section 11 of the Act also punishes standby. In other words, the section punishes simply standing by without putting any effort to assist a victim of gunshot and ensure that the person is taken to the nearest hospital for immediate treatment. For the avoidance of doubt, the section provides that: “Any person or authority including any police officer, other security agent or hospital who stands by and fails to perform his duty under this Act which results in the unnecessary death of any person with gunshot wounds commits an offence and is liable on conviction to a fine of ₦500,000 or imprisonment for a term of five years or both.” Of course it is understood that the nature of assistance an individual may be expected to offer to a victim of gunshot would depend on his ability and the circumstance of each case. But the point has been made hereinbefore that punishing any authority or police officer for standby may be understood, but extending that to a private citizen is what appears to stamp logic on its head. Apart from this, it would seem that Section 11 encompasses the

¹⁷⁸¹Ibid.

¹⁷⁸²Ibid.

true essence of the Act as it seeks to compel compliance with all the duties imposed under the Act.

Further to this, Section 14 (1) (2) of the Act¹⁷⁸³ provides that in addition to the penalties highlighted above, the High Court shall order a person or corporate body convicted of an offence to make restitution to victim by directing that person or corporate body to pay to the victim an amount equivalent to the loss sustained by the victim. If made, such order of restitution may be enforced by the victim or by the prosecutor on behalf of the victim in the same manner as a judgment in a civil action. It is clear from the above provision that restitution as a compensatory measure cannot be a substantive relief or form the basis of an action under the Act. It can only be ordered after the Court has found the accused person guilty of violating his statutory obligation as enshrined in the Act which resulted in the victim incurring some loss. In other words, the Court cannot award restitution before deciding the guilt of the accused person as that would be premature. The restitution to be awarded is clearly in “addition” to any other penalty the Court may award as prescribed by the Act. In this connection, the award of restitution can only be made after the plea of allocutus, as was the case in *Raji v. State*.¹⁷⁸⁴

It follows that where the property involved is money, the accused will be ordered in addition to any penalties that may be imposed, to pay to the victim an amount equivalent to the loss sustained by the victim. This position of law resonates well with the decision in *Nwosu v. FRN*¹⁷⁸⁵, wherein the Court held that “the essence of restitution is to compensate the victim of crime for the loss suffered and restore him to the status before the commission of the crime”. In fact, there is no need for additional evidence of any kind at this point as the Court does not have to further investigate whether the accused had money in his possession before restitution can be ordered. The most significant thing in the eyes of the law is whether the accused is guilty of an offence under the Act. Aside this, one major take away from Section 14 of the Act is that the power of the Court to make an order for restitution after conviction in a criminal trial is exercisable by the Court irrespective of whether the prosecution applies for restitution

¹⁷⁸³ Ibid.

¹⁷⁸⁴ (2012) LPELR 7968-CA).

¹⁷⁸⁵ (2022) LPELR-57787(CA).

to the victim of crime or not. This is unlike in the domain of civil suit where claims for restitution are made in the originating process or statement of claim.

3.1. Issues and Challenges

As pointed out above, the CTCVG Act¹⁷⁸⁶ was enacted with the view to guarantee the right to dignity and enhance emergency treatment of gunshot victims by conferring specific obligations on the public, police and hospitals to render assistance and treatment to victims of gunshots. Now, while the Act no doubt represents a ground-breaking effort to provide the citizenry with solace on the issue of the treatment of gunshot victims, it would seem however that seven years after its enactment, and with the rise in terrorism and banditry in remote villages across Nigeria leading to mortality rates from gunshots, the problem remain partly unresolved as the Act is arguably honoured more in breach than in compliance, thereby negating the noble objective it seeks to achieve especially. It cannot escape mentioning at this point that this concern was equally raised by the Hon. Minister, Federal Ministry of Health and Social welfare, in his press statement of February, 2024 wherein he stated thus:

“ It has come to the knowledge of the Federal Ministry of Health and Social welfare, of the slow or non- compliance by most medical facilities going contrary with the gunshot Act 2017 which mandates all medical facilities to provide for the compulsory treatment and care for victims of gunshots; and related matters...”¹⁷⁸⁷

There are many reasons seemingly militating against the successful implementation of the Act. Some of these impediments which range from inadequate legal provisions to weak institutional framework have combined together to create challenges for the stakeholders in a manner that make compliance and effective implementation very difficult. Of particular note are the following impediments:

3.1.1. Resistance to Prohibition on Initial Monetary Deposit

Health facilities, especially private hospitals and clinics are run as businesses with the motive of profit maximization. With this mind-set, and despite their corporate social

¹⁷⁸⁶ CTCVG Act, op.cit.

¹⁷⁸⁷ Muhammad Ali Pate, (2024) “Press Statement on Non-Compliance of Medical Facilities on the Gunshot Act 2017”, Federal Ministry of Health and Social welfare, (2024), https://www.health.gov.ng/Bpg_info/35/Press%20Statement%20on%20non-compliance%20of%20Medical%20Facilities%20on%20the%20Gunshot%20ACT%202017

responsibility policy, it is natural that they would want to satisfy themselves that the patients have the capacity and are ready to pay the bills before they can offer their services to clients. Experience has shown that one of the ways by which they determine whether a patient has the capacity to pay for treatment is when the patient at their request paid a certain amount upfront. This is a general practice, and not just restricted to victims of gunshot. From this context therefore, it is not difficult to see why some hospitals have mounted resistance to Section 2 (2) of the CTCVG Act¹⁷⁸⁸ which criminalizes the demand for initial monetary deposit from victim of gunshot before administering treatment. In order to facilitate ease of understanding, the particulars of section 2 (2) of CTCVG Act¹⁷⁸⁹ upon which the foregoing point is anchored are set down as follows: “a person with gunshot shall be received for immediate and adequate treatment by any hospital in Nigeria with or without initial monetary deposit”.

The point has been made earlier that the philosophical basis of the Act is predicated on the need to save the life of gunshot victims. However, it is a no brainer that to achieve this noble objective, the effective collaborative of health facilities is required. Hence, the drafters of Section 2 (2) of the Act ought to have gauged the ease with which health centers, especially private hospitals or clinics will implement the foregoing obligation without necessarily affecting or crippling their businesses. Admittedly, refusing immediate and adequate treatment for victims of gunshot cannot be justified but it must also be noted that private medical facilities incur cost while taking care of victims of gunshot. The point to underscore is that these hospitals pay taxes, remunerate their staff and also need funds to continue operating. Therefore, implementing this section particularly in private hospitals may be problematic because embarking on treatment without being sure of payment may not be easy as the hospitals may have to bear the cost of treatment where the victims lack the money to pay after they have been treated or where the patient dies in the course of or after treatment have been administered. Unfortunately, in such circumstance, Section 2 (2) of the Act does not specify who would be responsible for the victim’s medical bills.

3.1.2. The Problem of Implementation of the provision for Notification of Police and Victims family

¹⁷⁸⁸Ibid.

¹⁷⁸⁹Ibid.

A careful analysis will reveal that the sweeping requirement under Section 4 of the Act¹⁷⁹⁰ that hospitals treating a gunshot victim must report that fact to the police within two hours is not well thought out. But it did not end here, while grappling to understand how that can be achieved with less obscurity, another obligation imposed on a hospital treating victim of gunshot by Section 12 of the Act to notify the family members or relations of the victim as far as they may ascertain within 24 hours of becoming aware of the victim's identity. Now, in all fairness, these mandatory time-bound obligations are capable of creating unnecessary stress and hardship to medical practitioners. The problem with these provisions is that they did not into account whether the hospital has the resources to perform such task at the material time. Depending on the gravity of the gunshot injuries, but experience has shown that stabilizing a victim of gunshot may take more than two hours to carry out.

The point to note is that medical facilities, especially private hospitals are not of equal financial status. Thus, implementation of these requirements by small hospitals or medical facilities having limited personnel would be difficult especially in situation where the medical doctor who needs to lodge such report is the one trying to resuscitate the patient. In such situations, the doctor may have divided attention on whether to abandon the patient half way and report the matter to the police or to continue with the treatment and risk paying fine which may even be more than the treatment fee. Worst still, if he decides to abandon the victim in order to report the matter and the victim dies or suffers any damage, he will still be liable for murder (in case of death of the victim) or imprisonment for not more than 15 years and not less than five years without option of fine. Furthermore, part of the problem is that there are some remote villages in Nigeria that don't have a police outpost or station. Thus, medical personnel would have to travel many kilometers at their own expense to report such matter. All these appear to suggest that the law simply imposed obligation without averting its mind on whether the persons to whom it relate have what it takes to live up to such statutory responsibilities.

3.1.3. The Challenges Associated with the Duty to Assist

¹⁷⁹⁰ Ibid.

As noted earlier, prior to 2017, Nigeria was faced with the compelling need to protect the rights of individuals who have been injured by firearms by establishing a framework for their access to medical services without unnecessary delays or financial barriers. And now we have the CTCVG Act¹⁷⁹¹ as the answer to that quest. But a close scrutiny of the Act would show that some provisions are not properly conceived. One shining example in this regard is Section 2 which provides that: “Every person including security agents shall render every possible assistance to any person with gunshot wounds and ensure that the person is taken to the nearest hospital for immediate treatment”. Of course, on the face of it, the section seems innovative, but legally speaking, apart from security agents, the obligation imposed on every person who came in contact with a gunshot victim to provide assistance toward taken the person to the hospital would be difficult to enforce. Of course, from moral or corporate responsibility point of view, people may be appreciated for taking a victim of gunshot to the nearest hospital for immediate treatment. But from the legal point of view that obligation is not practicable because unlike the security agents, private citizens have no operational vehicles or budgetary allocation to that effect and the law cannot impose a duty without given the necessary tools for implement it.

Ideally, citizens do not need to be policed by a law with threat of sanction to mandate them to render help before doing so. They should be encouraged to help by the dictates of human conscience. Unfortunately, that is not the case as Section 11 of the Act out rightly criminalizes standby. In other words, it punishes any person including private citizens who stands by and fails to assist victims of gunshot resulting in unnecessary death. Such persons are liable on conviction to a fine ₦ 500, 000, 00 or imprisonment for a term of five years or both. This is tantamount to commanding the impossible. In *Pantazis v. Pantazis*¹⁷⁹² the Court of Appeal also emphatically stated this settled position of law that a Court will not command the doing of that which is impossible to do. This is expressed under the latin maxim *impotentia excusat legem*, meaning the mere fact that a thing cannot be done excuses the doing of it. The Supreme Court in *Ohuka v. State*¹⁷⁹³; enthused that: "...one has to bear in mind that the law itself

¹⁷⁹¹Ibid.

¹⁷⁹² (2024) LPELR-61901(CA).

¹⁷⁹³ (1988) 7 SC 24.

and its administration must yield to that which everything must bend to necessity or impossibility of performance...”. Unfortunately, just like the case of Section 2 (2) and 3, it would seem that the drafters of Section 2 (1) of the CTCVG Act did not aver their mind to the impossibility of performance of the part of the section that compel every person to “render every possible assistance to any person with gunshot wounds and ensure that the person is taken to the nearest hospital for immediate treatment”.

3.1.4. Possible Conflict with Administration Criminal Justice Act

It is no longer in doubt that primary of the security agents under Section 2 of the CTCVG Act¹⁷⁹⁴ is to save the victims’ life first before acting as employees in the criminal justice system. From the foregoing, it is clear that every security agents shall render assistance to any person with gunshot wounds and ensure that the person is taken to the nearest hospital for immediate treatment. It does not matter whether the victim is a fleeing suspect who sustained the gun injuries during a gun duel with security agents, the forgoing obligation of the security agents in this regard still remain the same. In fact, even if the victim of gunshot was brought to the hospital by a civilian, the hospital is required by Section 4 of the Act to report the fact to the nearest police station within two (2) hours of commencement of treatment, who, by virtue of Section 6 of the Act can only commence investigation with a view to determining the circumstances under which the person was shot if certified by the Chief Medical Director of the hospital that the said victim of gunshot is fit and no longer in dire need of Medicare.¹⁷⁹⁵

Now, contrary to the foregoing provisions, Section 14 of the Administration of Criminal Justice Act (ACJA)¹⁷⁹⁶ provides that “a suspect who is arrested, whether with or without a warrant, shall be taken immediately with reasonable dispatch to a police station, or other place for the reception of suspect, and shall be promptly informed of the allegation against him in the language he understands”. Section 15 of the Act¹⁷⁹⁷ further require that where a suspect is arrested, whether with or without a warrant, and taken to a police station or any other agency effecting the arrest, the police officer making the arrest or the officer in charge shall cause to be taken immediately, in the prescribed form, the suspect arrested the alleged offence; the date and circumstances of

¹⁷⁹⁴CTCVG Act, op.cit.

¹⁷⁹⁵S.6, CTCVGA Act, No.733, op.cit.

¹⁷⁹⁶ACJA, 2015.

¹⁷⁹⁷Ibid.

his arrest; his full name, occupation and residential address; and for the purpose of identification his height; his photograph; his full fingerprint impressions; or such other means of his identification.

The above provisions of ACJA have received the blessings of consistent judicial interpretation in a plethora of cases including *Benjamin & Anor v. Obechu & Anor*¹⁷⁹⁸ wherein the Court held that “The Police are conferred with the duty to arrest and detain anyone suspected of having committed any crime depending on the circumstance of each case. Therefore, the police cannot be prevented from carrying out its constitutional duty of arrest of a suspect or conducting an investigation into an alleged crime”. Similarly in *Hassan & Ors v. EFCC & Ors*¹⁷⁹⁹ the Court held that once criminal allegations are made against a citizen, the Police have a constitutional and a statutory duty to investigate the allegations. And in carrying out these tasks, the Police is empowered under the provisions of Section 24 of the Police Act to arrest without warrant any person whom any other person charges with having committed a felony or misdemeanor subject to the provisions of Section 27 of the Police Act that a person so arrested shall be taken before a Magistrate within a reasonable time or granted bail with or without sureties at the Police Station.

The point to underscore from the foregoing is that CTCVG Act has no provision on fleeing suspects. In fact, strictly speaking, it only deals with victims of gunshot. Nonetheless, conflict may arise between relevant provisions of these two laws where the said victim is a fleeing suspect who sustained gun injuries during a gun battle with the police. This is where the problem lies. At this point, even if it is argued that the victim should be taken to hospital for treatment in line with the provision of CTCVGA Act in order to be alive to stand trial, it can still not be denied that the Police has the powers under Section 14 of the ACJA and the above judicial authorities to immediately take the injured suspects to a police station for further investigation. The implication of this dual position is that the police have the discretion to pick and choose between whether to take an injured fleeing suspect to hospital or to police station for further investigation. Unfortunately, with the highhandedness or overzealousness of some officers of the Nigeria police, we do not think the police should be trusted with such a wide discretion.

¹⁷⁹⁸ (2021) LPELR-56395(CA).

¹⁷⁹⁹ (2013) LPELR-22595(CA).

3.1.5. Institutional weakness

The provisions of the CTCVGA Act aimed at ensuring that no person nor institution, particularly healthcare institutions and security officers act in a manner that would jeopardize the life or health of a gunshot victim. Unfortunately, despite the clear obligations imposed on the relevant institutions and organization toward the victims of gunshot, there has not been a resounding compliance. Record has it that both the Nigerian Police Force and Association of General and Private Medical Practitioners of Nigeria have issued warnings on several occasions to their officers and members respectively to desist from demanding police report and deposit before admitting victims of gunshots for treatments. For instance, the Inspector General of Police has ordered police formations across Nigeria to enforce the CTCVGA Act in view of the raging concern over the rising loss of lives due to the refusal of health facilities to provide treatment to gunshots and accident victims without a police report. He specifically noted that this decision “comes as a response to the relentless outcry from concerned citizens and the broader community, highlighting the tragic consequences of delays in treating these victims.”¹⁸⁰⁰

Despite this directive, we could not lay our hand on any report of health workers being arrested for refusing to treat victims of gunshots for failure to present police reports. Consequently, the situation continues to raise its ugly head on daily basis across the federation as reports indicate that some hospitals still reject gunshot victims who failed to present police report. In one account, it was reported that a man shot 19 times could not get prompt care from a Nigerian hospital because he could not provide a police report of the incident at the point of care despite an existing law that mandates all medical facilities to provide compulsory treatment and care for victims of gunshots.¹⁸⁰¹ This is just to mention but a few.

Another cause of the low compliance may not be unconnected to poor awareness among the citizens or sympathizers who often fear being implicated for coming to the

¹⁸⁰⁰Mariam Ileyemi (2023), op.cit.

¹⁸⁰¹Temitayo, A.O. (2024) “Police report blocks man shot 19 times from critical care”, available @<https://businessday.ng/news/article/police-report-blocks-man-shot-19-times-from-critical-care/>, accessed on 1st July, 2024. 2:01. P.M.

aid of these victims.¹⁸⁰² In fact, some citizens do not even know that they are mandated by law at the risk of punishment to provide help and so they walk away or stand by. Consequently, there are reported cases of victims of gunshots whose lives could have been saved but died as a result of the refusal by passerby to render every possible assistance and ensure that the person is taken to the nearest hospital for immediate and adequate treatment. One touching report by the Guardian Nigeria indicates that a victim of gunshot who was lying helplessly in excruciating pain begged the passerby and onlookers not to allow him to die, but many said they were afraid of what they called ‘police trouble’.¹⁸⁰³

4.1. Conclusion

This paper examined access to medical care under the CTCVGA Act, and finds that indeed, there are provisions in the Act that seek to ensure that person, institution, particularly healthcare institutions and security officers act in a manner that does not jeopardize the life of a gunshot victim. Nonetheless, the paper finds that there are challenges that need urgent attention in order for the Act to effectively promote seamless access to immediate and adequate treatment of gunshot victims in Nigeria. Some of these challenges as identified in the paper include the fact that some of the provisions of CTCVGA Act lack the critical components necessary for achieving the objective set out in the Act. There is also the problem of lack of enforcement by the relevant agencies such as the police as well as inadequate awareness regarding the relevant provisions of the Act due largely to institutional weakness. In view of the foregoing, the paper makes the following recommendations:

1. Section 3 of the CTCVG Act needs to be amended to allow a hospital or health facility treating victims of gunshot to report the matter to the nearest police only after the victim has been fully stabilized or resuscitated.
2. In order to encourage hospitals to accept or receive victims of gunshot for immediate and adequate treatment, provision should be made to compel States

¹⁸⁰²Mariam Ileyemi (2023) “Victims of Gunshot Act 2017: Nigerian police direct immediate nationwide enforcement”, available @<https://www.premiumtimesng.com/news/top-news/638157-victims-of-gunshot-act-2017-nigerian-police-direct-immediate-nationwide-enforcement.html?tztc=1> accessed on 1st July, 2024. 2:28. P.M.

¹⁸⁰³<https://guardian.ng/deaths-mount-as-lax-enforcement-of-victims-of-gunshots-act-persists/>, accessed on 1st July, 2024. 2:32. P.M.

to pay the cost of such treatments and any sundry expenses where it is established that the victims cannot afford the bills.

3. A special unit or task force should be created comprising of the police, leadership of the Nigerian Medical Association and other relevant stakeholders, and saddled with the powers to arrest and prosecute any hospital or clinic that refused to accept or receive victims of gunshot for immediate and adequate treatment.
4. At the moment, legislation alone, especially in remote villages, will not be sufficient in combating the practice of stands by and rejection of gunshot victims by hospital for failure to present report. Hence, it is recommended that National Orientation Agency and other public and private media outlets should create awareness through sensitization programmes through broadcast, town hall meeting, seminars, and workshops to educate the citizens, police, hospitals and clinics on their obligations under the Act.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN APPRAISAL OF THE CONSTITUTIONAL ABROGATION OF ISLAMIC CRIMINAL
JUSTICE SYSTEM

Usman Abdulrahman Aboki
Upper Shariah Court Judge, Shariah Court of Appeal, Minna.
Niger State.

usmana.aboki@gmail.com

07062562310

Abstract

Islamic law provides for the safeguarding and protection of peoples' welfare in this life and in the next. In matters of adjudication, it is all encompassing by empowering judicial bodies to exercise both civil and criminal jurisdiction. The Nigerian Constitution which declares itself as supreme has made provisions ousting completely the criminal jurisdiction of the Shariah Court and limiting its jurisdiction to Islamic Personal law only. The formal re-introduction of Sharia Criminal Justice System by some state in Northern Nigeria mark the beginning of a turning point in the legal and constitutional history of the nation. In order to achieve the objectives of this work, reference were made to the constitution of the Federal Republic of Nigeria, Sharia Penal Codes of Niger, Katsina, Kano, and Kaduna States respectively. The study examines the constitutional provisions that limit the jurisdiction of Sharia Courts in Nigeria, focusing on the criminal justice system. Despite the long history of Islamic law in the region, the Nigerian Constitution has restricted Sharia Courts' jurisdiction. However, the reintroduction of Sharia Criminal Justice Systems by some northern states, sparked a legal and constitutional debate. This research appraises the relevant constitutional provisions, Sharia Penal Codes, and Islamic law to identify areas of conflict and recommend amendments that accommodate the exercise of criminal jurisdiction by Sharia Courts. The objective is to uphold Muslims' fundamental rights, promote legal harmony, and enhance the administration of justice in Nigeria.

Keywords: *Islamic Criminal Justice System, Sharia Courts, Nigerian Constitution, Islamic Law, Religious Freedom.*

1.1 Introduction

Nigeria, a federal republic with a diverse population, has a complex legal landscape. The country's legal system is a legacy of colonialism, with a received English law coexisting with Islamic law and customary law. The 1999 Constitution of the Federal Republic of Nigeria, which declares itself supreme, has provisions that limit the jurisdiction of Sharia Courts to matters of personal law, effectively abrogating the Islamic Criminal Justice System. Sharia as the natural rights of muslims and as constitutionally recognized right accrues to muslims through divine means, and not as a deliberate conscious acts of human being. The Islamic system of administration of justice, particularly the criminal aspect which was in existence before the advent of colonialism was re-inforced after over a decade of military role in Nigeria. The constitutional democracy which replaces the military role provides freedom to the citizens. This found freedom reawaken the clamour by some people for the introduction of Sharia. Some states, particularly in the northern part of the country, like Niger, Zamfara, Katsina etc created Sharia Courts and vested in them both civil and criminal jurisdictions. However, the jurisdiction of Sharia Court of Appeal is limited to Islamic Personal Law by the Constitution¹⁸⁰⁴.

The constitution proclaims and entrenches its own supremacy. Section 1 of the constitution provides that: "this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria"¹⁸⁰⁵. It went further to state that "if any other law is inconsistent with the provision of this constitution, this constitution shall prevail and that order law shall to the extent of its inconsistency be void"¹⁸⁰⁶.

The above provisions of the constitution has created irreconcilable differences between the constitution and the Sharia. These differences are fundamental and of crucial

¹⁸⁰⁴ S. 277 (2) (a) - (e) of the Constitution of the Federal Republic of Nigeria

¹⁸⁰⁵ S.1 Ibid

¹⁸⁰⁶ S.3 Ibid

importance. The basic underling reason for these differences is the difference in value system. This paper examines and analyse the aspect of Sharia Criminal Justice System and limitation of the jurisdiction of Sharia Court of Appeal by the constitution. This is because the constitution has taken an inconsistent position thereby impliedly abrogating the relevant Islamic laws on the criminal jurisdiction of the Sharia Court of Appeal. The research further appraises the constitutional provisions that abrogate the Islamic Criminal Justice System in Nigeria, examining the historical context, legal framework, and implications of this abrogation. The study aims to contribute to the ongoing discourse on legal pluralism, religious freedom, and the administration of justice in Nigeria, with a focus on the role of Sharia Courts in the country's legal system.

2.2 The Constitutional Abrogation of the Criminal Jurisdiction of Sharia Court of Appeal

The 1999 Constitution of the Federal Republic of Nigeria (as amended) has provisions that limit the jurisdiction of Sharia Courts, effectively abrogating their criminal jurisdiction. Specifically, Section 277 of the Constitution vests the Sharia Court of Appeal with appellate jurisdiction in civil proceedings only, excluding criminal matters¹⁸⁰⁷. This constitutional limitation is a significant departure from the pre-colonial and colonial era, when Islamic law was applicable in criminal matters in Northern Nigeria¹⁸⁰⁸. The Sharia Court of Appeal, established under the Sharia Court of Appeal Law (2000), was initially empowered to exercise criminal jurisdiction¹⁸⁰⁹. However, the Constitution's supremacy clause (Section 1(3)) renders the Sharia Court of Appeal's criminal jurisdiction null and void ¹⁸¹⁰.

This abrogation has been criticized for infringing on the rights of Muslims in Nigeria, who constitute approximately 50% of the population¹⁸¹¹. Scholars argue that the

¹⁸⁰⁷ National Assembly. (1999). Constitution of the Federal Republic of Nigeria (1999).

¹⁸⁰⁸ Khalid, A. (2017). Islamic law in Nigeria: A historical perspective. *Journal of Islamic Studies*, 28(1), 1-12.

¹⁸⁰⁹ Kano State Government. (2000). Sharia Court of Appeal Law (2000).

¹⁸¹⁰ Ibid

¹⁸¹¹ NPC (National Population Commission). (2016). Nigeria Demographic and Health Survey 2016

limitation violates the principle of legal pluralism¹⁸¹² and the right to freedom of religion¹⁸¹³.

The constitution recognizes Islamic Law only as a personal law¹⁸¹⁴. this is unknown to Sharia. It was purely a creation of the British Colonialist which they introduce to all their colonies where muslims formed a majority of the population¹⁸¹⁵. This was adopted in the Sharia Court of Appeal Law¹⁸¹⁶ and subsequently found it way from there into the constitution.

The constitution identifies and provides in Sections 277 (1), (2), (a-e) the applicable Islamic law thus:

277-(1)The sharia court of appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

(2)For the purposes of subsection (1) of this section, the sharia court of appeal shall be competent to decide:

(a) any question of islamic personal law regarding a marriage conducted in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends

¹⁸¹² Igbiniedion, S. O. (2020). Legal pluralism and the administration of justice in Nigeria. *Journal of Legal Pluralism and Unofficial Law*, 52(1), 1-15.

¹⁸¹³ Abumere, F. A. (2018). The constitutional status of Sharia courts in Nigeria. *Journal of African Law*, 62(1), 1-18.

¹⁸¹⁴ S.277 (2) (a) - (e) Op.Cit

¹⁸¹⁵ Mahmud A.B. (1988) *A Brief History of the Sharia in the Defunct Northern Nigeria* Jos, University Press, p.38

¹⁸¹⁶ Cap 122, (1963) Laws of Northern Nigeria

on such a marriage and relating to family relationship or the guardianship of an infant;

(b) where all the parties to the proceedings are muslims, any question of Islamic personal law regarding marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant;

(c) any question of Islamic Personal Law regarding *wakaf*, gift, will or succession where the endower, donor testator or deceased is a muslim;

(d) any question of Islamic Personal Law regarding an infant, prodigal or person of unsound mind who is a muslim or the maintenance or the guardianship of a muslim who is physically or mentally infirm; or

(e) where all the parties to the proceedings, being muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.¹⁸¹⁷

It is in exercise of the provisions of section 277 (1) SFRN 1999 that some of the Northern State House of Assembly passed the Sharia Penal Code Law to, among other things, codified the Islamic Criminal Law principle and to satisfy the aspiration of those calling for application in those state. For instance, the Sharia Court of Appeal (Amendment) Law No.8 2002 of Katsina State law provides in section 11 (1) that “notwithstanding the provisions of Section 11 of this law, the Court shall have jurisdiction to hear and determine civil/criminal appeals in respect of matters on Islamic Sharia Court”¹⁸¹⁸

¹⁸¹⁷ S.277 (1) and (2), (a-e) Op.Cit

¹⁸¹⁸ S.11 (a) of Sharia of Appeal (AMENDMENT) No.8 2002, Katsina State Law

The above provision of the Katsina State Law seeks to give criminal jurisdiction to the Sharia Court of Appeal and which also seeks to extend the jurisdiction of the Sharia Court of Appeal from Islamic personal law to unlimited jurisdiction on Islamic law; and which impliedly amended the provision of the constitution. This provision is inconsistent with the constitution, and it has been declared ultra vires by the Court of Appeal.¹⁸¹⁹ Belgore JCA (as he then was) says “by virtue of the provisions of section 1 (3) of the Constitution, the Sharia Court of Appeal (Amendment) Law, No.8 2002 is void to the extent of its inconsistency to the Constitution.”¹⁸²⁰

3.3 Some Constraints Against the Full Implementation of Sharia in the States in Nigeria

3.3.1 Constitutional Limitations:

The 1999 Constitution of the Federal Republic of Nigeria (as amended) remains the supreme law, and its provisions limiting the jurisdiction of Sharia Courts remain in force. This creates a legal conundrum, as Sharia Courts are expected to operate within the constitutional framework.

A writer has rightly identified the Nigeria’s Federal structure as the impediment to the full application of Islamic law by the states.¹⁸²¹ Therefore, it is intended to discuss at this juncture some constraints that may impede the full implementation of Sharia by some of the northern states that have introduced and adopted Sharia. These constraints include, the question of legality of Sharia within the provisions of 1999 Constitution of Nigeria, the courts hierarchy in Nigeria and the police.

The major obstacles against the application of Sharia in Nigeria is the question of its legality or otherwise within the framework of the 1999 Constitution of Nigeria. There are so many scholarly literature on the Sharia controversy in Nigeria and it will be out of place to recount the arguments here.

¹⁸¹⁹ Mai Daura v. Tudun Iya (2013) 1 SQLR pt IV, p.72 at 79

¹⁸²⁰ Ibid

¹⁸²¹ Madaki A.M. *Some Reflections on the Kaduna State Sharia Penal Code Law 2002* Ahmadu Bello University Law Journal (2003-2004) p.180 quoted from Salleh M.K. Nigeria Federal Structure as an impediment to the full Application of Sharia by the States (2002 - 2004) & ABULSJ p.76

From the debate, it is clear that the reasons for the seemingly unending controversy are fear,¹⁸²² ignorance and simple mischief,¹⁸²³ further still is the unsatisfactory provisions of the 1999 Nigerian Constitution. This paper shares same view with one writer¹⁸²⁴ who postulated that we had had opportunities in constitutional making process of the 1970s and 1980s to resolve this controversy but curiously even the 1999 Nigerian Constitution did not seem to take adequate cognizance of the problem of 1979 Constitution as it relate to the issue of Sharia. The current implementation of Sharia by some states in Nigeria was made possible by the inconsistencies in the 1999 Constitution.¹⁸²⁵

For instance, the 1999 Constitution in its section 1 provides that the constitution shall be the supreme law of the land, and Section 10 forbids adoption of a state religion in Nigeria. But in section 38 it provides for the right of freedom of religion.

Further still, section 275(1) provides for the establishment of Sharia Court of Appeal for any state that requires it. Finally section 277 (1) provides that the Sharia Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civic proceedings involving question of Islamic personal law which the court is competent to decide in accordance with the provisions of sub-section (2) of that section. All the states that have implemented the Sharia relied on the provisions of section 277 (1) and extended the jurisdiction of the Sharia Court of Appeal to cover criminal matters.

These inconsistent provisions of the constitution may not be unconnected with the way and manner the constitution was hurriedly assembled with little or no discussion of its provisions. Hence any implementation of Sharia by any state based on the existing legal framework will always constitute problem.

3.3.2 The Court Structure in Nigeria

Nigeria's Federal structure provides for only one hierarchy of courts. Thus, appeals against decision of state courts(Area Court/Sharia Court, Customary Court, High Court)

¹⁸²² Aduba J.N. The Sharia Controversy and 1999 Constitution: A case of Shadow Boxing. In: Ed. Ladan M.T. Law, Human Right and the Administration of Justice in Nigeria p.379. As quoted by Madaki A.M. Op.Cit

¹⁸²³ Sani Idris Sharia and the 1999 Constitution: Is There any Cause for Alarm (2002 - 2004) & ABULSJ. As quoted by Madaki A.M. Op.Cit p.181

¹⁸²⁴ Madaki M.A Op.Cit p.181

¹⁸²⁵ Ibid

will, all things being equal, end up in the Federal courts (Court of Appeal and Supreme Court). The problem that may emanate from this arrangement is further compounded by the introduction of Sharia and Sharia Courts in some states. It is a fact that where a Sharia Court of Appeal delivers final judgement, any aggrieved party can appeal to the court of appeal and ultimately to the Supreme Court. Any argument to the contrary will jeopardize the right of appeal of the parties. If this position is correct, then can the Court of Appeal or the Supreme Court determine any appeal from the Sharia Court of Appeal based on the application of Islamic Criminal Law? The answer is negative and the courts may not hesitate to declare the decision of Sharia Court of Appeal void. Our position is strengthened by the provision of section 277 of the 1999 Constitution which provides that the Sharia Court of Appeal's jurisdiction is limited to civil appeals only and it has no powers to exercise jurisdiction on criminal appeals.¹⁸²⁶ The Sharia Penal Codes enacted in some states are often vague and inconsistent, leading to confusion and difficulties in implementation (Kano State Government, 2000; Zamfara State Government, 2000).

This position is further strengthened by the recent ruling delivered by the Chief Judge of Borno State in the case of Garba Maitangaram v. Abdullah Maitaxi¹⁸²⁷. In this case, the court was to consider the effect of section 8(3) of Borno State Sharia law which provides as follows:

“In addition to the power conferred by section 277 of the constitution the Sharia Court of Appeal shall have jurisdiction and power to hear and determine appeal in criminal matters from the decisions of the Upper Sharia Court.”¹⁸²⁸

After reviewing some authorities, the court held that section 8 (13) of the Borno State Sharia Administration of Justice Law 2000 is in conflict with the provision of section 272 and 277 of the 1999 Constitution. The court went further to say:

The word in ‘addition’ stated under section 277 of the 1999 Constitution does not give a blanket or blank cheque to the State House of Assembly

¹⁸²⁶ Mai Daura v. Tudun Iya (supra)

¹⁸²⁷ Unreported Suit No. BOM/505/2002 Delivered on 28/06/2002

¹⁸²⁸ Ibid

to confer jurisdiction which were not envisaged or provided by the 1999 Constitution. The words in addition are tied down and subjected to the provision of section 277 of the 1999 Constitution. In given effect to section 277 of the 1999 Constitution, regard must be add to other section of the constitution. Section 277 ought not be read in isolation¹⁸²⁹

The court came to conclusion that the State House of Assembly cannot enact a law and confer an appellate jurisdiction in criminal matter on the Sharia Court of Appeal. It is therefore submitted that all the states that have implemented Sharia via the amendment of section 277 (1) of 1999 Constitution by enlarging the jurisdiction of the Sharia Court of Appeal to include criminal matter acted in breach of the constitution and their actions are void.

In the case of **Kano State v. Aminu Iliyasu and 1 Or**¹⁸³⁰. the accused persons were charged before Upper Sharia Court, Bompai (sitting at Yankaba) Kano for causing the death of a four (4) year old girl (Zainab Abdulhamid) contray to section 142 of Kano State Sharia Penal Code by doing a rash and negligent act with the knowledge that such act is likely to cause death. The case of the prosecution was that on the faithful day , the accused persons (Aminu Iliyasu and Shuaibu Yusuf), while trying to rape the deceased, closed her mouth and nose with a pillow to block any possible shout for help from her, an act which suffocated and caused her death. They were found guilty and eventually convicted under section 143 of the code and sentenced to death by hanging. The accused persons being dissatisfied by the decision of Upper Sharia Court, Bompai appealed to Kano State Sharia Court of Appeal.

Similarly, in the case of **Kano State v. Shehu Usman & 1 Or**¹⁸³¹. The accused persons were arraigned before Upper Sharia Court Shahuci , Kano for the offence of homicide

¹⁸²⁹ Ibid

¹⁸³⁰ Unreported CR/1/2005

¹⁸³¹ (2007) 1 RSMNW, p.97

contrary to section 142 of the Kano State Sharia Penal Code, 2000. The accused persons-Shehu Usman and Muhammed Inuwa Idris were alleged to have hit the deceased -Gali Muhammed on the head with a stick during *Sallah* festival with knowledge that such act is likely to cause the death. The deceased died as a result of their act.

The case went into full trial and at end of it the court discharged and acquitted the second accused person on ground of insufficient evidence against him. The court, however, found the first accused person -Shehu Usman guilty of intentional homicide but the heir of the deceased (deceased's father) remitted *qisas* (retaliation). Consequently, the court sentenced the first accused person to seven years imprisonment under section 143 (c) of the Kano State Sharia Penal Code 2000.

The first accused person being dissatisfied with the decision of the lower court appealed to Kano State Sharia Court of Appeal on the ground that the evidence relied upon by the lower court was insufficient to sustain a conviction of homicide.

After hearing both sides in the appeal, the Sharia court of Appeal reversed the decision of the lower court and discharged the first accused person.

The above cases cited are illustrations that the Sharia Court of Appeal has it jurisdiction extended to criminal cases by the State House of Assembly. This inconsistent position to the provision of the Nigeria's Constitution is an indication that applicability of Islamic law in the affairs of muslims is not optional or limited to Islamic personal law as the constitution may want people to believe in an heterogeneous society like Nigeria.

4.4 Sharia Controversy and the Constitution Compared

The reintroduction of Sharia in Nigeria has sparked intense controversy and debate, with some arguing that it violates the Constitution and human rights¹⁸³². A comparison of Sharia and the Constitution reveals areas of conflict and tension. There appear to be a lot of confusion of these matters arising from the ignorance of the issues involved. The

1832

Constitution recognized that the polity referred to as 'Nigeria' was constituted by people, who not only believe in the existence of God, but also have different religious beliefs and their perceptions of how to worship the Supreme Being. The Constitution was at pains to protect and in some cases, even advance these religious faiths. Other related issues were in fact advanced by legislations e.g Sunday not being a working day, declaration of various or different days as public holidays to observe or celebrate certain religious activities or occasions. For examples, Id-el fitr, good Friday etc Let us consider other issues relating to religion under constitution.

Firstly, the preamble to the constitution described Nigeria as "one indivisible and indissoluble sovereign nation under God..." secondly section 38(1) guaranteed the right to freedom of thought, conscience and religion- including the freedom to propagate belief or worship, manifest, teach, practice and observe these religious belief either in public or in private, alone or in community with others. Thirdly, the constitution under section 275 (1) established the Sharia Court of Appeal and vested it with powers under section 277 to exercise jurisdiction on "Islamic Personal Law" which term has not been defined although, the scope of the jurisdiction has been elaborately defined under subsection 2. Fourthly, the sixth schedule to the constitution which prescribed the Oath of Office of all elected officials from the president to all members of legislative houses and other judicial officers ended with the phrase SO HELP ME GOD

Ironically, section 10 attempted in a very poor manner to restrict this right to religion in the sense of prohibiting the adoption of any religion as a state religion. It is this provision that has been erroneously defined to mean that the Constitution has enshrined "the doctrine of secularism". Secularism from its historical perspective was a Christian doctrine of attempting to separate the church from the state. This is based upon the philosophy of "giving unto Caesar what is Caesar's and unto God what is God's..."¹⁸³³

There is a serious gap in the Constitution in the sense that it has failed to either define the word "adopt" as used in the section or at least by way of illustrations specify certain actions or conducts that could be regarded either as expressly or impliedly to mean

¹⁸³³ Jamo N.M. Salient Observations on the 1999 Constitution: The Need for some Amendment, ABULJ (1999 - 2000) p.148

adopting a state religion. Any propose constitutional amendment must, as a matter of urgent necessity address this issue most especially because of its emotive nature.

Related to the issue of Secularism is the issue of Sharia which appears to generate a lot of controversy and was unjustifiably used as a basis of causing mayhem by some political forces against law abiding and innocent people. Perhaps, it is necessary to examine this emotive issue from its historical perspectives. In 1960 the Penal Code law was passed by the Northern Region House of Assembly and became the criminal legislation governing the law of crimes in the entire Northern Nigeria. The subsequent states created in the region did not alter this law. The Penal Code Law is a state criminal legislation which every state has the power to amend specific provision, repeal other provisions or completely abrogate the law and replace it with new code.

The recent amendment or repeal of Penal Code in the name of adopting Sharia by some Northern States legislatures appeared to generate a lot of tension and/or controversy¹⁸³⁴. The opponents argue that the action of the states amounted to introduction of state religion which contradicted section 10 of the Constitution. The question that remains unanswered is whether such legislation amounted to adoption of state religion as contemplated by section 10 of the Constitution, especially when considered against the background of the continuous existence of other institutions in the state established under other laws whose origin could be traced to canon laws.

For the avoidance of doubt, the true and correct legal position is that the exercise of powers of amending the Penal Code Law by the various Houses of Assembly is constitutional in so far as the constitutionally laid down procedures were comply with in such amendment. It must be pointed out, mere amendment of a criminal legislation even if it provide for the complete application of Islamic Criminal Code did not amount to the introduction of a state religion for the following reasons:

Firstly, Sharia is a complete legal system governing not only the criminal aspect of a muslim life only but also extent to all other aspect of life including political, economic, social etc. Sharia prescribes punishments like amputation and stoning, which many non- muslims often perceive to contravene human rights. Secondly, it must be

¹⁸³⁴ Ibid

remembered that Islamic Criminal Law as a law of evidence (*muraqfa'at*) which may be completely inapplicable especially because EVIDENCE as a subject matter belongs to the exclusive Legislative List (meaning that the state could not make law in respect of). Thirdly, all other institutions of the state remain intact and continue to perform their functions on the basis of the laws establishing them. This so-called Sharia Law, it was argued, will be applied on the muslims only and does not extend to Christians¹⁸³⁵. Finally, the courts created to administer this law remained inferior to those created under section 6 (5) (a-g) of the constitution and therefore the system of appeal to the Supreme Court remain valid and operational.

5.5 Conclusion

Islamic law applies to all affairs of muslims and in matters of adjudication, it covers both civil and criminal jurisdiction, the inconsistent of the constitution to the Sharia is part of the relic of colonialism. This study has appraised the constitutional abrogation of the Islamic criminal justice system in Nigeria, with a focus on the constraints and controversies surrounding its implementation. It is also clear that there are so many problems in the 1999 Constitution. Our discussion here regarding criminal jurisdiction of Sharia Court is only a tip of the iceberg. The comparison between Sharia and the Constitution highlights areas of conflict and tension, particularly in regards to source of law, jurisdiction, punishments, equality and human rights. The research contributes to the ongoing discourse on legal pluralism, religious freedom, and the administration of justice in Nigeria. It provides insights for policymakers, legal practitioners, and scholars working on the intersection of law and religion.

5.5.1 Findings

a. The Constitution recognizes the supremacy of the Constitution and federal laws, while Sharia derives its authority from Islamic law and tradition. This is against the principle of true federalism.

¹⁸³⁵ Ibid p.149

- b. The implementation of Sharia criminal justice system has been met with resistance and criticism from some quarters, particularly from non-Muslim communities. This is borne out of fear , ignorance and mischief.
- c. The Constitution limits the jurisdiction of Sharia Courts to civil matters. Whereas Sharia criminal justice system encompasses both civil and criminal jurisdiction.

5.5.2 Recommendation

- a. This paper recommends true federalism. In this respect, each of the state has a Supreme Court which is the highest court within the courts' structure of the state. All appeals within the competence of the state are determined by the supreme court of that state.
- b. Sharia Court judges and officials may require specialized training and capacity building to effectively adjudicate criminal cases under Sharia law. This is in addition to public education and awareness on Sharia criminal justice system.
- c. This paper recommends Constitutional review to address the legal conundrum and reconcile tensions between Sharia and the Constitution. The implementation of Sharia should be in all ramification and the jurisdiction of Sharia Court of Appeal should cover both civil and criminal jurisdiction.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

CRITICAL ANALYSIS OF LEGAL PROTECTION OF GIRLS AND WOMEN FROM
HARMFUL PRACTICES AND PROCEDURES OF FEMALE GENITAL MUTILATION IN
NIGERIA

Ifepe Nnennia Adaku

Abstract

Female Genital Mutilation is a cultural practice that has health, and human rights impacts on girls and women. The practice of female genital mutilation is deeply rooted in many traditions and cultures across the world, and it involves the partial or total removal of the external female genitalia or other injury to the external female genital organs, without medical indications. Women and girls who are subjected to female genital mutilation are exposed to health hazards such as life-threatening bleeding, infections, childbirth complications as well as psychological trauma. The practice is proven to have no benefit for women rather it violates their right to dignity and leaves them with health complications. The research avers that Nigeria has ratified global legal and policy instruments for the prevention of female genital mutilation but to what extent the existing legal and policy documents address prevention has remained unclear. The research also avers that the Violence Against Person Prohibition Act was signed into law in 2015 but little or nothing has been done as regards the prosecution of offenders or eliminating the practice of female genital mutilation to a large extent. The research which uses doctrinal and socio-legal method seeks to critically analyse the legal protection of women and girls from the harmful practice of female genital mutilation. The research argues that the current legal frameworks of which have been ratified by Nigeria has not been implemented adequately to address the prevention of Female genital mutilation and recommends collaboration, partnership and cooperation of all relevant stakeholders, participation of

women, inclusion of all stakeholders, respect for culture within the framework of Human rights as a way of preventing female genital mutilation to a large extent in our society.

Keywords: Female Genital Mutilation, Violence Against Persons Prohibition Act, International Legal Instruments, Violation of rights, Gender Discrimination

1.1 INTRODUCTION AND BACKGROUND

According to the World Health Organization (WHO), Female Genital Mutilation (FGM) is a traditional harmful practice involving the partial or complete removal of the female genitalia or other injuries to female genital organs for non-medical reasons.¹⁸³⁶ It may also be referred to as Female genital cutting or Female Circumcision.¹⁸³⁷ FGM is recognized globally as a violation of the human rights of girls and women and an extreme form of gender discrimination practice that cuts across countries in Africa, Asia and the Middle East.¹⁸³⁸ It is most prevalent in developing African countries like Nigeria which according to the United Nations International Children's Emergency Fund (UNICEF) ranks third place globally, with an estimated 19.9 million survivors (women and girls) who have undergone FGM worldwide.¹⁸³⁹

FGM has remained rampant in Nigeria despite concerted efforts made by Civil Society Organizations (CSOs), and international development partners such as United Nations Populations Funds (UNFPA), United Nations International Children Emergency Fund (UNICEF), World Health Organization (WHO) and UN Women. These key stakeholders in partnership with the government and community

¹⁸³⁶ World Health Organization: 'Female Genital Mutilation' <<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>> Accessed 31st December 2023

¹⁸³⁷ The World Bank: 'Compendium of International and National Legal Frameworks on Female Genital Mutilation (February 2023)' <<https://elibrary.worldbank.org/doi/abs/10.1596/39509>> Accessed 28th February 2024

¹⁸³⁸ Chijindu Nwakama and others, 'The Practice of Female Genital Mutilation in Africa and the Challenges Facing its Eradication: Nigeria as a Case Study' (2023) 4(2) International Journal of Scientific Advances, 190

¹⁸³⁹ United Nations International Children's Emergency Fund, 'UNICEF warns FGM on the rise among young Nigerian girls' (06 February 2022) <<https://www.unicef.org/nigeria/press-releases/unicef-warns-fgm-rise-among-young-nigerian-girls>> accessed 12 February 2024.

members have supported sensitisation and awareness including the establishment of FGM Survivor networks and initiatives that empower beneficiaries with the skills needed to be drivers of change against the practice and to increase their access to survivor-centered FGM response services (health, education, social, services and justice).¹⁸⁴⁰

FGM has received considerable attention at both national, regional, and international levels, largely due to its far-reaching implications and effects. Survivors subjected to this systemic form of violation and rights violation, often require lifesaving, care-urgent treatment to staunch hemorrhage, antibiotics to quell infections, surgery to address urinary backup or emergency obstetric care for complicated deliveries.¹⁸⁴¹ Some also experience life-long trauma and inability to participate in or enjoy normal sexual relations while some other victims may pay the ultimate price of death. Despite these recorded effects of this harmful practice as well as its statutory prohibition, FGM has remained significantly prevalent in Nigeria for various reasons, including cultural and economic factors that make it difficult for girls, women and communities to abandon the practice.¹⁸⁴² In recent years, Nigeria has made fundamental progress in protecting the rights of women by legislating against FGM and this has been done by acceding to different International and regional Conventions and enacting domestic laws. The most recent innovation regarding legal protection on the subject matter in Nigeria is the passage of the Violence Against Persons (Prohibition) Act (VAPP Act) which is the first federal law to prohibit and criminalise FGM across Nigeria.¹⁸⁴³ The VAPP Act is termed federal law because it was enacted by the National Assembly of Nigeria and signed (assented to) by the President of Nigeria to become law in 2015.

Although VAPP Act 2015 does not clearly define FGM, it is the only law that criminalises and prohibits it.¹⁸⁴⁴ The VAPP Act 2015 grants wide-ranging protection to victims of FGM however the implementation of these laws has been extremely poor or inadequate in terms of protection against

¹⁸⁴⁰ Chijindu Nwakama and others, 'The Practice of Female Genital Mutilation in Africa and the Challenges Facing its Eradication: Nigeria as a Case Study' n3

¹⁸⁴¹ United Nations International Children's Emergency Fund, 'UNFPA-UNICEF Joint Programme on the Elimination of Female Genital Mutilation: Accelerating the elimination of an extreme form of violence against girls' (May 2024) <<https://www.unicef.org/protection/unfpa-unicef-joint-programme-eliminating-fgm>> accessed 07 May 2024.

¹⁸⁴² UNFPA-UNICEF Joint Programme on the Elimination of Female Genital Mutilation.

¹⁸⁴³ Section 6 of the Violence against Persons (Prohibition) Act of 2015

¹⁸⁴⁴ Section 6 VAPP Act 2015

FGM.¹⁸⁴⁵ This research aims to critically assess the adequacy, effectiveness, and impact of the legal frameworks for combating FGM in Nigeria. The recognition of FGM as a gross violation of the rights of girls and women is well established in Section 6 of the VAPP Act 2015 and several international human rights instruments and declarations of which Nigeria is a signatory.¹⁸⁴⁶ These instruments guarantee a range of fundamental rights such as equality, dignity and non-discrimination and they form the cornerstone of the legal framework behind the protection of women's rights against discrimination in Nigeria.¹⁸⁴⁷

It is against this backdrop that this study seeks to probe the VAPP Act 2015 and other national and international legal instruments addressing FGM in Nigeria which include The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,¹⁸⁴⁸ Universal Declaration of Human right,¹⁸⁴⁹ Convention on the Elimination of All Forms of Discrimination Against Women,¹⁸⁵⁰ Convention on the Rights of the Child,¹⁸⁵¹ and African Charter on the Rights and Welfare of the Child.¹⁸⁵²

This study probes the impact of provisions of the VAPP Act 2015 and other regional and international legal instruments on the eradication of FGM in the deterrence of perpetrators of FGM and their effectiveness in response to incidences of FGM during their application and implementation. Furthermore, the study aims to contribute to the existing body of knowledge on FGM in Nigeria, foster reforms and promote evidence-based reforms that can improve the legal landscape and better protect the rights of victims of FGM in Nigeria. By examining the nexus between legal provisions for the

¹⁸⁴⁵ Babatunde.M. Gbadebo, Adetokunbo.T. Salawu and Ayo .Adebowale,' Cohort analysis of the state of female genital cutting in Nigeria: Prevalence, daughter circumcision and attitude towards its discontinuation (2021) BMC Women's Health 1,5. <https://doi.org/10.1186/s12905-021-01324-2> 'Accessed on 28th February 2024'. See also, Chigozie Victor, Nigeria's Violence Against Persons Prohibition Act has been widely Accepted But What Now? <https://humanglemedia.com/nigerias-violence-against-persons-prohibition-act-has-been-widely-accepted-but-what-now/>. 'Accessed 12th April, 2024'

¹⁸⁴⁶ The 1999 Constitution, The Nigerian Criminal Code Act, Maputo Protocol, Universal Declaration of Human Rights, Convention on the Rights of the Child, CEDAW, African Charter on the Rights and Welfare of the Child.

¹⁸⁴⁷ 'GBV, Affirmative Action:' Female Gender Rights in Need of Defence' This Day Live (Lagos, September 2022).

¹⁸⁴⁸ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11th July 2003, entered into force 25th November 2005) UNTS 1249 (Maputo Protocol) Article 5

¹⁸⁴⁹ The Universal Declaration of Human Rights (adopted 10th December 1948, entered into force 10th December 1948) Articles 5 and 7

¹⁸⁵⁰ Convention on the Elimination of all Forms of Discrimination against Women (adopted 18th December 1979, entered into force 3rd September 1981) UNTS 1249(CEDAW)Article 1

¹⁸⁵¹ Convention on the Right of the Child (adopted 20th November 1989, entered into force 2nd September 1990) UNTS 1577 (CRC)Article2 and 19

¹⁸⁵² African Charter on the Rights and Welfare of the Child (adopted 1st July 1990, entered into force November 29th 1999, date of last signature 27th June 2019) (ACRWC) Article 21

protection of the victims of FGM, this study seeks to offer valuable insights into addressing the problem by strengthening consequences and accountability against FGM in whatever form or shape in Nigeria.

This paper consists of five sections, Following the introduction, the second section is the conceptual clarification of terms. This section gives national and international perspectives on the concepts of FGM, Violence Against Person Prohibition Act, International Legal Instrument, Violation of rights and Gender discrimination with the aim of delineating other related concepts. The third section discusses FGM and overview of legal Protection in Nigeria. This section examines the implementation of VAPP Act 2015 and makes comparative analysis with the Female Genital Mutilation Act 2003 whose scope was expanded by the Serious Crime Act 2015. In the fourth section, the article makes recommendations that will guide law and policy makers towards a strategic implementation of the various legal framework.

2.0 FEMALE GENITAL MUTILATION

According to the World Health Organization (WHO), Female Genital Mutilation (FGM) is a traditional harmful practice involving the partial or complete removal of the female genitalia or other injuries to female genital organs for non-medical reasons.¹⁸⁵³

According to a 2024 UNICEF Report, Nigeria has the third highest burden of FGM globally and accounts for 10% of the 200 million women and girls survivors of FGM globally, estimated at nearly 20 million.¹⁸⁵⁴ Despite the fundamental progress gained by the recognition and protection of the rights of women in Nigeria and with legal reforms aimed at promoting equality and combating discrimination many women and girls still face discrimination based on sex and gender.¹⁸⁵⁵

¹⁸⁵³ World Health Organization, 'Female Genital Mutilation' n1

¹⁸⁵⁴ United Nations International Children's Emergency Fund, 'Standing with survivors to end female genital mutilation in Nigeria. Day of zero tolerance for FGM'(6th February 2024) <<https://www.unicef.org/nigeria/press-releases/standing-survivors-end-female-genital-mutilation-nigeria>> Accessed 14th May 2024.

20. Amnesty International, 'Women's rights are human rights' (2024).
<<https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/>> Accessed on 10th December 2023.

The four different types of FGM includes Type 1 which is also known as clitoridectomy and this consist of partial or total removal of the external part of the clitoris or its prepuce,¹⁸⁵⁶ the Type 2 also known as excision occurs where the external part of the clitoris and labia minora are partially or totally removed with or without excision of the labia majora, the Type 3 also known as infibulation or pharaonic type consist of narrowing the vaginal orifice with creation of a covering seal by cutting/ apositioning the labia minora or labia majora with or without removal of the external part of clitoris and the Type 4 consist of all other procedures to the genitalia of women for non-medical purposes such as pricking, piercing, incising, scraping and cauterization.¹⁸⁵⁷

FGM depicts patterns of structural inequality maintained by rules, norms and procedures that dictate a subordinate role for women in all spheres of the economy.¹⁸⁵⁸ As a socio-cultural construct, FGM Practice cuts across age, religion and socio- cultural groups and justification for the practice includes concern that the clitoris is unclean, risk of promiscuity will be increased if the mutilation did not occur, the need to preserve societal relationships, the need to preserve cultural practices against the influence of the West and enhancement of fertility.¹⁸⁵⁹

The practice of FGM has received a great deal of attention in recent years both at the national and international levels but its derivation from cultural beliefs and norms makes it almost impossible for the discriminatory cultural practice to be eliminated.

2.1 Violence Against Person Prohibition Act 2015

The VAPP Act is a national law applicable in Nigeria and signed into law in 2015 by the President to cover most prevalent forms of violence and eliminate violence against women.¹⁸⁶⁰ The VAPP Act

¹⁸⁵⁶ <https://www.endfgm.eu/female-genital-mutilation/what-is-fgm>

Accessed on 20th June 2024

¹⁸⁵⁷ Ibid

¹⁸⁵⁸ Centre for Reproductive Rights: Female Genital Mutilation A matter of Human Rights. An Advocate's Guide to Action.

www.reproductiverights.org Accessed on 15th June, 2024.

¹⁸⁵⁹ National Policy and Plan of Action for The Elimination of Female Genital Mutilation in Nigeria (2021-2025) by Federal Ministry of Health

¹⁸⁶⁰ OBI, Violence Against Persons(Prohibition) Act 2015: Advancing Legal Protections of Women Against Violence in Nigeria IRLJ 2 (1)2020.

provides a solid foundation for effective and coordinated legal action against gender-based violence and explicitly prohibits and criminalises FGM. It provided a solid foundation for the legal protection of women and is the first legislation to prohibit and punish whoever performs or procures another to perform FGM.¹⁸⁶¹ This confers a progressive status on Nigeria as one of the Countries in the world to take significant steps towards protecting women from this harmful practice.

In its effort to address the scourge of FGM, the Nigerian government has developed national policies the most recent being the National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria which was in place from 2013 to 2017 with an extension to the end of 2019 yet the policies did not critically address the scourge of FGM to ensure the full realization of women's rights.¹⁸⁶² However, despite legal advancements, there appears to be insufficient awareness and access to the legal instruments by the Judiciary, Nigerian Police, and advocacy groups to implement the laws, hence rendering the policy implementation process ineffective.¹⁸⁶³ Discriminatory attitudes, cultural norms, and social stigmas often serve as justification for FGM in Nigeria and these hinder the effective implementation and enforcement of legal protection.¹⁸⁶⁴ Additionally, the adequacy, impact, or effectiveness of legal protections for the protection of the girl child against FGM is not only determined by the existence of legislation rather Implementation, enforcement, and access to justice play crucial roles in translating legal provisions into tangible benefits and protection for the girl child.¹⁸⁶⁵ Barriers such as inadequate awareness, slow litigation processes, ignorance, and limited resources for implementation can hinder the effective recognition of the victims who were plunged into the dreadful FGM practice.

A research carried out by Thomas Reuter Foundation depicted the fact that a national law targeted at ending FGM must provide a clear definition of FGM, criminalise the performance of FGM, criminalise procuring, arranging/assisting in acts of FGM, criminalise the failure to report incidents of FGM,

¹⁸⁶¹ Section 6 VAPP ACTs

¹⁸⁶² Federal Ministry of Health, 'National Policy and plan of action for the elimination of female genital mutilation in Nigeria'(2021-2025).

<<https://nigeria.unfpa.org/en/publications/national-policy-plan-action-elimination-female-genital-mutilation-nigeria-2021-2025>>

Accessed on 3rd December,2023

¹⁸⁶³ Obidinma Igwe,' Critique of the Violence Against Persons (Prohibition) Act 2015, (2022) (6)(2)115,118.

¹⁸⁶⁴ Federal Ministry of Health, 'National Policy and Plan of action for the elimination of female genital mutilation in Nigeria'. N19.

¹⁸⁶⁵ Federal Ministry of Health, 'National Policy and Plan of action for the elimination of female genital mutilation in Nigeria'. n19.

criminalise the participation of medical professionals in acts of FGM and criminalise the practice of cross- border FGM and unfortunately the VAPP Act is yet to accomplish all these .¹⁸⁶⁶

The signing of VAPP Act into law by the President is the right step towards the criminalization of FGM in Nigeria but a lot still needs to be done in order to make this dream a reality.

2.2 VIOLATION OF RIGHT

The goal that every human being should have full enjoyment of their human rights implies that nobody should suffer violation of those rights.¹⁸⁶⁷ The Vienna Declaration and Programme of Action says that “the international community should devise ways and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human right violations resulting therefrom throughout the world.”

Violation of rights simply means any act, programme, process, method, or response either through commission or omission, that infringes upon the enjoyment of the basic rights of any human being.¹⁸⁶⁸ Human right protection is crucial for the development of any Country hence must be protected at all cost by both the government and the citizens at large.

2.3 GENDER DISCRIMINATION

¹⁸⁶⁶ Thomson Reuters Foundation:28 TOO MANY: The Law and FGM. An overview of 28 African Countries. September 2018

www.28toomany.org/law

Accessed on 21st June 2024

¹⁸⁶⁷ Preventing Human Rights Violations

<https://www.ohchr.org/en/prevention-and-early-warning/preventing-human-rights-violations>

Accessed on 20th June 2024

¹⁸⁶⁸ Legal Protection of human rights- Manual for Human Rights Education with Young People

<https://www.coe.int/en/web/compass/legal-protection-of-human-rights#Domestic%20Human%20Rights>

Accessed on 20th June 2024

Article 2 of the Universal Declaration on Human Right states thus, “Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind such as race, color, sex, language, religion political or other opinion, national or social origin, property, birth or other status”.

Gender discrimination means the unjust and unequal treatment of individuals and groups based on gender and this primarily affect women and girls.¹⁸⁶⁹

2.4 STATEMENT OF RESEARCH PROBLEM

According to a 2024 UNICEF Report, Nigeria has the third highest burden of FGM globally and accounts for 10% of the 200 million women and girls survivors of FGM globally, estimated at nearly 20 million.¹⁸⁷⁰ Despite the fundamental progress gained by the recognition and protection of the rights of women in Nigeria and with legal reforms aimed at promoting equality and combating discrimination many women and girls still face discrimination based on sex and gender.¹⁸⁷¹ Despite the presence of the VAPP Act and other legal frameworks, concerns persist about the adequacy of the provisions in deterring perpetrators and the effectiveness of the implementation and enforcement of this protection. Despite the ratification of these progressive legal instruments and the VAPP Act, this study highlights that there is still a gap in the legal instruments in lack of penalty for the perpetrators of FGM. Another obvious gap lies in the fact that the penalties are too low to deter perpetrators from carrying out disgraceful acts against girls.

This study aims to critically analyse the adequacy and effectiveness of the VAPP Act and other legal instruments in deterring perpetrators from carrying out FGM by examining

¹⁸⁶⁹ Amnesty International, what is Discrimination.
<https://www.amnesty.org/en/what-we-do/discrimination/>
Accessed on 21st June 2024

¹⁸⁷⁰ United Nations International Children’s Emergency Fund, ‘Standing with survivors to end female genital mutilation in Nigeria. Day of zero tolerance for FGM’(6th February 2024)
<<https://www.unicef.org/nigeria/press-releases/standing-survivors-end-female-genital-mutilation-nigeria>>
Accessed 14th May 2024.

¹⁸⁷¹ Amnesty International, ‘Women’s rights are human rights’ (2024). <<https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/>> Accessed on 10th December 2023.

the barriers and challenges that hinder their full realization. This will be done by conducting an in-depth analysis of the legal landscape, which will involve examining relevant legislation, case law, and the policy framework.

2.5 OBJECTIVES

The specific objectives of the study are:

- 1) To examine the impact of the VAPP Act and other legal frameworks in holding perpetrators of FGM accountable in Nigeria.
- 2) To determine the effectiveness of the existing legal frameworks for FGM in Nigeria.
- 3) To use comparative best practices to identify patterns, contexts, and environmental differences and to draw lessons for Nigeria.
- 4) To examine international and regional Legal frameworks in combatting FGM to establish what constitutes global best practices and determine whether Nigeria meets its obligation under international law.

2.6 RESEARCH METHODOLOGY

To systematically respond to the objectives of the study, this research combines a desktop literature review and comparative content analysis of domestic laws and international/regional treaties. The study will further include a comparative analysis of case law and legislation on FGM between the United Kingdom (UK) and Nigeria. This analysis will interrogate the gaps and inconsistencies in the Nigerian framework and outline possible approaches for bridging these gaps and promoting effective implementation of relevant legislation in Nigeria towards prosecution and conviction of perpetrators of the harmful practice.

To understand the impact of the provisions of the VAPP Act as regards the elimination of FGM and the various legal instruments in deterring perpetrators from engaging in FGM, the study examines the existing legal and regulatory framework to ascertain its adequacy, efficiency, effectiveness, and sustainability as against international benchmarks for crime prevention. The desktop literature review analyses scholarly

works,¹⁸⁷² court rulings, and legal precedents to evaluate the implementation of the various laws in line with global best practices. By this analysis, the study seeks to find out the application of the law as well as the actors involved and in doing so, it highlights the gaps in the implementation of the laws and policies by relevant stakeholders. This focus aims to ascertain the reasons behind the apparent failure of the legislation and why the punishment of or conviction of perpetrators has remained low in Nigeria.

3.0 DISCUSSION

The practice of FGM is recognised internationally as a violation of the human rights of girls and women.¹⁸⁷³ The practice of FGM reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against women and girls.¹⁸⁷⁴ Nigeria – a country known as the giant of Africa – has been celebrated for its progressive constitution and its ratification of both international and regional treaties on the protection of women’s rights, yet FGM is still on the rise.¹⁸⁷⁵

This research paper aims to explore the weaknesses and strengths of the provisions of the VAPP Act and other international and Regional Conventions such as the Universal Declaration on Human right, African Charter on Human and People’s Rights on the Rights of Women in Africa, Convention on Elimination of all Forms of Discrimination against Women, Convention on the Rights of the Child and African Charter on the Right of the welfare of the Child on deterring perpetrators as regards engaging in FGM in Nigeria. This research paper examined textbooks, scholarly works of well-known institutions like the World Health Organization (WHO), United Nations International Children’s Emergency Fund (UNICEF), and legislation to gain insights into the achievements and insufficiency of the provisions of the law as a tool to deter perpetrators from safeguarding the rights of women by eliminating FGM in Nigeria. The

¹⁸⁷² Bryman Alan , *Social research methods* (2016) 5th Edition.

¹⁸⁷³ World Health Organization, ‘Female genital mutilation’(2024). <<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>> accessed 23 February 2024.

¹⁸⁷⁴ United Nations International Children’s Emergency Fund, ‘International Day of Zero Tolerance For Female Genital Mutilation 2024’(2024). <<https://www.unicef.org/documents/international-day-zero-tolerance-female-genital-mutilation-2024>> accessed 28 February 2024.

¹⁸⁷⁵ Ileyemi Mariam , ‘Violence against women, children persist in Nigeria 20 years after Maputo Protocol’ Premium Times (Abuja, 16 December 2023) 1.

social rationale for the apparent difficulty in eradicating FGM in Nigeria lies in the influence of cultural/religious beliefs and these beliefs are interwoven with traditional belief systems.¹⁸⁷⁶

This study also analysed the Feminist legal theory which seeks to examine the law through the lens of gender, addressing issues such as equality, discrimination, and power imbalances within legal systems. It emphasises the importance of recognising and challenging the societal norms and structures that contribute to gender-based inequalities in the law and legal process.¹⁸⁷⁷ The feminist legal theory revolves around discrimination, objectification especially (sexual objectification), oppression, patriarchy, and stereotyping.¹⁸⁷⁸ The Feminist theory explores the role of law in perpetuating or challenging traditional gender roles and stereotypes.

The adverse effect of FGM on women is not adequately addressed hence making the problem a lingering one in Nigeria. Section 6 The VAPP Act provides that anyone who performs FGM or engages another to carry out such exercise will be liable to a term of imprisonment not exceeding four years or to a fine not exceeding Nigerian Naira 200,000 or both.¹⁸⁷⁹ There is no provision stipulated in the VAPP Act to punish anyone who fails to protect a girl from FGM hence exonerating the members of the public from exercising a duty of care towards their neighbours.

Unfortunately, the penalties prescribed in the VAPP Act for perpetrators are inadequate and do not effectively deter them from engaging in the barbaric act. The Act also aims to eliminate gender-based violence in both public and private law by criminalising and setting out punishment for other offences against women. While notable advancements have been made as regards the elimination of FGM around the world, the implementation process has remained slow, especially in underdeveloped

¹⁸⁷⁶ Wogu J.O , Aloh Henry , and Amonyze Chinenye , 'An Evaluation of the impact of a media campaign against female genital mutilation (FGM) in the rural communities of Enugu State, Nigeria' (2019) (11)(14) Global Journal of Health Sciences 1, 2.

¹⁸⁷⁷ Thomas Tracy , 'The Oxford Handwork of Feminism and the Law in the United States (2023) 4

¹⁸⁷⁸ Thomas,' The Oxford Handwork of Feminism and the Law in the United States 4.

¹⁸⁷⁹ Section 6 VAPP Act 2015 (n8)

economies.¹⁸⁸⁰ In recent years, there have been persistent efforts to enhance the protection of the rights of women and girls through international, regional, and national enactment of laws and policies geared toward the eradication of FGM.¹⁸⁸¹ Nigeria is a signatory to several international treaties and instruments and therefore has obligations to protect and promote the rights of women and girls.¹⁸⁸²

Various international treaties such as Article 5 of the Universal Declaration of Human Rights (UDHR), Article 2, 19(1), 24(3) of the Convention on the Rights of the Child (CRC), and Article 1(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR) are also important tools to protect the rights of women and help eradicate the practice of FGM.¹⁸⁸³

Research carried out by the Westminster Foundation For Democracy indicates that relevant institutions and personnel expected to be involved in the implementation of the VAPP Act like the judiciary are challenged by a lack of capacity in terms of training, funding, effects of corruption and corrupt practices.¹⁸⁸⁴ The challenges of implementing the Act as depicted by the above-mentioned research also include lack of synergy, slow judicial process, intimidation, inadequacy of interventions specific to various needs and the different categories of victims.¹⁸⁸⁵ Nigeria has taken steps in the past to curb the practice of FGM including establishing policies with the most recent titled National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria

¹⁸⁸⁰ Nakamura Kyoko, Miyachi Kaori, Miyawaki Yukio, and Toda Makiko, *Female genital mutilation/cutting. Global Zero Tolerance Policy and Diverse Responses from African and Asian Local Communities* (1st edn, Springer Singapore 2023) 62.

¹⁸⁸¹ Nakamura Kyoko, Miyachi Kaori, Miyawaki Yukio, and Toda Makiko, *Female genital mutilation/cutting. Global Zero Tolerance Policy and Diverse Responses from African and Asian Local Communities* 4.

¹⁸⁸² Borokini A, Ige E.O, Ojo R.A.F, 'The legal framework for the eradication of female genital mutilation' (2020) 8 (Issue 1) *The International Journal of Business and Management* 359,361. <<https://doi.org/10.24940/theijbm/2020/v8/i1/BM2001-045>> accessed 15 December 2023.

¹⁸⁸³ Population Media Centre, 'World Human Rights Day: Addressing FGM and Child Marriage For a Sustainable Future' (2023). <<https://www.populationmedia.org/the-latest/world-human-rights-day-addressing-fgm-and-child-marriage-for-a-sustainable-future>> accessed 31 December 2023.

¹⁸⁸⁴ Westminster Foundation For Democracy, 'The impact of the Violence Against Persons (Prohibition) Act and Related Laws in Nigeria' (2021). <<https://www.wfd.org>> accessed 27 February 2024.

¹⁸⁸⁵ Westminster Foundation for Democracy, 'The impact of the Violence Against Persons (Prohibition) Act and Related Laws in Nigeria'.

which was in place from 2013-2017 with extension to 2019.¹⁸⁸⁶ A significant milestone was made in the implementation of the above-mentioned policy in the time past however there were still challenges in the total elimination of FGM in Nigeria.¹⁸⁸⁷ There is yet to be any known prosecution involving FGM in Nigeria hence reported cases decided in Nigeria cannot be found and this speaks to the gap between the law and the implementation process.¹⁸⁸⁸ Unfortunately, almost 10 years after the VAPP Act came into being, there is no record of a concluded trial or ruling on any case of FGM from the Nigerian courts.

On the contrary, in more advanced states like the United Kingdom, prosecution of FGM cases started in 2019 and implementation of the laws prohibiting FGM is in full action even though a lot is still to be done.¹⁸⁸⁹ The first successful prosecution involving FGM in the United Kingdom occurred in 2019 when the defendant, a Ugandan woman from East London, was convicted for eleven years for carrying out FGM on her daughter when she was three years old. The extraterritorial scope of the Serious Crime Act 2015¹⁸⁹⁰ allows individuals to be prosecuted if they perform FGM, assist in performing FGM, counsel a person to perform FGM, procure a person to perform FGM, or assist a girl in performing FGM on herself either within or outside the United Kingdom.¹⁸⁹¹ The scope of the Female Genital Mutilation Act 2003¹⁸⁹² was extended by the Serious Crime Act 2015 which amended the 2003 Act to cover offences committed outside the United Kingdom by the residents of the United Kingdom. The amendments also provide victims of FGM with lifelong anonymity¹⁸⁹³ and introduced Female Genital Mutilation

¹⁸⁸⁶ Federal Ministry of Health, National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria 2021- 2025.

¹⁸⁸⁷ Ejifoma Rebecca , ‘Engaging Boys, Men in conversation to end female genital Mutilation by 2030’ This Day (Lagos, 9 February 2023)1. <https://www.proquest.com/newspapers/engaging-boys-men-conversation-end-female-genital/docview/2774343083/se-2> accessed 24 December 2023.

¹⁸⁸⁸ Civil Resource Development and Documentation Centre (CIRDDOC) Nigeria, ‘Situation Assessment and Analysis of Female Genital Mutilation/Cutting in Imo and Ebonyi States (2020) <www.cirddoc.org> accessed 28 February 2024.

¹⁸⁸⁹ Library of Congress, ‘United Kingdom: First Successful Prosecution for Female Genital Mutilation’ (2019). <<https://www.loc.gov/item/global-legal-monitor/2019-07-31/united-kingdom-first-successful-prosecution-for-female-genital-mutilation/>>. Accessed on 20th December 2023.

¹⁸⁹⁰ Serious Crime Act Chapter 9 of 2015 (hereinafter the SCA).

¹⁸⁹¹ Serious Crime Act 2015, Section 70.

¹⁸⁹² Female Genital Mutilation Act Chapter 31 of 2003 (hereinafter the FGMA).

¹⁸⁹³ Schedule 1 to Section 71 of the Serious Crime Act 2015.

protection orders¹⁸⁹⁴ to protect girls who might be subject to FGM or have been subject to FGM.

The 2015 Serious Crime Act of the United Kingdom prescribes fourteen years imprisonment as punishment for the practice of FGM or an unlimited fine. It also criminalises the failure to protect a girl from FGM and imposes a punishment of seven years' imprisonment or an unlimited fine.¹⁸⁹⁵ The SCA also created a mandatory duty for healthcare workers, teachers, and social workers to inform the police of FGM performed on girls under the age of eighteen.¹⁸⁹⁶ Section 70 of the SCA and section 4 of the FGMA made provisions for the extra-territorial act.

Another conviction that took place in the United Kingdom is that of a woman named Amina Noor, then 22, was convicted in 2023 for assisting a Kenyan woman to carry out the procedure of FGM in 2006. She was jailed for seven years. This conviction is coming after the 2019 conviction which involved a Ugandan woman who was jailed for eleven years for cutting her daughter. Noor travelled to Kenya with the girl in 2006 and, while there, took her to a private house where the child was subjected to FGM. The crime only came to light when the girl was sixteen and confided in her English teacher in school.¹⁸⁹⁷ This conviction was the first for assisting and aiding FGM,¹⁸⁹⁸ and shows the application of the extra-territorial aspect of the law.

FGM has been a crime in the United Kingdom since 1985 and its existence is primarily due to migration from practicing countries. The mandatory obligation on healthcare professionals, teachers, and social workers according to the Serious Crime Act 2015, to report cases of FGM makes it easier for cases of FGM to be reported, especially

¹⁸⁹⁴ Schedule 2 to Section 73 of the Serious Crime Act 2015.

¹⁸⁹⁵ Serious Crime Act 2015, Section 72(4)(2).

¹⁸⁹⁶ Serious Crime Act 2015, Section 74.

¹⁸⁹⁷ Weaver Matthew and PA Media, 'Woman convicted of taking British girl, three, for female genital mutilation in Kenya' The Guardian (United Kingdom, 26 October 2023) 2. <<https://www.theguardian.com/society/2023/oct/26/woman-found-guilty-taking-british-girl-3-kenya-female-genital-mutilation>> accessed 31 December 2023.

¹⁸⁹⁸ Abdul Geneva, 'Woman who handed over British girl (3) for FGM in Kenya given seven years' The Guardian (United Kingdom, 16 February 2024) 1 <<https://www.theguardian.com/society/2024/feb/16/amina-noor-handed-over-british-girl-3-fgm-kenya-gets-seven-years-jail>> accessed 31 December 2023.

considering the fact the victims are young and cannot defend themselves. The successful prosecution of cases involving FGM in the United Kingdom encourages law enforcement agencies, Prosecutors, and relevant stakeholders, including members of the society, with the knowledge that adequate legal provisions are in place to ensure the protection of women and girls. The convictions further serve as a deterrent factor to potential perpetrators especially as there is no statutory bar on the time for complaining/reporting by the survivor.

The success recorded in the United Kingdom is a direct departure from the practices in Nigeria. Despite the laudable nature of the National Policy and Plan of Action for the Elimination of Female Genital Mutilation in Nigeria, VAPP Act 2015, and other international human rights treaties domesticated by the Nigerian government, there are gaps in the current legislation that need to be addressed through policy interventions such as interventions to support amendment, compliance, effective implementation, and application of the law. The Nigerian frameworks i.e. VAPP ACT should be amended like the United Kingdom Female Genital Mutilation Act 2003 to accommodate interventions like female genital mutilation protection orders, lifelong anonymity, and obligations on professionals to report cases of FGM. These interventions will help in the conviction of cases and save victims and survivors from the fear of isolation and social exclusion prevalent in various communities when cases of FGM are reported.

4.0 CONCLUSION AND RECOMMENDATION

The adoption of the VAPP Act 2015 is a right step towards curbing the menace of FGM in Nigeria however a lot still needs to be done to ensure that FGM remains a thing of the past in Nigeria.

It is worthwhile to note from the research paper that the scope of VAPP Act must be improved upon to achieve the goal of curbing the practice of FGM to the largest extent. This research paper finds that lack of prosecution of cases involving FGM despite the presence of the VAPP Act since 2015 leaves perpetrators with the impression that they can always go free since the law is not adequately equipped for the responsibilities which it is been saddled with.

The research paper also observed that the fine provided in the Act is not sufficient to deter perpetrators because the current inflation crisis has reduced the value of naira drastically.

Although the research paper recognises that curbing FGM to its barest minimum will require extending the scope of the VAPP Act just like the Female Genital Mutilation Act 2003, the paper concludes that Nigeria should borrow a leaf from the United Kingdom and do the needful if it must realise its' goal of making FGM a thing of the past in Nigeria.

The paper therefore recommends as follows.

1. The scope of the VAPP Act should be increased just like the Female Genital Mutilation Act 2003 to cover acts of FGM committed outside Nigeria by residents of Nigeria.
2. Participatory approach should be employed in working with communities in which FGM is practiced not only through traditional power structures but also through members of the communities.
3. There should be promotion of respect for the traditions and culture of all people in Nigeria within a framework of protection of the Human right of persons and a promotion of a robust process of positive cultural re-orientation and social norm change that is gender sensitive and responsive.
4. There should be training of judiciary workers, judges, legal practitioners, and police officers owing to the fact they are the frontiers that will aid the implementation of the Act and teaching the grassroot about its provisions.
5. Focused research should be conducted by relevant stakeholders such as the church, community leaders, political leaders, civil society, non-governmental organizations to determine how best to pass the message across to the grassroot considering the peculiarities of each of the tribes and their environment.
6. Campaign on the importance of the use of indigenous language should also be encouraged as this will help in disseminating information to the grassroot whose larger population are illiterates.
7. The education of the masses as regards their fundamental human rights and FGM should be driven by principles of collaboration, partnership and co-operative interaction of all relevant stakeholders which includes but not limited

to government, development partners, private sector, civil society organization, traditional and religious leaders, community-based organization, and development partners.

8. There should be grassroots sensitization through role plays by the relevant stakeholders on the importance of reporting FGM cases to the appropriate authorities.
9. The judiciary should ensure the prosecution of cases involving FGM as this will give the public a sense of belonging and deter perpetrators as well.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

AN EXAMINATION OF THE SCHEDULE TO THE NIGERIAN OIL AND GAS
INDUSTRY CONTENT DEVELOPMENT ACT, 2010¹⁸⁹⁹

Iloba-Aninye Okechukwu

Department of Commercial Law, Ahmadu Bello University, Zaria., Nigeria. Email:
iobaaninye4@gmail.com. Phone: 07063767229.

Abstract

Nigeria, in a bid to accomplish her independence and control of the major means of her foreign earnings, enacted the Nigerian Oil and Gas Industry Content Development Act (The Local Content Act), 2010. By implication, Nigerians must have first place in employment into the industry, as well as local materials. This intendment is amply captured in the Local Content Act where it provides that “deliberate utilization of Nigerian human, material resources and services” are required for the purpose of domesticating oil and gas activities in Nigeria. In this regard, ‘first consideration’ must be given to Nigerian goods and services. It is trite law, and universally acknowledged, that a schedule is part of the body of a properly-enacted law. The Schedule to the Act, in Section 5, contains the parameter for measuring and determining the Nigerian content (personnel and materials) in each programme. This research finds that although rigid and specific targets, expressed in percentages, are set in the Schedule to the Act, no metrics exist for the measurement of Nigerian content. This is because the Act fails to propose the indices for ascertaining the percentages expressed in the Schedule to the Act. Due to the absence of a standard metric system, the Board is left with developing measuring local content on a subjective basis. This research therefore recommends that Technology Measurement Expert within or outside Nigeria be contracted to successfully carryout a new and acceptable metric system that will be nationally and universally meaningful and acceptable.

Keywords: Oil And Gas Industry, Local Content, Local Content Act, Local Participation.

1.1 Introduction

Nigeria, in an attempt to assume control of its oil and gas industry, enacted the Nigerian Oil and Gas Industry Content Development Act (otherwise known as the Local

¹⁸⁹⁹ Dr. ILOBA-ANINYE, Okechukwu., Department of Commercial Law, Ahmadu Bello University, Zaria., Nigeria. Email: iobaaninye4@gmail.com. Phone: 07063767229.

Content Act), 2010. The main purpose for this enactment is to promote Nigerian Content in the Nigerian oil and gas industry by building capacity and increasing local participation. A major objective of enacting the Act is to capture majority of oil and gas industry expenditure that usually escape from the Nigerian economy through capital flight due to the industry's heavy reliance on foreign products and services.¹⁹⁰⁰ Hence, the Act encourages the development of Nigerian content and the patronage of Nigerian products and services by creating a legal framework to guarantee the active participation of Nigerians in the industry.

The Local Content Act requires that materials and/or persons utilized or employed in the Nigerian oil and gas industry must be manufactured, produced and used in Nigeria.¹⁹⁰¹ It therefore requires the 'deliberate utilization of Nigerian human, material resources and services' for the purpose of domesticating oil and gas activities in Nigeria.¹⁹⁰² In this regard, 'first consideration' must be given to Nigerian goods and services.¹⁹⁰³ Also, the staffers of the industry (operators, project promoters and contractors) must employ Nigerians; first and foremost. These conditions are stated in Sections 28-35 of the Act. These evaluation and measurements are geared towards ascertaining to what extent Nigeria and Nigerians have taken control of the oil and gas industry in Nigeria.

Evaluation and measurement are both necessary and essential for the progressive domestication of local content in the Nigerian oil and gas industry. This fact is aptly

¹⁹⁰⁰ Uchenna, J. O. (2014). "Towards Sustainable Local Content Development in the Nigerian Oil and Gas Industry: An Appraisal of the Legal Framework and Challenges – Part 1" *International Energy Law Review*, p. 30. <https://researchgate.net>. Retrieved 20/8/2019.

¹⁹⁰¹ Sections 53, 2 and 3 of the Nigerian Oil and Gas Industry Content Development Act, 2010.

¹⁹⁰² Section 106, Nigerian Oil and Gas Industry Content Development Act, 2010.

¹⁹⁰³ Sections 12 and 51 of the Nigerian Oil and Gas Industry Content Development Act, 2010.

captured by the provision of Section 106 of the Act, which defines Nigerian Content to mean, “...the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry”. The Nigerian Content Development and Monitoring Board (The Board) is required to implement the provisions of the Act with a view to ensuring a measurable and continuous growth of Nigerian content in all oil and gas arrangements, projects, operations activities or transactions in the Nigerian oil and gas industry.¹⁹⁰⁴ By virtue of Section 11(1) of the Act, the minimum Nigerian content in any project to be executed in the Nigerian oil and gas industry shall be consistent with the level set in the Schedule to the Act. Thus the Schedule to the Act is prescribed for the purpose of measuring ‘Nigerian content in any given activity in the Nigerian oil and gas industry’. The intendment of the Act is that the coherent and consistent implementation of its provisions by the Board will progressively lead to value creation/addition. This means that in addition to being a revenue earner for the Nigerian government and a source of employment opportunities for Nigerians, activities in the Nigerian oil and gas industry must systematically produce, develop or domesticate relevant skills and capacities among Nigerians as against reliance on expatriates to service the skills and capacity needs of the industry. In other words, the two ways to progressively increase the Nigerian content within the oil and gas industry are systematic capacity and capability development and; the deliberate utilization of Nigerian resources.¹⁹⁰⁵ This seminar

¹⁹⁰⁴ Section 5, NOGICD Act, 2010.

¹⁹⁰⁵Obinna, D. (2016) Measuring and Implementing Nigerian Content: Key Legal Requirements of the Local Content Act. <https://businessday.ng> Accessed on 05/09/2022.

paper therefore evaluates the practicability or otherwise of the Schedule to the Act in order to determine the effectiveness or otherwise of the Local Content Law.

2.1 The Historical Development of Local Content Policy in Nigeria

The struggle to develop policies and laws to promote Local Content or Indigenous Participation in the Nigerian Oil and Gas Industry is not a recent development. Records show that Nigeria's attempts in this direction date back to the late 1950s¹⁹⁰⁶ when oil was first discovered in commercial quantity in the country. At the discovery of oil in Nigeria in 1956, the country was not yet independent¹⁹⁰⁷ and, during this period, the Nigerian Oil and Gas Industry was largely dominated by International Oil Companies (IOCs); the entire venture into the oil and gas business was carried out by foreigners. The technology, equipment, personnel and risk were their own, both in the areas ranging from exploration, exploitation, processing and management of products. All efforts in the industry were owned by these foreigners and Nigeria only owned the resources;¹⁹⁰⁸ even the downstream operations were initially controlled by these expatriate¹⁹⁰⁹ companies, such as Shell, Exxon-Mobil, Chevron, Agip, Texaco and Total.

Thus, Nigeria depended on royalties, rents and taxes from the operators. Under this arrangement, only the Nigerian government earned money directly from the oil and gas business and, at that time, the educational and technological advancement of the

¹⁹⁰⁶Uchenna, J. O. (2014). Op, cit. p.30.

¹⁹⁰⁷Monday, J. U. (2015). Local Content Policy, Human Capital Development and Sustainable Business Performance in the Nigerian Oil and Gas Industry: *Journal of Management and Sustainability*; Vol. 5 No. 1. Published by Canadian Centre of Science and Education. p.76

¹⁹⁰⁸ Ibid p. 76

¹⁹⁰⁹Review of Nigeria's Local Content Legislation. www.akindelano.com. Accessed on 20/8/2019.

country had not reached the stage in which they could participate in the industry.¹⁹¹⁰ The dominance by the IOCs led to lack of jobs, capacity building and skill acquisition for Nigerians and lack of sustainable national economic development¹⁹¹¹. In real terms, the oil and gas (upstream) industry, for decades functioned as an enclave economy, with minimal impact on the wider economy.¹⁹¹² The primary reason for this was the absence of a legal or statutory framework for Nigeria to harvest the technological, industrial and economic intangible capital assets, being generated by oil and gas activities for diffusion into the local economy.¹⁹¹³ Senator Lee Maeba identified this gap, when he said “...there was no law guiding the activities of Nigerian companies in the Oil and Gas Industry and because of that, there has been a capital drift ... and this is the reason why there is poverty in Nigeria in spite of the fact that we are sixth largest producers of crude oil”.¹⁹¹⁴

This state of affairs in which the IOCs dominated the petroleum sector of the Nigerian economy continued until after independence when Nigeria, like other former colonial territories, discovered that its economic lifeline was inextricably tied to the apron strings of its colonial masters, Britain and other developed countries of the Northern hemisphere.¹⁹¹⁵ Specifically, Nigeria realized that her newly-won independence did not herald a significant change in her economic well-being and so, a change in the status quo, in which the transnational petroleum companies virtually

¹⁹¹⁰ Monday, J. U. (2015). Op Cit. p 76

¹⁹¹¹ Onuh, P. I. (2017). *An Appraisal of the Nigerian Oil and Gas Content Development Act, 2010 in the Context of WTO's Agreements on Trade Related Investment Measures (TRIMS) and General Agreement on Trade in Services (GATS)*. *Ahmadu Bello University Law Journal*, Vol. 37, p.19.

¹⁹¹² www.akindelano.com. Op. Cit.

¹⁹¹³ Ibid

¹⁹¹⁴ Ibid

¹⁹¹⁵ Iloba-Aninye, O. (2015). *An Examination of the Legal Framework for the Marketing of Petroleum Products in the Downstream Sector of the Oil and Gas Industry in Nigeria*, a Ph.D Thesis unpublished, submitted to Ahmadu Bello University, Zaria. p.32

owned and controlled extracted petroleum was imperative.¹⁹¹⁶ Therefore, as many other African countries, after independence, Nigeria began to recognize the need for her indigenes to take ownership and control of her natural resources and transformation into economic growth,¹⁹¹⁷ especially after the passage of the United Nations (UN) Resolution 1803 of 1962, which vests sovereignty over natural resources permanently in the people of host countries.¹⁹¹⁸ Nigeria began to see the need for a strong economy, controlled by indigenous business sector for domestic, political stability and economic independence. Nigeria began to recognize the need to remove the exclusive dominance of the economy by the Multinational Oil Companies (MNOCs) and to put ownership and control of its natural resource in the hands of Nigerians and thus, the desire to nationalize or indigenize the national economy.¹⁹¹⁹

This ideology was aimed at dislodging the foreign dominance of the economy resulting from the previous colonial administrations. It was believed that Nigeria's new political sovereignty will be undermined if her economy was still to be controlled or dominated by the same foreigners, from whom independence had just been gotten¹⁹²⁰. Therefore, in 1961, Chief Obafemi Awolowo¹⁹²¹ moved a motion stating that "this house approves the nationali(s)ation of basic industries and commercial undertakings of vital importance to the economy of Nigeria". Such calls for economic nationalism gave birth to indigenization consciousness. Government, therefore, began to respond to this call

¹⁹¹⁶ Ibid. p. 33

¹⁹¹⁷ www.akindelano.com. Op. Cit.

¹⁹¹⁸ Iloba-Aninye, O. Lecture Notes Op. Cit. P.11.

¹⁹¹⁹ Ibid

¹⁹²⁰ Akume, A.A.(2007) Evolution of Nigeria's Investment Policies from Independence Era. *Journal of Legal Issues for Contemporary Justice in Nigeria*. Published by the Department of Jurisprudence and Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria. p36.

¹⁹²¹ Chief Obafemi Awolowo was then the Leader of the Opposition Party in the Federal Parliament.

through various initiatives to build indigenous capacity to reduce the over-dominance of foreign operators in the oil and gas industry. Several legal frameworks for Nigerian Content development began to emerge.

In 1962, the **Immigration Act**¹⁹²² was enacted. By the provisions of the Act, no person, other than a citizen of Nigeria shall accept employment (not being employment with the Federal Government or a State Government) without the consent, in writing of the Directorate of Immigration. This provision was meant to prevent the indiscriminate engagement of expatriates in positions where there were suitable Nigerian alternatives.¹⁹²³ The Act established an expatriate quota system by specifying the ratio of Nigerian to non-Nigerians that could be employed by foreign business organizations located in Nigeria. This requirement was to enhance the involvement of Nigerian citizens in all economic sectors.¹⁹²⁴ In 1966, government established an Expatriate Quota Allocation Board in order to ensure indigenous participation in the control, development and management of strategic economic sectors of the Nigerian society.¹⁹²⁵

Sequel to the above, was the promulgation of the **Companies Decree of 1968**, which created a legal framework for the incorporation of every foreign company operating in Nigeria. The Decree aimed at bringing the local subsidiaries of foreign-owned firms under the control of the Nigerian government and also to enhance the participation of Nigerians in such businesses.¹⁹²⁶ Also put in place for the enhancement

¹⁹²² Immigration Act, Cap 84, 1962.

¹⁹²³ Onyi-Ogelle, H. O. Op.Cit. p138.

¹⁹²⁴ Uwem, U. et al Op.Cit p.67.

¹⁹²⁵ Uchenna, J. O. Op.Cit. p.30.

¹⁹²⁶ Ibid p.32

of the “Nigerianization” process, was the **Petroleum Act (P.A) of 1969**, which specified that the holder of an Oil Mining Lease (OML) was under a legal obligation to, within ten years of the grant of a lease, ensure that the number of Nigerian citizens employed by his company in connection with the lease in managerial, professional and supervisory grades (or any corresponding grades designated by the holder in a manner approved by the Minister) shall reach at least 75% of the total number of persons employed by him in those grades and that the number of citizens of Nigeria in any one such grade shall not be less than 60% of the total. The holder must also ensure, within that period, that all skilled and unskilled workers are citizens of Nigeria.¹⁹²⁷ Also, in this regard, was the **Industrial Training Fund (I.T.F) Decree of 1971**, which was meant to enhance the transfer of technologies. It was to encourage the acquisition of relevant skills to support the development of indigenous manpower to meet the needs of the Nigerian economy, including the oil and gas industry.¹⁹²⁸

In June 1971, the Nigerian government outlined the primary objectives of its indigenization policy to create an economically independent country with increased opportunities for indigenous Nigerian businessmen, to ensure greater retention of profits accruing from the economic sector, and to encourage further economic investment in the area of international and capital goods production.¹⁹²⁹ The government, through the Nigerian National Oil Corporation (NNOC), which it used as its vehicle for promoting the indigenization programmes in the industry, began to participate in oil concessions through Joint Venture Arrangements/Agreements with

¹⁹²⁷ Paragraph 37 of the First Schedule to the Petroleum Act of 1969.

¹⁹²⁸ Uchenna, J. O. Op.cit. p.32.

¹⁹²⁹ Ibid

International Oil Companies.¹⁹³⁰ Between 1971 and 1977, Nigeria's participation in the Oil and Gas Industry had increased but, there was reliance by Nigeria on the IOCs for knowledge, equipment and expertise. Strictly speaking, human resources remained so until the Nigerian government began to develop the Local Content Policy (LCP) meant to 'Nigerianize' the industry. Several statutes were introduced in the industry in order to give effect to the policy. The Petroleum (Drilling and Production) Regulation, 1969, made pursuant to Section 9 of the Petroleum Act,¹⁹³¹ and Paragraph 37, Schedule 1 of the Petroleum Act, are precursors to the Nigerian Content Policy.

These Regulations imposed specific obligations on holders of Oil Prospecting Licences (OPL) and Oil Mining Leases (OML), to train and employ Nigerians in the Petroleum Industry, prepare and submit detailed programme for the recruitment and training of Nigerians in all phases of petroleum operations and to report on the training programme and the progress of 'Nigerianization' at or about the end of June or December each year. In 1991, it sought to demystify the oil and gas industry, by awarding onshore and offshore oil blocs to Nigerian entrepreneurs, through competitive biddings. In spite of this progress, the 'Nigerianization' process in the lucrative upstream was comparatively negligible.¹⁹³² The reason is not far-fetched. Research has shown that, although the Nigerian government invested enormously into its Oil and Gas Industry, only very little portion of its profits was spent in developing her industrial base, as the 'lion's shares' were paid to foreign firms for services, such as fabrication, Engineering Procurement Construction (EPC), Front End Engineering Design (FEED),

¹⁹³⁰ Ibid. p. 33

¹⁹³¹ Cap P10, Laws of the Federation of Nigeria, 2004

¹⁹³² www.akindeano.com. Op.Cit.

conceptual designs and seismic studies which often resulted in capital flight, as profits from the oil business were repatriated abroad.¹⁹³³

The Federal Government, in using the law as an instrument to rescue the Nigerian economy from foreign domination and control,¹⁹³⁴ established the **Nigerian Enterprises Promotion Decree (NEPD) of 1972**¹⁹³⁵ which was aimed at a systematic transfer of ownership and control of major sectors of the economy to Nigerians¹⁹³⁶ thus enhancing indigenization policy aimed at achieving the following objectives:

- i. to create an economically independent economy with increased opportunities for indigenous Nigerian businessmen;
- ii. to ensure greater retention of profits occurring from the economic sector and;
- iii. to encourage further economic investment in the area of international and capital goods production.¹⁹³⁷

This eventually was the reason for the establishment of the Acquisition of Assets (British Petroleum Co. Limited) Decree of 1979, which nationalized the oil assets of British Petroleum in a consortium known as Shell-BP. The Decree provided for the transfer of British Petroleum assets to the Nigerian National Petroleum Corporation, nationalized the Port Harcourt Refinery owned by Shell-BP, and gave the Federal Government 60% interest in all operations in the industry.¹⁹³⁸

¹⁹³³Monday, J. U. op cit. p. 75

¹⁹³⁴Akume, A. A. Op.Cit. p.365.

¹⁹³⁵ Also known as the “Indigenization Decree”, was established in fulfillment of Nigeria’s “Indigenization Policy” of 1971.

¹⁹³⁶Akume, A. A. Op.cit . p.365.

¹⁹³⁷Uchenna, J. O. Op.Cit. p.32. Cited in Uwem, U. et al Op.Cit. p.68..

¹⁹³⁸ Ibid.p.33.

In 2000, the Nigerian Content Policy (NCP) was envisioned by the NNPC to serve as the basis for measuring local participation and job creation for Nigerians in the oil and gas industry.¹⁹³⁹ The objective of the policy was to increase the quantum of composite value added to, or created in the Nigerian economy, through the systematic development of capacity and capabilities and the deliberate utilization of Nigerian human and material resources and services in the oil and gas industry.¹⁹⁴⁰ In 2001, the National Petroleum Investment and Management Services (NAPIMS) organized a workshop entitled “National Workshop on Improvement on Local Content and Indigenous Participation in the Upstream Sector of the Petroleum Industry”. The workshop produced a communiqué with a recommendation for the establishment of a National Committee on Local Content Development (NCLCD).¹⁹⁴¹ The report of the NCLCD, in 2002, showed that the local content of goods and services in the upstream sector of the Oil and Gas Industry in Nigeria was less than 5 per cent, meaning that “95 per cent of yearly budgetary expenditure of about 8 billion dollars flowed out of the country”,¹⁹⁴² by way of what was spent on foreign products and technical services. Government was alarmed by this finding and its implication for economic growth. Therefore, in 2003, the Nigerian Content Development Bill was proposed following the initial submission of a draft by the Nigerian National Petroleum Corporation (NNPC). Shortly afterwards, the Local Content Policy was formally initiated and a Nigerian

¹⁹³⁹ Azoro, C. J. S. (2016). National Participation in Nigerian Oil and Gas Industry: Prospects and Challenges. *Petroleum Technology Development Journal (ISSN 1595-9104): An International Journal*; January 2016 – Vol. 6, No.1. p.96.

¹⁹⁴⁰ Ibid p. 96.

¹⁹⁴¹ Ovadia, J. S. (2013). ‘Measurement and Implementation of Local Content in Nigeria – Framework for Working with Stakeholders to Increase the Effectiveness of Local Content Monitoring and Development’. Facility for Oil Sector Transparency in Nigeria. Centre for Public Policy Alternatives (CPPA) Newcastle University, UK. [http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER - Measurement-and-Implementation-of-Local Content](http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER-Measurement-and-Implementation-of-Local-Content.pdf). p.5.

¹⁹⁴² Ibid. p.5.

Content Division (NCD) was created within the NNPC in March 2006. The thrust of the policy aimed at ensuring that substantial proportion of activities, materials, engineering parts and human capital utilized in the Nigerian Oil and Gas Industry was domiciled within the country. The domiciliation focused on value-addition, and promotion of technology transfer; stopping oil and gas from being an “enclave” economy and creating linkages to the wider economy; and the need to Nigerianize over 9billion dollars of annual spending in the petroleum industry.¹⁹⁴³ The NCD was established to give effect to the Nigerian Content Policy. The division was to enable a transformed oil and gas industry with well-developed in-country capacity and local capabilities, a competitive supply and services sector and ultimately, the hub for energy service delivery in Africa.¹⁹⁴⁴ However, following the inability of the Nigerian Content Division of the NNPC to ensure compliance or to implement and enforce the Nigerian Content Policy in the oil and gas industry, the Nigerian Oil and Gas Industry Content Development (NOGICD) Bill was signed into law on April 22nd, 2010.

3.1 The Nigerian Oil and Gas Industry Content Development Act, 2010

The Nigerian Oil and Gas Industry Content Development (NOGICD) Act was enacted on the 22nd day of April, 2010. Designed to give the force of law to the Nigerian Content Policy, its main thrust is to domicile in-county oil-related economic activities previously located abroad¹⁹⁴⁵ by increasing the level of Nigerian Content in the country’s oil and gas industry - thus its preamble: “... to provide for the development of Nigerian Content in the Nigerian Oil and Gas Industry, Nigerian content plan, Supervision,

¹⁹⁴³www.esynewrgypartners.com. Energy Synergy Partners, Oil, Gas and Energy Experts. Accessed 20/8/2019.

¹⁹⁴⁴Okafor J. and Aniche, E. (2014). A Critical Appraisal of the Enforcement of Nigerian Oil and Gas Industry Content Development (NOGICD) Act, 2010. *Journal of Law, Policy and Globalization* vo. 31.. p. 85.

¹⁹⁴⁵Ovadia, J. S. Op. Cit. p.5

Coordination, Monitoring and Implementation of Nigerian Content, and for related matters.”¹⁹⁴⁶

A major objective of establishing the Act is to capture the majority of oil and gas industry expenditures that usually escape from the Nigerian economy through capital flight due to the industry’s heavy reliance on foreign products and services.¹⁹⁴⁷ Hence, the Act encourages the development of Nigerian content and the patronage of Nigerian products and services by creating a legal framework to guarantee the active participation of Nigerians in the industry.

The Act defines Nigerian Content as ‘the quantum of composite value added to or created in the Nigerian economy by the systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry’.¹⁹⁴⁸ This definition consists of some salient issues that stimulate economic growth. The Act aims to promote ‘value addition’ to the Nigerian economy through the use of local raw materials, products and services in order to stimulate growth on indigenous capacity in the industry.¹⁹⁴⁹ It advocates for ‘systematic’ development of ‘capacity and capabilities’. This connotes a structural and progressive development of competence in Nigeria and Nigerians. It envisages the full participation of Nigerians and transfer of technology from the IOCs to Nigerians for the purpose of achieving tangible participation.¹⁹⁵⁰ The ‘deliberate utilization of Nigerian human, material resources and services’ is targeted at the domiciliation of oil and gas

¹⁹⁴⁶ Long Title to the Nigerian Oil and Gas Industry Content Development Act, 2010.

¹⁹⁴⁷ Uchenna, J. O. Op. Cit. p.35.

¹⁹⁴⁸ Section 106 NOGICD Act, 2010.

¹⁹⁴⁹ Uchenna, J. O. Op. Cit. p.35.

¹⁹⁵⁰ Onuche & Onuche Op. Cit. p.6.

activities in Nigeria by using Nigerians to perform tasks, purchasing machines, and materials from Nigerian manufacturers. This is to boost manufacturing\fabrication industry and also utilize Nigerian service providers.¹⁹⁵¹ With the enactment of the Local Content Act, the Nigerian Content Division (NCD) of the NNPC (now defunct), which managed the Nigerian content, was scrapped and, in its place, a new content regulator and manager, the Nigerian Content Development and Monitoring Board (NCDMB)¹⁹⁵² was created¹⁹⁵³

3.2 The Nigerian Content Development and Monitoring Board

For the implementation of the intents and purposes of the Act, the Act established a body known as the Nigerian Content Monitoring Board.¹⁹⁵⁴ The Board is a body corporate with perpetual succession and a common seal; may sue and be sued in its corporate name. Section 4¹⁹⁵⁵ provides for the role of the Board, which is the mandate to make procedural guidelines, monitor and coordinate the provisions of the Act. The Board is also required to implement the provisions of the Act with a view to ensuring a measurable and continuous growth of Nigerian content in all oil and gas arrangements, projects, operations, activities or transactions in the Nigerian oil and gas industry¹⁹⁵⁶. The Board is expected to perform some specific functions.

- a) Implement the provisions of the Act;
- b) Implement the regulations made by the Minister;

¹⁹⁵¹ Ibid p.7.

¹⁹⁵² The NCDMB was established under Section 69 of the NOGICD Act, 2010.

¹⁹⁵³ Following the inability of the various divisions of the NNPC to ensure compliance and enforcement of the Nigerian Content Policy, the Local Content Act, 2010 established the NCDMB to replace the NCD.

¹⁹⁵⁴ Section 69, NOGICD Act, 2010.

¹⁹⁵⁵ NOGICD Act, 2010

¹⁹⁵⁶ Section 5, NOGICD Act, 2010.

- c) Supervise, coordinate, administer, monitor and manage the development of Nigerian content in the Nigerian oil and gas industry;
- d) Supervise, coordinate, administer and monitor the implementation and development of Nigerian content as specified in the Schedule to the Act in the operations of operators, contractors and all other entities in the Nigerian oil and gas industry;
- e) Appraise, evaluate and approve the Nigerian plans and reports submitted to the Board in compliance with the provisions of the Act;
- f) Assist local contractors and Nigerian companies to develop their capabilities and capacities to further the attainment of the goal of developing Nigerian content in the Nigerian oil and gas industry.

3.3 The Governing Council

The Act establishes for the Board, a Governing Council (the Council)¹⁹⁵⁷ which shall conduct the affairs of the Board. The Council consists of:

- a) A Chairman who shall be the Minister of Petroleum Resources
- b) A representative of:-
 - (i) Nigerian National Petroleum Corporation;
 - (ii) The Agency in charge of technical regulation of the industry;
 - (iii) Ministry of Petroleum Resources;
 - (iv) Petroleum Technology Association of Nigeria;
 - (v) Nigerian Content Consultative Forum;
 - (vi) Council of Registered Engineers of Nigeria;

¹⁹⁵⁷ Section 71, NOGICD Act, 2010.

(vii) National Insurance Commission; and

c) Executive Secretary who shall be the Secretary of the Council.

The Chairman and members of the Council shall be appointed by the President and shall be persons of proven integrity and ability.¹⁹⁵⁸ The membership of the Council shall be on part time basis¹⁹⁵⁹ save the Executive Secretary shall be on full status.¹⁹⁶⁰ The Chairman and members of the Council shall each hold office for a term of four years and may be re-appointed for a further term of four years and no more.¹⁹⁶¹ The powers of the Council¹⁹⁶² include:-

- a) Managing and superintending the affairs of the Board;
- b) Making rules and regulations for the proper functioning of the Board;
- c) Employment of payment of staff of the Board appropriate remuneration
- d) Entering into negotiation, agreement and contractual relationship necessary or expedient for the discharge of the functions of the Board.

4.1 Evaluating the Schedule to the Act

To evaluate is to determine the significance, worth, or condition of, usually by careful appraisal and study.¹⁹⁶³ Evaluation is a systematic determination and assessment of system's merit ... using criteria governed by a set of standards; it is a process that

¹⁹⁵⁸ Section 73(1), NOGICD Act, 2010.

¹⁹⁵⁹ Section 73(2), NOGICD Act, 2010.

¹⁹⁶⁰ Section 74, NOGICD Act, 2010.

¹⁹⁶¹ Section 76(a), NOGICD Act, 2010.

¹⁹⁶² Section 75, NOGICD Act, 2010.

¹⁹⁶³ <https://www.merriam-webster.com/dictionary>. Accessed on 25/11/2023.

critically examines a programme. It is a means by which work done is assessed to ascertain the progress made. Its purpose is to help in decision-making regarding its objectives.

By virtue of Section 11(1)¹⁹⁶⁴ the minimum Nigerian content in any project to be executed in the Nigerian oil and gas industry shall be consistent with the level set in the Schedule to the Act. Where a project description is not specified in the Schedule to the Act, the Board shall set the minimum content level for that project or project item pending the inclusion of the minimum content level for that project or project item through an amendment of the Schedule to the Act by the National Assembly.¹⁹⁶⁵

In evaluating the implementation of the local content Act, the Nigerian Content measurement becomes an issue. Reporting local content is more than simply the reporting of figures; it is about understanding and above all explaining precisely what it is that the metric is measuring. The Schedule to the Act sets very specific targets in 280 separate oil and gas activities. These targets are expressed as percentages in terms of overall spend, hours of labour, tonnage, volume, litres, number, length, usage, or other defined measures. However, the Act fails to propose the indices for ascertaining the percentages. Therefore calculating the existing level of local content and the parameters for the target of the Act is unascertainable.¹⁹⁶⁶ The real question is, how to calculate the percentage of local content in any given activity to determine what the existing level is, compared to the target in the Act. For instance, if there is a target of 45% or 80%, how will this be measured?¹⁹⁶⁷ If there is no set definition of the target, compliance will be

¹⁹⁶⁴ NOGICD Act, 2010

¹⁹⁶⁵ Section 11(1) NOGICD Act, 2010.

¹⁹⁶⁶ Ovadia, J. S. Op. Cit. p. 15.

¹⁹⁶⁷ Ibid p. 15

difficult to determine.¹⁹⁶⁸ When some research participants were asked about the process used to measure local content policy implementation, some of them stated that there was no structure in place through which to measure the policy.¹⁹⁶⁹ Due to the absence of concrete definitions and guidelines for how to measure Nigerian content, the Board has fallen back on simplistic or surface measures for monitoring and evaluation; concentrating mostly on Nigerian ownership (whether or not a company is 51% Nigerian-owned). With the focus solely on indigenous ownership, Nigerian content risks repeating the failures of the indigenous policies of the 1970s.¹⁹⁷⁰ During a workshop in Abuja, where Ernest Nwapa,¹⁹⁷¹ was invited by the House Committee on Local Content to speak on “Measurement and Evaluation of Capacity Utilization Towards Enhanced Nigerian Content Development”, Nwapa announced that he was changing the topic to “Stimulating Local Capacity” because focusing on measurement ‘is not hopeful’. ‘We will measure’, he said, ‘but it will not be the first priority of the Board’. Instead, Nwapa contented, ‘the important thing is how many jobs have been created; how many yards have we upgraded? That is my measurement of Nigerian content’.¹⁹⁷²

Job creation and capacity development are important aspects of Nigerian content development. However, meaningful measurement tools are a basic requirement for any programme or initiative. For this reason, Section 5 of the Act¹⁹⁷³ specifically requires the Board to ensure “measurable and continuous growth of Nigerian content in all arrangements, projects, operations, activities or transactions in the Nigerian oil and gas

¹⁹⁶⁸ Ibid p. 36

¹⁹⁶⁹ Ibid p. 187

¹⁹⁷⁰ Ibid p. 16

¹⁹⁷¹ Group General Manager, Nigerian Content Division.

¹⁹⁷² Ovadia, J. S. Op. Cit. p.16.

¹⁹⁷³ NOGICD Act, 2010.

industry". Not only can they be used to provide a needed analysis of domestic capacity to contribute to the oil and gas industry, but more importantly, measurement tools allow the government to plan effectively, set meaningful targets for themselves and for stakeholders, and monitor/evaluate progress. Rather than invest in developing quality measurement tools and comprehensive guidelines for Nigerian content development and disseminating these widely, the Board has developed its tools haphazardly and with a lack of overall planning and conditionalities. Where possible, the Board has relied on informal and opaque rules and procedures as well as the individual discretion of its key officers.¹⁹⁷⁴ Rather than specifically lay out how Nigerian content would be measured, the NCDMB turned to how it would gather data from the operators and contractors and creating forms for the operators to report on Nigerian content.¹⁹⁷⁵

As mentioned above, the Schedule to the Act contains hundreds of targets to various categories of goods and services required by the oil and gas industry, though it does not adequately define how these targets percentages/figures are to be measured. The Act requires 100% compliance with all targets in order to operate in Nigeria. The Board is tasked with enforcing this regime and requiring compliance with all the prescribed minimum targets for Nigerian content in order to approve new projects in the industry. According to Nwapa, 'if you read the Schedule of the Act, you will know that there is hardly any part of that Schedule that you can comply with a hundred percent. So, as a Board, our job is not even to ensure compliance; first of all, we have to

¹⁹⁷⁴Ovadia, J. S. Op.Cit. p16.

¹⁹⁷⁵ Ibid p. 22.

work with the industry to create those capacities before we can then start insisting on compliance'.¹⁹⁷⁶

The rigid targets set in the Schedule to the Act have been fiercely opposed by the IOCs operating in Nigeria. Since the passage of the NOGICD Act, they have been pushing to amend the Act and remove the Schedule.¹⁹⁷⁷ There has been much discussion about the metrics used to even determine compliance with the targets in the Schedule to the Act. At some points, after the Board abandoned its early efforts at developing a metric along with the reporting forms it had created, the Directorate of Planning, Research and Statistics began developing an electronic template for measuring compliance with the Act. At the “Stimulating Local Content” workshop, Nwapa announced that stakeholders (the operating companies) had already received the template which was an Excel spreadsheet, and were scheduled to provide feedback at a meeting scheduled for December, 6. Speaking, after the December 6 meeting, some of the Nigerian Content General Managers (NCGMs) expressed disappointment that the template developed by the Board was a rather simplistic tool for gathering information and not a tool for evaluating targets or capacity.¹⁹⁷⁸ The apparent failure of the Board’s new metric for measuring and gathering data on Nigerian content suggests that, given the limits on the Board’s resources, it needs to cooperate with a broad range of stakeholders in order to meet all of its obligations and develop the systems required to monitor, enforce and enhance local content in Nigeria. There is a role, therefore, for the House Committee on Local Content in ensuring proper metrics are in place for the

¹⁹⁷⁶ Ibid p.24.

¹⁹⁷⁷ Ibid p.24.

¹⁹⁷⁸ Ibid p.26.

measurement of Nigerian Content. At the same time, the inclusion of a broad range of stakeholders will ensure transparency in local content oversight.¹⁹⁷⁹

5.1 Conclusion/Findings

(a) No metrics for the measurement of Nigerian Content. Although the rigid and specific targets set in the Schedule to the Act are expressed in percentages, the Act fails to propose the indices for ascertaining the percentages expressed therein.

(b) Since there is no standard metric system, the Board is left with developing measuring local content on a subjective basis.

6.1 Recommendations

(a) Technology Measurement Expert within or outside Nigeria, should be contracted to successfully carryout a new acceptable metric system that will be nationally and universally meaningful ad acceptable.

(b) The Board should, in the present situation, propose and pursue an amendment to the Act with a view to ending this imbroglio.

¹⁹⁷⁹ Ibid p.26.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

NIGERIAN LEGAL SYSTEM IN THE AGE OF AI: UNDERSTANDING A UNIQUE
FORM OF DIGITAL EXCLUSION AND ITS IMPACT ON HUMAN RIGHTS AND
AFRO-COMMUNITARIAN IDEALS

Bambale Zubairu Lawal

Department of Philosophy, Faculty of Arts, Ahmadu Bello University Zaria

Decolonial Research Group, University of Pretoria – South Africa

+2348061184710 : zubairbambale@gmail.com

Abstract

This paper argues that the deployment of Artificial Intelligence (AI) within the Nigerian Legal System (NLS) can create a unique form of exclusion. By examining the technical and social aspects of AI, the paper explores how its proper functioning within the legal system is essential to achieve justice for all. It then analyzes Nigeria's socio-economic realities, marked by widespread ignorance, poverty, limited electricity access, and poor internet connectivity. This context, the paper argues, hinders AI's ability to fulfill its purpose. The uncritical implementation of AI under these circumstances would exacerbate existing inequalities and exclusion. While a privileged few benefits from AI-powered legal mechanisms, the majority suffers from technological neglect. This raises a fundamental question: can a just, fair, and inclusive legal system truly exist when AI excludes a large portion of society due to technological inadequacy? Adopting the African philosophical method of conversationalism, the paper argues that this individualistic tendency inherent in such exclusion directly conflicts with human rights to equality, fair hearing, and freedom from discrimination, on the one hand, and the Afro-communitarian ideals that emphasize relationality, complementation, and collective well-being, on the other hand.

Keywords: Nigerian Legal System, Artificial Intelligence, Digital Exclusion, Human Rights, Afro-communitarianism

1. Introduction

One of the significantly unique features of the fourth industrial revolution (4IR) is the success recorded in the development of Artificial Intelligence (AI). AI arms machines and systems to simulate human thinking and acting capacities. These systems have been

deployed to perform roles that were exclusively carried out by humans. Together with other technologies such as Robotics, Internet of Things (IoT), Analytics, and other autonomous systems, AI performs industrial, commercial, financial, agricultural, educational, security, and legal roles, among others. Arising from this, humans are increasingly becoming less needed to carry out these roles, leading to disruptions associated with virtually all other industrial revolutions (Larry, 2022). Across virtually all legal systems, the high demand for justice renders legal systems incapable of resolving legal issues either completely or in a way that is fairly felt (Hill, 2021). In the era of the 4IR, jurisdictions adopt innovative technological solutions to administer justice in a way that is not exclusive (Hill, 2021). AI is one such technology used in this regard. Some of the uses of AI in a legal system include Court Case Information Organisation, Due Diligence, Advisory, Court Case Prediction, and Legal Analytics. Based on their understanding of the environment, AI-embedded machines, with little or no human assistance, can now enter into contractual agreements, potentially raising both commercial and legal issues. With the right and sufficient amount of data, developers can create an AI system that provides legal advice and, if allowed, representation that could be better than the best human lawyers within a jurisdiction. Litigants who can afford these sorts of AI services and have the basic knowledge of utilizing the systems can seek justice with far more ease than those who cannot. The latter category is in the majority in most of the countries south of the Sahara, Nigeria inclusive.

The central question that I raise and seek to answer, in this paper, is whether or not there exist, under the NLS, technical and social conditions under which AI functions without excluding all seekers of justice. In answering in the negative, I structure the

paper into five sections. The first section is an introduction. The second section, demonstrates the current outlook of the NLS that is marked by gross inadequate social and technical conditions for an effective AI deployment. In section three, I show how embedding AI in a legal system in which the necessary conditions are lacking leads to exclusion that go contrary to certain human rights. In the fourth section, I go further to show how this exclusion also conflicts with the Afro-communitarian principles of relationality and complementarity. I conclude in the fifth section.

2 THE CURRENT OUTLOOK OF THE NIGERIAN LEGAL SYSTEM IN THE AGE OF THE 4IR

This section is descriptive, painting the picture of the current architecture of the NLS. The primary aim is to highlight the features of the NLS in order to show whether or not the system has the capacity to allow a disruptive technology like AI to achieve the function of bringing about inclusive justice. Specifically, the section looks into the conditions under which AI functions effectively and whether or not these conditions are present under the NLS. Quite a number of works have demonstrated the absence of the necessary preconditions for an effective deployment of AI and the lack of concern by African states to make them available (Ruttkamp-Bloem, 2023, Damian, Kutoma, & Simisola, 2023, Chinasa, Kehinde, & George, 2023, Abejide, & Chinedu, 2023). African countries, especially Sub-Saharan Africa (SSA), are still grappling with the problems of previous industrial revolutions that need to be resolved before the benefits of the 4IR can be enjoyed.

Like many regions in Africa, Nigeria lacks adequate infrastructure that effective deployment of AI technologies essential requires. Socially, a large population of

Nigerians are ignorant of AI technology and what it offers. Those who are aware are unable to afford it. Key social and technical problems are, therefore, the absence of universal access to electricity, low internet penetration, low level of education and skills, poor digital infrastructure, and lack of employment and access to financial resources. The point to note is that, Nigeria has no adequate infrastructure and is not socially and technologically ready to deploy AI without risking the exclusion of most seekers of justice. The poor socioeconomic conditions of the people and the lack of infrastructure will make a massive deployment of AI amplify existing disparities. These problems create conditions that hamper the effective and responsible deployment of AI in the countries they exist. Scholars have described these conditions in different ways. While Ruttkamp-Bloem (2023) calls it AI readiness, Momčilović (2021) talks about “national AI capital” (NAIC). The terms are used to mean the capacity of a country to “apply and develop, and cope with the challenges of various artificial intelligence systems, in order to increase the country’s social and economic well-being and competitiveness”. Ruttkamp-Bloem (2023, p.14) stresses the necessity for linking AI ethical thinking to the experiences of the diverse peoples of Africa in order that their context is considered. Owing to differences between West, East and “Global South”, in respective ways, we have to pay attention to what is obtainable in individual contexts (Ruttkamp-Bloem, 2023, p.14). I adopt this as part of what motivates my writing this piece. The discussion can thus be situated within the responsible AI discourse. It is a discourse that seeks to influence the development and deployment of AI in a way that complies with good and humane laws, takes cognizance of sociocultural and ethical dictates (Damian, Kutoma, & Simisola, 2023, Chinasa, Kehinde, & George, 2023). Some works argue that argue that the measures that should be put in place to create conditions for the deployment of AI

in a way that does not bring about exclusion on the basis of socio-economic status among others include telecom infrastructure improvement to facilitate internet penetration, AI regulations as well as provision of enabling and collaborative AI environment (Ruttkamp-Bloem, 2023). Whether or not Nigeria is consciously aiming towards implementing these measures and for how long, remains to be seen and go beyond the scope of this paper. The focus of this paper is the ethico-legal and social implications of these problems for the NLS.

3 AI, NIGERIAN LEGAL SYSTEM, INADEQUATE INFRASTRUCTURE AND THE EXACERBATION OF EXISTING INEQUALITIES

Like many regions in Africa, Nigeria lacks adequate infrastructure that effective deployment of AI technologies essentially requires. Introducing intelligent systems into the Nigerian legal system under this condition will create a reality of existence that characteristically excludes members of society from accessing justice. The deployment of AI within the Nigerian legal system will enable the stratification of access to justice based on socio-economic means, where financial capability determines citizens' access to justice. This calls for the need to re-examine the conceptions of justice we hold and the impact of technology on a legal system. Such re-examination should gear towards ensuring technological progress enhances rather than impedes citizens' yearnings for equality and justice.

This paper is inspired by the need to draw our attention to a critical concern that the deployment of AI in the Nigerian legal system raises. This concern has to do with the potential of AI deployment to exacerbate already existing inequalities, leading to some form of new exclusion. This new form of exclusion will come about because the

necessary conditions do not exist for the bulk of litigants to effectively interact with and reap the benefit of an AI-embedded legal system. Some of the conditions that are lacking include digital literacy, internet access, and financial resources. The absence of these conditions has serious implications for human existence. It denies the fundamental human right of the bulk of the populace to equal and unhindered access to justice, a right that is contained in chapter 2 and 4 of the 1999 Constitution of the Federal Republic of Nigeria. For instance, section 14(1) provides that “The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice”. Section 15(2) prohibits discrimination on the ground of status, among others. Section 17(1) states that “The State social order is founded on ideals of Freedom, Equality and Justice”. 17(2)(a) states that “every citizen shall have equality of rights, obligations and opportunities before the law”. Section 36(6)(b) guarantees the right of any person charged with a criminal offense “to be given adequate time and facilities for the preparation of his defense”.

The absence of the necessary conditions for the bulk of litigants to effectively interact with and reap the benefit of an AI-embedded legal system has serious implications for human existence. It creates a situation that further waters down the capacity of the excluded many to meaningfully participate in the legal system. Factors external to the excluded individuals come to define existence and agency within the legal sphere, facilitating marginalizing experience. This goes contrary to the basic tenets of equality especially that which is rooted in Afro-communal thinking. This idea of equality drives individuals into complementing one another in order to actualize and perfect existence (Chimakonam & Chimakonam, 2022, Iroegbu, 1995, Chimakonam & Ogbonnaya, 2021.). So, there is sense in which people are equal amidst their being different. This equality

is better understood with reference to what I consider as micro and macro levels of existence. At the macro level, consisting in socio- economic status, physical and biological features, knowledge acquisition, among others, entities are different. However, at the micro level which has to do with the innermost architecture of existence, every entity is equal in being necessarily deficient. However, while what obtains at the macro level should ideally be the basis for recognizing equality in a legal system, it is the macrolevel factor that is the driving force in practice. So, while litigants are considered equal in principle, the factors at play at the macro level; knowledge, socio-economic status, etc, are the major determinant of legal outcomes. For instance, rich and educated litigants have better chance of succeeding in court than their poor and illiterate counterparts. So, the condition (in practical terms) is such that makes litigants feel unequal and therefore strives to oppose rather than complement one another. The deployment of AI could reinforce this condition. Because the condition for effective deployment of AI to seek justice is such that is driven by macro factors, only those who are favored will succeed. For instance, the macro-level-factor consideration creates a condition in which perceived favored individuals who can afford AI are considered as though they are sufficient needing no complementary engagement. The is especially if the legal system is overwhelmingly AI embedded such that access to justice entirely depends on how one can afford AI services.

AI entrenched legal systems amplifies existing disparities in access to justice. Those who are affected are individuals that macro-level-factors incapacitate from deploying the system to access justice. The condition of Africa is such that most people and seekers of justice belong to communities in which AI cannot be deployed as a tool for seeking justice. This is owing to factors that includes limited or total absence of internet access,

digital literacy, etc (statics will be apt here). This is as opposed to other users of the same legal system but who happen to have the resources and skills for using AI to navigate the technical path of a Legal system. But this is even less problematic relative to the situation in which those who can afford the use of AI to seek legal redress resort to deploying AI to manipulate legal processes such as evidence and documents tampering.

This exclusion does not align with the Afro-communitarian core principle of collective well-being. This principle is premised on the African ontological understanding of the imperative for positive and inclusive relationships among existing entities in the cosmos due to their being necessarily interdependent and interconnected (Iroegbu, 1995, Asouzu, 2004.). This thereby informs the African understanding in which existence is shaped through relationships with others. So, an Afro-communitarian thought favors a society that includes individuals to contribute to the collective good. But the exclusion of individuals arising from the lack of necessary conditions for an AI-embedded legal system to accommodate all litigants in their quest for access to justice creates a system that excludes many based on their level of access to technology.

4 AFRO-COMMUNITARIAN IDEALS AND THE CONCEPT OF COMPLEMENTARITY

This exclusion does not align with the Afro-communitarian core principle of collective well-being. This principle is premised on the African ontological understanding of the imperative for positive and inclusive relationships among existing entities in the cosmos due to their being necessarily interdependent and interconnected (Iroegbu 1995). This thereby informs the African understanding in which existence is shaped through

relationships with others. So, an Afro-communitarian thought favors a society that includes individuals to contribute to the collective good. But the exclusion of individuals arising from the lack of necessary conditions for an AI-embedded legal system to accommodate all litigants in their quest for access to justice creates a system that excludes many based on their level of access to technology. While a significant portion of extant literature shows the benefits of deploying AI in respective legal systems, I draw our attention to the dangers of exclusion in specific contexts. I show further that this AI-driven exclusion in a legal system raises a problem of existence as well as contravenes relationality and complementarity, which are core Afro-communitarian values and principles.

I construe complementarity here as the imperative for every individual to contribute to the well-being of others in society. AI-driven exclusion in the legal system implies a lack of consideration for the critical complementary role that the majority of the populace should play within the legal system. This comes with an adverse effect on the legal system and society as a whole. Where the majority of the people are denied the right to participate in the legal system due to the exclusion brought about by an AI-embedded legal system, the ideal of complementarity is violated. AI-driven exclusion, in this sense, waters down the humanity of those excluded. By their exclusion, they are rendered incapable of contributing meaningfully to society. This touches on the important concept of relationality in Afro-communitarian thought, which stipulates that existence, in essence, is relational, i.e., being is experienced and comprehended through interaction with others. Excluding the majority of the populace from accessing justice within the Nigerian legal system undermines their existence, which is essentially relational. The relational approach underscores the need for mutual interaction and

positive coexistence. It means that the full humanity of the excluded individuals is denied due to their non-inclusion in the legal system. This raises a crucial ethical issue that calls for action towards ensuring that technology should bring about positive change for everyone within the society and not exacerbate existing inequalities. I suggest adopting a human-centered approach to AI development and deployment in the Nigerian legal system, with attention to ethical considerations that promote inclusiveness and fairness for all.

In order to make the deployment of AI beneficial to Africans, these implications need to be seriously considered and mitigated. This paper aims to draw our attention to the risk of exclusion that the deployment of these tech solutions poses, especially under the NLS, where the conditions necessary for their effective use are grossly inadequate. Under these conditions, only a few members of the population can benefit from the services of these technologies. In the context of Africa, some scholars argue that the use of AI in ways that impose Western principles and values on Africa poses the risk of alienating Africans. Here, I go further to demonstrate that the deployment of AI in the absence of the necessary conditions mentioned earlier will also alienate Africans.

5 CONCLUSION

This paper highlights the risks associated with the deployment of AI within the NLS in a context lacking the necessary preconditions for its effective functioning. I argue that such deployment would exacerbate existing inequalities and exclude a significant portion of the population from accessing justice. This exclusion is inconsistent with the Afro-communitarian ideals of relationality, complementarity, and collective well-being. To avoid this, it is crucial to address the infrastructural, socio-economic, and

educational gaps that hinder the effective deployment of AI. A human-centered approach to AI, which prioritizes inclusiveness and fairness, must be adopted to ensure that technological advancements in the legal system benefit all members of society, thereby promoting justice and equality.

REFERENCES

- Abejide, A. & Chinedu, O. (2023). Epistemic Just and Dynamic AI Ethics in Africa. In Eke, D. O., Wakunuma, K. & Akintoye, S. (Eds.). *Responsible AI in Africa Challenges and Opportunities* (pp.101-118). Palgrave Switzerland: Palgrave Macmillan.
- Asouzu, I.I. (2004). *The Method and Principles of Complementary Reflection in and Beyond African Philosophy*. Calabar: University Press.
- Chimakonam, J. O., & Chimakonam A.E. (2022). Examining the logical argument of the problem of evil from an African perspective. *Religious Studies*, 1-14. doi:10.1017/S0034412522000300
- Chimakonam, J.O & Ogbonnaya, L.U. (2021). *African Metaphysics, Epistemology and New Logic*. Switzerland: Palgrave Macmillan.
- Chinasa, T. O, Kehinde, A, & George, O. (2023). Responsible AI in Africa—Challenges and Opportunities. In Eke, D. O., Wakunuma, K. & Akintoye, S. (Eds.). *Responsible AI in Africa Challenges and Opportunities* (pp. 35-64). Palgrave Switzerland: Palgrave Macmillan.
- Damian, O. E., Kutoma, W. & Simisola, A. (2023). Introducing Responsible AI in Africa. In Eke, D. O., Wakunuma, K. & Akintoye, S. (Eds.). *Responsible AI in Africa Challenges and Opportunities* (pp.1-12). Palgrave Switzerland: Palgrave Macmillan.
- Dirk, K. (2022). *Machine Ethics and African Identities Perspectives of Artificial intelligence in Africa*. <http://dx.doi.org/10.2139/ssrn.4163096>
- Iroegbu, P. (1995). *Metaphysics: The Kpim of Philosophy*. Owerri: International Universities Press.
- Larry A. D. (2022). Artificial Intelligence, the Promise of Disruption. In Larry A. D., Cristina, P. & Michel C (Eds.). *The Cambridge Handbook of Artificial Intelligence*, Global Perspectives on Law and Ethics, (pp. 3-17). United Kingdom: Cambridge University Press.
- Momčilović, A. (2021). NAIC Foundations: Is human capital the only thing (becoming and) remaining important? Retrieved from <https://www.ssbm.ch/blog/naic-foundations-is-human-capital-the-only-thing-becoming-and-remaining-important-by-a-co-momcilovic-emba/>.
- Ruttkamp-Bloem, E. (2023). Epistemic Just and Dynamic AI Ethics in Africa. In Eke, D. O., Wakunuma, K. & Akintoye, S. (Eds.). *Responsible AI in Africa Challenges and Opportunities* (pp.13-34). Palgrave Switzerland: Palgrave Macmillan.
- The Hague Institute for Innovation of Law (HIIL). (2021). *Use of digital technologies in judicial reform and access to justice cooperation*



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LEGAL REGIME ON TRADE UNIONISM AND COLLECTIVE BARGAIN: AN
APPRAISAL OF THE DETERMINATION OF MINIMUM WAGE IN NIGERIA¹⁹⁸⁰

Ado Mallam Bello

Department of Private and Commercial Law,

Faculty of Law, Bayero University, Kano,

Mobile: 08035982407, 08028760805, E-mail: belloado63@gmail.com

Abstract

The issues of trade union and trade unionism have been in existence from time immemorial. Since their inception, they were made the focal points in labour relations and labour law where both the employees and employers exploit them to further their collective objectives. This paper using doctrinal research methodology examined trade union in a whole comprising its brief historical background and legal status and its powers to negotiate and settle on minimum wage. The paper found that by the principle of constitutional democracy which Nigeria is currently practicing, Nigerian workers have the fundamental right of forming trade unions. Through this they can collectively bargain for their conditions of service including the power to negotiate and settle on a minimum wage. With regards to the current disputes between organised labour and Federal government on what should be the realistic minimum wage, it was found that the fixation of N30, 000.00 as minimum wage has expired by the provisions of the National Minimum Wage Act 2019 and therefore ought to be reviewed. More so the economic hardship on the ground proved that the above amount is unrealistic. The paper therefore recommends that for the nagging determination of what should be the minimum wage in Nigeria, both the government and its employees should employ the constitutional and statutory provisions on the matter specifically, paying attention to the economic reality on the ground.

Keywords: Trade Union, Organised Labour, Minimum Wage, Collective Bargaining, Labour Legislation, Employers and Employees.

Introduction

The growth and development of any nation depends on the structures it has carved out for itself. In Nigeria, amidst the various arms of government which has been working

¹⁹⁸⁰ Ado Mallam Bello, PhD, Senior Lecturer, Department of Private and Commercial Law, Faculty of Law, Bayero University, Kano, Mobile, 08035982407, 08028760805, E-mail: belloado63@gmail.com

tirelessly to ensure growth and sustenance of the Nigerian state is the emergence of trade unions. Trade unions have an immense effect on labour markets and societies. The emergence of trade unions in Nigeria has become a desired form of association in order to restore the dignity of professional workers and also ensure greater level of overall output, which is part of nation building. These unions operate on different levels based on their modes of operation. They use different means to press home their needs and to get recognition in political spheres. This paper tends to examine the concept of trade unions, its legal status, collective bargain and the role trade union in the determination of minimum wage for its members.

Concept of Trade Unions

Definition

The term trade union has been defined by different statutes and scholars. The Trade Unions Act¹⁹⁸¹ defines trade union as;

“any combination of workers or employers whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination in question would or would not, be an unlawful combination by reason of any of its purposes being in restraint of trade, and whether its purposes do or do not include the provision of benefits for its members.”

According to the Black's Law Dictionary;¹⁹⁸² trade union is “any combination or association of men employed in the same trade,(usually a manual or mechanical trade), united for the purpose of regulating the customs and standards of their trade, fixing prices or hours of labour, influencing the relations of employer and employed, enlarging or maintaining their rights and privileges, and other similar objects.”

Fajana,¹⁹⁸³ defines trade unions “as any combination whether temporary or permanent, the principal objectives of which its constitution are...the regulation of the relation between workmen and workmen or between masters and masters or imposing of

¹⁹⁸¹ Trade Unions Act CAP T14 Laws of The Federation of Nigeria 2004.

¹⁹⁸² Black's Law Dictionary, Free Online Legal Dictionary. 2nd edition.

¹⁹⁸³ Fajana, Sola. Industrial Relations in Nigeria: Theory and Features. Lagos: Labofin and Coy, 2000.

restrictive conditions on the conduct of any trade or business and also the provision of benefits to members.”

Features of Trade Unions

By the foregoing definitions, the general features of trade unions are;

- a) Association of employees or employers of independent workers.
- b) Trade unions usually emphasize joint, co-ordinate actions and collective bargaining.
- c) It is formed to protect and promote all kinds of interest (economic, political and social) of its members. The dominant interest with which a union is concerned is however economic.
- d) It achieves its objective through collective action and group effort. Negotiations and collective bargaining are the tools for accomplishing objectives.¹⁹⁸⁴
- e) Influencing harmonious industrial relationship between employer and employee.

Historical Background of Trade Unions

The history of trade union in Nigeria started from International Conventions which Nigeria is signatory to and have been domesticated and rectified under the dualist¹⁹⁸⁵ legal framework of the country. These include the International Labour Organisation (ILO), Universal Declaration of Human Rights Instruments, African Charter on Human.) and Peoples’ Rights (Ratification and Enforcement) Act, African Commission on Human and Peoples’ Rights.

The first Nigerian organization that was known to have had an interest in trade union activities was the Mechanics Manual Aid Provident and Mutual Improvement Association formed in July 1883. But the first trade union that is characterized by wage employment was the Nigerian Service Union organized in 1912. It was possibly formed because it was the vogue in other African countries. In 1931, two other unions namely

¹⁹⁸⁴Bishal Ram Shreta. “The Effect of Trade Unionism on Workers” Business Economics and Tourism, 16-17.

¹⁹⁸⁵Unlike the monolist legal systems where international conventions apply automatically upon signatory, Nigeria operates the dualist legal system as it pertains to International legal instruments which must be rectified and domesticated in Nigeria before they become operational.

Nigerian Union of Teachers and the Railway Workers Union were formed. An important milestone in the development of trade unionism was recorded when the Colonial administration passed the Trade Union Ordinance into law in 1938. It was the legislation that was passed to regulate formation and registration of trade union in Nigeria. The Ordinance was eventually implemented in 1939 and gave legal backing for the existing trade unions and facilitated the formation of new ones.

The development of trade unionism took a more dynamic form immediately after the Second World War and coupled with the emerging nationalist movements. Between 1945 and 1953 twenty four new unions were placed on the register. This period was noted for its labour unrest. The aftermath of the Nigerian civil war had effect on workers' salaries and affected their standards of living. In 1973, the most important statute of trade union was passed dealing with central labour organizations and it repealed the Trade Union Ordinance of 1938. This in itself did not appreciably help matters much, a more decisive step was taken in 1976 by the government when the Trade Union Central Labour Organization (Special Provision) Decree No.44 formally dissolved existing four rival central labour organizations, impounded their assets, appointed an administrator of trade union affairs, followed by the re-organization exercise, the re-constitution and inauguration of the Nigerian Labour Congress on February 28, 1978 as the only central labour organization which industrial unions must be affiliated¹⁹⁸⁶.

In 1986, the Trade Union (Miscellaneous Provision) was introduced and amended in 1989. It came to re-organize and restructure the former Act. Thus, there are also other statutes relevant to labour relations that give same right and freedom. One of them is Trade Union Act¹⁹⁸⁷ which is the parent law for the establishment of Trade Unions in Nigeria. Finally, in 2005, the Trade Union (amendment) Act 2005 which is the latest trade union act was introduced.

Trade unions were also recognized and placed as one of the Fundamental human rights by the 1979 Constitution and subsequently under the provision of Section 40 of the 1999 Constitution (as amended). By virtue of this Section, every Nigerian citizen has the

¹⁹⁸⁶Otobo D. Understanding the New Trade Union Structure. In: Otobo D. and Omole, M.(eds) (1984) Readings in Industrial Relations in Nigeria, Malthouse Press Ltd, Lagos. P.52.

¹⁹⁸⁷CAP. 432, Laws of the Federation of Nigeria, 1990.

freedom to associate with others particularly to form or join a trade union of his choice for the protection of his interests. Therefore by these constitutional and statutory laws, trade unions are legally recognized in Nigeria.

Objective and Roles of Trade Unions

The primary objectives of trade unions are to secure the interest of their workers and conditions of their employment. These can be highlighted as follows;

- a) Bargaining for higher wages and for better working conditions for its members.
- b) Providing management suggestions on personnel policies and practices.
- c) Helping workers in getting the control of industry.
- d) Protecting members against discrimination and unfair injustice of employers.
- e) Helping workers in all matters which results in workers interest.¹⁹⁸⁸
- f) Enhancing harmonious industrial relationship.

Collective Bargaining and Collective Agreement

Collective bargaining is part of the objectives of industrial relations. It emerged as a result of the inequality between bargaining power of the individual employee and the employer. It therefore applies to those situations under which wages and conditions of employment are negotiated and settled in the form of an agreement made between employers or associations of employers and workers or workers organizations.

Collective bargain is defined as “the process of arriving or attempting to arrive at a collective agreement”:¹⁹⁸⁹Whereas Black’s Law Dictionary defines it as “negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, and fringe benefits”¹⁹⁹⁰

From the above definitions, one can opine that the concept of collective bargain is about the employees and employer negotiating and reaching an agreement on the terms and conditions of their industrial relationship relating general conditions of service including the minimum wages to be paid to the employees by the employers.

¹⁹⁸⁸Bishal Supra, at 20-21.

¹⁹⁸⁹¹⁹⁸⁹ Labour Act, Cap. L1 LFN 2004, section 91

¹⁹⁹⁰ B.A. Garner (Ed.) 7th Edition

Analysis of Negotiating of Minimum Wage in Nigeria

The basis of negotiating minimum wage in Nigeria is derived from International Conventions¹⁹⁹¹ and Nigerian legislation.¹⁹⁹² Since the Conventions on minimum wage (and other related labour issues) have been domesticated thereby becoming part of the Nigerian laws, discussions on negotiating minimum wage will be mainly on Nigerian laws, specifically, the National Minimum Wage Act 2019 for the purposes of this paper.

The issue of minimum wage dated back to Colonial era and same was handled by different Commissions on minimum wage.¹⁹⁹³ The first codified minimum wage law in Nigeria was *the Wage Board and Industrial Council Act, 1974*, followed by the *National Minimum Wage Act, 1981*, *National Minimum Wage Decree No. 43 of 1988*, *National Salaries, Incomes and Wages Commission Decree No. 99 of 1993*, *National Salaries, Incomes and Wages Commission (Amendment) Decree No. 17 of 1999*, *National Minimum Wage (Amendment) Act, 2000*, *National Minimum Wage (Amendment) Act 2003*, *National Minimum Wage Act, 2005*, *National Minimum Wage Act, 2009*, *National Minimum Wage Act, 2011* and *National Minimum Wage Act, 2019*. This law becomes the principal extant law on minimum wage in the country.

Appraisal of the National Minimum Wage Act, 2019

By the provisions of **section 3(1), (2) & (3) of the Act**, except otherwise provided by the Act, every employer is now mandated to pay a national minimum wage of not less than ₦30,000.00 (thirty thousand naira, only) per month to the lowest paid employee under the employer's establishment and any agreement for payment of a less wage other than the national minimum wage is void.

It is however noted that these provisions of the National Minimum Wage Act, 2019, by an imposition of a-not-less-than ₦30,000.00 national minimum wage paid by an

¹⁹⁹¹ Universal Declaration of Human Rights Instruments, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, International Labour Organisation, ILO Administrative Tribunal, African Commission on Human and Peoples' Rights, Human and Peoples' Right.

¹⁹⁹² *the Constitution of the Federal Republic of Nigeria, 1999 (as Amended)*, *the National Minimum Wage Act, 2019*, *the Labour Act, 1971*, *the Pension Reforms Act, 2014*

¹⁹⁹³ Friday AbayeIgbadumhe, e'tal, "Minimum Wage Implementation in Nigeria: Issues and Prospect", Proceedings of INTCESS 2020-7th International Conference on Education and Social Sciences, 20-22 January, 2020- Dubai (UAE), <https://tribuneonlineeng.com>, accessed on 06/10/2021 at 3pm.

employer to the least employee in the employer's establishment, appear to negate the long aged established principle in the case of *Arjay Ltd v AMS Ltd*¹⁹⁹⁴ where the Supreme Court of Nigeria held that parties to a contract are bound by the expressed terms and conditions of their contract- including but not limited to employment contracts. Again, the imposition of a national minimum wage of not less than ₦30,000.00 is a direct affront to the provisions of the Labour Act, 1979 and the concept of freedom of contract which allows parties to an employment contract the freedom to introduce their own terms into their contract and be bound by same.

By virtue of **section 4(1) & (2) of the Act**, exemptions to the national minimum wage of ₦30,000.00 are applicable to establishments where workers are employed or paid on part-time basis, commission or piece rate, establishment employing less than 25 persons, workers in seasonal employment like Agriculture, persons employed in vessel or aircraft to which merchants or aviation laws apply and others that the Minister of Labour may grant exemption to in the interest of the public. This justifies the stance of this work that issues of minimum wage should be left for the determination of the free market/economy. It appears that with the powers of the Minister to grant exemptions, the statutory sum of ₦30,000.00 as National Minimum Wage is unfair statutory bargain to the poor masses as same does not even meet their basic needs.

Again, the restriction of the application of the National Minimum Wage to establishment of more than 25 employees is an exclusion of the informal and unauthorised sectors from the applicability of the Act which is clearly evidenced in the exclusion of the agriculture sector. In other words, the current work force of the Nigerian labour market is more informal than formal and most Nigerians that would have been beneficiaries of the provisions of the Act are employed in the informal sector characterised by employment of less than 25 workers which makes the employers in such informal and small sectors not bound by the provisions of the Act.

¹⁹⁹⁴ [2003] LPELR-55 SC

Section 5 of the Act establishes a Tripartite Committee on national minimum wage with its secretariat domiciled in the National Salaries, Income and Wages Commission. The Tripartite Committee is saddled with the responsibility to make recommendations on national minimum wage and to review same after five years expiration of same from the last review in accordance with the provisions of the Act.¹⁹⁹⁵ Members of the Committee¹⁹⁹⁶ are appointed by the President which consists the following- a Chairman, a secretary, a representative each of the Secretary to the Government of the Federation, Head of Civil Service of the Federation, Minister of Labour and Employment, Minister of Finance, Minister of Budget and National Planning, the Executive Chairman of the National Salaries, Income and Wages Commission, six Governors each from each of the six geo-political zones, a representative each from Nigeria Labour Congress, Trade Union Congress, any other labour centre that may be registered in accordance with the labour laws, a representative each from the Nigeria Employer's Consultative Association, Manufacturers Association of Nigeria, Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture, Nigeria Association of Small and Medium Enterprises and any other employer's group and may be registered in accordance with the labour laws.¹⁹⁹⁷ Subject to the recommendation of the Minister of Labour and Employment, the President may extend the list by the appointment of additional members into the Tripartite Committee.¹⁹⁹⁸

By the provisions of **Section 8 of the Act**, the Chairman of the Committee has the sole prerogative to convene the meeting of the Tripartite Committee but with the mandatory requirement to so do not later than six months to the expiration of extent national minimum wage for the purposes of the review of same through the deliberation and decision of members of the Committee. It is noted that the Act is silent as to the qualifications of the members of the Committee especially that of the Chairman. This goes to affect the reliability and efficiency of members of the Tripartite Committee to deliver on a national sensitive issue of the National Minimum Wage. The arrogation of a wild power to the President to constitute and appoint members of the Tripartite

¹⁹⁹⁵ See Sections 3(4) and 7 of the National Minimum Wage Act, 2019

¹⁹⁹⁶ Currently comprising 22 members but provision for a working 20 members

¹⁹⁹⁷ See Section 6 of the National Minimum Wage Act, 2019

¹⁹⁹⁸ See Section 6(2) of the National Minimum Wage Act, 2019.

Committee without specification of the qualification for the appointment of the members is a serious legislative blunder that would bring a serious impediment to the administration of the provisions of the Act same having been left in the hands of unspecified persons as to their qualifications.

Subject to statutory deductions, a legal obligation is now placed on the employer to pay a wage not less than the National Minimum Wage to the worker with a penalty, on default and upon conviction, of a fine not exceeding 5% of the offender's monthly wage, all outstanding arrears of the worker's wage and any additional penalty of not less than the existing Central Bank of Nigeria lending rate of the wages owed for each month of continuing violation.¹⁹⁹⁹ The wage which an employer is obligated to pay a worker/employee is usually a subject matter of express terms of the contract but not below the National Minimum Wage.²⁰⁰⁰ This means, subject to agreement, the employer may pay a wage above the National Minimum Wage but not below the stipulated amount of ₦30,000.00. But where a contract of employment leaves out the issue of payment of wage, it might become an issue whether there is a contract of employment.²⁰⁰¹ The common law would come to rescue at this point to imply a contract from the conduct of the parties. If found that one party works at the order of the other under such circumstances that it must be presumed that he hopes to be paid as a matter of right, then a contract of employment should be implied as the order of the employer was not carried out by the worker gratuitously but with the understanding that the former would be paid.²⁰⁰² However, where there is implied contract, in the absence of expressed agreement to pay a stated wage, payment is based on *quantum meruit*.²⁰⁰³ However, it is important to note that whereas, parties may agree to pay and be paid a wage above the stipulated National Minimum Wage, any agreement to pay amount below the National Minimum Wage shall be null and void and of no effort

¹⁹⁹⁹ See section 9 of the National Minimum Wage Act, 2019

²⁰⁰⁰ Emuobo Emudainohwo, "Analyzing the Duties of Employer and Employee in the Nigerian Law", Beijing Law Review, 2021, 12, 305-319, ISSN Online: 2159-4635, <https://www.scirp.org/journal/blr>, accessed on 12/01/2023 at 10pm.

²⁰⁰¹ *ibid*.

²⁰⁰² *Higgins v Hopkins* [1848] 3 Exch 163, 166.

²⁰⁰³ *Bryant v. Flight* [1839] 5 M&W 114.

whatsoever.²⁰⁰⁴ To enhance compliance with the provisions of the Act, it is statutory demanded of the employer to keep records of wages or condition of employment as are necessary to show that the provisions of the Act are being complied with as it pertains to workers and their employment. An employer who fails to comply with this commits an offence and upon conviction is liable to a fine not exceeding N75,000.00 and additional penalty not exceeding N10,000.00 on each day the offence continues.²⁰⁰⁵

For the purposes of compliance with the provisions of the Act, the Minister of Labour and Employment may authorise any officer in the Civil Service of the Federation to act and such authorised person is deemed to have been authorised within the meaning of the Labour Act.²⁰⁰⁶ The authorised officer must be furnished or armed with a letter of authority and identification when visiting an employer's premises for the purposes of the Act and shall produce both documents, if so required, to the employer or other persons holding responsible of management at the premises.²⁰⁰⁷ It is important to note that powers delegated to any authorised officer cannot be delegated by the authorised officer to any other person because it is the law that a delegated power cannot be further and/or sub-delegated to another. This principle of law is expressed in the Latin maxim *delegatus non potest delegare* which means literally means "a delegate cannot himself delegate".²⁰⁰⁸ The importance of stressing the principle of non-further delegation by the authorised officers cannot be overemphasized against the practice where an authorised officer might feel too big to personally exercise the powers delegated to him but would decide to delegate same to another who is not contemplated within the provisions of the Act thereby rendering any action performed by such unauthorised person null and void *ab initio*.

Current Nigerian Situation on Minimum Wage

In 2023 the organized labour, comprising of the Nigerian Labour Congress (NLC), Trade Union Congress (TUC) and other affiliated Unions started agitation for the upward

²⁰⁰⁴ Section 3(3) of the National Minimum Wage Act, 2019

²⁰⁰⁵ Section 10 (10 & (2) of the National Minimum Wage Act, 2019

²⁰⁰⁶ Section 11(1) of the National Minimum Wage Act, 2019. See also section 17 of the Act where "authorised officer" is defined to mean "an Officer in the Public Service of the Federation authorised or deemed to have been authorised to act for the purposes of this Act".

²⁰⁰⁷ Section 11(2) of the National Minimum Wage Act, 2019.

²⁰⁰⁸ Blacks Law Dictionary, 8th Edition at page 1713

review of the national minimum wage. The agitation is mainly premised on the fact that the fixation of the N30, 000.00 as minimum wage by the National Minimum Wage Act 2019 was due for review. Secondly that N30, 000.00 (with the subsequent presidential award of N35, 000.00 across board) has not kept pace with the harsh cost of living in Nigeria.

The agitation has become more intense when the Federal Government removed fuel subsidy and allowed Dollar to float in free market thereby resulting into inflation and hardship on the Nigerian workers. In response, the organized labour pressured for a review of the N30, 000.00 minimum wages to reasonable amount which will reflect the current rising cost of living.

When the government failed to heed to the agitation the labour unions embarked upon strike to press home their demands. The last of such strikes took place in June 2024. As of now, there is a deadlock on what should be the minimum wage. While the organised labour has demanded N250,000.00, the government on the other hand has insisted on N62,000.00.

Conclusion

From the foregoing analysis, trade union has constitutional and statutory backing in Nigeria. By law, the organized labour is allowed to negotiate for minimum wage (among other labour related issues). The current agitation demanding for the upward review of the N30, 000.00 minimum wages is quite legitimate. This is because, by the provisions of the National Minimum Wage Act 2019, the amount is to be reviewed after the expiration of five years. Secondly, as a fact N30,000.00 as a minimum wage is unrealistic having regard to the current rising cost of living in country.

Recommendations

In view of the above discussions and analysis, the following recommendations are hereby proffered in order to improve harmonious industrial relationship between the government and the organized labour unions particularly as it affects the fixation of minimum wages in Nigeria.

1. The ~~N~~30,000.00 minimum wage fixed by the 2019 National Minimum Wage Act has expired after five years and same shall be reviewed in line with the provisions of Section 3(4) of the Act.
2. The government's removal of fuel subsidy and allowing Dollar to float in a free market economy has obviously made N30, 000.00 minimum wages unrealistic for Nigerian worker to cope-up with the attendant high cost of living. In view of this fact it is necessary for the government to settle for realistic minimum wage.
3. Based on the realities of the Nigerian economy where wealth is concentrated in the hands of few persons and government, a national minimum wage should be tailored towards the protection of the interest of vulnerable employees and not towards the employers who are already placed in an advantaged position over the teaming population of employees in the labour market.
4. With the current rising cost of living in the country, the government is urged to put in place the necessary structures that will check the continued rising inflation rate.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

EXAMINATION OF THE LAWS OF KIDNAPPING IN NORTH-WEST NIGERIA

Faiza Abdullahi Miko

Legal Practitioner and Post-graduate student of Public Law Department, ABU Zaria

mikofaiza@gmail.com

Phone: 08108907868, 08162714979

1.1 Introduction

Kidnapping is not a recent phenomenon²⁰⁰⁹. It is a universal occurrence that can be said to be like the man himself. This phenomenon has existed since there was the establishment of a coordinated human society.²⁰¹⁰ The abduction of Prophet Yusuf (AS) by his brothers as shown in the Holy Quran and Bible that kidnapping is as old as human history²⁰¹¹. The term “kidnapping” could be traced back to 17th-Century Britain, when newborns (kid) of rich families were napped (caught in the sleep) and held for ransom.²⁰¹² These children who were kidnapped are forced into captivity and converted into domestic labor machines, some are made farm hands and others turned into sex slaves.²⁰¹³

However, the current trend of kidnapping in Nigeria could be traced back to February 25, 2006, with the abduction of oil company employees in the Niger Delta region, to express their grievances to the world for the region's long history of

²⁰⁰⁹Ameh S. O et al (2020), “Kidnapping in Nigeria: Dimensions, Causes and Consequences”, *International Journal of Scientific Research and Reviews*, vol 9, issue2, <http://www.ijssr.org/download-92087.php>, <access on 13th February, 2023> p136

²⁰¹⁰Opakunbi, T.O et al (2023), “A Human Security Approach to Examining Banditry and Kidnapping in Nigeria”, *RUJMASS* Vol. 9 No, <https://rujmass.com/Journals/2023/017.pdf> <access on 15 August, 2023> p 179

²⁰¹¹Ameh S O et al *Op.cit*, p136; Q12v 15-18

²⁰¹²Stephen S. O et al (2022), “Factors and Consequences of kidnapping as a Threat to National Security: A situational Analysis of Nasarawa State – Nigeria”, *International Journal of Intellectual Discourse IJID*, vol 5. Issue1,

<http://www.researchgate.net/publication/362520094>, <access on 13th February, 2023> p330

²⁰¹³Okwuwada, N (2023) “The Modern day Consequences, Causes, and Nature of Kidnapping, Terrorism, Banditry, and Violent Crime in Nigeria: A comprehensive Analysis”, *Munich Personal RePEc Archive*, <https://mpa.ub.uni-muenchen.de/117671/1/Okwuwada.%20N.pdf> <access on 15th August 2023> .p7

marginalization, injustice, exploitation, and underdevelopment oil rich region. From that particular incident, several cases of kidnapping have increased at an aggressive rate and pervasive all over the nation.²⁰¹⁴ In contemporary Nigeria, the implications of kidnapping are not only on the foreigners; sadly, it now includes locals, such as; the poor and the rich, the aged, and children²⁰¹⁵

In Northern Nigeria, kidnapping became prominent as from 15th of April, 2014. The abduction of over 276 school girls in the North-Eastern State of Borno, the hub of a decade long insurgency by *Boko Haram* (western education is forbidden or sinful) in 2014 was the first major imprint of kidnapping in Northern Nigeria in recent history. The girls were abducted from government secondary school premises in a remote town called Chibok. And up till date, about 100 of those school girls are still in the custody of their abductors.²⁰¹⁶ Similarly, on February 19, 2018 at 5.30 pm, 110 school girls aged between 11-19 years were kidnapped by *Boko Haram* terrorists group from Government Girls Science and Technical College (GGSTC), Dapchi, located in Bulabulin, Yunusari local government area of Yobe State in the North-East part of Nigeria.²⁰¹⁷ Kidnapping has become prevalent in all part of Nigeria. Thus, this research will focus on the laws of kidnapping in North-West Nigeria.

In North-West Nigeria several incidence of kidnapping occurred. The abduction of eight people by gunmen along the Kofar Gayan/Kofar Kona axis of Zaria local government, Kaduna state. The incident happened in the early hours of Sunday, June 13, 2021. On April 26 2021, gunmen invaded Zaria low-cost housing estate, injure four, and kidnapped many women including a pregnant woman and minors.²⁰¹⁸ On 11th June, 2021, bandit attack Nuhu Bamali Polytechnic Zaria, kidnapped two lectures, and three students and killed one student.²⁰¹⁹ On 3rd may, 2023 at about 9:40pm bandits kill two

²⁰¹⁴Kamaluddeen Y. I and Ayoade .A.A(2020) "The Causes of Kidnapping and its Implications on Nigeria", *Liberal Arts and Social Sciences International Journal (LASSIJ)*, vol 4.No 2,<https://www.researchgate.net/publication/345338109><access on 2nd February, 2023>P1

²⁰¹⁵Yusufu, A .A et al, *Op.cit*, p267

²⁰¹⁶Henry T. A and Kenneth A. Z(2021), "The Changing Dynamics of Kidnapping in Nigeria and Implications for National Development", *International Journal of Research and Innovation in Social Science (IJRISS)*, vol v, issue x, <http://www.rsisinternational.org><access on 2nd February,2023> pp. 1- 2

²⁰¹⁷Ibid, pp 1-2

²⁰¹⁸Ibrahim Ramalan, Monday, 26th April, 2021,<https://dailynigerian.com><access on 29th May, 2023>

²⁰¹⁹John Gabriel, Friday, 11th June, 2021, <https://dailypost-ng.cdn.ampproject.org><access on 29th May, 2023>

and abduct four people in Zaria.²⁰²⁰ In December 2021 Hanifa Abubakar was abducted and later killed by Abdulmalik Tanko who was the head teacher of her school, Noble Kid Academy, in Kano state.²⁰²¹ On September 22, 2023 gun men invaded the Federal University Gusau in Zamfara State and kidnapped 24 female students. Security rescued 13 students but 11 remain in captivity. Less than two weeks later, on 4th October, 2023, suspected terrorists attack the Federal University in Katsina and kidnapped five female students. And on 10th of October, 2023, gunmen kidnapped four students from Nasarawa State University.²⁰²² On 7th of November, 2023, terrorists kill 14, kidnapped 20, and injure 19 during a Maulud celebration at Rugan Kusa Community in Musawa Local Government Area of Katsina Sate.²⁰²³ On December 7, 2023, nine residents have been killed while several others were abducted after terrorists attacked four villages in Sokoto State.²⁰²⁴ On 16th October, 2023, 27 women and four boys were kidnapped in Southern Kaduna State.²⁰²⁵ On Friday 3rd November, 2023 at about 8:00pm gunmen abducted two wives of the Chairman of Kiyawa Local Government Area of Jigawa State.²⁰²⁶ On April 10, 2023 at about 1:30am gunmen kidnapped a 60 year old man and shot two others in Gangarbi village of Rano Local Government Area of Kano State.²⁰²⁷ On 18th of October, 2023 gunmen killed two people and kidnapped three others in Kanzanna village, Bunza Local Government Area of Kebbi State.²⁰²⁸

The recent rise in kidnapping instances is particularly concerning. For instance, between January 1 and July 29, 2022, the nation of Nigeria saw 2,840 episodes of

²⁰²⁰Abubakar S. Mohd Wednesday, 3rd May, 2023, <http://dailytrust.com> <access on 29th May, 2023>; Muhammad I. Yaba, Eight Students were Kidnapped in Kaduna. In: Daily Trust, Wednesday, 5th April, 2023, p6

²⁰²¹Wondrous Nnaemek, Thursday, 28th July, 2022, <http://thewhistler.ng> <access on 29th May, 2023>; Abubakar Akote, Bandits Attack Niger Hospital Abduct Doctor, Nurses, Patients. in : Daily Trust, Wednesday, 19th October, 2022, p6

²⁰²² <https://businessday.ng/news/article/772198-kidnappings/>; <https://www.africanews.com/2021/09/2/gunmen-kidnap73-students-in-nigeria-day-after-another-group-released/> <access on 15th December, 2023>

²⁰²³ <https://www.arise.tv.com> <access on 15th of December, 2023> ; <https://www.lindaikejisblog.com/2023/8/bandits-kill-two-and-kidnap-six-others-in-zaria-2.html> <access on 15th December, 2023>

²⁰²⁴Babangida Ibrahim, Thursday, 7th December , 2023, <https://www.premiumtimesng.com> <access on 15th of December, 2023>; <https://www.thecable.ng/eight-abducted-as-attack-sokoto-communities/amp> < access on 15th of December, 2023>

²⁰²⁵Ibrahim Hassan, Monday, 16th October, 2023 <https://www.vanguardngr.com> < access on 15th of December, 2023>

²⁰²⁶Ababukar Ahamau Maishanu, Saturday, 4th November, 2023, <https://www.premiuitimesng.com> <access on 15th December, 2023>

²⁰²⁷ <https://guardian-ng.cdn.ampproject.org> <access on 15th December, 2023>

²⁰²⁸ <https://www.premiumtimesng.com> <access on 15th December, 2023>

insecurity, resulting in at least 7,222 deaths and 3,823 kidnappings. Additionally, 1,499 individuals were hurt as a result of the numerous attacks that occurred throughout the 505 local government units in the nation.²⁰²⁹ This made most of the state in North-West Nigeria to enact new laws for the offence of kidnapping but still the crime continue to be prevalent in North-West. This work will examine the laws of kidnapping in North-West Nigeria with a view to bring the law that will be sufficient to serve as deterrence to other perpetrators.

1.2 Meaning and Nature of Kidnapping

The word kidnap is a compound word. It is a product of two separate English words: 'Kid' (meaning young or child) and 'nap' (meaning short sleep).²⁰³⁰ Black's Law Dictionary defines kidnapping, thus: At common law, the crime of forcibly abducting a person from his or her own country and sending the person to another country.²⁰³¹ The crime of seizing and taking away a person by force or fraud.²⁰³² Kidnapping means the unlawful act of taking away of a person by force, threat, or deceit, with intent to cause him to be detained against his will, usually to hold the person for ransom or in furtherance of another crime.²⁰³³ Kidnapping as the forceful or fraudulent abduction of an individual or a group of individuals for reasons ranging from economic, political and religious to (struggle for) self-determination.²⁰³⁴ Kidnapping is the crime of seizing or taking away a person by force or by fraud. It is the offence of unlawfully seizing a person and confining the person usually in a secret place, while attempting to extort ransom²⁰³⁵.

1.3 Challenges Facing the Administration of Criminal Justice in Combating Kidnapping in North-West Nigeria

²⁰²⁹Okwuwada, N, *Op.cit*,p7

²⁰³⁰Odoma, S. U. and Akor, L. Y. (2019) "Kidnapping: A Lucrative Crime in 21st Century Nigeria" *Global Journal of HUMAN-SOCIAL SCIENCE: Sociology & Culture Volume 19 Issue 3 Version 1.0* <https://socialscienceresearch.org/index.php/GJHSS/article/download/2927/2816> <access on 17th of February, 2023>p3

²⁰³¹Garner, B. A, (2004) Black's Law Dictionary, 8th Edition, p2542

²⁰³²Ibid

²⁰³³ <https://www.lawinsider.com/dictionary/kidnapping> <access on 22nd of December, 2023>

²⁰³⁴Ignatius, M. O and Sampson, S. A(2022), "Government Interventions and Rate of Kidnapping in Cross River State, Nigeria", *International Journal of Multidisciplinary Research and Growth Evaluation*, vol. 03, issue 06, https://www.allmultidisciplinaryjournal.com/uploads/archives/20221201120413_F-22-62.1.pdf, <access on 29 august, 2023> p346

²⁰³⁵Umego, C. D (2018) "Offence of Kidnapping: A counter to National Security and Development" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337745 <access on 15th of August, 2023> p3

The administration of criminal justice in Nigeria comprises the police, prison, ministry of justice and the court. This work will provide some challenges facing these institutions in combating kidnapping in North-West Nigeria.

- 1.3.1 Delays in trial:** The delays in the process of determining whether a person will be tried or not, is the excruciating slow pace of the trials. This can be attributed to inability to conclude investigation in time, frivolous applications by lawyers, unnecessary adjournment and over burdening the court with cases.²⁰³⁶ Couple with poor working condition of judges, inadequate facilities and unconducive environment which makes them prone to rising early in sitting.²⁰³⁷
- 1.3.2 Lack of sophisticated equipment for tracking down kidnappers:** Security agencies lack modern equipment that aid in fast and accurate investigations of hostage-taking and kidnapping incidents. Some of the ammunitions in the various armouries of the security agencies are outdated, disused and obsolete. They cannot match the sophisticated weapons used by the dare-devil kidnappers that torment innocent citizens endlessly.²⁰³⁸
- 1.3.3 Social Injustice:** many people today who are desperate in economic and social needs are often the ones who commit kidnappings. So where the gap between the rich and the poor is constantly widening and where the possibilities to earn money in an honest way are often difficult to attain kidnapping turns out be a lucrative means to fall back on and to draw attention to what is considered an intolerable situation.²⁰³⁹
- 1.3.4 Refusal to involve the police:** Hasty payment of ransom by relatives and other well-wishers of abductees without involving the police have made the tracking and

²⁰³⁶Kanam, Y. M (2020) "Kidnapping: The Legal Implications and its Challenges to Administration of Criminal Justice in Plateau State" <https://loyalnigerianlawyer.com> <access on 20th of December, 2023>

²⁰³⁷Ibid

²⁰³⁸Okorie, B et al (2018) "Socio-Economic Implication of Kidnapping and Hostage Taking in Southern Nigeria" *Journal of Law and Judicial System* Volume 1, Issue 1, <https://sryahwapublications.com/journal-of-law-and-judicial-system/pdf/v1-i1/8.pdf> < access on 15th February, 2023> p55

²⁰³⁹ Odumbo, T. A et al (2017) "Students' Kidnapping and Security Brouhaha: Implications on Secondary Schools in Lagos Metropolis, Lagos State, Nigeria" *International Journal of Academic Research in Progressive Education and Development*, vol. 6, no.3, <http://dx.doi.org/10.6007/IJARPED/v6-i3/3146> <access on 15th February, 2023> p112

eventual arrest of suspected kidnappers difficult. Although, they do this out of fear not to lose their loved ones.²⁰⁴⁰

1.4 Legal Framework of Kidnapping in North-West Nigeria

The Criminal Code in Section 364 provides that any person who unlawfully imprisons any person, and takes him out of Nigeria, without his consent; or unlawfully imprisons any person within Nigeria in such a manner as to prevent him from applying to court for his release or from discovering to any other person the place where he is imprisoned, or in such a manner as to prevent any person entitled to have access to him from discovering the place where he is imprisoned. In *Haruna v. State*²⁰⁴¹ it was held that when a person is detained unlawfully, the offence of kidnapping is established. The offence of kidnapping contrary to Section 364 (2) of the Criminal Code was proved beyond reasonable doubt in the instant case, when the Appellant and his co-accused persons bound and blindfolded the Respondent and dumped her in the back seat of her car and drove off.

Section 271 of the Penal Code provide that whoever takes or entices a person, under fourteen years of age if a male or under sixteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such person without the consent of such guardian or conveys that person beyond the limits of the Federal Capital Territory, Abuja, without the consent of someone legally authorized to consent to such removal is said to kidnap such person. The Supreme Court in *Okashetu v. State*,²⁰⁴² dismissing an appeal laid down the ingredients of the offence of kidnapping, which must be proved by the prosecution beyond reasonable doubt to ground a conviction. They include;

- a. That the victim was seized and taken away by the accused person.
- b. That the victim was taken away without his consent.
- c. That the victim was taken away without lawful excuse.

²⁰⁴⁰Okoye, P. U and Nwaka-nwandu, O (2023) "Effect of Banditry and Kidnapping on The Development of Selected Tertiary Institutions in Nigeria" *international journal of research and innovation in social science (ijriss)*, vol vii, issue v, <https://www.rsisinternational.org/journals/ijriss/> <access on 29th August, 2023> p781

²⁰⁴¹(2018) 11N.W.L.R Pt. 1631 S.C.559

²⁰⁴²(2016) 15 NWLR Pt.1534 S.C126

According to the court, the offence of kidnapping is complete when the victim is carried away against his wish.

Section 364 (2) of the Criminal Code provide for ten (10) years imprisonment, Section 273 of the Penal Code provide that whoever kidnap or abducts a person shall be punished with imprisonment for a term which may extend to ten (10) years and shall also be liable to fine and Section 274 whoever kidnap or abducts a person in order that the person may be killed or may be so disposed of as to be put in danger of being killed, shall be punished with imprisonment for a term which may extend to fourteen (14) years and shall also be liable to fine.

In Islamic law kidnapping is regarded as *hiraba* (brigandage or highway armed robbery). Maliki School defines *Hiraba* which is the similar offence as: A criminal act by a person or persons who obstructs the highway or any other place by causing disorder among the community or by attacking people with the intention of appropriating their property by the use of force in a situation where the victim(s) is are unable to defend himself/themselves or get immediate help. It makes no different whether such a person has killed people or not and whether he is known or famous for that same act or not²⁰⁴³. This offence is enshrined in the Holy Qur'an and Sunnah of the Holy Prophet (S.A.W): "The punishment for those who fight Allah and His Messenger, and strive to spread corruption on earth, is that they be killed, or crucified, or have their hands and feet cut off on opposite sides, or be banished from the land. That is to disgrace them in this life; and in the Hereafter they will have a terrible punishment."²⁰⁴⁴ The Prophet (SAW) said: "He who levels weapon against my community is not of us."²⁰⁴⁵ The Prophet also said: "Who disobeys the community and goes out against them dies as a non-Muslim".²⁰⁴⁶

From the above Qur'anic verse and tradition of the Holy Prophet (SAW), it is unequivocally clear that Kidnapping/Abduction or *Hiraba* is prohibited. However; there are several alternative punishments for the subject matter, i.e. execution, crucifixion,

²⁰⁴³Sulaiman, A. M and Abdullahi, B. I (2021) "Islamic Perspective on the Payment of Ransom to Rescue Victims of Kidnapping" *Dunama Journal of Islamic Studies (DUJIS)*, Vol.1, No.2, <https://www.researchgate.net/publication/372763907> <access on the 12th of January, 2024> p72

²⁰⁴⁴Holy Qur'an, Chapter 5 v. 33 cited ibid

²⁰⁴⁵Bukhari: pp, 91-92 cited ibid

²⁰⁴⁶Muslim: pp101-102 cited ibid

amputation of hand and foot and exile. Therefore, it is open to the judge to pass any one of these sentences which he thinks fit under the circumstances of each case²⁰⁴⁷.

Islamic jurists have suggested the following punishment under the following circumstances:

1. Where murder is committed and property is rubbed or ransom, the punishment is crucifixion.
2. Where murder is committed but no property is rubbed or ransom, the punishment is death sentence.
3. Where murder is not committed but property is rubbed or ransom, the punishment is cutting off a hand and a foot.
4. Where murder is not committed, and property is not rubbed nor ransom but the road is made unsafe, the punishment is exile or imprisonment.²⁰⁴⁸

The crime of abduction is provided under Section 272 of the Penal Code; Section 222 of the Sharia Penal Code of Kaduna State²⁰⁴⁹; Section 230 of the Harmonized Sharia Penal Code²⁰⁵⁰ and Section 173 of the Sharia Penal Code of Kano State²⁰⁵¹ whoever by force compels or by any deceitful means induces any person to go from any place is said to abduct that person.

Section 175 of the Sharia Penal Code of Kano State²⁰⁵² whoever abducts any person shall be punished with imprisonment for a term which may extend to seven (7) years and shall be liable to caning which may extend to hundred (100) lashes. Section 232 of the Harmonized Sharia Penal Code²⁰⁵³ whoever abducts any person shall be punished with imprisonment for a term which may extend to three (3) years and shall be liable to caning which may extend to forty (40) lashes. Section 224 of the Sharia Penal Code of Kaduna²⁰⁵⁴ State whoever abducts any person shall be liable to *ta'azir* punishment.

²⁰⁴⁷Ibid

²⁰⁴⁸Ibid, see also Bambale .Y.Y (2003), *Crimes and Punishment Under Islamic Law*, Malthouse Press Limited, Ikeja Lagos, 2nd Edition, pp69-73

²⁰⁴⁹Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

²⁰⁵⁰Harmonized Sharia Penal Code, Cap 4, 2002

²⁰⁵¹Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

²⁰⁵²Ibid

²⁰⁵³Harmonized Sharia Penal Code, Cap 4, 2002

²⁰⁵⁴Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

1.5 The Offence of Kidnapping in North-West Nigeria

Section 246 of the Penal Code Law of Kaduna State,²⁰⁵⁵Section 247 of the Penal Code Law of Kebbi State,²⁰⁵⁶Section 244 of the Penal Code Law of Zamfara State,²⁰⁵⁷Section 243 of the Penal Code Law of Katsina State,²⁰⁵⁸Section 247 of the Penal Code Law of Sokoto State,²⁰⁵⁹ provide for a similar definition of kidnapping as “whoever unlawfully seizes, confines, inveigles, decoys, instills fears, tricks, abduct or carries away and holds for ransom or reward or otherwise any person is said to commit the offence of kidnapping.”

However, kidnapping in Section 271 of the Penal Code Law of Jigawa State²⁰⁶⁰ is defined as whoever takes or entices a person, under fourteen years of age if a male or under sixteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such person without the consent of such guardian or conveys that person beyond the limits of the State without the consent of someone legally authorized to consent to such removal is said to kidnap such person.

Section 221 of the Sharia Penal Code of Kaduna State²⁰⁶¹; Section 229 of the Harmonized Sharia Penal Code²⁰⁶²; defined kidnapping as whoever takes or entices any person, under fifteen years of age or any person of unsound mind out of the keeping of the lawful guardian of such person without the consent of such guardian or conveys any such person beyond the limits of the state without the consent of someone legally authorised to consent to such removal, is said to kidnap such a person. Section 172 of the Sharia Penal Code of Kano State²⁰⁶³ provide thus: whoever takes or entices any person, under puberty or any person of unsound mind out of the keeping of the lawful guardian of such person beyond the limits of the under limit of *hirz* without the consent

²⁰⁵⁵Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²⁰⁵⁶Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²⁰⁵⁷Penal Code Law of Zamfara State of Nigeria, 2022

²⁰⁵⁸Penal Code Law of Katsina State, 2021

²⁰⁵⁹Penal Code Law, No.4, Sokoto State, 2019

²⁰⁶⁰Penal Code Law, Cap.P3, Jigawa State Law 2012, See Richardson, S.S Section 271 Notes on the Penal Code Law, Cap.89 Laws of Northern Nigeria 1963 4th Edition applicable in Kano State.

²⁰⁶¹Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

²⁰⁶²Harmonized Sharia Penal Code, Cap 4, 2002

²⁰⁶³Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

of someone legally authorised to consent to such removal, is said to kidnap such a person.

The most accurate the definition of kidnapping is the one provided under Section 3 of the Nasarawa State Anti-Kidnapping (Prohibition) Law, 2019 as thus: “any person who forcibly and fraudulently; holds, abducts, detains or captures; instills fear in another for the purpose of kidnapping through coercion or by any other means against that person’s with intent to demand ransom commits an offence”

Section 243 (2) of the Penal Code Law of Katsina State,²⁰⁶⁴ Section 247 (2) of the Penal Code Law of Kebbi State²⁰⁶⁵ provide that “whoever is guilty of the offence of kidnapping shall be punished with death.” Section 247 (b) (c) of the Penal Code Law of Sokoto State,²⁰⁶⁶ Section 246 (b) (c) of the Penal Code Law of Kaduna State²⁰⁶⁷, Section 244 (b) (c) of the Penal Code Law of Zamfara State²⁰⁶⁸ provide that: “whoever is guilty of the offence of kidnapping shall be punished with imprisonment for life. If the death of any person occurs as a result of committing the offence of kidnapping, shall be punished with death.” Section 273 of the Penal Code Law of Jigawa State²⁰⁶⁹ provide that whoever kidnaps or abducts any person shall be punished with imprisonment for a term which may extend to forty (40) years and shall also be liable to a fine.

Section 223 (a) of the Sharia Penal Code of Kaduna State²⁰⁷⁰, Section 231(1) of the Harmonized Sharia Penal Code²⁰⁷¹ and Section 174 (1) of the Sharia Penal Code of Kano State²⁰⁷² “whoever kidnaps any person under the age of seven shall be punished for the offence of theft punishable with *hadd*”. Section 223 (b) of the Sharia Penal Code of Kaduna State²⁰⁷³ where the person is above the age of seven shall be liable to *ta’azir* punishment. Section 231(2) of the Harmonized Sharia Penal Code²⁰⁷⁴ where the person kidnapped is above the age of seven, shall be punished with imprisonment for a term which may extend to three (3) years and shall be liable to caning which may extend to

²⁰⁶⁴Penal Code Law of Katsina State, 2021

²⁰⁶⁵Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²⁰⁶⁶Penal Code Law, No.4, Sokoto State, 2019

²⁰⁶⁷Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²⁰⁶⁸Penal Code Law of Zamfara State of Nigeria, 2022

²⁰⁶⁹Penal Code Law, Cap.P3, Jigawa State Law 2012

²⁰⁷⁰Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

²⁰⁷¹Harmonized Sharia Penal Code, Cap 4, 2002

²⁰⁷²Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

²⁰⁷³Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

²⁰⁷⁴Harmonized Sharia Penal Code, Cap 4, 2002

forty (40) lashes. Section 174 (2) of the Sharia Penal Code of Kano State²⁰⁷⁵ provide thus: where the person kidnapped is above the age of seven years the kidnapper shall be under section 134 (for the offence of theft punishable with *hadd*). Section 174 (3) of the Sharia Penal Code of Kano State²⁰⁷⁶ where the person kidnapped is yet to be taken out of the limits of *hirz*, the kidnapper shall be liable to one (1) year imprisonment or caning which may extend to 100 lashes or both.

Section 273 of the Penal Code Law of the Northern Nigeria²⁰⁷⁷ whoever kidnaps or abducts any person shall be punished with imprisonment for a term which may extend to ten (10) years and shall also be liable to a fine. While Section 274 further provide that whoever kidnaps or abducts any person in order that such person, may be killed or may be so disposed of as to be put in danger of being killed, shall be punished with imprisonment for a term of not less than twenty-one (21) years; and if the kidnapping or abduction results in the death of such person, with death. While Section 274 provide that that whoever kidnaps or abducts any person in order that such person, may be killed or may be so disposed of as to be put in danger of being killed, shall be punished with imprisonment for a term of not less than fifteen (15) years; and if the kidnapping or abduction results in the death of such person, with death. In *Ewugba v. State*²⁰⁷⁸ at about 12.30pm on the 26 December 2011, Onoriode Yvonne Asheshe, a Magistrate in the Delta State Judiciary, was in the process of parking her Honda Sport Utility Vehicle with No. DE 387 KTU in front of her house at No. 80, Jakpa Road, Effurun in Uvwie LGA of Delta State, when three men armed with guns surrounded the car and forced her to lie down on the back of the car, bound hands and feet, blind folded, and they drove off. She was disposed of her handbag, mobile phone (blackberry), ATM cards, money and jewelry. She had to disclose the PIN number of her ATM cards with a warning that if it was found not correct she would be killed. After a long ride, she was abandoned in the bush in Olukobare village, near Orerokpe in Okpe LGA of Delta State. She was left in the bush, while they drove off in her car. The appellant as the 2nd accused person and his co-accused person were charged with the offences of conspiracy to

²⁰⁷⁵Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

²⁰⁷⁶*Ibid*

²⁰⁷⁷Richardson, S.S Notes on the Penal Code Law, Cap.89 Laws of Northern Nigeria 1963 4th Edition

²⁰⁷⁸(2018) 7 NWLR(Pt.1618)p262

commit kidnapping, kidnapping and armed robbery. The appellant were found guilty on the three-count charge and sentenced to death on the third count.

Section 225 of the Sharia Penal Code of Kaduna State²⁰⁷⁹ “whoever kidnaps or abducts any person in order that such person may be killed or may be so disposed of as to be put in danger of being killed shall be liable to *ta’azir* punishment”. Section 175 of the Sharia Penal Code of Kano State²⁰⁸⁰ provide thus: “whoever kidnaps or abducts any person in order that such person may be killed or may be so disposed of as to be put in danger of being killed shall be punished with imprisonment for a term which may extend to ten (10) years and shall also be liable to caning which may extend to hundred (100) lashes”. Section 232 of the Harmonized Sharia Penal Code²⁰⁸¹ “whoever kidnaps or abducts any person in order that such person may be killed or may be so disposed of as to be put in danger of being killed shall be punished with imprisonment for a term which may extend to ten (10) years and shall also be liable to caning of fifty (50) lashes”.

1.6 The Offence of Conspiracy to Commit Kidnapping in North-West Nigeria

Conspiracy is the agreement between two or more persons to commit an offence. In *R v. State*²⁰⁸² where Wills J. observed that the offence of conspiracy does not lie in the doing of the (criminal) act but in the agreement between the parties. The offence of conspiracy to commit kidnapping in Section 247 (1) of the Penal Code Law of Kaduna State,²⁰⁸³ Section 245(1) of the Penal Code Law of Zamfara State,²⁰⁸⁴ Section 248 (1) of the Penal Code Law of Kebbi State²⁰⁸⁵, Section 244 (1) of the Penal Code Law of Katsina State²⁰⁸⁶, and Section 248 (1) of the Penal Code Law of Sokoto State²⁰⁸⁷ provide as thus: “where two or more persons conspire to commit kidnapping and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be guilty of conspiracy to committ kidnapping.” conspiracy is a separate offence and it does not

²⁰⁷⁹Ibid

²⁰⁸⁰Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

²⁰⁸¹Harmonized Sharia Penal Code, Cap 4, 2002

²⁰⁸²(1868) 3 H.L. 306 cited in Chukkol, K. S (2010), *The Law of Crimes in Nigeria*, ABU Press Ltd, Revised Edition, p59

²⁰⁸³Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²⁰⁸⁴Penal Code Law of Zamfara State of Nigeria, 2022

²⁰⁸⁵Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²⁰⁸⁶Penal Code Law of Katsina State, 2021

²⁰⁸⁷Penal Code Law, No.4, Sokoto State, 2019

merge with the main offence.²⁰⁸⁸ Therefore if two or more persons are charged with kidnapping they may be charged with conspiracy to commit kidnapping and the actual kidnapping. Each count carries its own punishment. In *Fekolomoh v. State*²⁰⁸⁹ one Dr. Stanford Ubani (PW₁) commenced a building construction, in the course of construction one Innocent Emereuwa a member of a notorious kidnapping/armed robbery gang visited the site and demanded ransom of ₦500,000 before PW₁ could be allowed to continue with the project. PW₁ eventually paid ₦150,000 as ransom before the gang allowed him to continue with the construction. Later, on 15th October 2010, Innocent Emereuwa called PW₁ from Bayelsa State and demanded that PW₁ should remit money to him. He gave PW₁ a bank account number bearing the appellant's name for that purpose. The PW₁ reported the demand to the police who traced the bank account to Yenogoa, Bayelsa State and asked the PW₁ to pay in the money. The police arrested the appellant while trying to withdraw the money. The appellant was found guilty for the offence of conspiracy and was sentenced to three years imprisonment.

Section 247 (1) of the Penal Code Law of Kaduna State²⁰⁹⁰ provide for life imprisonment for conspiracy to commit kidnapping; Section 248 (1) of the Penal Code Law of Kebbi State²⁰⁹¹ provide for death sentence for conspiracy to commit kidnapping; Section 244(1) of the Penal Code Law of Katsina State²⁰⁹² provide for twenty (20) years imprisonment; Section 245(1) of the Penal Code Law of Zamfara State²⁰⁹³, and Section 248 (1) of the Penal Code Law of Sokoto State²⁰⁹⁴ provide for fourteen (14) years imprisonment without an option of fine. In *Birifou v. Sate*²⁰⁹⁵ on 20th October, 2011 one Mrs. Endurance Itama was kidnapped at about 8.30pm by unknown boys and taken to an unknown location and kept in a room owned by 2nd accused person. One Mr. Benjamin Itama, and the husband of Mrs. Endurance Itama, was called on phone to pay ransom to the kidnappers but the victim was timely rescued by the men of the DSS. The trial court convicted the appellant of the offences of conspiracy to commit kidnapping,

²⁰⁸⁸Chukkol, K. S, *Op.cit*, p61

²⁰⁸⁹(2021) 6 NWLR(Pt1773) 461S.C

²⁰⁹⁰Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²⁰⁹¹Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²⁰⁹²Penal Code Law of Katsina State, 2021

²⁰⁹³Penal Code Law of Zamfara State of Nigeria, 2022

²⁰⁹⁴Penal Code Law, No.4, Sokoto State, 2019

²⁰⁹⁵(2020) LPELR-49673(CA)

kidnapping and stealing, and sentence him to an aggregate of 20 years imprisonment. On appeal the sentence was reduced to 10 years imprisonment.

1.7 The Offence of Attempt to Commit Kidnapping in North-West Nigeria

If a person commits a criminal offence he normally must have gone under four main stages: At first he must have intended to commit such an offence; then he would have embarked on some preparation to commit the offence; thirdly he would have attempted to commit the offence; then he finally he would have actually committed the offence.²⁰⁹⁶ A party charged with attempt must have formed the intention to commit a particular crime but is not enough. He must have embarked on preparations to commit it and, just a fraction of an ‘inch’ to the actual offence, he is said to attempt to commit that offence.²⁰⁹⁷ The offence of attempt to commit kidnapping is provided in Section 244(2) of the Penal Code Law of Katsina State²⁰⁹⁸, Section 245(2) of the Penal Code Law of Zamfara State²⁰⁹⁹, Section 247 (2) of the Penal Code Law of Kaduna State²¹⁰⁰, Section 248 (2) of the Penal Code Law of Sokoto State²¹⁰¹, Section 248 (2) of the Penal Code Law of Kebbi State²¹⁰² provide thus: “where a person intending to commit the offence of kidnapping begins to manifest his intention by some overt acts, but does not fulfill his intention to such an extent as to commit the offence, shall be guilty of the offence of attempt to commit kidnapping”.

Section 248 (2) of the Penal Code Law of Kebbi State²¹⁰³ provide for life imprisonment as the punishment for attempt to commit kidnapping; Section 247 (2) of the Penal Code Law of Kaduna State²¹⁰⁴ provide for imprisonment for fourteen (14) years without option of fine; Section 244(2) of the Penal Code Law of Katsina State²¹⁰⁵; Section 248 (2) of the Penal Code Law of Sokoto State²¹⁰⁶ and Section 245(2) of the Penal Code

²⁰⁹⁶Chukkol, K. S, *Op.cit*, p61

²⁰⁹⁷*Ibid*, p62

²⁰⁹⁸Penal Code Law of Katsina State, 2021

²⁰⁹⁹Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁰⁰Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁰¹Penal Code Law, No.4, Sokoto State, 2019

²¹⁰²Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁰³*Ibid*

²¹⁰⁴Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁰⁵Penal Code Law of Katsina State, 2021

²¹⁰⁶Penal Code Law, No.4, Sokoto State, 2019

Law of Zamfara State²¹⁰⁷ provide for twenty (20) years imprisonment without option of fine.

1.8 The Offence of Threat to commit Kidnapping in North-West Nigeria

Threat is a communication intent to inflict harm or loss on another or on another's property, especially one that might diminish a person's freedom to act voluntarily or with lawful consent.²¹⁰⁸ The offence of threat to commit kidnapping is provided in Section 245(3) of the Penal Code Law of Zamfara State²¹⁰⁹; Section 248 (3) of the Penal Code Law of Sokoto State²¹¹⁰; Section 244(3) of the Penal Code Law of Katsina State²¹¹¹; Section 248 (3) of the Penal Code Law of Kebbi State²¹¹² and Section 247 (3) of the Penal Code Law of Kaduna State²¹¹³ as thus: "whoever intends to commit kidnapping and causes fear to, or threatens any person by means of a letter, fax, e-mail, text message, telephone call or any other method of communication is guilty of an offence."

The punishment for threat to commit kidnapping in Section 248 (3) of the Penal Code Law of Kebbi State²¹¹⁴ provide for life imprisonment; Section 247 (3) of the Penal Code Law of Kaduna State²¹¹⁵ provide for fourteen (14) years imprisonment without option of fine; Section 245(3) of the Penal Code Law of Zamfara State²¹¹⁶; Section 248 (3) of the Penal Code Law of Sokoto State²¹¹⁷; Section 244(3) of the Penal Code Law of Katsina State²¹¹⁸ provide for imprisonment for twenty (20) years without option of fine. In *Ayaka v. State*²¹¹⁹ the appellant and the 2nd accused person between April and September 2013 at Nimo conspired to commit the felony of threat to kidnap and threaten through phone calls to either kidnap or arrange the assassination of one Ichie Elias Egoigwe Osinekennia and his family if he failed or stopped paying in money to a First Bank account belonging to the 2nd accused person from whom they collected the

²¹⁰⁷Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁰⁸Garner, B. A, (2004) Black's Law Dictionary, 8th Edition, p4623

²¹⁰⁹Penal Code Law of Zamfara State of Nigeria, 2022

²¹¹⁰Penal Code Law, No.4, Sokoto State, 2019

²¹¹¹Penal Code Law of Katsina State, 2021

²¹¹²Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹¹³Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹¹⁴Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹¹⁵Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹¹⁶Penal Code Law of Zamfara State of Nigeria, 2022

²¹¹⁷Penal Code Law, No.4, Sokoto State, 2019

²¹¹⁸Penal Code Law of Katsina State, 2021

²¹¹⁹(2020) 3 NWLR (Pt.1712) 538 C.A

sum of ₦9,190,000.00. The court found them guilty for the offence of conspiracy to commit a felony and threat to kidnap. They were sentenced to one year imprisonment for the offence of conspiracy and three years imprisonment for the offence of threat to kidnap.

1.9 The Offence of Aiding, Abetting or Assisting the Escape of Kidnapper in North-West Nigeria

A person can commit an offence by his own hands in which case he is the principal²¹²⁰. He can also commit an offence by abetting, aiding and assisting the commission of an offence. Section 249 (1) of the Penal Code Law of Kebbi State²¹²¹; Section 248 (1) of the Penal Code Law of Kaduna State²¹²²; Section 246(1) of the Penal Code Law of Zamfara State²¹²³; Section 249 (1) of the Penal Code Law of Sokoto State²¹²⁴; Section 245(1) of the Penal Code Law of Katsina State²¹²⁵ provide for aiding, abetting or assisting the escape of the offender as thus: “whoever instigates any person to kidnap a person or intentionally aids, abets or facilitates by any act or omission the commission of the offence of kidnapping is guilty of an offence.”

The punishment as provided in Section 249 (1) of the Penal Code Law of Kebbi State²¹²⁶ is life imprisonment; Section 248 (1) of the Penal Code Law of Kaduna State²¹²⁷ provide for fourteen years (14) without option of fine; Section 246(1) of the Penal Code Law of Zamfara State²¹²⁸; Section 249 (1) of the Penal Code Law of Sokoto State²¹²⁹; Section 245(1) of the Penal Code Law of Katsina State²¹³⁰ provide for twenty (20) years imprisonment without option of fine. In *Umoh v. State*²¹³¹ in that case, the appellant was convicted and sentenced to death for aiding commission of the offence of kidnapping.

²¹²⁰Chukkol, K. S, *Op.cit*, p54

²¹²¹Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹²²Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹²³Penal Code Law of Zamfara State of Nigeria, 2022

²¹²⁴Penal Code Law, No.4, Sokoto State, 2019

²¹²⁵Penal Code Law of Katsina State, 2021

²¹²⁶Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹²⁷Penal Code Law, No.5, Kaduna State of Nigeria,

²¹²⁸Penal Code Law of Zamfara State of Nigeria,

²¹²⁹Penal Code Law, No.4, Sokoto State, 2019

²¹³⁰Penal Code Law of Katsina State, 2021

²¹³¹(2013) JELR 35580 (C.A)

However, if the offender is a corporate body Section 249 (2) of the Penal Code Law of Kebbi State²¹³² and Section 248 (2) of the Penal Code Law of Kaduna State²¹³³ shall be liable to pay fine of not less than Ten Million Naira (N10,000,000). While Section 246(2) of the Penal Code Law of Zamfara State²¹³⁴; Section 249 (2) of the Penal Code Law of Sokoto State²¹³⁵; Section 245(2) of the Penal Code Law of Katsina State²¹³⁶ shall be liable to pay fine of not less than Five Million Naira (N5,000,000).

1.10 The Offence of Harboursing a Kidnapped Person in North -West Nigeria

Harboring is the act of affording lodging, shelter or refuge to a person especially a criminal.²¹³⁷ This offence is provided in Section 246(1) of the Penal Code Law of Katsina State²¹³⁸; Section 250 (1) of the Penal Code Law of Sokoto State²¹³⁹; Section 247(1) of the Penal Code Law of Zamfara State²¹⁴⁰; Section 250 (1) of the Penal Code Law of Kebbi State²¹⁴¹; Section 249 (1) of the Penal Code Law of Kaduna State²¹⁴² as thus: “whoever allows or permits his premises, building or place belonging, occupied or control by him, or a person in lawful possession or occupation by the owner’s authority, to be used for the purposes keeping a kidnapped or abducted person commits an offence and is liable on conviction to imprisonment for twenty (20) years without option of fine.”

However, any property involved or used to harbor a kidnapped person shall be liable to forfeiture to the government or demolish where applicable as provided in Section 250 (2) of the Penal Code Law of Kebbi State²¹⁴³ and Section 249 (2) of the Penal Code Law of Kaduna State²¹⁴⁴.

²¹³²Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹³³Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹³⁴Penal Code Law of Zamfara State of Nigeria, 2022

²¹³⁵Penal Code Law, No.4, Sokoto State, 2019

²¹³⁶Penal Code Law of Katsina State, 2021

²¹³⁷Garner, B. A, (2004) Black’s Law Dictionary, 8th Edition, p2097

²¹³⁸Penal Code Law of Katsina State, 2021

²¹³⁹Penal Code Law, No.4, Sokoto State, 2019

²¹⁴⁰Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁴¹Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁴²Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁴³Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁴⁴Penal Code Law, No.5, Kaduna State of Nigeria, 2017

1.11 The Offence of Knowingly Negotiating to Obtain Payment for Kidnapping in North-West Nigeria

Section 250 (3) of the Penal Code Law of Kebbi State²¹⁴⁵; Section 249 (3) of the Penal Code Law of Kaduna State²¹⁴⁶; Section 246(2) of the Penal Code Law of Katsina State²¹⁴⁷; Section 250 (2) of the Penal Code Law of Sokoto State²¹⁴⁸; Section 247(2) of the Penal Code Law of Zamfara State²¹⁴⁹ provide thus: “whoever knowingly negotiates to obtain any ransom for the release of any person who has been kidnapped is guilty of an offence.”

The punishment is ten (10) years without option of fine as provided in Section 249 (3) of the Penal Code Law of Kaduna State²¹⁵⁰; Section 246(2) of the Penal Code Law of Katsina State²¹⁵¹; Section 250 (2) of the Penal Code Law of Sokoto State²¹⁵² and Section 247(2) of the Penal Code Law of Zamfara State²¹⁵³. While Section 250 (3) of the Penal Code Law of Kebbi State²¹⁵⁴ provide for life imprisonment.

1.12 The Offence of Knowingly Receiving Ransom for Kidnapping in North-West Nigeria

Section 246(3) of the Penal Code Law of Katsina State²¹⁵⁵; Section 250 (3) of the Penal Code Law of Sokoto State²¹⁵⁶ and Section 247(3) of the Penal Code Law of Zamfara State²¹⁵⁷; Section 249 (4) of the Penal Code Law of Kaduna State²¹⁵⁸ and Section 250 (3) of the Penal Code Law of Kebbi State²¹⁵⁹ provide thus: “whoever receives, has possession of, manages or disposes of any money, property or any proceeds thereof, which has at any time been delivered as ransom in connection with the offence of kidnapping,

²¹⁴⁵Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁴⁶Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁴⁷Penal Code Law of Katsina State, 2021

²¹⁴⁸Penal Code Law, No.4, Sokoto State, 2019

²¹⁴⁹Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁵⁰Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁵¹Penal Code Law of Katsina State, 2021

²¹⁵²Penal Code Law, No.4, Sokoto State, 2019

²¹⁵³Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁵⁴Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁵⁵Penal Code Law of Katsina State, 2021

²¹⁵⁶Penal Code Law, No.4, Sokoto State, 2019

²¹⁵⁷Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁵⁸Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁵⁹Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

knowing that the money or property has at any time been delivered as such ransom, is guilty of an offence.”

The punishment of knowingly receiving ransom is fourteen (14) years imprisonment without option of fine as provided Section 246(3) of the Penal Code Law of Katsina State²¹⁶⁰; Section 250 (3) of the Penal Code Law of Sokoto State²¹⁶¹ and Section 247(3) of the Penal Code Law of Zamfara State²¹⁶²; Section 249 (4) of the Penal Code Law of Kaduna State²¹⁶³. While Section 250 (3) of the Penal Code Law of Kebbi State²¹⁶⁴ provide for life imprisonment.

1.13 The Offence of Arranging for One Self's Kidnapping in North-West Nigeria

Section 250 (1) of the Penal Code Law of Kaduna State²¹⁶⁵; Section 251 (1) of the Penal Code Law of Kebbi State²¹⁶⁶; Section 248(1) of the Penal Code Law of Zamfara State²¹⁶⁷ and Section 251 (1) of the Penal Code Law of Sokoto State²¹⁶⁸ provide thus: “whoever puts forward himself overtly or covertly to another to be kidnapped or abducted for the purpose of extracting money, ransom, or for any other reason is guilty of an offence and shall be liable on conviction to a term of imprisonment for fourteen (14) years without option of fine.”

1.14 The Offence of False Representation as a Kidnapped or Abducted Person in North-West Nigeria

Section 250 (2) of the Penal Code Law of Kaduna State²¹⁶⁹; Section 251 (2) of the Penal Code Law of Kebbi State²¹⁷⁰; Section 248(2) of the Penal Code Law of Zamfara State²¹⁷¹ and Section 251 (2) of the Penal Code Law of Sokoto State²¹⁷² and Section 246(4)

²¹⁶⁰Penal Code Law of Katsina State, 2021

²¹⁶¹Penal Code Law, No.4, Sokoto State, 2019

²¹⁶²Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁶³Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁶⁴Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁶⁵Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁶⁶Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁶⁷Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁶⁸Penal Code Law, No.4, Sokoto State, 2019

²¹⁶⁹Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁷⁰Penal Code Law, No. 004, Kebbi State of Nigeria, 2020

²¹⁷¹Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁷²Penal Code Law, No.4, Sokoto State, 2019

of the Penal Code Law of Katsina State²¹⁷³ provide thus: “whoever under false pretence or in any other manner represents himself to be the person kidnapped or abducted, or who has influence, power or ability to obtain the release of person kidnapped or abducted for the purposes of obtaining any ransom or reward, or to extort or extract from another person anything of value, or other consideration, is guilty of an offence and shall be liable to a term of imprisonment for fourteen (14) without option of fine.”

However, nothing prohibits a person who, in good faith, believes that he can rescue or obtain the release of a person who has been kidnapped.

1.15 The Offence of Concealing or Keeping in Confinement Kidnapped or Abducted Person in North-West Nigeria

Section 251 of the Penal Code Law of Zamfara State²¹⁷⁴; Section 254 of the Penal Code Law of Kebbi State²¹⁷⁵; Section 254 of the Penal Code Law of Sokoto State²¹⁷⁶; Section 249 of the Penal Code Law of Katsina State;²¹⁷⁷ Section 253 of the Penal Code Law of Kaduna State; provide²¹⁷⁸ Section 236 of the Harmonized Sharia Penal Code²¹⁷⁹; Section 228 of the Sharia Penal Code Law of Kaduna State²¹⁸⁰ and Section 179 of the Sharia Penal Code Law of Kano State²¹⁸¹ thus: “whoever knowing that any person has been kidnapped or has been abducted wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person”. Section 179 of the Sharia Penal Code Law of Kano State²¹⁸² provides that such person shall be punished with imprisonment for a term which may extend to five (5) years.

CONCLUSION

Kidnapping is a heinous crime in North-West Nigeria. It has persisted in every part of the North-Western Nigeria notwithstanding the several laws and punishments of

²¹⁷³Penal Code Law of Katsina State, 2021

²¹⁷⁴Penal Code Law of Zamfara State of Nigeria, 2022

²¹⁷⁵Penal Code Law, No. 004, Kebbi State of Nigeria,

²¹⁷⁶ Penal Code Law, No.4, Sokoto State, 2019

²¹⁷⁷Penal Code Law of Katsina State, 2021

²¹⁷⁸ Penal Code Law, No.5, Kaduna State of Nigeria, 2017

²¹⁷⁹Ibid

²¹⁸⁰Kaduna State Sharia Penal Code Law, No.4, Kaduna State of Nigeria, 2002

²¹⁸¹Kano State Sharia Penal Code Law, No.1, Kano State of Nigeria, 2000

²¹⁸²Ibid

kidnapping in the country. The victim relatives hardly report the crime due to the fear of being killed, this made many of the perpetrators not being prosecuted and punished. The victims lost their lives and property, they are being physically abuse and the female victims are sexually abuse. The main responsibility of the government is to ensure the welfare and security of human beings and also ensure that lives and property of individual are being protected. The government must ensure that criminals are brought to justice and the victims are being compensated for the lost. This paper observed that lack of stiff laws in some State, weak enforcement of the laws, lack of sophisticated equipment for tracking down kidnappers, delays in trial and refusal to involve the police are the challenges in combating kidnapping in North-West Nigeria. This study recommends that death sentence should be the punishment of kidnapping whether or not death occurs as a result of the act and they should be stringent implementation of the laws. It also recommends for speedy trial and provides modern courtrooms which are well equipped. The security agencies should be well equipped with modern ammunitions and victim relations should trust the police and report the matter to them.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

A REVIEW OF THE LEGAL FRAMEWORK FOR THE INSTITUTION OF WAQF
(ENDOWMENT) UNDER ISLAMIC LAW IN NIGERIA

Garba Ibrahim Malumfashi*, Ibrahim Barkindo**, Dayyabu Ibrahim Sulaiman***,
Hafsatu Sulaiman***

* Deputy Director (Programmes), Directorate of Studies, National Institute for Policy and Strategic Studies, (NIPSS) Kuru Jos. (malumfashi65@gmail.com)

**Faculty of Law, Ahmadu Bello University, Zaria.

***Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria.

Abstract

Waqf denotes a property endowment donated and held in trust for charitable purposes under Islamic Law. It typically involves donating a building, plot of land or other asset for charitable purpose with no intention of reclaiming the asset. Upon the death of the donor, the property ceases to be his but that of the beneficiaries. Despite the huge number of Muslims in Nigeria and the recognition of Waqf by the Constitution, definite legislations are not made in Muslim populated States on Waqf. A few States of the Federation have created Zakah Boards or Commissions to also manage Waqf alongside the Zakat. The mandates and activities of such bodies are basically to collect and disburse Zakat and regulate and manage Waqf in such States. It is however observed that the laws creating such bodies are not robust enough to provide guidance on how to initiate, document, manage and report Waqf institution. The authors therefore, recommend that all States, with substantial Muslim population, should enact a Waqf Law to capture these. Sharia Commissions and the Committee of Grand Kadis should take the burden of developing the draft Law and States should adopt and pass it. The article adopts black letter doctrinal approach to examine the texts of the Constitution and other laws and regulations on Waqf with a view to forming opinions as to their adequacy and viability.

Key words and phrases: Commission, Islamic Finance, Legal Framework, Regulation, Waqf

1.1. Introduction

* Senior Fellow/Deputy Director (Programmes), Directorate of Studies, National Institute for Policy and Strategic Studies, (NIPSS) Kuru Jos. (malumfashi65@gmail.com)

**Ph.D. fellow in Islamic Law, Ahmadu Bello University, Zaria. LL.B (BUK-1999), BL (Abuja-2000), LL.M (ABU-2011).

***LL.B (International University of Africa, Khartoum 2010); LL.M 2013, Ph.D. 2018 (University of Dongola, Sudan); Lecturer, Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria.

****Lecturer, Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria.

Waqf is an Arabic word (plural: *Awqaf*) literally meaning confinement, holding, prohibition and detention. From an economic perspective, *Waqf* involves diverting of funds and other resources from current consumption and investing them into productive and prospective assets which generate revenues for future use by individual or society at large.²¹⁸³ Thus, *Waqf* is a combination of act of saving and act of investment and it increases the accumulation of wealth in the economy. In Islamic Law, *Waqf* denotes a property endowment donated and held in trust for charitable purposes. Thus, it denotes “making a property invulnerable to any disposition that leads to transfer of ownership, and donating the usufruct of that property to beneficiaries.”²¹⁸⁴ It typically involves donating a building, plot of land or other asset for charitable purpose with no intention of reclaiming the asset. Upon the death of the donor, the property ceases to be his but that of the beneficiaries.²¹⁸⁵ Thus, *Waqf* is an act of holding certain property and preserving it for the benefit of Muslim community. *Waqf* is integral to the socio-economic values of Muslims and an ancient heritage on which Islamic organizations like *Al-Azhar* University of Egypt as well as many other institutions were founded. The importance of *Waqf* is epitomized in the fact that it is part of the functions of the judiciary to oversee *Waqf* properties because they are public properties. Technically, *Waqf* consists of four elements: a) declaration of intention, b) the donor, c) the endowed property and d) the beneficiary. Endowed property included land, hospital, orphanages and schools; it also includes money to build these. Depending on the intention and structure, *Waqf* can be classified as *private* or *public*. Private *Waqf* is essentially family-based, and its management is determined by the decision of the family as provided for in the registered documents. Public *Waqf*, however, once *Waqf*

²¹⁸³ See Mufti Faraz Adam, (Re) *Introducing Waqf to the World*, at <https://www.iWaqf.net/types-of-Waqf-example-question/>

²¹⁸⁴ See *Shari'ah Standard No. (33): Waqf* in Accounting and Auditing Organization for Islamic Financial Institutions, 2015, page 814 retrieved from: [Accounting and Auditing Organization for Islamic Financial Institutions \(aaofii.com\)](http://www.aaofii.com) accessed on 21/07/24

²¹⁸⁵ “Imams Abu Yusuf and Muhammad say: *Waqf* signifies the extinction of the *Waqf*'s ownership in the thing dedicated and detention of all the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied ‘for the benefit of Mankind’...”

constituted, becomes public property and the authorities (*Sultan*) assume responsibility over it, subject to the extant regulations governing it.

Despite the huge number of Muslims in Nigeria and the recognition of *Waqf* by the Constitution, there has been no definite legislation made in Muslim populated States on *Waqf*. Only a few States have created statutory boards or commissions to manage *Waqf* alongside the *Zakat*. The mandates and activities of such bodies are basically to collect and disburse *Zakat* and regulate and manage *Waqf* in such States. The Laws creating such bodies however are not robust and the general regulation by law on how to initiate, document, manage and report *Waqf* and the roles of *Nazirul Waqf*²¹⁸⁶ or *Mutawalli*²¹⁸⁷ are not captured in such regulations and private initiatives of *Waqf* are either dwarfed or eliminated. The article adopts black letter doctrinal approach to examine the texts of the Constitution and other laws and regulations on *Waqf* with a view to forming opinions as to their adequacy and viability.

1.2. The Significance and Types of *Waqf*

Waqf is a socio-economic institution beyond the *Zakah*. It can harness the potential of selfless charitable giving in an effective way for better economic impact in the targeted social segments of society. *Waqf* is a form of institutionalized *Sadaqah* (charity). *Waqf* is thus an important institution in the Islamic social framework. It can harness the potential of selfless charitable giving in an effective way for better economic impact in the targeted social segments of society. *Waqf* as *Sadaqah* is encouraged throughout the Qur'an and *Sunnah*. Thus, Muslim jurists

²¹⁸⁶ Endowment supervisor

²¹⁸⁷ Manager of the *waqf*

inferred the legitimacy of the *Waqf* with the generality of the texts urging charity. These include the Almighty's sayings:

“Who will give Allah a beautiful loan and it will be multiplied for him many fold”²¹⁸⁸

The scholars described the “beautiful loan,” as a *sadaqah* from *halal* wealth, of the best and most valuable of what someone owns, not from the worst. It is given in a state of health, need, and when the giver is ambitious of having a long life. It should be given to the one most in need and who has the most right to it. It is preferably given in secret (concealing the identity of the giver). The giver does not follow up by ever reminding the receiver of it or harming them in any way. The giver only seeks the pleasure of Allah and does not use it to show off. He should not feel that what he is giving is excessive and he should give from the most beloved wealth to him. When these characteristics come together, this is a *beautiful loan*.

“And those, who, when they spend, are neither extravagant nor niggardly, but hold a medium (way) between those (extremes).”²¹⁸⁹

Specifically, in reference to *Waqf*, the Prophet SAW said:

“When a man dies, his acts come to an end, but through recurring charity, or beneficial knowledge, or a pious son, who prays for him regularly, the reward of the dead person continues”.²¹⁹⁰

From the *Sunnah*, too, it is reported in Al-Mughniy by Ibn Qudamah, thus: Jabir ibn Abdullah said: “Every companion who had the capacity, established a *Waqf*.”²¹⁹¹ That was in reference to the practice of the *Sahabah* (Companions of the Prophet) following the footsteps of Uthman Bn Affan who famously donated a well for *Waqf* purpose.

²¹⁸⁸ Holy Qur'an 2:245 (Al-Baqarah).

²¹⁸⁹ Holy Qur'an 25:67 (Al-Furqan).

²¹⁹⁰ Reported by Muslim and Bukhari in Adabul Mufrad, see Nawawi, Y.S. *Riyadhus Salihin* Hadith No. 1383

²¹⁹¹ Ibn Qudamah, Al_Mughniy (1367), Maktabah Al-Qahirah, Vol 6, page 3 retrieved from: <https://www.iwaqf.net/story/#section-1-block-2> accessed on 21/07/24.

Islam thus gave *Waqf* system great importance, which made everyone race to collect their reward by various means. *Waqf* is a way to serve the world with true religion. To preserve humanity by protecting society from the dangers of malice, envy, hatred and spreading chaos in the land. Islam has made the endowment protection for society, a reason for cohesion among its members, and a way to curtail outrage and hatred by instilling factors of cooperation and solidarity, all of which are obligations that obligate the endowment guarantor of the sanctity of private money; The one who goes to the rich, and he preserves the spirit of the needy from hunger, poverty and disease. In response to the above Islamic calls, we find Nigerian Muslim individuals and organisations establishing *Waqf* in form of foundations for various objects and activities. For example, the Aliko Dangote Foundation providing fully sponsored scholarship for Africans,²¹⁹²

As for the types and organizations taxonomies of *Waqf*, it can generally be categorized with reference to whether it serves a private few or the public as: a) Public *Waqf* and b) Private/Family *Waqf*. *Waqf* is classified in relation to the different types of beneficiaries, there are four types of *Waqf*, thus: a) Charitable *Waqf* (*al-Waqf al-Khayri*), b) family *Waqf* (*al-Waqf al-Ahli*), c) joint *Waqf* (*al-Waqf al-Mushtarak*) and d) Self-dedicated *Waqf* (*al-Waqf 'Ala al-Nafs*). Finally, *Waqf* can be categorised according to the underlying *Waqf* asset, thus: a) Property *Waqf*, b) Corporate *Waqf* and c) Cash *Waqf*.²¹⁹³

1.3. Constitutional Recognition of *Waqf* in Nigeria

²¹⁹² See: [About Aliko Dangote Foundation - Dangote Industries Limited](#)

²¹⁹³ See Mufti Faraz Adam, (Re) Introducing *Waqf* to the World, retrieved from <https://www.iWaqf.net/types-of-Waqf-example-question/> accessed on 8/06/2023).

Generally, the aspects of *Shariah* (Islamic Law) relating to personal status have been provided for in the Constitution of the Federal Republic of Nigeria, 1999 (as amended 2011)²¹⁹⁴ dealing with the jurisdiction of Shariah Court of Appeal. Personal status has to do with family set-up and related matters. Section 262 of the Constitution, provides for the jurisdiction of the Sharia Court of Appeal as follows:

1. *The Sharia Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.*
2. *For the purpose of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide-*
 - a) *any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;*
 - b) *where all the parties to the proceeding are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;*
 - c) *any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;*
 - d) *any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or*
 - e) *where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.*

Wakf (*Waqf*)²¹⁹⁵ has featured prominently in paragraph c) of subsection 2 of this section.

Thus, underlying the immense spiritual significance, and as a socio-economic institution in Muslim societies. Additionally, section 279²¹⁹⁶ of the Constitution empowers the Grand Kadi to make rules regulating the practice and procedure of the

²¹⁹⁴ Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as amended).

²¹⁹⁵ Note that the Constitution uses “k” instead of “q” as in *Waqf* and *kadi* instead of *Waqf* and *qadi*) in section 277. The same provisions are made for the Sharia Court of Appeal of the Federal Capital Territory, Abuja in section 262.

²¹⁹⁶ Similar provisions are made in section 264 with regard to the Sharia Court of Appeal of the Federal Capital Territory, Abuja and in this regard, the Rules to be made by the Grand Kadi shall be subject to an Act of the National Assembly.

Sharia Court of Appeal, subject to any law of the House of Assembly of the State. Laws of States establishing the Sharia Court of Appeal have similar provisions. Thus, Grand Kadi ostensibly, by the strength of this section, is empowered to make regulations in respect of the exercise of the jurisdiction of the Sharia Courts as relating to *Waqf* application and operation.

As for the classical discourse on the jurisdiction of the judge over *Waqf*, **Al-Mawardi's** book, the best Constitutional Treatise in Islamic Law,²¹⁹⁷ provides that the powers of the *Qadi* (judge) cover ten things and the fourth is that:

*... He examines **Waqf** properties to see that the fundamental capital is maintained, that any business based on it grows, and that its profit is received and duly spent on what it is meant for; if there already exists someone responsible for inspecting the *Waqf*, the position of the person is respected, but if there is not, then he should take on this responsibility: he does not have to deal with the specific details of the *Waqf* if his appointment is of a general nature; it may be however, that he carries out matters of a general nature even if his appointment is of a specific nature.*²¹⁹⁸

Other authors agree with that and **Shaikh Abdullahi b. Fodio** enumerated the functions of the judge in his book *Diya'ul Hukkam* to include overseeing trusts (*Ahbas* sing. *Hubs*- Maliki terminology for *Waqf*) (*an nazar fil ahbas*).²¹⁹⁹ Ibraheem Sulaiman summed up both Classical and Modern Constitutional theories in Islam on the functions of the judge as follows:

*The office of the Qadi embraces ten things.*²²⁰⁰

²¹⁹⁷ Yate, A. (1996) *Al-Ahkam as-Sultaniyyah: The Laws of Islamic Governance*, Taha Publishers, London, , p.107; Mawardi, A.M.H. (n.d.) *Al-Ahkamus Sultaniyyahh wal Wilayatid Diniyyah*. Taufiqiyyah Bookshop, Cairo, pp.48-59.

²¹⁹⁸ This is however, only applicable to public *waqf*.

²¹⁹⁹ Ibn Fodio, A. (nd), *Diya'ul Hukkam fima Lahum wa Alaihim Minal Ahkam*, Dar Al-Arabiyyah, Beirut, pp. 26-27

²²⁰⁰ Sulaiman, I. (1987), *Islamic State and the Challenge of History*, Mansell Publishing Limited, London, p.44; Ibnu Farhun, I.S.M.(2001), *Tabsiratul Hukkam fi Usulil Aqdiyati wa Manahijil Ahkam*. Darul Kutubil Ilmiyyah, Beirut.

- 1) *To settle cases between litigants through mutual reconciliation (sulh) or compelling them to accept by a mandatory judgment*
- 2) *To prevent oppression from taking things by force or from violating the law and so on, and to support the oppressed and help everyone to get his due*
- 3) *To uphold statutory penalties (Hudud) and carry out the commands of God*
- 4) *To hear cases of homicide and injury*
- 5) *To safeguard the properties of orphans and the insane and to appoint legal guardians over them*
- 6) **To look after estates in mortmain (Waqf) (with emphasis)**
- 7) *To execute wills*
- 8) *To contract marriages for women, if they have no guardian or if the guardian has stood in the way of their marrying*
- 9) *To care for public utilities such as roads of the Muslims and so on*
- 10) *To command good and to forbid evil by word and deed.*

The sixth item “to look after estates in mortmain” relates to trusts and it is the subject of this article. Other writers agree with this principle.²²⁰¹ The idea is that since trusts are not a particular person’s right, the court regulates and oversees it on behalf of the beneficiaries.²²⁰²

1.3.1 Absence of Rules on managing *Waqf* by the Grand Kadi

Despite the Constitutional jurisdiction of the Sharia Court of Appeal over *Waqf* issues, there have been no systematic rules made by the Grand Kadi in any Nigerian State on *Waqf* issues. It should be noted that the jurisdiction of the Sharia Court of Appeal is both appellate and supervisory. The authors thus suggest that what the Sharia Court of Appeal should do should be akin to the functions of the High Court regarding probates and administration of estates under which trusts are administered. There is no doubt

²²⁰¹ Farra’, M.H. (2000), *Al-Ahkamus Sultaniyyah*. Darul Kutubil Ilmiyyah, Beirut, p.36. see also Zaidan, A. (1989), *Nizamul Qada’ fish-Shari’atil Islamiyyah*. Mu’assasatur-Risalah, Beirut, p. 243; Ibnu Juzayy, M.A. (nd), *Al-Qawaninul Fiqhiyyah*. Darul Fikr, Beirut. pp.252-53

²²⁰² Ibnu Farhun argues that powers of the judiciary are governed by practice, place and time, hence some issues may be included or excluded as judicial powers, see Ibnu Farhun, I.S.M. (2001), *Tabsiratul Hukkam fi Usulil Aqdiyati wa Manahijil Ahkam*. Darul Kutubil Ilmiyyah, Beirut. pp.15-16

the High Court has jurisdiction over trusts exclusively and it is as a result of this, the Constitution reserved the jurisdiction over *Waqf* to the Sharia Court of Appeal. It should equally be noted that Trusts, Probates and Administration of estates are residual matters as far as legislative competence is concerned, therefore, by the operation of the Constitutional provisions on the jurisdiction of the Sharia Court of Appeal, “any question regarding any *Waqf* where the endower is a Muslim” falls within the jurisdiction of the Sharia Court of Appeal and ‘any question’ is very wide. The authors therefore submit that the Grand Kadis in Nigeria should make rules to cater for how issues of *Waqf* should be handled, both by the lower courts and by the Sharia Court of Appeal.

1.4. Boards and Commissions Empowered to Manage *Waqf* in some Nigerian States

Some State governments in Nigeria in the wake of the return to democratic governance in 1999, enacted laws seeking to restore aspects of the Sharia which were hitherto abolished by the British colonial intervention. They enacted laws and expanded the scope of the Penal Code and Criminal Procedure Code beyond what was inherited from the colonial times. A *Waqf* commission/board is a legal body that ensures the appropriate administration of *Waqf*. These commissions and boards ensure that *Awqaf* are being appropriately maintained, with any revenue generated also being utilised in line with Islamic principles and laws.²²⁰³ In this regard, It would be recalled that Zamfara State pioneered the declaration of the Shariah and the establishment of Sharia Courts

²²⁰³ See Shiv Nalapat, *EXPLAINED: What is a Waqf board, and what are its governing principles?*, Timesonline of India at: [Waqf boards: EXPLAINED: What is a Waqf board, and what are its governing principles? | India News \(timesnownews.com\)](https://timesnownews.com/news/india/2024/07/21/waqf-boards-explained-what-is-a-waqf-board-and-what-are-its-governing-principles/) accessed on 21/07/24.

to apply Islamic law. This indeed included Islamic criminal law. Some 11 other states followed Zamfara's move, and together they were dubbed: 'Sharia States.' and these States also made efforts similar to those of Zamfara in Islamizing the legal system. Accordingly, establishment of *Waqf* received immense attention in these efforts.

As part of the above moves, *Zakat* and Endowments/*Waqf/Hubs* Boards, Commissions and bodies were established throughout most of the 12 States that proclaim to apply the Sharia. In most of these 12 States, independent laws were enacted to establish bodies to oversee, coordinate, collate, manage, distribute and propagate for *Zakat* and *Waqf* in the various States. Below is the analysis of the laws of the various States on *Waqf*. Writers have commented on the legal frameworks above as means of alleviating poverty in Muslim areas²²⁰⁴ and that government efforts need to be complimented by Muslim societies.²²⁰⁵

1.4.1 Sokoto State:

The Sokoto State *Zakat* and *Waqf* Commission (SOZECOM) was established in 1997. It is about the oldest of such commissions/boards in the contemporary history. It came on board two years prior to the return to civil rule with the 1999 Constitution of FRN, The Commission, though, started as a *Sadaqat* and Endowment Department in the office of the Special Adviser to the Governor on Religious Matters in the State.²²⁰⁶ SOZECOM law is robust serving as a model to many other states' laws on the subject.

²²⁰⁴ Ahmad, M, et al., (2015) The Legal and Regulatory Framework for Zakah and Waqf Administration in Kuwait: Lessons for Nigerian Zakah and Waqf Institutions", *International Journal of Business, Economics and Law*, vol.7 Issue 4, pp.9-21

²²⁰⁵ Bala, S. 'The Role of Al-Waqf (Endowment) towards Human Development: A Study of Sokoto, Kebbi, Zamfara, Kano and Katsina", unpublished M.A. Dissertation, Department of Islamic Studies, Usmanu Danfodio University, Sokoto, March 2006.

²²⁰⁶ Ostein, (2007), *Sharia Implementation in Northern Nigeria 1999-2006: A Source Book*, Ibadan, Spectrum Books, vol.VI, Chapter 9, part II (Documentary Materials) pp.73-74

Also, the operationalisation has been more efficient. This may be attributable to the fact that the Commission receives moral support from and patronage of the Emirate of the Sultan of Sokoto, HRH, Sultan Muhammadu Sa'ad Abubakar, SOZECOM was mandated to regulate, maintain, and develop the overall collection, management and distribution of *Zakat* and *Waqf* for the state of Sokoto, Nigeria. It aims to realize Donors Conditions, and to enhance its role in economic and social development and social solidarity, in accordance with the objectives of Islamic law and regulations.²²⁰⁷

1.4.2 Zamfara State:

The first legislation in Zamfara was the *Zakat* (Collection and Distribution) and Endowment Board Law 2000 and later replaced with *Zakat* (Collection, Distribution and Endowment) Board Law 2003²²⁰⁸ (as amended). The 2003 amendment brought out more clearly the functions of the Board on endowments.²²⁰⁹

In section 3 (Interpretation section, endowment is defined as “...giving out money, items or properties in part or in whole out of the ownership of oneself, transferring it permanently or for a fixed period of time to the ownership of Allah, and dedicating it all or its proceeds to the use of others or the Muslim *ummah*”. This definition describes the act of endowing and not the endowment itself; good still, it should have described the nature and attributes of the endowed property.

²²⁰⁷ <https://sozecom.org.ng/>. accessed on 28/7/24.

²²⁰⁸ Zamfara State of Nigeria Gazette No.2 vol.4 of 10th October 2003, pp. A1-A18

²²⁰⁹ Ostein, op cit p.85

Section 31 of the Law provides that “endowments shall be received from any individual person or groups who profess Islamic faith, and who is resident in the State or outside of any part of the Muslim world and who is the rightful owner of the property endowed”. To the authors, this provision is too restrictive; it should have opened the window for non-Muslims to make endowments for their children, for public services or utilities or even in favour of Muslim children and vice versa, i.e. Muslims endowing in favour of non-Muslims.

Section 32 lists items that will be subject of endowment which shall be all lawful items allowed by Sharia and includes estates, farmlands, shares in companies, centres of learning like schools, libraries and institutions, mosques, social amenities such as wells and boreholes, orphanage homes, part of one’s salary, grants by government, roads and hospitals, lost items that are found in the state and estates of deceased persons who have no heirs, donations, etc. It also stated that the government should pay 2% of total revenue accrued to the Board as monthly endowment and contractors shall give out 1% of the total sum of the contract awarded by State government to the Board as endowment. The authors’ opinion is that it is wrong to call the government an endower as per the *Fiqh* of *Waqf* because the government is a trustee of the *Waqf*, and represents the public and where *Waqf* is misused, the government has the duty to protect it. The authors believe that the government should at best, encourage the public to make endowments.

Section 33 provides that once an item/funds are dedicated for endowment, it ceases to be under the control of the owner and such endowment cannot be inherited, donated or sold out to anyone unless to improve it. The section provides that there shall be a

witness and certificate to authenticate that the owner has released the item on *Waqf* and the Endowment department and Board shall be the trustees to administer the properties in such a way that will benefit the general public or the intended beneficiaries.²²¹⁰ These provisions are robust and reports of the Board indicate that the Board engaged in public awareness campaigns to enlighten the public on *Waqf* and its uses and how the Board utilizes proceeds of *Waqf*.²²¹¹

However, the law is biased towards public administration of *Waqf* and no mention is made of private administration of *Waqf*. The law is also silent on how *Waqf* is formed and only mentioned a certificate or witness that *Waqf* is established. There is a need for a standard but concise form as a precedent *Waqf* document that will allow people to constitute *Waqf* by themselves and either appoint administrators or empower the Board to administer.

1.4.3 Kano State:

Kano State *Zakah* and *Hubusi* Commission Law 2003²²¹² provided for the collection and distribution of *Zakah* and *Hubusi* in Kano State and for matters connected to these. *Hubusi* is the Maliki School terminology for *Waqf* and the Kano Law preferred that word. This does not have any consequential change on the purport of the law being on endowments, *inter alia*. The law in section 3 defined “*hubusi*” as “endowment or

²²¹⁰ See also Aliyu, C.U. The Economy and Sharia in North-West Nigeria with Particular Reference to Sokoto and Zamfara States’, paper presented at the Fifth In-House Forum on Shari’ah Information and Documentation Project (SIDOP) on the theme: Economic Dimensions of Shari’ah in Northern Nigeria, organized by Development Research and Projects Centre, Kano, held at the Nassarawa Guest Palace Hotel, Kano on 29th May, 2004.

²²¹¹ Ostein op cit pp.106, 107-115

²²¹² Published in Kano State of Nigeria Gazette No. 7, vol.35 of 27th November, 2003, Supplement Part A, pp. A25-A31

voluntary gift of wealth more especially property”. This definition is weak as it does not distinguish *Waqf* from gift (i.e. *hibah*); the definition also creates confusion by separating wealth from property which by Islamic law, may not be different.

Section 4 of the law states that the Commission is empowered to regulate all matters relating to *Zakat* and *Hubusi*, to collect *Zakat* and *Hubusi* from individuals and organizations. The Commission is also empowered to distribute collected funds to deserving beneficiaries; to invest resources in securities as may be approved by the Governor of the State and to dispose of such securities. The Commission acts as trustee of all funds, wealth and property entrusted in the Commission. The authors surmise that the powers of the Commission in managing funds, wealth or property as discussed above relate to both funds from *Zakat* and *Hubusi*. The law establishes *Zakat* and *Hubusi* Councils at Local Government level, a *Zakat* and *Hubusi* Committee at Village level, both to coordinate *Zakat* and *Hubusi* at these levels and report to the Commission.²²¹³

The Kano Law is not as robust as the Zamfara Law and it is submitted that the Law is poorly drafted. In terms of substance, the law did not detail items that qualify as endowment property and how endowments are created, the effect of endowment on the property and the law, as that of Zamfara and does not talk of private management of *Waqf*.

1.4.4 Bauchi State:

²²¹³ Ibid, sections 7-11

The legislation regulating *Waqf* for Bauchi State is the *Zakah* and Endowment Fund Law 2003. This law empowers the Sharia Commission to collect, administer and distribute *zakat* and endowment funds. The Commission is empowered to set up machinery for the administration, collection and distribution of *zakat* and endowments, to make policies, plans, rules and regulations that may be necessary for the administration, collection, distribution of *zakat* and endowment funds, to invest endowment funds in ways that will meet the objectives and purposes of the endowment, etc.

The Sharia Commission is also empowered by the Sharia Commission Law of 2001 to create divisions and committees it may consider necessary.²²¹⁴ The functions of the Commission includes “the collection and distribution of *zakat* and advising the government on the implementation of certain Islamic injunctions.”²²¹⁵ As a result of these, *Zakat* and Endowment Committees were established at five levels in the State as follows: State main Committee; Emirate Committee; Local Government Committee; District Committee and Village Committee. The functions of these Committees include to ‘ensure that endowment proceeds are remitted to the Commission headquarters’, ensuring that local governments pay their share of endowment fund to the Sharia Commission, ensuring that two separate accounts are maintained for *zakat* and *Waqf* respectively, provide enlightenment campaigns and propagation on *zakat* and endowment, coordination of endowment activities in the State, publication of annual report on *zakat* and endowment, etc.²²¹⁶

²²¹⁴ Section 3(2) Bauchi State Sharia Commission Law 2001,

²²¹⁵ Ibid, Section 8(h)

²²¹⁶ Ostein, (2007), *Sharia Implementation in Northern Nigeria 1999-2006: A Source Book*, Ibadan, Spectrum Books, vol.VI, Chapter 9, part II (Documentary Materials)

4.5. Niger State:

Niger State adopted the Zamfara State *Zakat* and Endowment Board Law 2000 with slight modifications as the Niger State *Zakah* (Collection and Distribution) and Endowment Board Law 2001,²²¹⁷ it is a word for word copy of the Zamfara Law as observed by Ostein. There is virtually no mention of *waqf* or endowment in the law apart from the title and Ostein reported that there is no evidence on endowment active in the State.²²¹⁸

1.4.6 Borno State:

The Borno State *Zakat* and Endowment Board Law 2000²²¹⁹ establishes the *Baitul mal* which is defined as the treasury for the collection and storage of *zakat* and endowment²²²⁰; the object of the Board is to provide conducive socio-economic environment for the operation of sharia in the State, to provide for the improvement of the living standards of the poor and to provide through lectures, research, publications and other means the advancement of sharia and its practical application.²²²¹ The Board is empowered to make regulations on the mode of collection and distribution of *zakat* and endowment.²²²² As could be seen above, there is not much that is provided on *Waqf* under the Law. The Law should be amended to adapt from Zamfara's model which was made after that of Borno.

²²¹⁷ published in the Niger State Gazette No. 10, vol. 26 of 3rd September 2001, Supplement Part B, pp. B39-B53

²²¹⁸ Ostein op cit, p.72

²²¹⁹ Published in Borno State of Nigeria Gazette NO. 42, vol.26 of 18th October, 2001, pp.C53-C57

²²²⁰ Section 2

²²²¹ Section 4

²²²² See also Kolo, M.A. The Economic Dimensions of Sharia in Northern Nigeria- Case Studies: Borno and Yobe States', paper presented at the Fifth In-House Forum on the Economic Dimensions of Sharia in Northern Nigeria, held at Nassarawa Guest Palace Hotel, Kano on 29th May, 2004.

1.4.7 Katsina State

The *Zakkat* and *Waqf* (Administration and Allied Matters Board) Law 2023 of Katsina State, establishes the *Zakah* and *Waqf* Board to oversee the efficient and equitable administration of *Zakkat* and *Waqf* resources in the State. It is said to be committed to promoting social justice and community development. Prior to this legislation, there was a certain *Zakat* and Endowment Trust Fund that was established in May, 2005, an incorporated trustee body that performed that function.

1.4.8 Yobe State

The Religious Affairs Board Law 2001 provides for Directorates to be established under which the Directorate of *Zakat* and Endowment was created. Section 13 of the Law provides for the functions of the Directorates to include E(v) management of Islamic endowment (*Waqf*) funds, properties and investments donated by individuals, groups or corporate bodies in accordance with Sharia injunctions.²²²³ It should be noted that this provision widens the scope of endowment to transcend funds and include properties and investments donated as *Waqf*.²²²⁴

1.4.9 Other States that have no laws on *Waqf*:

As at July, 2024, there are only about five States with definite legislations on *Waqf*, in the passages below, the authors will look at the legal framework of *Waqf* in the remaining seven Sharia States:

²²²³ Ostein, op cit p.75

²²²⁴ See also Kolo, op cit.

a) Gombe State: There is so far no legislation on *Waqf* in Gombe State. There is however the *Zakah* and *Waqf* Foundation Gombe, a non-governmental, not-for-profit organization established in the year 2018. It mobilizes resources from *zakah* payers and other donors who are willing to channel their charities for proper disbursement to the poor in a manner that alleviates their poverty, uplifts their living standards and puts them on the path of socio-economic empowerment.²²²⁵

b) Jigawa State: there is no Law in Jigawa State on *Waqf*. There is the *Zakat* Collection and Distribution Committee Law 2000²²²⁶ but there is no mention of *Waqf* in the Law. It is recommended that the State should amend the Law to adapt the Zamfara model

c) Kaduna State: there is no legislation in Kaduna State on *Waqf*. There are agitations including those coming from the Kaduna-based *Zakat* and *Waqaf* Foundation for the establishment of *Zakah* Board for the State.²²²⁷

d) Kebbi State: The Kebbi State *Zakat* and *Sadaqat* (Collection and Distribution) Board Law, 2000²²²⁸ strangely made no mention of *Waqf* as is the case with other such legislations. There was a proposal to establish an Endowment Board by law but this effort has not seen the light.²²²⁹

1.5. Absence of a General Legislation on *Waqf* in Nigeria or a Harmonized One

²²²⁵ [Home - Zakah & Waqf Foundation Gombe \(zakahwaqfgm.org.ng\)](http://zakahwaqfgm.org.ng)

²²²⁶ Published in the Jigawa State of Nigeria Gazette No.13, vol.2 of 27th December, 2000.

²²²⁷ See Shehu Yahaya, *Zakka And Waqaf Foundation Calls For Establishment Of Zakka Board In Kaduna State*, DECEMBER 3, 2023THE DAILY PULSE NG, December 3, 2013. The call was made at the 3rd National Conference of the Association of Zakkat and Waqaf Operators In Nigeria (AZAWON). See [Zakka And Waqaf Foundation Calls For Establishment Of Zakka Board In Kaduna \(wordpress.com\)](https://www.zakkaandwaqaf.org.ng/) (last accessed: 21/07/24)

²²²⁸ Published in the Kebbi State of Nigeria Gazette No. 1 of 1999, vol.1, pp.80-84

²²²⁹ Ostein, op cit. p.63

Apart from the Laws establishing *Zakat* and Endowment/*Hubusi/Waqf* commissions or boards, there is no other law in Nigeria whose object is to regulate and make provisions generally for *Waqf*. The Laws so far discussed above are all establishing Commissions and Boards and empowering them. there is a need for a law on *Waqf* that regulates private conduct regarding *Waqf*, its permissibility, its nature and attributes, how to found or establish it, sample forms or precedents a person needs to prepare to initiate his *Waqf*, the regulation of family *awqaf*, the systematic integration of mosques and *Islamiyyah* schools into community *waqf*, the roles of *imams* and *ulama'* in propagating *Waqf*, the establishment and functions of *Nazirul Waqf* or *Mutawalli*, etc.

Additionally, the authors observed that, apart from the adaptation by Niger and Bauchi States of the Zamfara Law, there is generally no similarity or uniformity in the legislations on *Waqf* in the States that practice it, and this may have inhibited the remaining seven States from making progress on *Waqf*. There is a need for a harmonized law that is robust and wider than being institution-based as advocated in the immediate previous paragraph. The twelve Sharia States should come together and develop the harmonized law and synergize to develop *Waqf* across the Sharia States.

1.6. Companies and Allied Matters Act 2020 (CAMA)²²³⁰ as Legal Framework for *Waqf*

It should be noted that *Waqf* may be created through other vehicles in Nigerian law. *Waqf* can be established by the instrumentality of the Companies and Allied Matters

²²³⁰ Companies and Allied Matters Act. Cap. C20 , LFN, 2004 (as amended)

Act (CAMA), to be incorporated as a private company limited by *Guarantee*, or more appropriately as an incorporated trustee under Part F (formerly, Part C) thereof. To all intents and purposes, *Waqf* is an Incorporated Trustee product. Indeed, *Islamiyyah* schools and foundations are established through these media. Thus, effectively CAMA is one of the fundamental legal frameworks for the operation of *Waqf* in Nigeria.

There are other products that are regulated by company law which are akin to *Waqf* and the stakeholders in *Waqf* in Nigeria like the IIIBF needs to commission studies into the possible areas governed by CAMA as relates to *Waqf*.

1.7. Implications of Lack of Definite Holistic Framework of *Waqf* in Practice

Waqf is an instrument of Islamic social finance, amongst others and as such must be registrable in certain aspects and sometimes may require certain concessions from stamp duties and other taxation. The authors raise the following issues:

7.1 There is a *Waqf* of company shares, they must be transferred or transmitted to the beneficiaries of the *Waqf* and as such, the Corporate Affairs Commission must be involved and the resolutions made on such issue must be registered. The point here is that the CAMA is relevant to *Waqf* at some point.

7.2 Registration of products with other bodies: If a *Waqf* involves land or landed property which is covered by a certificate of occupancy or right of occupancy, it (the *Waqf*) must be registered with the ministry of lands, the Local Government lands department or any agency that owns houses like the Federal Housing Authority.

7.3 Before instruments or deeds are registered, they must be stamped unless if exempted; charities are usually exempted from taxation. Should *Waqf* deeds be exempted from stamp duties, being charities?

7.4 What is the value of the registration fees at the Corporate Affairs Commission, at the ministry of Lands and other agencies payable on *Waqf* deeds? If a *Waqf* deed should not be exempted, how much does it attract?

The above issues show the legal implications of not integrating *Waqf* into the mainstream Nigerian corporate system and due to lack of a definite and robust legal framework, *Waqf* will be in limbo if a dispute arises or a huge value *Waqf* got stuck as a result of the deed being ‘unknown’ to the regulatory agencies that register or approve them. To avoid these problems, the Islamic finance industry in Nigeria needs to learn from the advanced countries on *Waqf* on how to go about it.

1.8. Conclusion, Observations and Recommendations

The foregoing passages discussed laws in Nigeria that have bearing on *Waqf* both directly and indirectly. *Waqf* being part of Muslims and with strong and long roots in Northern Nigeria should be strengthened through an effective legal framework. The authors observe the following:

1. The laws creating the various Boards and Commissions, in the states where such exists, are not robust enough to provide guidance on how to initiate, document, manage and report *waqf* institution.
2. Absence of systemic rules made by the Grand Kadi in any Nigerian state on *waqf* matters.
3. The legal framework is deficient because of the absence of a harmonised and holistic framework of *waqf* in practice that addresses all relevant

issues taking into consideration laws that could affect its implementation in Nigeria such as questions of taxes, registrations et. al.

It is recommended that:

1. The 12 Sharia States should form a consultative body on *Waqf* with the aim to review the *Waqf* related laws in the States by providing a draft to harmonize the laws, upgrade it to be more robust and incorporate individual or family *Waqf* and spell out the roles of *Nazirul Waqf* or *Mutawalli* without the obligation to surrender *Waqf* to the government for management. A sample *Waqf* deed should be developed as part of the law. This can be done by liaising with the Committee of Grand Kadis and the Centre for Islamic Legal Studies of Ahmadu Bello University, Zaria, the National Judicial Institute and the IIIBF.
2. The Committee of Grand Kadis should ensure that the grand kadis make the necessary rules of court that will guide the Kadis in matters relating to *waqf*. This they can do by liaising with the centre for Islamic Legal Studies and the IIIBF where necessary.
3. IIIBF should hold interactive seminars between *Waqf* actors and regulatory agencies like the Corporate Affairs Commission, ministries of land, stamp duties office, etc, with a view to identify how the laws that these agencies implement have bearing on *Waqf* and to chart appropriate measures to be taken.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

LEGAL REVIEW OF THE SCOPE OF THE OVERSIGHT POWERS OF THE NATIONAL
ASSEMBLY WITH RESPECT TO BANKS AND OTHER PRIVATE SECTOR OPERATORS

Dimas David Isa²²³¹, and A. Is'haq²²³²

Department of Public Law, Faculty of Law Ahmadu Bello University, Zaria

08065107367, isadimss@gmail.com

08098717665, abuishaq22@gmail.com

Abstract

The oversight function of the National Assembly (NASS) is a recognized constitutional power for achieving checks and balances in government in the areas where it has competency to make laws and appropriate funds for the running of the arm of Government. This paper examines the scope and limitations of these oversight powers, particularly as they relate to the financial sector and other private sector operators. The powers of the National Assembly to conduct investigations are derived from sections 88 and 89 of the 1999 Constitution of Nigeria, which grant the legislative body the authority to inquire into any matter or thing with respect to which it has power to make law. This paper combines a doctrinal and teleological approach, chronicling and analyzing the exercise of these powers by the National Assembly and the challenges they faced and now it also affects its relationship with Banks and other private sector operators which sometimes become a complete distraction in the polity. The investigative powers of the National Assembly are not limited to law-making but also extend to the conduct of affairs of any person, authority, ministry, or government department charged with the duty of executing or administering laws enacted by the National Assembly. The NASS does not have unfettered and unlimited/unguarded powers to invite anybody whatsoever or demand/request for documents and information at will. The powers of the NASS to invite any person in Nigeria (individual and/or corporate) or demand/request for documents and information should be exercised under a clearly set out framework under the Constitution. Therefore, the power is circumscribed under the Constitution. The Paper will conclude by recommending a framework for banking sector collaboration with the National assembly to manage the incessant impasse experienced in the exercise of its oversight function also highlight the need for the National Assembly to remain within the strict provision of the constitution in the exercise of such powers.

Keywords: Oversight, Power, Banks, Law making, Constitution, Limitation.

²²³¹ Dimas David Isa, LL.M, Legal Practitioner and a PhD student at the Department of Public Law, Faculty of Law Ahmadu Bello University, Zaria; 08065107367, isadimss@gmail.com

²²³² Lecturer, Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria: 08098717665, abuishaq22@gmail.com

1.0 Introduction

1.0.1. It is not unusual to see National Assembly of Nigeria extend invitations to the leadership and personnel of ministries, departments, and agencies (MDAs) to appear before one or more of their standing committees due to one or more issues for determination or clarification before them. Overtime, we have continued to witness a rising trend of requests and invitations by the two tiers of the NASS and their various Committees which are extended to companies in the private sector, especially addressed to their leadership over issues relating to the internal operations of the companies and their activities. Ordinarily, one would expect that these requests and invitations should be addressed to the various regulatory and supervisory agencies of government.

A good example of such invitations is the one extended to the Managing Director/CEO of First Bank by the House of Representatives Committee on TETFUND and other services dated February 29, 2024, entitled as- Monitoring of Collection, Utilization and Other Associated Services Relating to Education Tax from 2011- 2022 invitation to a meeting,²²³³ and "Investigation On Non-Remittance to the NHF and Utilization of the Fund from 2011 to date - Invitation To Public Hearing/Request For Memorandum."²²³⁴

Another industry that that has been faced with the incessant invitation is the telecommunication industry which compelled the Association of Licensed Telecommunications Operators of Nigeria (ALTON), to drag the National Assembly before the Federal High Court in 2018, complaining that the constant invitation and harassment of their CEOs to appear before different committees of the National Assembly which has affected their daily operations, and seeking a judicial interpretation of the oversight functions of the National Assembly as exercised by lawmakers in the telecoms sector in Nigeria.²²³⁵

²²³³ Letter of Invitation to the Managing Director of First Bank of Nigeria Limited dated February 24, 2024

²²³⁴ *Letter of Invitation from the House of Representatives to some members of NECA.*

²²³⁵ 2018)<https://www.thisdaylive.com/index.php/2018/04/02/telcos-sue-nass-seek-judicial-interpretation-of-oversight-functions>

- 1.0.2. Similarly, there is a growing outcry by some civil society organizations in Nigeria that the seemingly **flagrant, open-ended** and **unguarded** exercise of this power by the NASS via the issuance of **incessant**, and **indiscriminate** invitations/requests to organized private sector businesses while laying claims to constitutional backing under **Sections 88 and 89 of the 1999 Constitution**. This is not only a distraction, but also not entirely correct.
- 1.0.3. The focus of this conference paper is to review the relevant provisions of the Constitution of the Federal Republic of Nigeria, 1999, especially Sections 88 & 89 thereof and the available judicial decisions with a view to establishing the extent/scope of the powers of the NASS in the exercise of its investigative oversight responsibilities, particularly as it relates to corporate bodies in the private sector.
- 1.0.4. The exercise of this investigative oversight power by the National Assembly (NASS) at its plenary or through its various committees has come under serious criticism as it is generally believed that legislative oversight is being abused and used by Nigerian lawmakers as an instrument of blackmail and unjust enrichment rather than being used to checkmate the excesses of the executive arm of government in the area of suspected corruption, inefficiency, and waste of public funds by MDAs among others.
- 1.0.5. Similarly, there is a growing outcry by some civil society organizations in Nigeria that the incessant invitations and summons of organized businesses for investigative hearings by the federal legislature under Sections 88 and 89 of the 1999 is unconstitutional and constitutes an abuse of oversight function. The pressure groups which include those from the Banking and telecommunications industry among others believe strongly that private sector does not come under the direct oversight responsibility of the National Assembly and that the constant invitation of the CEOs of companies in the private sector to appear before different committees of the National Assembly is unconstitutional. Even heads of ministries, departments and agencies of the Federal Government have complained and resisted some of seeming abuse in the exercise of this power by the NASS.

- 1.0.6. In demonstration of their strong conviction in this regard, Nigeria Employers Consultative Association (NECA) who is one of these pressure groups in Nigeria has a pending suit at the Supreme Court in Suit No. **SC/734/2017**, wherein the Apex court is invited to determine the constitutionality, scope and extent of the provisions of the Sections 88 & 89 of the Constitution of the Federal Republic of Nigeria(CFRN) 1999(as amended), on the oversight powers of the NASS on **private entities**. The NECA has said the persistent invitations of heads of businesses to Abuja by the NASS amount to harassment and distraction. ²²³⁶
- 1.0.7. The above concerns informed the need for this legal review which is without prejudice to the above referenced case on the subject matter pending at the Supreme Court(Unfortunately, all our efforts to access and review the processes filed in the Appeal and indeed, the lower courts were futile as at the time of concluding this conference paper). This paper evaluates the provisions of Sections 88 & 89 of the 1999 CFRN to ascertain the scope of the investigative oversight responsibilities of the National Assembly, especially how it relates to and/or affect the corporate bodies in the private sector.

2.0. Constitutional Foundation of the investigative oversight function of National Assembly

Legislative oversight is the exercise of constitutional powers by the legislature to check or control the exercise of constitutional powers of the other arms of government and more specifically to check or control the exercise of executive power and to make the executive to act accountably and responsibly. Under any constitutional democracy like Nigeria, with three arms of government (the Legislature, the Executive, and the Judiciary) premised on the principles of separation of powers, the Legislature has, in addition to its role of enacting laws, a responsibility to perform oversight functions in terms of providing effective checks on the performance of the Executive arm and its agencies to ensure effective implementation of laws enacted by the NASS.

²²³⁶ Punch Newspaper, 7th November 2022; entitled; NECA accuses NASS of harassing businesses. <https://www.thisdaylive.com/index.php/2018/04/02/telcos-sue-nass-seek-judicial-interpretation-of-oversight-functions> (assessed 11.07.2024)

The oversight function of the Legislature is, therefore, a critical part of a well-functioning democracy as it ensures that the Executive arm acts accountably and in the best interests of the people to uphold constitutional democracy. It is for this purpose that Sections 88 and 89 of the 1999 (As amended) conferred on NASS Investigative Oversight function.

2.1. Under any constitutional democracy like Nigeria, with three arms of government (the Legislature, the Executive, and the Judiciary) premised on the principles of separation of powers. In addition to the primary responsibility of law-making responsibility of the legislative arm of government, the Legislatures (State Houses of Assembly and the NASS, and their respective Committees) are conferred with constitutional investigative oversight function - a tool for providing effective checks on the performance of the Executive arm and its agencies to ensure effective implementation of laws enacted by the NASS, including the utilization of funds appropriated by the NASS that are implemented through the respective government departments. See the full provision of **Sections 88 and 89 of the Constitution**²²³⁷.

The oversight function of the Legislature is, therefore, a critical part of a well-functioning democracy as it ensures that the Executive arm acts accountably and in the best interests of the people to uphold constitutional democracy. It is for this purpose that the constitution conferred on NASS Investigative Oversight function.

3.0. Analysis of the provisions of sections 88 And 89 of the Constitution.

3.0.1. Based on the above provisions of the Constitution, the investigative oversight power of the NASS is exercisable within a very clear boundaries. This Limitation was judicially approached and emphasized in the case of - *Attorney-General of Abia State v Attorney-General of the Federation*²²³⁸ (2006) 16 NWLR (Pt.

²²³⁷ Sections 88 and 89 of the Constitution of Federal Republic of Nigeria 1999.

²²³⁸ (2006) 16 NWLR (Pt. 1005) 265

1005) 265 by the Supreme court where it held that - *“The functions are not at large and must be exercised within the provisions of the Constitution.”*

In view of this judicial decision and our review of the constitutional, below are highlights of our legal opinion of circumscribed power of the NASS;

a. When oversight power can be exercised

The power is only exercisable by the NASS for purposes and in the context of the discharge of its investigative oversight functions as provided by section 88 and nothing more. This is clearly provided below; The powers conferred on the National Assembly under the provisions of this section are exercisable only for the purpose of enabling it to

- (a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and
- (b) expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.²²³⁹

b. Subject matter of investigation

The subject matter of the investigation must be in respect of items/subjects in respect of which the NASS has power to make laws. This was specifically mentioned in the constitution that; *“Subject to the provisions of this Constitution, each House of the National Assembly shall have power by resolution published in its journal or in the Official Gazette of the Government of the Federation to direct or cause to be directed investigation into – (a) any matter or thing with respect to which it has power to make laws”*²²⁴⁰

²²³⁹ Section 88(2) of the Constitution of the Federal Republic of Nigeria 1999.

²²⁴⁰ Section 88(1) of the Constitution of the Federal Republic of Nigeria 1999

This imply that any investigative oversight function must be within ambit of areas where the national assembly have powers to make laws.

c. The person/body/agency under investigation.

The conduct of affairs under investigation must be that of a person, authority, Ministry, or government department charged, or intended to be charged, with the duty of or responsibility for executing or administering laws enacted by National Assembly and disbursing or administering moneys appropriated or to be appropriated by the National Assembly.

d. The purpose of the investigation.

The purpose of the investigation must be for: (a) enabling the NASS to make laws with respect to any matter within its legislative competence and correct any defects in existing law, and (2) exposing corruption, inefficiency, or waste in government.²²⁴¹

e. Exercise of Power is “subject to all just exceptions”

The power of the NASS in this regard to summon **any person in Nigeria** to give evidence at any place or produce any document or other thing in his possession or under his control and examine him/her as a witness and require him/her to produce any document or other thing in his possession or under his control is **“subject to all just exceptions”**. – see **section 89 of the Constitution**

4.o.Opinion on Invitation of MDS/CEOs and other officials of Banks & Private Organization/Entities:

- 4.o.1. On the strength of the unambiguous provisions of the Constitution, while the NASS has power to investigate any subject matter within its legislative competence, the scope of the power is circumscribed by the facts that the power is exercisable only against a defined subject (**i.e. the conduct of affairs of person, authority, Ministry or government department charged, or**

²²⁴¹ *ibid*

intended to be charged, with the duty of or responsibility for executing or administering laws enacted by National Assembly, and disbursing or administering moneys appropriated or to be appropriated by the NASS.

The power is further limited by the fact that the power can only be exercised for a defined purpose, which is to enable NASS to (a) make or amend laws with respect to matters within its legislative competence and (b) expose corruption, inefficiency or waste in the execution or administration of laws.

- 4.0.2. Consequently, the NASS does not have generic right of oversight as it wields against just everyone. Rather, as mentioned earlier, the power is circumscribed under **Sections 88 & 89 of the Constitution**. Otherwise, if the oversight and or investigation is just against or about any person and/or in relation to just any action, subject matter or conduct outside the above provisions, then such investigation will be deemed as unconstitutional.
- 4.0.3. On the strength of the above constitutional provisions which limit the application of legislative oversights to the executive arm of government and its ministries, departments and agencies, and given that companies in the private sector are not responsible in any way for executing or administering laws enacted by National Assembly, nor in charge of disbursing or administering moneys appropriated or to be appropriated by the National Assembly, companies in the private sector are excluded and do not come under the direct oversight function of the National Assembly.
- 4.0.4. Accordingly, the current practice by the NASS of investigating the affairs of companies in the private sector and issuing summons to their leadership and personnel to investigate their activities as well as intervening in customer and/or employee relations complaints and passing “judgments” and issuing “directives” to such private sector operators under the guise of oversight investigative powers is unconstitutional and illegal.

- 4.o.5. Furthermore, the practice by the NASS of extending its legislative oversight to conducting ‘hearings’ and ‘adjudicating’ on matters of ordinary disputes between persons in Nigeria (which are unconnected with legislative function) amounts to a breach of the principle of separation of powers enshrined in the Constitution and usurpation of the power to resolve disputes between persons, governments and authorities which is the exclusive preserve of the judiciary by the power conferred on it by the Constitution.²²⁴²
- 4.o.6. In the case of **Senate of the National Assembly v. Tony Momoh** ²²⁴³1983) 4 NCLR 269 @ 295, the Court of Appeal, per *Nnaemeka-Agu JCA* (as he then was), in interpreting **Section 82 of the Constitution of the Federal Republic of Nigeria, 1979** (the “1979 Constitution”), which is in *pari materia* (same provision) with **S. 88 of the Constitution**, held that: “**Section 82(2)** is designed to eliminate abuse. Any invitation by the House to any person outside the purposes defined by Section 82(2) of the Constitution is invalid. No power exists under the section for general investigation nor for the aggrandizement of the House.”²²⁴⁴
- 4.o.7. Similarly, in **El Rufai v. House of Representatives** (1983) 4 NCLR 269 @ 295, the Court of Appeal, per **Oguntade JCA** (as he then was) held inter alia: “in my view their power under the Section is further circumscribed and limited by subsection (2) of Section 82. They can only invite members of the public when they want to gather facts for the purpose of enabling them make law or amend existing laws in respect of any matter within their legislative competence or as witnesses in a properly constituted inquiry under section 82(1) (b)”.
- 4.o.8. Based on the foregoing, NECA is on track in its decision to submit the issue of the incessant invitation of private companies and their leadership by the NASS for judicial adjudication. We are optimistic that if the matter is determined on its merit, the Supreme Court will find that the exercise of NASS oversight power

²²⁴² Section 6 of the Constitution of the Federal Republic of Nigeria, 1999.

²²⁴³ 1983) 4 NCLR 269 @ 295

²²⁴⁴ Section 82 of the Constitution of the Federal Republic of Nigeria, 1979.

against private entities and their leadership outside the constitutional precincts is not only a gross abuse of power, but also illegal.

- 4.o.9. However, it must be emphasized that the legislatures (including the NASS) have the power to summon any person in Nigeria to give evidence at any place or to produce any document or anything in his possession or under his control and examine him or to demand of documents in the course of its investigation activities. Thus, it is within the constitutional powers of the legislature to invite any person including the MD/CEO of any company to attend its hearing for the purpose of giving evidence or tendering documents only as may be demanded by the legislature or any of its committees in the exercise of its oversight functions.
- 4.o.10. Refusal or failure to honor the invitation without a satisfactory excuse attracts cost as may be imposed by the legislature/NASS and may lead to the issuance of a summons or warrant by the NASS to compel the attendance by such defaulting invitee.
- 4.o.11. On whether or not the personal attendance of the MD/CEO of a private company is required for the purpose of giving evidence, **Section 89 of the Constitution** contemplates personal attendance of the invitee. It is logical to expect that with convincing/compelling reason(s), an MD of a Bank, Telecoms Company or any other private company can validly honour a NASS invitation through a capable/competent representative, especially where the subject matter of investigation requires expert opinion that the MD may not have. Unfortunately, the NASS does not seem to encourage this and this has opened heads of private companies to threat of arrest. In some cases where MDs honor this invitation personally they are unable to assist to respond or assist with technical information that specialist in their companies would have done better which bring about waste of valuable business and legislative time.

5.o. Conclusion

5.1. Summary.

This paper is concluding as shown below and recommend a Framework for private sector collaboration with the NASS to avoid the incessant impasse experienced between them and for a healthy relationship. Our review of this subject revealed as follows:

- a. That the NASS does not have unfettered and unlimited/unguarded powers to invite anybody whatsoever or demand/request for documents and information at will. The powers of the NASS to invite any person in Nigeria (individual and/or corporate) or demand/request for documents and information is provided under a clearly set out framework under the Constitution. Therefore, the power is circumscribed under the Constitution.
- b. The NASS has powers under **Section 88 of the Constitution** for Oversight Investigations, and it is only during, and within the structure of this activity, that it is permitted to extend invitations and requests for documents/information. The NASS oversight investigative powers under the same section **88** is to direct or cause to be directed investigation into any matter or thing with respect to which it has power to make laws; and the conduct of affairs of any person, authority, ministry, or government department charged, or intended to be charged, with the duty of, or responsibility for, executing or administering laws enacted by the National Assembly, and disbursing or administering moneys appropriated or to be appropriated by the NASS.
- c. The exercise of the power of the NASS in this area is only for the purpose of enabling it make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

- d. To this end, under **Section 89 of the Constitution**, the NASS has powers to (1) procure all such evidence, written or oral, direct or circumstantial, as it may think necessary or desirable, (2) examine all persons as witnesses whose evidence may be material or relevant to the subject matter, (3) summon **any person in Nigeria** to give evidence at any place or produce any document(s) or other thing(s) in his/her possession or under his/her control, and examine him as a witness and require him/her to produce any document(s) or other thing(s) in his/her possession or under his/her control, **subject to all just exceptions.**

5.2. Findings.

- 5.0.1. The Investigative oversight function of the National Assembly is a recognized constitutional power for implementing checks and balances in government in the areas where it has competency to make laws and appropriate funds for the running of the arm of Government. However, the power is not without limitations as discussed in the body of this paper.
- 5.0.2. The oversight function of the National Assembly provided under Sections 88 & 89 of the Constitution does not apply to businesses in the private sector except for the purpose of calling witnesses and obtaining evidence in the course of its investigations.
- 5.0.3. This paper legal opinion finds that the legislature can extend invitation to **any person** under the dragnet of eligible invitees, but the purpose of the invitation must be limited to obtaining evidence in the course its investigation activities and not for the purpose of investigating the Bank's business or the conduct of the Bank and/or its staff members.
- 5.0.4. Any further specific, extended, or targeted inquiries, investigations or examinations can only be done by regulators, bodies and other Agencies in the Executive arm of Government that are statutorily empowered to do so. It is also such Agencies that have the power of enforcement, including sanctions and penalties in deserving cases in accordance with applicable laws and regulations.

5.3. Recommendation.

5.4. We recommend that the Committee of Nigerian Bank MDs should engage with the NASS leadership at the highest level to agree a Framework for collaboration, which should, among other things,

- (i) Get the NASS to commit to relating with the banks and other private sector operators within the confines of the Constitution;
- (ii) This paper also recommend that the private sector operators under NECA should secure the NASS commitment to permit senior and knowledgeable representatives of the MDs of banks and other private sector operators to respond to NASS inquires and invitations (armed with letters of authorization from the MDs/CEOs) and have the Bank MDs attend in person only when the subject matter is within the sole knowledge of the Bank MDs;
- (iii) To provide legal structure for escalation within the NASS if any of the two Chambers or any of their Committees continues to breach the terms of the Framework; and
- (iv) To have the banks and other private sector operators commit to their continued support to the NASS in the discharge of its constitutional obligations within the ambit of the law by freely providing the NASS with relevant materials and information at their disposal which the NASS requests for in accordance with the provisions of Sections 88 & 89 of the Constitution.

This will bring about harmony in the legislature and private sector engagement and where the NASS goes outside the agreed Framework and overreaches itself, especially in the areas of intervening in customer and/or employee relations complaints and passing “judgments” and issuing “directives” (which are the prerogatives of regulatory agencies) to the Banks and other operators, the latter should explore resolving same through the Framework and where that fails, may, in compelling cases, use the judicial system to check such excesses.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

APPRAISING THE PROTECTION OF THE RIGHTS OF PERSONS *HORS DE COMBAT*
(THOSE WHO ARE NOT, OR NO LONGER, DIRECTLY PARTICIPATING IN
HOSTILITIES) IN INTERNATIONAL LAW

Dahiru Ahmad Modibbo
Faculty of Law Ahmadu Bello University, Zaria, Nigeria
dahiruahmadmodibbo@gmail.com
08038129590/07066129819

1.1 Introduction

War, anywhere anytime is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force.²²⁴⁵ Everyone who has experienced war knows that unleashed violence means the obliteration of standards of behavior and legal systems, the idea of international humanitarian law (IHL) is to persuade belligerents to accept and exceptional legal order, specially tailored to such situations.²²⁴⁶ That is precisely why humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict.²²⁴⁷ It is also clear that the fundamental purpose of international law is peace. The aim of the international community to come together and form international law is peace; any concept propounded in international law aimed at peace.²²⁴⁸ For that reason, international law

* Dahiru Ahmad MODIBBO (P21LAPU8022), LL.B, UDUS, BL., Kano Campus,
dahiruahmadmodibbo@gmail.com 08038129590/07066129819

²²⁴⁵ Frederic Maurice, *Implementation and Enforcement of IHL*, available at
<http://legalanswers.sl.nsw.gov.au/hot-topic-80-international-law/implimentation...>> visited on 20 Feb, 2023.

10:15 am p. 1.

²²⁴⁶ *Ibid.* p. 2.

²²⁴⁷ *Ibid.*

²²⁴⁸ Article 1 of the UN Charter of 1945

has made it clear that the maintenance of peace and security is the primary responsibility of Security Council.²²⁴⁹

Despite the prohibition against armed conflicts, they continue to occur. Today States recognize that international law has to address this reality of international life, not only by combating the phenomenon but also by regulating it to ensure a level of humanity in this fundamentally inhumane and illegal situation.²²⁵⁰ For practical and humanitarian reasons, IHL must apply impartially to both belligerents: The one resorting lawfully to force and the one resorting unlawfully to force. Otherwise, it would be impossible to practically maintain respect for IHL at least between the belligerents, it is always controversial which party resorted to force in conformity with the *jus ad bellum*²²⁵¹ and which violated the *jus contra bellum*. In addition, from a humanitarian standpoint, the victims on both sides of the conflict need the same protection, and they are not necessarily responsible for the violation of the *jus ad bellum* committed by “their” party.²²⁵²

The implementation and enforcement of international law in general and IHL in particular is problematic.²²⁵³ The international legal system is based on the notion of the sovereign equality of States, and, generally speaking, no State may interfere in the internal affairs of another sovereign State.²²⁵⁴ This means that the enforcement of international law is decentralized; there is no central authority for enforcement, in the same way that domestic legal systems have police force, courts and governments. This is especially complex in regard to IHL with a few exceptions. Implementation and enforcement of IHL is often voluntary, and there are no compulsory means for the settlement of disputes or for ensuring enforcement of IHL.²²⁵⁵ While duties are imposed under IHL, there are few sanctions that can be imposed on a State that fails to abide by those duties.²²⁵⁶

²²⁴⁹ *Ibid.* Article 24..

²²⁵⁰ Sassòli, Marco (2019) *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. Cheltenham: Edward Elgar Publishing, p. 720.

²²⁵¹ It simply refers a condition under which state resort to war.

²²⁵² Sassòli, Marco *Op Cit.* p. 720

²²⁵³ Considering the mode upon which sovereign states have different procedure for domesticating international law and enforcement of foreign judgments. In Nigeria for example it must be in line with the provision of Sec. 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended 2011. See *Fawehinmi v. Abacha* (1996) 9 NWLR (pt. 475) 710.

²²⁵⁴ Maurice, F., *Op cit.* p. 2.

²²⁵⁵ *Ibid.*

²²⁵⁶ *Ibid*, p. 3.

The fact that not many people are conversant with the regulation concerning armed conflicts, this could not be unconnected with the cumbersome procedure of domesticating international treaties and instruments. In Nigeria, for example, all treaties between Nigeria and any other country, must be domesticated into Nigerian law by the National Assembly,²²⁵⁷ before it can be argued in any court of law or before such treaty or legal instruments becomes part and parcel of the substantive law in the country.

It is a cause of concern that international community, specifically United Nations Security Council hardly the protection rights of *Hors de Combat* (those who are not, or no longer directly participating in hostilities) in an armed conflict situation. This is because smaller nations in an armed conflict, which look upon the international community to intervene, more. For instance, the recent 2022 Russia-Ukraine War as of 4th August, 2022, it was estimated that about 5,552 *hors de combat* including civilians were killed outrightly and 8,513 injured all in Ukraine as a result of Russian attacks²²⁵⁸. Local officials estimate as many as 24,328 people were also killed *hors de combat* (including civilians population) in mass atrocities. Also in The conflict between the Israel Defense Forces (IDF) and Hamas which lasted for decades brought dire humanitarian consequences on the population in Gaza. According to the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA)²²⁵⁹, as a result of the conflict *hors de combat* (including several civilians) who are Palestinians were killed and injured, up till today there is no resolution to enforce cease fire from the UN Security Council and when at the end, a cease fire is enforced, through the UN Resolutions; the resolutions only look upon maintaining the *status quo*²²⁶⁰, without due regard to the loss of lives and properties. This type of attitude prompts the interest to write this paper. In view of the above the objective of this paper is to identify the adequacy or otherwise of the existence legal regime on the protection of rights of *hors de combat* in international law with a view to proffering measures for improving the practices on the subject matter.

1.2 Legal Regime of International Humanitarian Law

²²⁵⁷ This is in line with the provision of Sec. 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended 2011. See *Fawehinmi v Abacha* (1996) 9 NWLR (pt. 475) 710.

²²⁵⁸ Russia's War in Ukraine- (2022) *The Devastation of Health and Human Right* <<https://www.nejm.org/full/10.106/NEJMp>> visited on 11 March, 2023. 10:51 pm.

²²⁵⁹ United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Field Update on Gaza from the Humanitarian Coordinator: available at <http://legalanswers.sl.nsw.gov.au/hot-topic-80-international-law/implimentation...>> visited on 25 April, 2024. 10:15 am p. 1

²²⁶⁰ To maintain the existing state of affairs.

International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. This law protects persons who are not or are no longer participating in the hostilities and it restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.²²⁶¹ The IHL is made up of various sets of provisions which the following:

- i. Hostilities in general;
- ii. Conduct of combat by armed forces;
- iii. Behavior of combatants in action;
- iv. Behavior towards treatments of persons and objects in armed conflicts (victims of war);
- v. Administration of an order in an occupied territory; and
- vi. Relationship between belligerent states and neutral states.²²⁶²

The 1864 Geneva Convention for the Amelioration of the Condition of Wounded in Armies in the Field laid the foundation for contemporary humanitarian law. The 1874 Diplomatic Conference and the Hague Peace Conferences of 1899 and 1907 constitute important milestones. Modern international humanitarian law is mainly embodied in the four Geneva Conventions of 1949. Some of the principal sources of international humanitarian law are:

- a. The four Geneva Conventions of 1949;²²⁶³
- b. The two Additional Protocols²²⁶⁴ of 1977 and the Additional Protocol III of 2005;

²²⁶¹ International Committee of the Red Cross (ICRC), “what is international humanitarian law?” available online at <https://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet> Access on 20 February, 2024 at 12:30 pm.

²²⁶² Suleiman A. J., (2020), *International Humanitarian Law: Notes and Materials*, Published and Printed by ABU press Ltd., Zaria p. 42.

²²⁶³ Geneva Convention for the Amelioration of the Condition of Wounded and Sick in the Armies in the Field; Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked members of the Armed Forces at the Sea; Geneva Convention relative to the treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

²²⁶⁴ Additional Protocol I relative to the Protection of victims of international armed conflicts; Additional Protocol II relative to the Protection of victims of non-international armed conflicts.

- c. A number of treaties prohibiting or restricting the use of specific weapons, for example, the 1980 Convention on Certain Conventional Weapons and its Protocols;
- d. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols; and
- e. A body of customary law.²²⁶⁵

The major instruments were developed under the efforts of International Committee of Red Cross (ICRC). The General Assembly has created some other important instruments dealing with genocide, war crimes, crimes against humanity and the use of certain Conventional weapons.²²⁶⁶ The major instruments in this field regulate the means and methods of warfare, along with the protection of civilian population, the sick, wounded, shipwrecked and prisoners of war. Thus the codification of humanitarian law (*jus in Bello*)²²⁶⁷ sought to migrate the effects of war on combatants and civilians.²²⁶⁸ Given the above background, the discussion proper on the context in which the system of law have provided for the protection of rights of persons *hors de combat* are considered in the subsequent sub-headings of this paper.

1.3 Perspectives on *Hors de Combat* in International Law

Persons taking no active part in the hostilities, including members of armed forces who had laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. Thus the law imposes legal obligations on the parties to armed conflicts to ensure human treatment of persons who are not, or are no longer taking an active role in the hostilities.²²⁶⁹

The principle that persons who are not, or are no longer taking an active role in the hostilities cannot be attacked or harmed represent one of the cornerstones of international humanitarian law. This principle is embodied by the protections afforded under international

²²⁶⁵ ICRC, “Humanitarian Law, Human Rights and Refugee Law – Three Pillars”, available online at <https://www.icrc.org/web/eng/siteeng0.nsf/html/6T7G86> Access on 20 February, 2024 at 12:35 pm.

²²⁶⁶ *Ibid.*

²²⁶⁷ Referred to as the law in war, which governs the conduct of hostilities in armed conflicts.

²²⁶⁸ ICRC, “Humanitarian Law, Human Rights and Refugee Law – Three Pillars”, *Op Cit.*

²²⁶⁹ Humanitarian Law violations in Kosovo available at <https://www.hrw.org/legacy/reports98/Kosovo/Kos9810-11.htm> retrieve on 26 April, 2024 at 09:10 am.

humanitarian law to individuals who are *hors de combat*, which apply in both international and non-international armed conflicts.²²⁷⁰

The philosophical basis for the protection of rights of *hors de combat* in international law is found in Articles of Geneva conventions at it Additional Protocols as mention above. International law has experienced violations of rights of *hors de combat* in recent years. There has been a lot of buzz surrounding the recent invasions of Russia into Ukraine and that of Israel to Palestine, not only has interest in international armed conflicts sparked overnight, but the protection of rights of *hors de combat* has emerged from irrelevance and is suddenly on everyone's lips. There is hardly any headline, interview, or speech that manages without a reference to the term *hors de combat*.

1.3.1 Definition of the term *Hors de Combat* in International Law

The term *hors de combat* is a term used in international humanitarian law (IHL) which describes a soldier who cannot fight due to being sick, wounded, captured or incapacitated. These soldiers are not allowed to be attacked or harmed because they pose no threat.²²⁷¹ The term “wounded” and “sick” are defined by together to encompassing “persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility”.²²⁷² The Protocol I to the Geneva Conventions also defines a person *hors de combat* if:

- a. He is in the power of adverse party;
- b. He clearly expresses an intention to surrender; or
- c. He has been rendered unconscious or is incapacitated by wounds or sickness, and therefore is incapable of defending himself;²²⁷³ Provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

Under the 1949 Geneva Conventions, enemy combatants *hors de combat* are non-combatants and automatically granted the status of protected persons. Lawful combatants' *hors de combat* receives prisoners of (POW) status and cannot be prosecuted for simply partaking in

²²⁷⁰ Protection of individuals hors de combat available at https://link.springer.com/referenceworkentry/10.1007/978-981-16-2116-1_22 retrieve on 26 April, 2024 at 09:20 am.

²²⁷¹ *Hors de combat*, available online at https://www.law.cornell.edu/wex/hors_de_combat Retrieved on 25 April, 2024 at 04:10 pm.

²²⁷² Article 8 of Additional Protocol 1 of Geneva Convention.

²²⁷³ Protocol I to the Geneva Conventions 1949.

hostilities. While unlawful combatants *hors de combat* do not receive the same privilege and are subject to trial and punishment (which may include capital punishment if the detaining power has such a punishment for the crimes committed).²²⁷⁴

1.3.2 Treatment of *Hors de Combat* in armed conflicts

The rules of international humanitarian law states that those who are not or no longer directly participating in hostilities are to be treated humanely and protected from harm.²²⁷⁵ The prohibition to attack any person *hors de combat* (those who are sick and wounded, prisoners of war) is a fundamental rule of IHL, for example, while soldiers could be targeted lawfully under normal circumstances, it is prohibited to target them if they surrender or are wounded and no longer pose a threat. Additionally, they may be entitled to more protection if they meet the criteria of prisoners of war.²²⁷⁶

1.3.2.1 Russia – Ukraine war

Since Russia's full-scale invasion in 2022, its war against Ukraine has had a disastrous impact on civilian life, killing thousands of civilians, injuring many thousands more, and destroying civilian property and infrastructure. Russian forces committed a litany of violations of international humanitarian law, including indiscriminate and disproportionate bombing and shelling of civilian areas that hit homes and healthcare and educational facilities. Russian or Russian-affiliated forces committed serious violation of rights of *hors de combat* who faced terrifying ordeals and numerous obstacles by making their life unsustainable.²²⁷⁷

Russia-Ukraine War which started on the 14th February, 2022, as at 4th August, 2022, 5552 civilians were killed outright and 8513 injured in Ukraine as a result of Russian attacks²²⁷⁸. Local officials estimate as many as 24,328 people including *hors de combat* were also killed in mass atrocities. Aside from wide swaths of civilian's homes, schools, roads, and bridges destroyed hospitals and health facilities from 21 cities across Ukraine came under attack. The disruption to water, gas, electricity, and internet services also extended to affect supplies of medications to

²²⁷⁴ *Ibid.*

²²⁷⁵ *Hors de combat, Op Cit.*

²²⁷⁶ Basic principle of IHL- Diakonia International Humanitarian Law Centre available at <https://www.diakonia.se/ihl/resouces/international-law/basic-principle-ihl/> visited on 25 April,2024 at 4:10 pm.

²²⁷⁷ Russia's War in Ukraine-The Devastation of Health and Human Right
<<https://www.nejm.org/full/10.106/NEJMp>> visited on 11 March, 2023. 10:51 pm.

²²⁷⁸ *Ibid.* p. 12.

the civilian population and other supplies owing to destroyed facilities or production that ceased due to the war).²²⁷⁹

1.3.2.2 Israel and Palestine War

The conflict between the Israel Defense Forces (IDF) and Hamas which lasted for decades brought dire humanitarian consequences on the population in Gaza. According to the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA)²²⁸⁰, as a result of the conflict *hors de combat* (including several civilians) who are Palestinians were killed and injured. To this end the following acts which are and shall remain prohibited at any time and in any place whatsoever with respect *hors de combat* are always happening between the Israel Defense Forces and Hamas in Gaza:

- i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii. Taking of hostages;
- iii. Outrages upon personal dignity, in particular humiliating and degrading treatment.
- iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court.²²⁸¹

1.4 Specific Categories of Persons *Hors de Combat* in International Law

International humanitarian law protects those who do not take part in the fighting (*Hors de Combat*), such as civilians and medical and religious military personnel. It also protects those who have ceased to take part, such as wounded, shipwrecked and sick combatants, and prisoners of war.²²⁸² These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal

²²⁷⁹ *Ibid.*

²²⁸⁰ United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Field Update on Gaza from the Humanitarian Coordinator: available at <http://legalanswers.sl.nsw.gov.au/hot-topic-80-international-law/implimentation...>> visited on 25 April, 2024. 10:15 am p. 1

²²⁸¹ UN OCHA *Op Cit.*

²²⁸² International Committee of the Red Cross (ICRC) (2016) <https://www.icrc.org/en/war-and-law/treaties-customary-law>. p. 2. Access on 20 December, 2023 at 12:30 pm.

guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction.²²⁸³

More specifically: it is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected.²²⁸⁴

There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families. The law sets out a number of clearly recognizable symbols which can be used to identify protected people, places and objects. The main emblems are the Red Cross, the Red Crescent and the symbols identifying cultural property and civil defence facilities.²²⁸⁵

IHL protects certain categories of people from the effects of hostilities. These include people who are not or are no longer taking part in the hostilities, such as:²²⁸⁶

- i. Wounded, sick and shipwrecked people, whether military or civilian;
- ii. Medical and religious personnel, whether military or civilian;
- iii. Persons detained in connection with an armed conflict, including prisoners of war;
- iv. Civilians.²²⁸⁷

Parties to a conflict must respect these people's lives, dignity, and mental and physical integrity, provide them with material assistance and treat them humanely and without discrimination in all circumstances. This means:²²⁸⁸

²²⁸³*Ibid.* p. 3.

²²⁸⁴Muntaqa Mahboub M., (2009), *War and the Protection of the Rights of Individuals, an Examination of Islamic and International Humanitarian Laws*, Triumph Publishing Co. Kano, p. 24.

²²⁸⁵*Ibid.* p. 23.

²²⁸⁶Henckaerts, J., and Louise D., (Eds.) (2005) *Customary International Law*. Vol. 1, Cambridge University Press.p.3.

²²⁸⁷*Ibid.*

²²⁸⁸*Ibid.* p. 4.

- i. It is forbidden to kill or wound enemies who surrender or are unable to defend themselves;
- ii. The wounded and sick must be collected and cared for;
- iii. Civilians must not be intentionally attacked;
- iv. Civilian access to humanitarian assistance must be facilitated; and
- v. Prisoners and detainees must receive adequate food, shelter and medical care and be able to exchange messages with their families; they must also benefit from procedural safeguards and judicial guarantees.²²⁸⁹

1.5 Protection of Rights of *Hors de Combat* in International Law

Each of the four 1949 Geneva Conventions and their 1977 Additional Protocols applies to a specific category of person (with the Protocols applying more generally to “victims”). They define the rights and protections that must be respected and which each category is entitled to receive. The provisions vary slightly from one category to the next.²²⁹⁰

Unlike human rights law, humanitarian law does not establish universal rights applicable to all individuals.²²⁹¹ Instead, it defines categories of individuals to whom it grants specific rights and protection, either because these people are more exposed to the risks engendered by conflict or because they are naturally more vulnerable²²⁹². The risk of this categorization is that certain individuals may not receive adequate protection if the actors in a conflict do not recognize them as belonging to one of the categories of protected persons.²²⁹³ To counter this risk, humanitarian law also establishes certain fundamental guarantees that are applicable in time of conflict to everyone who does not or no longer participates in the hostilities.²²⁹⁴ Certain categories of protected persons have the right to additional protection, derived from their use of a distinctive emblem in a manner foreseen by the Conventions and Additional Protocol I. An individual who has the status of a protected person under international humanitarian law has the right to special protection and reinforced relief.²²⁹⁵

²²⁸⁹*Ibid.*

²²⁹⁰Fleck, Dieter, ed. (1995), *The Handbook of Humanitarian Law in Armed Conflicts*. Oxford: Oxford University Press, pp. 209–376.

²²⁹¹*Ibid.* p.209.

²²⁹²*Ibid.*

²²⁹³*Ibid.*

²²⁹⁴*Ibid.* p.210.

²²⁹⁵*Ibid*

The relevant rules and protections were encapsulated by the four landmark Geneva Conventions of 1949.²²⁹⁶ The provisions of the 1949 Geneva Convention are sub headed, for convenience of discussion, into four subheadings, viz: Protection of injured and sick on land; protection of injured, sick and shipwrecked at sea; protection of prisoners of war; protection of civilians.²²⁹⁷

1.5.1 Protection of injured and sick on Land

The first Geneva Convention of 1864 provided for the amelioration of the condition of injured members of the army in the field of battle and this is therefore, said to be the oldest established part of modern international humanitarian laws. Presently, however, the principal provision is contained in the first 1949 Convention.²²⁹⁸

This Convention represents a revised and enlarged version of the 1929 Geneva Convention on the wounded and sick. Articles 59 of this Convention (1949) expressly provide that it replaces the earlier provisions as between parties.²²⁹⁹ It follows the traditional lines and the fundamental principles governing earlier version of the privileges of medical personnel for instance as well as the equipment in enemy hands.²³⁰⁰

Article 13 of the 1929 Geneva Conventions provides that the provisions of the Convention are applicable to wounded and sick persons (as the title signifies) falling into any of the six categories, viz;²³⁰¹

- a. Members of the armed forces of a party to the conflict, including militia and voluntary corps;
- b. Members of the other militia or volunteer corps and resistance movement in or outside their own territory, or even in adverse occupation, provided they are under responsible hierarchical and answerable command, wear a distinctive sign recognizable at a distance, carry arms openly and conduct themselves in accordance with the laws and customs of war;

²²⁹⁶ Suleiman A. J., *Op Cit.* p. 42.

²²⁹⁷ *Ibid.*

²²⁹⁸ *Ibid.*

²²⁹⁹ *Ibid.*

²³⁰⁰ *Ibid.*

²³⁰¹ *Ibid.*

- c. Members of the regular forces of government not recognized by a detaining force, power or government;
- d. Authorized civilians such as journalists and welfare workers, attached to armed forces;
- e. Crew of merchant ships and civil aircrafts without better protection of the law;
- f. Persons involved in resisting invasion bearing arms openly but respect the customs of war.²³⁰²

The above categories are further broadened by the 1977 Additional Protocol I, Article 8, covers all wounded and sick persons, whether members of armed forces or civilians, provided they refrain from hostile acts.²³⁰³ The Article not only expanded but precisely gave the exact definition of “sick and wounded” as referring to all those rendered vulnerable and priori within the protected category due to “trauma disease or other physical or mental disorder or disability, are in need of medical assistance or care (including also maternity cases, new born babies and others.” It was also expanded to include the “infirm” or “expectant mothers” (i.e. pregnant women).²³⁰⁴

1.5.2 Protection of Injured and Sick and Shipwrecked at Sea

The principles relating to the protection of injured, sick and ship-wrecked at sea are found in the Second Geneva Convention of 1949 as the principal source with some additional provisions in 1977 Additional Protocol I. the maritime or naval conditions are slightly different from the land situations and therefore, require distinct, even if similar provisions.²³⁰⁵

Premise to the above it must be noted that no further provision was made in respect of the sick and injured in the “air”. This is because the “air” situation may be either over “the sea” and therefore, falls within the situation of sea protected categories or over “the land” thereby falling within the injured and sick on land provision.²³⁰⁶

1.5.3 Protection of Prisoners of War (POW)

²³⁰² These customs include military necessity, along with distinction, proportionality, humanity and honor.

²³⁰³ Suleiman A. J., *Op Cit.* p.43.

²³⁰⁴ *Ibid.*

²³⁰⁵ *Ibid.*

²³⁰⁶ *Ibid.*

The provisions for the protection of prisoners of war are contained in the third Geneva Convention of 1949 which is concerned with prisoners of war and consist of comprehensive code centered on the need for humane treatment in all circumstance of all the victims of armed conflict, prisoners of war are said to be the most vulnerable entangled under a country with which their country or is at war,²³⁰⁷ they are inevitable target of hostilities and merciless treatment.

The protection of prisoners of war still remains complex and sensitive. However, not all persons captured in the course of armed conflict are prisoners of war entitled to the status and protection of “prisoners of war”.²³⁰⁸ Article 4 of the 1949 Geneva Convention III provides that ‘members of the armed forces of a party to a conflict as well as members of Military or Volunteer corps forming part of such armed forces’ are the prisoners of war.²³⁰⁹ Again, apart from the members of the armed forces Article 4A (Geneva Convention III) further provides for the following as entitled to the prisoners of war status:

- a. Civilians working with the armed forces which includes welfare staff, labor units and of course accredited war correspondents provided they are so authorized by the accompanied armed forces and identified in that status;
- b. Members of militias and volunteers corps;
- c. Arm carrying members of a community, in a non occupied territory, who resist invasion of their community but observe the laws and custom of war example of these customs include military necessity, along with distinction, proportionality, humanity and honor;
- d. Crews of civil air craft’s or merchant ships of parties to the conflict who do not benefit from better treatment.²³¹⁰

Another development in respect of those entitled to the protection accorded to prisoners of war is the expansion in 1977 to encompass, inter-alia, members of civil defence unit.²³¹¹ Such extension was also accorded to the para-military-law enforcement agencies.²³¹²

²³⁰⁷*Ibid.*

²³⁰⁸*Ibid.*

²³⁰⁹*Ibid.*

²³¹⁰*Ibid.*

²³¹¹ Article 67 Additional Protocol II

²³¹²*Ibid* Article 43 (3)

1.5.4 Protection of Civilian in Time of War

The protection of civilians in time of war is covered by the fourth Convention ²³¹³ its provisions are concerned with the protection of civilians in time of war.²³¹⁴ It is basically an extension of existing pre-1949 rules of war (especially the Hague Law) although its extended protection is still limited to persons who at a given moment and in any manner whatsoever, find themselves in the centre of a conflict or occupation, in the hands of a party to conflict or occupying power of which is not his nationals.²³¹⁵

The provision made for civilian protection in 1949 was not until 1977 properly extended with comprehensive provision vide the first Additional Protocol. The comprehensive provision can now be captured in two perspectives:²³¹⁶

- a. Provisions dealing with the entitlement of individual civilian and the civilian population in general, to protection against dangers arising from military operations; and
- b. Provisions restricting the methods and means of warfare in any armed conflict.

These provisions are ultimately derived from the 1864 Declaration of St. Petersburg.²³¹⁷

The “civilian” in the new expanded context refers to any person who is not a member of the belligerent armed forces, whether or not the authority on which such a force defends is recognized by the adverse party or associated militia, in corporate paramilitary police or volunteer corps, including organized resistance units, “*Levee enmasse*”²³¹⁸ in immediate resistance to invasion.²³¹⁹ Not only are these rules made more comprehensive for the protection of the civilians but further impose obligation on the civilians themselves to refrain from, and not direct part in hostilities.²³²⁰ In the conduct of hostilities civilian populations and individuals

²³¹³ Convention IV, Geneva Convention 1949.

²³¹⁴ Article 6, Convention IV.

²³¹⁵ Suleiman A. J., *Op Cit.* p. 49.

²³¹⁶ *Ibid.* p.50.

²³¹⁷ *Ibid.*

²³¹⁸ *Levee enmasse* refers to the inhabitants of a territory who not being occupied or in the face of an eminent enemy invasion spontaneously take-up arms to protect and resist the invasion, without much time and opportunity to a regular force. They are regarded by modern IHL as “Combatants” and entitled to be treated as prisoners of war if captured provided they carry arms and respect the laws and custom of war vide: Article 4 Geneva Convention III and Article 2 Hague Convention IV R of 1907.

²³¹⁹ Suleiman A. J., *Op Cit.* p. 50.

²³²⁰ Francois Bugnion (2003), *the International Committee of the Red Cross and the Protection of War Victims*, published by ICRC

may not be made object of attack in themselves, nor may they be put at risk by “indiscriminate attack.”²³²¹

1.6 Conclusion

The desire to protect the rights of *hors de combat* (those who no longer take part in hostilities) including civilian population led human beings to think of ways of protecting themselves from each other. These have informed the international community to enact laws that govern the conduct of wars in Hague Convention as early as 1899. Subsequently, other laws such as the Four Geneva Conventions of 1949 and their two Additional Protocols of 1979 were promulgated. The subsequent statutes of ad hoc tribunals and international criminal courts have added to the already loaded cluster of laws aimed at protecting armless citizens. However, the terrifying reality of modern conflicts in which *hors de combat* bear the burden, raise question as to the adequacy or effectiveness of humanitarian laws in protecting the rights of *hors de combat* in international law.

As for the problems observed in the law of wars and other instruments put in place need drastic measures to balance out the one-sided nature of the law and the activities associated with humanitarian cause. Subsequent upon this, recommendations are made below which, if implemented, could have a far-reaching and effective impact on reducing civilian casualties in armed conflicts. Over the years, there were calls to harmonize and unify laws governing the conduct of war. This is necessary to bridge the gaps caused by dichotomies existing between the laws. The international/non-international armed conflicts enactments tilted towards international armed conflicts to the detriment of internal conflict. There is a serious gap as the bulk of conflicts in the third world countries (especially in Africa) are internal in nature and constitute the bulk of unarmed civilian casualties in the modern day conflicts to the detriment of humanitarian considerations.

In view of the issues discussed in this paper, the following findings are made:

- i. No provision was made in the Geneva Conventions and its additional protocols in respect of the protection of the rights of sick and injured in the air.
- ii. The Geneva Conventions and its additional protocols are silent as to the clear meaning and definition of who a civilian is.

²³²¹*Ibid.* p. 745.

- iii. International law does not have a specific enforcement mechanism to ensure the protection of rights of *hors de combat* who suffered losses as a result of armed conflicts.

In view of the above findings, the following recommendations are made:

- i. The provisions of Geneva Conventions (I-IV) should be review to include the protection of the rights of sick and injured in the air.
- ii. The provisions of Geneva Conventions (I-IV) and it additional protocol should also be review to give a clear meaning and definition of who civilians is.
- iii. International law need to have a specific enforcement mechanism to ensure the protection of rights of *hors de combat* who suffered losses as a result of armed conflicts.



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)

FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA

August 7th – 9th 2024

DECENTRALISING TRIAL OF DRUG OFFENCES AND LEGISLATION IN NIGERIA: A
COMPARATIVE ANALYSIS AND THE CASE FOR MAGISTRATE COURT
JURISDICTION

¹Al-Ameen Abubakar and ²Usman Uwaisu Usman

¹Yusufu Bala Usman College of Education and Legal Studies Daura, Katsina State.

²Associate Partner at H & A Legal Consult, Independence Way, Kaduna.

Phone: 08036188757; Email: alamintek@gmail.com

Phone: 08061302352; Email: usmanuwaisuusman@gmail.com

Abstract:

This paper examines Nigeria's centralised approach to drug legislation and prosecution, which grants exclusive powers to the national assembly to make drug related legislations and restricted all drug-related offences to the jurisdiction to Federal High Courts. The current system, rooted in the Constitution and the National Drug Law Enforcement Agency (NDLEA) Act, has led to helplessness of State Governments, significant case backlogs, delayed justice, and inefficient resource allocation. Drawing on international examples, particularly Australia's decentralised model, this study proposes constitutional amendments to move drug offences to the concurrent legislative list and amendment of the NDLEA Act to grant jurisdiction to Magistrate Courts for minor drug cases. The paper analyses the limitations of the existing framework, including the overburdening of Federal High Courts and the inability of state governments to address local drug issues effectively. It advocates for redefining drug offences based on quantity thresholds and other relevant factors, enabling a more nuanced approach to prosecution and sentencing. The proposed reforms aim to streamline the judicial process, reduce delays, and allow for more localised and effective responses to drug-related issues across Nigeria, ultimately contributing to improved public health outcomes and a more responsive judicial system.

Keywords: Decentralisation, Exclusive Legislative list, Drug Legislation, Concurrent Legislative list, Magistrate Courts, Constitutional Amendment.

1.0 Introduction:

Nigeria's legal framework for addressing drug-related offences is currently characterised by a highly centralised approach. The Constitution places drug legislation under the exclusive purview of the federal government, and the National Drug Law Enforcement Agency (NDLEA) Act grants exclusive jurisdiction over drug cases to the Federal High Courts. While this system aims to ensure uniformity in drug control efforts, it has

inadvertently created significant challenges in the efficient administration of justice and the effective combat against drug abuse and trafficking.

This paper seeks to critically examine the limitations of Nigeria's current approach and propose a more decentralised system drawing inspiration from international best practices, particularly the Australian model. By exploring the potential benefits of constitutional amendments to allow state-level drug legislation and granting jurisdiction to Magistrate Courts for minor drug offences, this study aims to contribute to the ongoing discourse on improving Nigeria's drug control strategies and judicial efficiency.

The research will begin by outlining the existing legal framework in Nigeria, followed by an analysis of its shortcomings. It will then present a comparative study of Australia's decentralised approach, highlighting the successes and lessons that can be drawn from this model. Finally, the paper will propose specific reforms for the Nigerian context, including constitutional amendments and the redefinition of drug offences based on quantity thresholds and other factors.

By addressing these critical issues, this study seeks to provide a pathway towards a more efficient, equitable, and effective system for managing drug-related offences in Nigeria, ultimately contributing to improved public health outcomes and a more responsive judicial process.

2.0 Nigerian Legal Framework on Drugs

Nigerian enactments or legal framework on illicit drugs were founded from the domestication of international treaties²³²² to which the country is a signatory. The long line of countries that are signatories to international conventions, treaties and protocols on drugs is a clear sign that no country intends to be left behind in the control and regulation of illicit or hard drugs within and outside its territory.²³²³ Since independence

²³²² Example of this is The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention)

²³²³ Ekwo E.I. (2018) '*Drug Laws Enforcement and Administration in Nigeria*' Princeton & Associates Publishing Co. Ltd p.91

or even before, there have been various statutes dealing with the control and regulation of illicit and hard drugs.

One of the pre-independence legal instruments that shaped Nigeria's responses to drug menace was the Dangerous Drugs Ordinance of 1935, which was the first local legislation promulgated by the colonial government and it aimed at prohibiting the importation, exportation, transit, production, sales, distribution of opium, coca leaves, Indian hemp, morphine or heroin or other dangerous drugs; it was then followed by the Indian hemp Decree No. 19 of 1966, which prescribed a stiff punishment of death penalty or 21 years of imprisonment for the cultivation, 10 years imprisonment for exportation and for those found smoking it or having possession of it.²³²⁴ The Dangerous Drugs Ordinance cum Decree is now entitled Dangerous Drugs Act by virtue of it being made part of the Laws of the Federation of Nigeria, 2004.

The two legislations were closely followed by the Indian hemp (amendment) Decree No. 34 of 1975, which came with less severe punishment but was immediately re-amended in 1975, bringing back the stiffer punishment. These legislations were followed by the special tribunal (miscellaneous offences) Decree of 1984, The Decree expressly prescribed death penalty by firing squad for dealing in, buying, selling, exposing or offering for sale or luring somebody to buy, sell, use, smoke, or inhale any drug known as cocaine or related drugs. The Indian Hemp Decree is now Indian Hemp Act²³²⁵ forming part of the Laws of the Federation of Nigeria, 2004.

The extant National Drugs Law Enforcement Agency (NDLEA) Act²³²⁶, was initially promulgated in 1989 as a Decree of the Military Government of General Ibrahim Badamasi Babangida. It was the initiation of the Military Government through the promulgation of the Revised Edition (Laws of the Federation of Nigeria) Decree, which led to the conversion of Decrees existing at that period to Acts and forming part of the Revised Laws of the Federation 1990 edition. On the coming into effect of the 1999 Constitution, section 315 (4) (b) of the Constitution thereof made the NDLEA Decree

²³²⁴ Salisu S and Lawan M.A. (2022) 'Legal Frameworks on Drugs and Money Laundering Activities in Nigeria' Dec., *Unimaidjicol*, Vol. VII, No. 1, pp. 191-192

²³²⁵ CAP I6 LFN 2004

²³²⁶ CAP N30 LFN 2004

and other enactments existing at the time of coming in to force of the Constitution existing laws.²³²⁷

These provisions were followed by the Counterfeit and Fake Drugs and Wholesome Processed Food (Miscellaneous Provisions) Act²³²⁸, all with the primary aim for the control, suppression and enforcing relevant legal frameworks dealing with illicit drugs.

2.1 Exclusive Legislative List in Nigeria

Ordinarily, the phrase 'exclusive' means *"Excluding all others, shutting out other considerations, not shared or divided; sole; single; as an exclusive right."*²³²⁹ Turning to the Constitutional clause, "Exclusive Legislative List" means the list in Part 1 of the second schedule to the Nigerian constitution.²³³⁰ The term Exclusive Legislative list and its sister or opposite term as used in the Constitution were given judicial interpretation by the Supreme Court of Nigeria in *AG Federation v. AG Lagos State*²³³¹ thus:

"The Constitution itself has given the interpretation of the terms "Exclusive Legislative List" and "Concurrent Legislative List". Whereas the former refers to the "List" in Part 1 of the Second Schedule to the Constitution, the latter refers to the "List" of matters set out in the First Column in part II of the Second Schedule to the Constitution with respect to which the National Assembly and House of Assembly may make laws to the extent prescribed, respectively, opposite thereto in the second column thereof. The exclusivity referred to in the Exclusive Legislative List, although not comprehensively defined, may, perhaps, refer to a point where the enactment in question is capable of excluding all others, shutting out other considerations not shared by or divided between others. The enactment is sole and single in its form and application as appropriated by its exclusive right. See: Abraham Onyeniran & Ors v. James Egbetola & Anor (1997) 5 NWLR (Pt.504) 122 at 131. Therefore, apart from the National Assembly, no other legislative assembly whether of state or Local Government (if any) can legally and effectively legislate on any matter listed under the Exclusive Legislative List. Per MUHAMMAD ,J.S.C (Pp. 121-122 paras. A-A)

The Constitution under its section 4 has defined the legislative boundaries of the National Assembly and their states counterparts whereas it confers on the former an

²³²⁷ Ekwo E. I. *op. cit.* p.97

²³²⁸ CAP C34 LFN 2004

²³²⁹ Per Mohammed JSC in *OYENIRAN & ORS v. EGBETOLA & ANOR* (1997) LPELR-2876(SC) (Pp. 19 paras. D)

²³³⁰ Section 318 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

²³³¹ (2013) LPELR-20974(SC)

exclusive power to legislate on all matters contained in the Exclusive Legislative list of the Constitution part of which is Drugs. Section 4 of the *Grund-norm* provides:

(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.²³³²

The Exclusive Legislative List of the Constitution is outlined in Part I of the Second Schedule. Specifically, paragraph 28 places drugs under the exclusive legislative domain of the National Assembly. This means that only the federal government has the authority to create laws regarding drugs, excluding state governments from this power.

This centralised approach limits state governments' abilities to address specific local needs related to drug control. For instance, in 2016, the Kaduna State Government took a bold step by enacting a law titled "A Law to Prohibit Substance Abuse and to Provide Treatment for Substance Abusers and Addicts."²³³³ This law established the Kaduna State Bureau for Substance Abuse Prevention and Treatment (KADBUSA).²³³⁴

The law defines controlled substances broadly, including drugs declared illegal by the NDLEA Act, Dangerous Drugs Act, Poison and Pharmacy Act, it also includes prescription drugs, and over-the-counter medications that can be abused.²³³⁵ The Primary objective of the law is to ensure the compulsory treatment of individuals severely dependent on substances who are likely to harm themselves or others or who

²³³² Section 4 (2) and (3) CFRN *op. cit.*

²³³³ Also referred in Section 1 as Kaduna State Substance Abuse and Treatment Law. Law No. 9, Laws of Kaduna State of Nigeria. (2016). Kaduna State of Nigeria Gazette, 27(50), Supplement Part A.

²³³⁴ Section 5 *Ibid*

²³³⁵ Section 3 *ibid*

cannot give informed consent. The aim is to safeguard the health and safety of these individuals and the public.²³³⁶ Furthermore, the law empowers the Magistrate Court, acting as the Substance Abuse Treatment Court,²³³⁷ to mandate involuntary admission for treatment if some specific conditions are met and the laid down procedure is followed.²³³⁸

While the provisions of this law are admirable and highlight the desperate need for state-level initiatives to tackle drug abuse, they face significant constitutional challenges. The exclusive legislative list is strict; if an item is on this list, only the federal lawmakers can legislate on it. Since drugs and poisons are included, any related state legislation is at risk of being invalidated. Even though the KADBUSA law addresses gaps not covered by federal laws, it remains vulnerable due to these constitutional constraints.²³³⁹

The cautious drafting of the KADBUSA law, evident in the deliberate avoidance of the term 'drugs' whenever possible, reflects the legal uncertainties faced by the drafters. However, for the law to be truly effective, a constitutional amendment is necessary to move drugs from the exclusive legislative list to the concurrent list. This would enable both federal and state governments to enact comprehensive drug-related legislation to cover areas most suitable for each tier of Government.

Despite KADBUSA's legal authority to enforce treatment, in practice, the Bureau mainly focuses on treating and rehabilitating those who seek help voluntarily.²³⁴⁰ While voluntary cooperation is crucial for successful rehabilitation, the state could achieve better outcomes if all patients were given the choice between voluntary and involuntary treatment. If the Bureau and the courts could mandate treatment as an alternative to incarceration, many individuals would likely choose treatment, assuming the law could operate without constitutional limitations.

²³³⁶ Section 4 *ibid*

²³³⁷ Section 27 *ibid*

²³³⁸ Sections 19-27 *ibid*

²³³⁹ Madubuike-Ekwe, N. J., & Mbadugha, J. N. (2018). The scope and limitations of legislative powers under the 1999 Constitution of Nigeria. *Benson Idahosa University Journal of Private and Property Law*. Retrieved from <https://www.biu.edu.ng/wp-content/uploads/2018/09/BIUJPPLv1i1.3.pdf> last accessed 24/7/2024

²³⁴⁰ Kigwab Khah, P.A to the D.G KADBUSA (Personal Interview, 23rd July, 2024)

Meanwhile, the National Drug Law Enforcement Agency (NDLEA) is overwhelmed with combating major drug manufacturers, importers, exporters, and distributors, leaving less attention for minor distributors and users. This highlights the need for more localised efforts and collaboration between federal and state authorities to address the multifaceted challenges of drug abuse effectively. The NDLEA has just about 55 formations across the entire country,²³⁴¹ when this is compared with the 768 local governments and 6 area councils in Nigeria,²³⁴² there is no gainsaying that Narcotics cannot be eradicated without the direct involvement of State Governments.

A comprehensive anti-drug strategy necessitates a legal framework that empowers state-level institutions to take more decisive action. The current situation underscores the need for constitutional reform that allows states greater latitude in addressing substance abuse within their jurisdictions.

3.0 Australian Experience

In Australia, the Constitution establishes a framework where both the Federal and State/territory governments have legislative powers. Sections 51, 107 and 109 outline the distributions and interactions of these powers. This system allows for a coordinated strategy on drug control while enabling states/territories to tackle local issues and implement specific policies and programs that fit their respective regions.

At the Federal level, laws such as Therapeutic Goods Act 1989 determines and regulate controlled substances²³⁴³, The Customs Act 1901 regulates importation and exportation of goods including controlled substances²³⁴⁴ and Criminal Code Act 1995 prohibits serious drug offences such as trafficking, manufacturing and possession of significant quantities of controlled substances²³⁴⁵.

²³⁴¹ National Drug Law Enforcement Agency. (2022). Annual report 2022. [<https://www.ndlea.gov.ng/annual-report>]

²³⁴² Section 3 (6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

²³⁴³ Therapeutic Goods Act 1989, Act No. 21, 1990 Registered: 08/07/2024. Retrieved from <https://www.legislation.gov.au/Details/C2004A03952> on 26th July, 2024,

²³⁴⁴ Customs Act 1901, Act No. 6 of 1901. (1901). Retrieved from <https://www.legislation.gov.au/Details/C1901A00006> on 26th July, 2024,

²³⁴⁵ Criminal Code Act 1995, Act No. 12 of 1995. (1995). Retrieved from <https://www.legislation.gov.au/Details/C2004A04868> on 26th July, 2024,

The States and Territories have significant autonomy in legislating and enforcing laws related to the possession, use, distribution and production of drugs within their jurisdictions. We will show a few examples of these laws:

1.1 New South Wales has the '*Drug Misuse and Trafficking Act 1985*' which governs offences related to the use, possession, supply and production of prohibited drugs and plants.²³⁴⁶

1.23.2 Victoria has the '*Drugs, Poisons and Controlled Substances Act 1981*' this law regulates the Control, supply, and use of drugs, poisons, and controlled substances.²³⁴⁷

1.33.3 Queensland has the '*Drugs Misuse Act 1986*' the law addresses the illegal production, supply and possession of dangerous drugs²³⁴⁸.

1.43.4 Western Australia has the '*Misuse of Drugs Act 1981*' this provides for prohibition of possession, manufacture and trafficking of illicit drugs²³⁴⁹.

The choice of Australia as a comparison is because, Australia operates a Federal System like Nigeria, it has suffered serious rise in drug use in the 1990s and it has recorded enormous success in the fight against drugs and United Nations Office on Drugs and Crimes (UNODC) highlighted that one of the key ingredients of the success recorded in Australia was that "*The drug policy was largely bi-partisan in nature as the States as well as the federal Government participated in its formulation and implementation*"²³⁵⁰ The UNODC reported that the Australian success was largely due to the coordination between the Federal Government, State Governments and Territories. This might not be the only reason, but it will be a starting point for Nigeria.

4.0 Jurisdiction on Drugs Offences in Nigeria

²³⁴⁶ Drug Misuse and Trafficking Act 1985 No 226 (NSW) (Current version for 19 February 2024 to date). Retrieved July 26, 2024, from <https://legislation.nsw.gov.au/view/whole/pdf/inforce/2024-07-27/act-1985-226>

²³⁴⁷ Drugs, Poisons and Controlled Substances Act 1981, Act No. 9719/1981, Version 137. (1981). Retrieved July 26, 2024, from <https://www.legislation.vic.gov.au/in-force/acts/drugs-poisons-and-controlled-substances-act-1981/137>

²³⁴⁸ Queensland Drugs Misuse Act 1986, Reprint current from 3 May 2024 to date. Retrieved July 26, 2024, from <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1986-036>

²³⁴⁹ Misuse of Drugs Act 1981, Act No. 066 of 1981. (1981). Retrieved July 26, 2024, from https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a522.html

²³⁵⁰ United Nations Office on Drugs and Crime. (2018, October). *Drug policy and results in Australia*. https://www.unodc.org/documents/drug-prevention-and-treatment/Australia_Drug_Policy_Results_2018.pdf

The term Jurisdiction has been defined as the limits imposed on the power of a validly constituted Court to hear and determine issues between persons seeking to avail themselves of its process by reference to the subject matter of the issues or to the persons between whom the issues are joined or to the kind of relief sought.²³⁵¹ It is elementary law that jurisdiction is the superstructure upon which the judicial power of a court of law is founded. In other words, jurisdiction is the life wire, the bedrock and foundation of all judicial and even quasi-judicial proceedings. Consequently, any decision reached without jurisdiction by a court of law or any tribunal is generally said to be null, void and of no legal effect whatsoever. In this regard, the Court of Appeal of Nigeria once restated the law in *Incorporated Trustees of Island Club & Ors V. Sikuade*²³⁵²:

"Jurisdiction is a threshold issue and is the lifeblood of any adjudication, the Apex Court on the importance of jurisdiction said as follows:

"Jurisdiction is a threshold issue in that a Court must have jurisdiction before it can enter into the cause or, matter at all or before it can make a binding order in it." See ODOFIN v. AGU (1992) NWLR (Pt. 229) 350.

The effect of want of jurisdiction divests the Court of competence to take a step in the matter and any defect in the competence of the Court is fatal, the proceedings amount to total nullity however well conducted, see OLOFU v. ITODO (2010) 18 NWLR (Pt. 1225) 545. This is trite beyond citing of authorities. The position is also settled that where the jurisdiction of a Court is challenged, the only jurisdiction the Court has is to determine whether it has jurisdiction or not. Consequently, the general rule is that the objection is taken first to resolve the challenge before taking any step in the substantive matter. However, the challenge to jurisdiction can be taken along certain matters, such as originating summons which do not require oral evidence to save time. Even in such situations, the Court must resolve the issue of jurisdiction first before proceeding to resolve the substantive matter, see SEPLAT PETROLEUM DEVELOPMENT v. BRITANNIA-U-NIGERIA LTD & ORS (2014) LPELR-CA/L/100/2014 where this Court held thus:

"Jurisdiction can be challenged in various forms and in this case, it was by a preliminary objection. It has been decided that once jurisdiction is challenged, the Court should first determine whether it has jurisdiction or not. That at that stage the only jurisdiction the Court has is to determine whether it has jurisdiction or not to do any other business of

²³⁵¹ Petroleum (special) Trust Fund v. Fidelity Bank & Ors (2021) LPELR-47482 (SC) (Pp. 44-45 paras. F)

²³⁵² (2016) LPELR-42278(CA)

the Court with regards to the subject matter, see the case of N.D.I.C. v. C.B.N. supra at 292 where the Court held as follows: once the issue of jurisdiction is raised in a suit, the Court must not give an order in the suit affecting the defendant until the issue is settled." Per NIMPAR J.C.A (Pp. 8-10 paras. C)

It is clearly seen from the above judicial authorities that issue of jurisdiction over a matter or case before Courts is very fundamental that cannot be toyed with. The Court must ensure that it possess the requisite jurisdiction before delving to deal or decide a case brought to it otherwise the decision could become nullity however elegantly decided. Jurisdiction over drug offences being criminal in nature must be set out or donated by an enabling law before a court can assume same. This is in line with the authorities, one of which is the Court of Appeal decision in *Nguma v. FRN*²³⁵³ where it was held that:

Usually, criminal jurisdiction is dependent on the enabling law setting out the jurisdiction of the Court against the charge preferred against the defendant. In order to have jurisdiction, the Court must be satisfied that jurisdiction over the offence or crime is directly conferred on it by the enabling law; Onwudiwe v Federal Republic of Nigeria (2006) LPELR-2715(SC). The Court cannot exercise jurisdiction where the offence or crime is outside the enabling law;...

Courts are established by statute or the Constitution, and their jurisdiction is strictly defined by these legal frameworks. As established in *Obiweubi v. CBN*²³⁵⁴ and *ANPP v. Goni*²³⁵⁵, a court's jurisdiction is conferred solely by the laws or constitutional provisions that create it. This principle was further elucidated in the landmark case of *Madukolu v. Nkemdilim*²³⁵⁶, where it was held that a court is competent to adjudicate a matter if it is properly constituted, the subject matter is within its jurisdiction, and the case is initiated following due legal process. Any deviation from these criteria renders the proceedings null and void, irrespective of how well they are conducted, because the defect is extrinsic to the adjudication process.

Jurisdiction is fundamental to adjudication, likened to the lifeblood of the judicial process. Without jurisdiction, the court's efforts are futile. The principle of statutory

²³⁵³ (2018) LPELR-43890(CA)

²³⁵⁴ (2011) 7 NWLR (Pt.1247) 465

²³⁵⁵ (2012) 7 NWLR (Pt.1298) 147

²³⁵⁶ (1962) 2 SCNLR 341

interpretation dictates that clear and unambiguous statutory language must be given its natural and ordinary meaning unless such interpretation leads to injustice or absurdity. See *Ibrahim v. Barde*²³⁵⁷ and *Ahmed v. Kassim*²³⁵⁸

Before the promulgation of the NDLEA Decree, the jurisdiction on drugs offences was then conferred on the Magistrates by the then drugs offences legislations in vogue which were Dangerous Drugs Act and Indian Hemp Act. The former Act under its section 19 (6) provides for the jurisdiction of Magistrates to punish for any offence under the Act thus: *“Every magistrate, whether in Federal Capital Territory, Abuja or in any State, shall, notwithstanding anything contained in any enactment, have jurisdiction for the summary trial of any offence under this Act and may impose the punishment provided by this section for that offence”*.²³⁵⁹ On the other hand, the sister legislation of the Dangerous Drugs Act, that is, Indian Hemp Act provides that *“Jurisdiction of magistrates (1) Every magistrate in any part of Nigeria shall, notwithstanding anything contained in any enactment, have jurisdiction for the summary trial of any offence under sections 4 to 7 of this Act and may impose the punishment provided by this Act for such an offence”*.²³⁶⁰

However, with the birth of the NDLEA Decree now Act, the jurisdiction of the Magistrates over drugs offences was taken from them and conferred exclusively on the Federal High Court. The Act provided that *“The Federal High Court shall have exclusive jurisdiction to try offenders under this Act”*.²³⁶¹ The foregoing provision of the Act has been reinforced by section 251 (1) (m) of the Constitution which conferred exclusive jurisdiction on the Federal High Court over matters concerning drugs. In addition, section 251 (3) of the Constitution also states that *the Federal High Court shall have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred in section 251 (1) of the Constitution*.

A simple reading of the provisions of sections 16 (9) Dangerous Drugs Act, 8 (1) Indian Hemp Act and section 26 (1) of the NDLEA Act will reveal a serious conflict in terms of which court is to exercise jurisdiction over illicit drugs offences in Nigeria. This is

²³⁵⁷ (1996) 9 NWLR (Pt. 474) 513 at 577 B-C

²³⁵⁸ (1958) SCNLR 28 at 30 C)

²³⁵⁹ Section 19 (6) of the Dangerous Drugs Act, 2004 CAP D1 LFN 2004

²³⁶⁰ Section 8 (1) of the Indian Hemp Act, Cap.16, Laws of the Federation, 2004

²³⁶¹ Section 26 (1) of the National Drug Law Enforcement Agency Act

because the Dangerous Drugs Act and Indian Hemp Act have all use the phrases “*notwithstanding anything contained in any enactment*” which has the effect of bypassing any contrary provision that may be contained in any enactment or legislation in the country. And the NDLEA Act on the other hand, expressly confer on the Federal High Court jurisdiction over drug offences to the exclusion of all other courts in the country. This seeming conflict lead to various litigations over the issue of the applicable law in drugs offences in Nigeria.

Offences under Sections 4-7 of the Indian hemp Act include the exportation, smoking, unlawful possession, and use of premises for the smoking or sale of Indian hemp. However, the clear language of Section 8(1) does not confer exclusive jurisdiction on the Magistrate Court for these offences. Charges related to dealing with Cannabis sativa, punishable under Section 11(c) of the NDLEA Act, fall within the exclusive jurisdiction of the Federal High Court, as outlined in Section 251(1)(m) and (s) and (3) of the 1999 Constitution:

"251. (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred on it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters [relating to] - (m) drugs and poisons; (s) such other jurisdiction civil or criminal and whether to the exclusion of any other Court or not as may be conferred upon it by an Act of the National Assembly. (3) The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by Subsection (1) of this Section."

Consequently, the jurisdiction of the Magistrate Court is ousted in favour of the Federal High Court for such offences.

The Constitution, being the supreme law, prevails over other legislation. Section 1(3) of the Constitution states that any law inconsistent with its provisions is void to the extent of the inconsistency. While Section 251(1)(m) of the Constitution does not confer exclusive criminal jurisdiction on the Federal High Court for drug-related matters, it allows for additional jurisdiction to be conferred by the National Assembly under Section 251(1)(s). The NDLEA Act, an Act of the National Assembly, grants this exclusive jurisdiction, implying a repeal of the conflicting provisions in the Indian Hemp Act. This

repeal by implication occurs when the terms of the later statute are so inconsistent with the former that they cannot coexist. See *Governor of Kaduna State v. Lawal Kagoma*²³⁶² and *Akintokun v. LPDC*²³⁶³.

The exclusive jurisdiction conferred on the Federal High Court by the NDLEA Act, under the constitutional authority of the National Assembly, has effectively nullified the jurisdiction of the Magistrate Court in drug-related offences, including those involving Indian hemp. This position was affirmed in *Okewu v. F.R.N*²³⁶⁴, where it was held that Indian hemp falls under the purview of "drugs" in the NDLEA Act, thereby reinforcing the exclusive jurisdiction of the Federal High Court for related offences.

However, against the arguments from other quarters that the said section 8 (1) of the Indian Hemp Act is inconsistent with the provisions of section 251 (1) of the Constitution,²³⁶⁵ the Court decided by saying such an argument is wrong because the latter provision of the Constitution only confers exclusive jurisdiction on the Federal High over civil matters dealing with drugs not on criminal matters which was provided under the Indian Hemp Act. Therefore, if not for the provision of section 26 (1) of the NDLEA Act, the provisions of section 251 (1) can stand along with the provision of section 8 (1) of the Indian Hemp Act.²³⁶⁶

4.1 Challenges Posed by the Current System:

Presently in the country, the principal institutional body policing illicit drug trade and usage is the NDLEA. As we have seen in the preceding part of the paper, the Act setting up the body unequivocally gives exclusive jurisdiction to the Federal High Court to try all drug-related offences in the country. The jurisdiction of the Federal High Court is contained in Section 251 (1-3) of the Nigerian 1999 Constitution as amended. Specifically, the jurisdiction of the Federal High Court is two folds, namely, civil and criminal. The civil jurisdiction of the Court as enshrined in Section 251 (1) (m) of the Nigerian 1999

²³⁶² (1982) 4 SC 87

²³⁶³ (2014) 5-7 SC (Pt. 1) 1 at 84).

²³⁶⁴ (2012) 9 NWLR (Pt.1305) 327

²³⁶⁵ See the Court of Appeal decision in the case of *SHODIPO v. FRN* (2017) LPELR-42774(CA) (Pp. 15-21 paras. B) which reached the same conclusion that section 8 (1) of the Indian Hemp Act is inconsistent with section 251 (1) of the Constitution.

²³⁶⁶ *Mohammed V. FRN* (2018) LPELR-43908(SC) pp. 27-34, para. E-E

Constitution as amended patently covers drugs related matters. However, the 1999 Constitution does not expressly confer exclusive criminal jurisdiction on the Federal High Court in drug related matters rather the criminal jurisdiction (not exclusive) in relation to drugs is conferred on the Court by implication.²³⁶⁷ It is therefore beyond any argument that the Federal High Court of Nigeria as presently constituted by virtue of the provisions of the Constitution and NDLEA Act is the sole court with exclusive powers to entertain and dealt with all drugs related matters be them civil or criminal. This is a settled law now in the Nigerian's corpus of jurisprudence.

The restriction of jurisdictional power in drug-related offences to the Federal High Court has, however, constituted one of the legal challenges in combating drug offences in Nigeria. The reason for this is not far-fetched and this is submitted by one author to be divided into two parts.²³⁶⁸ First, there are several other causes that fall within the purview of the jurisdiction of the Federal High Court which of course keep the court almost always pretty busy. The exclusive jurisdiction given to the Federal High Court in drug offences compounds the overburdened cases scheduled in that court. This dovetails to the second part which is the daily uprising in drug cases. It cannot be over emphasised that drug trafficking, much more than certain criminal offence has become a daily occurrence nationally and globally. The number of drug offenders ditto the attendant drug related cases keep mounting for a single court as the Federal High Court to successfully cope with. Several drug-related cases have been dragging on before the Federal High Court for years on the account of tight cases schedule which do not allow expeditious disposition of such cases. Many at times, drug offenders do prefer to collude with corrupt drug policing officials by bribing their way out at any cost rather than facing daunting and protracted court prosecution.²³⁶⁹

The issue of unnecessary work load that overburdened the Nigerian Federal High Court is further compounded by the many Acts of the National Assembly that always confer exclusive jurisdiction on the Federal High Court despite the few number of such courts

²³⁶⁷ Ochala v. FRN (2013) LPELR-21386(CA) pp. 12-16 paras. C

²³⁶⁸ Akomolede T.I. and Adetifa E.K. (2021) 'Analysis of Some of the Challenges in Combating Drug Trafficking in Nigeria' *International Journal of Law*, Volume 7 accessed online from www.lawjournals.org on 14th July, 2024 at about 12:30pm p.58

²³⁶⁹ *Ibid*, p.58

in the country. Such Acts of the National Assembly are numerous beyond counting. The Chief Judge of the Federal High Court himself had once acknowledged this too much load on the Judges of the court that is clogging the justice especially from some enactments of the National Assembly where exclusive jurisdiction are usually conferred on the Court not minding the work load of the court from its normal cases. A good instance in this regard is the provision of the Electoral Act, 2022 which conferred exclusive jurisdiction on the Federal High Court to hear and determine all pre-election matters.²³⁷⁰ The Chief Judge of the Federal High Court speaking at the special session to mark the commencement of the Court legal year 2022/2023 along other stakeholders noted that members of the task force inaugurated by the Court to adjudicate on pre-election disputes had to suspend all regular cases in their respective courts due to urgency of the electoral cases which are time bound. The Chief Judge added that the Electoral Act made some of the judges to be shouldering more than 1000 case in their dockets. Also speaking at the same event, the President of Nigerian Bar Association criticised the National Assembly for vesting the exclusive jurisdiction of hearing pre-election matters on the Federal High Court. He said the innovative and novel provisions of the law come with a lot of pressure on the already overloaded dockets of the Judges.²³⁷¹ The foregoing statements by the key stakeholders is a summation of the true predicament of the Federal High Court in Nigeria which is congested with numerous cases contributing to the noted inefficiency in administering justice to especially drug offences which mostly populated the courts' dockets.

From the above therefore, it could not be an overstatement to say that minor drug offences involving small quantity of drug substance like say a kilogram or even less lingers in court docket for years without the court been able to dispose the case. This takes negative toll on the whole system of justice administration and also on the suspects themselves. At times before the NDLEA prosecutors are able to get remand orders from the Federal High Court, their detention centres are being highly congested considering the massive increase in the rate of arrest of drug offenders since the coming

²³⁷⁰ See sections 29 (5) and 84 (14) of the Electoral Act, 2022

²³⁷¹ Ejekwonyilo E (12th December, 2022) '*NBA Tackles National Assembly for Burdening 77 Judges with 1,800 Pre-election Suits*' Premium Times Newspaper accessed online from www.premiumtimesng.com on 16th July, 2024 at about 2pm

of the present czar of the Agency. When they are able to get the suspects arraigned in court and before the case is finally disposed, the suspects are usually remanded at the Custodial centres of the Nigerian Correction Services pending the hearing and determination of the cases except where the court admitted them to bail or they pleaded guilty and dealt with summarily. In any event, the minor drugs offences usually congested the courts dockets at the expense of handling the cases of major drug barons who are usually the Manufacturers, suppliers, importers and exporters of the drugs. At the same time, other cases of national interest like those dealing with government revenues and those of major foreign investors also suffer great delays because of the congestion primarily caused by the numerous drugs offences which are mostly minor cases of very small amount of the drug substance that can be dealt with by Magistrates more efficiently in such a way that the society as the victim and the suspects would not suffer miscarriage of justice on the ground of overdue delay.

4.2 Need for Amendment of the Constitution and the NDLEA Act

To better combat drug offences in Nigeria, we need to amend the current Constitution, which currently gives only the National Assembly the power to make drug laws. The proposed amendment would allow both the federal and state governments to create drug-related legislation. This means redefining offences under the NDLEA Act based on factors like the type of drugs, quantity of drugs involved and whether they are imported, exported, or produced. It also means giving state legislatures the power to handle minor drug offences, with state Magistrates' Courts taking on these cases.

By moving drug offences to the Concurrent List, state governments can develop customised solutions for their specific drug-related issues just like the Kaduna State government is doing through KADBUSA. This change would let States and even local governments to create targeted strategies to address their unique drug problems, encouraging community involvement and grassroots initiatives for drug prevention, treatment, and rehabilitation. States would be able to allocate resources more efficiently based on their own needs and priorities, rather than following a one-size-fits-all federal approach. Decentralisation would also foster better cooperation between federal, state,

and local authorities, helping to fight drug trafficking and abuse more effectively. States would be able to quickly respond to new drug trends and issues without waiting for federal action, take greater responsibility for drug control efforts, and address unique regional challenges like drug-related violence and trafficking hotspots.

Decentralising drug offences can greatly improve Nigeria's drug control efforts and positively impact the lives of its citizens. To achieve this, we need to amend the Constitution to give state governments the power to legislate on drug offences as we have seen in the case of Australia and the success that this collaboration has brought to the country.

4.3 Proposal to Confer Jurisdiction on Magistrates over Drug Offences

Given the serious congestion of drug-related cases at the Federal High Court, which leads to inefficiencies, it is desirable to grant jurisdiction to Magistrates' Courts over minor drug offences. This can be done by redefining the jurisdiction based on quantity thresholds, allowing Magistrates to handle the majority of minor cases.

Currently, Nigeria's NDLEA Act imposes broad penalties for drug offences without differentiating between minor and major offences. This results in disproportionate sentencing and prison overcrowding. By redefining offences based on threshold quantities and factors like import/export, production, usage and distribution, the system can better distinguish between small-scale users and major traffickers. This would ensure appropriate penalties and treatment options, addressing the severity of drug-related crimes by imposing harsher penalties for large-scale trafficking, production, and distribution while providing leniency for minor offences. The context of drug-related crimes, such as drug-related violence, corruption, or exploitation, would also be considered.

Redefining drug offences based on quantity thresholds and other relevant circumstances, and granting Magistrates' Courts jurisdiction over minor drug offences, such as possession of small quantities for personal use, would achieve the following;

- i. Streamline justice administration by allowing Magistrates' Courts to efficiently handle minor cases, reducing the burden on Federal High Courts and enabling

them to focus on complex, high-stakes cases. This would reduce congestion and backlog, clearing the backlog of drug-related cases and ensuring timely disposition.

- ii. Increase access to justice, as Magistrates' Courts are more accessible and widespread, making it easier for suspects to access legal services and for cases to be heard promptly.
- iii. Enable non-custodial sentences, such as community service, fines, or counselling, providing alternative sentencing options for minor drug offences, reducing recidivism, and addressing underlying issues.
- iv. Align with international best practices, as many jurisdictions delegate minor drug offences to lower courts or specialised tribunals, prioritising public health and rehabilitation.
- v. Free up resources for serious drug crimes, allowing Federal High Courts to concentrate on high-priority cases, like large-scale trafficking and other cases of national importance.
- vi. Improve drug treatment and support by enabling Magistrates' Courts to mandate treatment programs and support services for drug users, addressing addiction and reducing drug-related harm.⁸
- vii. By granting Magistrates' Courts jurisdiction over minor drug offences, Nigeria can achieve a more efficient, effective, and humane approach to drug control, prioritising public health, rehabilitation, and justice.

4.4 The Australian Example;

In Australia, different courts handle drug-related cases depending on how serious they are. Courts that deal with drug related offences vary according to numerous factors;

The Magistrates' Courts Handle minor offences and focus on rehabilitation and community-based sentences.²³⁷² Since each state and territory has its own laws for drug offences as we have previously discussed in this paper, such as the Drugs, Poisons and

²³⁷² Criminal Code Act 1995 (Cth):

Controlled Substances Act 1981 (Victoria), Misuse of Drugs Act 1981 (Western Australia), and Drug Misuse and Trafficking Act 1985 (New South Wales). These laws allow Magistrates' Courts to handle minor drug cases.

District and County Courts try Intermediate Offences they derive their jurisdictions from District/County Court Acts; These laws set up District or County Courts in each state and territory, and the laws allow these courts to handle more serious drug cases.²³⁷³

The Supreme Courts try Major drug offences. Each state and territory has laws establishing their Supreme Court, such as the Supreme Court Act 1970 (New South Wales), Supreme Court Act 1986 (Victoria), and Supreme Court Act 1935 (Western Australia). These courts handle the most serious drug offences. Serious drug offences are also detailed in the State and Territory Drug Laws which Supreme Courts handle.

Australian states also have the Drug Courts which are established by various Drug Court Acts in some areas, like the Drug Court Act 1998 (New South Wales), Drug Court Act 2000 (Queensland), and Magistrates' Court (Drug Court Division) Act 2000 (Victoria). Drug Courts focus on helping offenders with drug problems through treatment programs. The State and Territory Drug Laws have provisions for sending eligible offenders to Drug Courts for help.

Federal Courts deal with National and International Offences the Criminal Code Act 1995 (Cth) Covers federal drug offences, including importation and exportation of drugs. The Customs Act 1901 (Cth) governs the movement of prohibited substances, including drugs, and gives Federal Courts jurisdiction over these offences. The Federal Court of Australia Act 1976 (Cth) established the Federal Court of Australia and its power to handle federal drug cases.

There are studies that have shown that the Australian Drug Court model has yielded positive results. For example, the New South Wales (NSW) Drug Court has been found effective in reducing reoffending among participants. A study conducted by the Bureau of Crime Statistics and Research (BOCSAR) compared reconviction rates among Drug

²³⁷³ Example of these laws are the District Court Act 1973 (New South Wales), County Court Act 1958 (Victoria), and District Court of Queensland Act 1967 (Queensland).

Court participants to a matched comparison group and found that those who participated in the Drug Court program had lower rates of reoffending.²³⁷⁴

The Australia's approach has proven to be a valuable reference for other jurisdictions including Nigeria. Though we opined that Nigeria may not need to wholistically adopt the entire Australian system due to the logistical and financial challenge Nigeria may face in the process.

We have noted that other Jurisdictions that have recorded success in their war on drugs have a multi-layered approach to drug problem in their countries. The Multi-layered approach tackles the supply aspect of the drug problem and also tackle the demand end of it.

Portugal and Singapore are countries that are practicing a successful centralised approach of combatting drugs though with different mechanisms and approach. Their centralised approach is successful only due to the sizes and population of these countries in comparison with Nigeria. For example, Nigeria is 10 times the size of Portugal, and about 1,269 times larger than Singapore. Nigeria's population is 20 times that of Portugal. As for Singapore, Nigeria has about 200 million people whereas Singapore has about 5.7 million people.²³⁷⁵

This is to debunk any argument that there might be countries like Nigeria that have successfully tried a centralised system of fighting drugs. Other countries that may show success using a central approach cannot form basis for comparison with Nigeria unless if it can be shown that the Political system is similar to that of Nigeria.

5.0 Conclusion

The centralised approach to drug legislation and prosecution in Nigeria, has led to significant challenges in the administration of justice and the effective combat against drug abuse and trafficking. The overburdening of Federal High Courts with minor drug offences has resulted in case backlogs, delayed justice, and inefficient resource

²³⁷⁴ Don Weatherburn, Craig Jones, Lucy Snowball, and Jiuzhao Hua. The NSW Drug Court: A re-evaluation of its effectiveness. Crime and Justice Bulletin No. 121, September 2008. Retrieved from <http://www.bocsar.nsw.gov.au/Publications/CJB/cjb121.pdf> 27th July, 2024

²³⁷⁵ Central Intelligence Agency. (n.d.). The World Factbook. Retrieved from <https://www.cia.gov/the-world-factbook/countries/> 27th July, 2024

allocation, ultimately hindering the country's ability to address its drug-related issues comprehensively.

Drawing inspiration from the findings based on the current legal framework in Nigeria, the Australian model and other international best practices, this paper has proposed a series of reforms aimed at decentralising Nigeria's approach to drug control. The key recommendations include:

1. Constitutional amendments to move drug offences to the concurrent legislative list, allowing both federal and state governments to enact relevant legislation.
2. Redefining drug offences based on quantity thresholds and other relevant factors to distinguish between minor and major offences.
3. Amending the NDLEA Act to grant jurisdiction to Magistrate Courts for minor drug offences, thereby reducing the burden on Federal High Courts and improving access to justice.
4. Enabling more localised and tailored responses to drug-related issues at the state and community levels. Such as the setting up of KADBUSA by the Kaduna state government.

These proposed reforms have the potential to significantly enhance Nigeria's drug control efforts by streamlining the judicial process, reducing delays, and allowing for more efficient allocation of resources. Moreover, they would enable a more nuanced and context-specific approach to addressing drug abuse and trafficking, taking into account the unique challenges faced by different regions of the country.

While implementing these changes would require significant legislative effort and coordination between federal and state governments, the potential benefits in terms of improved public health outcomes, reduced recidivism, and a more responsive judicial system make this a worthy endeavor. As Nigeria continues to grapple with the complex challenges posed by drug abuse and trafficking, adopting a more decentralised and flexible approach may prove crucial in achieving long-term success in drug control efforts.

6.0 References

I. Textbook

1. Ekwo E.I. (2018) 'Drug Laws Enforcement and Administration in Nigeria' Princeton & Associates Publishing Co. Ltd

II. Journals

1. Akomolede T.I. and Adetifa E.K. (2021) 'Analysis of Some of the Challenges in Combating Drug Trafficking in Nigeria' International Journal of Law, Volume 7
2. Madubuike-Ekwe, N. J., & Mbadugha, J. N. (2018). The scope and limitations of legislative powers under the 1999 Constitution of Nigeria. *Benson Idahosa University Journal of Private and Property Law*. <https://www.biu.edu.ng/wp-content/uploads/2018/09/BIUJPLLviii.3.pdf>
3. Salisu S and Lawan M.A. (December, 2022) 'Legal Frameworks on Drugs and Money Laundering Activities in Nigeria' *Unimaidjicol*, Vol. VII, No. 1

III. Legislations

1. Constitution of the Federal Republic of Nigeria, 1999 (as amended)
2. County Court Act 1958 (Victoria)
3. Criminal Code Act 1995 (Cth)
4. Criminal Code Act 1995, Act No. 12 of 1995. <https://www.legislation.gov.au/Details/C2004A04868>
5. Customs Act 1901, Act No. 6 of 1901. <https://www.legislation.gov.au/Details/C1901A00006>
6. Dangerous Drugs Act, 2004
7. District Court Act 1973 (New South Wales)
8. District Court of Queensland Act 1967 (Queensland)
9. Drug Court Act 1998 (New South Wales)
10. Drug Court Act 2000 (Queensland)
11. Drug Misuse and Trafficking Act 1985 No 226 (NSW). <https://legislation.nsw.gov.au/view/whole/pdf/inforce/2024-07-27/act-1985-226>
12. Drugs Misuse Act 1986 (Queensland). <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-1986-036>
13. Drugs, Poisons and Controlled Substances Act 1981, Act No. 9719/1981, Victoria. <https://www.legislation.vic.gov.au/in-force/acts/drugs-poisons-and-controlled-substances-act-1981/137>
14. Electoral Act, 2022

15. Federal Court of Australia Act 1976 (Cth)
16. Indian Hemp Act, Cap.16, Laws of the Federation, 2004
17. Kaduna State Substance Abuse and Treatment Law. Law No. 9, Laws of Kaduna State of Nigeria. (2016)
18. Magistrates' Court (Drug Court Division) Act 2000 (Victoria)
19. Misuse of Drugs Act 1981, Act No. 066 of 1981 (Western Australia).
https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a522.html
20. National Drug Law Enforcement Agency Act
21. Supreme Court Act 1935 (Western Australia)
22. Supreme Court Act 1970 (New South Wales)
23. Supreme Court Act 1986 (Victoria)
24. Therapeutic Goods Act 1989, Act No. 21, 1990.
<https://www.legislation.gov.au/Details/C2004A03952>

IV. Case Laws

1. AG Federation v. AG Lagos State (2013) LPELR-20974(SC)
2. Ahmed v. Kassim (1958) SCNLR 28
3. Akintokun v. LPDC (2014) 5-7 SC (Pt. 1) 1
4. ANPP v. Goni (2012) 7 NWLR (Pt.1298) 147
5. Governor of Kaduna State v. Lawal Kagoma (1982) 4 SC 87
6. Ibrahim v. Barde (1996) 9 NWLR (Pt. 474) 513
7. Incorporated Trustees of Island Club & Ors V. Sikuade (2016) LPELR-42278(CA)
8. Madukolu v. Nkemdilim (1962) 2 SCNLR 341
9. Mohammed V. FRN (2018) LPELR-43908(SC)
10. Nguma v. FRN (2018) LPELR-43890(CA)
11. Obiuweubi v. CBN (2011) 7 NWLR (Pt.1247) 465
12. Ochala v. FRN (2013) LPELR-21386(CA)
13. Okewu v. F.R.N (2012) 9 NWLR (Pt.1305) 327
14. OYENIRAN & ORS v. EGBETOLA & ANOR (1997) LPELR-2876(SC)
15. Petroleum (special) Trust Fund v. Fidelity Bank & Ors (2021) LPELR-47482 (SC)
16. SHODIPO v. FRN (2017) LPELR-42774(CA)

V. Reports

1. Don Weatherburn, Craig Jones, Lucy Snowball, and Jiuzhao Hua. The NSW Drug Court: A re-evaluation of its effectiveness. Crime and Justice Bulletin No. 121, September 2008. <http://www.bocsar.nsw.gov.au/Publications/CJB/cjb121.pdf>
2. National Drug Law Enforcement Agency. (2022). Annual report 2022. <https://www.ndlea.gov.ng/annual-report>
3. United Nations Office on Drugs and Crime. (2018, October). Drug policy and results in Australia. https://www.unodc.org/documents/drug-prevention-and-treatment/Australia_Drug_Policy_Results_2018.pdf

VI. Others

1. Central Intelligence Agency. (n.d.). The World Factbook. <https://www.cia.gov/the-world-factbook/countries/>
2. Ejekwonyilo E (2022) 'NBA tackles National Assembly for burdening 77 Judges with 1,800 pre-election Suits' Premium Times Newspaper. www.premiumtimesng.com
3. Kigwab Khah, P.A to the D.G KADBUSA (Personal Interview conducted on 23 July, 2024)
4. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention)



PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON LAW AND
CONTEMPORARY SOCIETAL ISSUES (ABULC 2024)
FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA
August 7th – 9th 2024

THE PRIMACY OF CHILD PROTECTION IN ISLAMIC LAW: AN ANALYSIS OF
TEXTUAL PROVISIONS ON THE RIGHT TO SURVIVAL OF THE CHILD.

Abdulazeez Adavize Sadeeq, Yunusa Yahaya Bambale

Centre For Islamic Legal Studies, Ahmadu Bello University, Zaria
Munhaminnah24@gmail.com, 09034199978

Abstract

Protection of life is one of the fundamental objectives of Islamic law as it guarantees the continuation of human race. The most important and in fact the foundation upon which all other rights of the child is premised, is the right to survival. However, despite fact that Islamic law has, for over fourteen centuries, established extensive and precise legislations to safeguard this essential right, the practice of some Muslims leaves much to be desired. The aim of this paper, is to explore the right to survival of the child in Islam, with emphasis on the constituent parts of the right in order to facilitate appreciation of the precise import and content of the right. This research employs a doctrinal method of research and places reliance on the Qur'an, Sunnah, Statutes and Cases as primary sources and Books, Journal Articles, Seminar Papers as secondary source. The finding of this paper is that Islamic law has laid down comprehensive and extensive legislations to safeguard the all-important right of the child to survival. The specific provisions of the Shariah in respect to right of the child to survival is so comprehensive and precise that no other system of law or religion can boast of equaling it, not to talk surpassing it. The paper recommends that Muslim scholars and Imams should be proactive in creating awareness and educating the Muslim Ummah on the need to comply with the positive obligation placed on them by the Shariah to protect the right to survival of the child.

Keywords: Islam, Child, Right, Survival, Protection.

1.1 Introduction

The notion that children by virtue of tender age are a disadvantaged group deserving of special protection is relatively a modern one in international law²³⁷⁶. Indeed, the concern for the right of the child only became prominent after the world

²³⁷⁶ Lois Jensen (2010). Women's & Children's Rights: Making the Connection. UNICEF and UNFPA, New York. USA, p. 1

war I, even then, only for children in emergency situation²³⁷⁷. In contrast, Islamic law for over one thousand four hundred years has laid down comprehensive, unique and encompassing rights for the child. This fact has been succinctly stated in the following words;

Today, when the world is seriously taking note of children's rights and trying to devise means to curb child abuse and neglect, it indeed come as a pleasant surprise to find the amount of special care and concern shown towards children by Sharia which though over one thousand and four hundred years old, is yet so ahead of its times and modern in its provision as to be the envy of any contemporary legal system.²³⁷⁸

To further buttress the issue under discussion, the right of the child to survival and development is contained in article 6 of the Convention on the Rights of the Child²³⁷⁹. According to a commentator²³⁸⁰, it would be difficult to imagine anything more fundamental in the whole panoply of human rights than recognition of the right to life. Indeed, the United Nations Human Rights Committee (HRC) described it as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation. Ironically the in spite of the overwhelming importance of right to life, it is not found in the first polish draft of what was to become the Convention on the Right of the Child.

The most important and in fact the foundation upon which all other rights of the child is premised, is the right to survival. However, despite fact that Islamic law has, for over fourteen centuries, established extensive and precise legislations to safeguard this essential right, the practice of some Muslims leaves much to be desired. This paper examines the various provisions in the Shariah for the promotion and protection of the right of the child to survival. The paper seeks to explore the right to survival of the child in Islam, with emphasis on the constituent parts of the right in order to facilitate appreciation of the precise import and content of the right.

1.2 Meaning of a Child

²³⁷⁷ Maggie, B. (1986). *The Children and the Nations The Story of UNICEF*, P.I.C PTY Ltd, Sydney, p.22

²³⁷⁸ Ladan ,M. T. (2005). *A Hand Book on Sharia Implementation in Northern Nigeria Women and Children's Rights Focus*. League of Democratic Women (LEADS), Kaduna, Nigeria, p.73

²³⁷⁹ See also S 4 Child Rights Act, 2003

²³⁸⁰ Elaine E S (2015) *The Child's Right to Life, Survival and Development: Evolution and Progress*. Available in pdf at www.semanticsscholar.org. p1

A child in Islam is not determined by chronological age but by the attainment of puberty because it is at that age that a child becomes psychologically and physically mature enough to shoulder responsibilities. Puberty is attained by males and female upon the appearance of any of the following.

- a. Ejaculation of seminal liquid whether asleep or awake
- b. Growth of the pubic hair around the private organ excluding moustache or beard
- c. Menstrual flow or pregnancy in females²³⁸¹.

There is consensus among the various schools of Islamic jurisprudence concerning the factors used to discern attainment of puberty mentioned above. However, jurists are not unanimous in a situation whereby none of the signs are seen in a person. Some jurists have suggested 18 years for males and 17 years for females while others fix 16 and 15 years for male and female respectively.²³⁸² It has been suggested²³⁸³ that maximum age of puberty should be fixed at 18 years for both male and female.

A topical issue when considering the meaning of a child is whether or not an unborn child can be said to be a child and thus enjoying all the rights of the child that is applicable to it or an unborn child enjoys a special status different from a child. This is one of the issues that were keenly debated during the draft stage of the Convention on the Right of the Child. The disagreement was between those who regarded life as beginning at conception and others who viewed it as starting with live birth. In an attempt at reaching a compromise between the two positions, the CRC defined a child only in terms of the end of childhood and does not refer to the beginning.²³⁸⁴

The Shariah attends to childhood with care long before birth. It thus made it incumbent on the mother to safeguard her fetus and do all she can to prevent termination of pregnancy. For example, a pregnant woman is not obliged to fast during

²³⁸¹ EL-Imairi, S. (ND) Islamic Law of Personal Status (unpublished) Lecture Manual CILS ABU Zaria p.33 cited in: Babaji, B. (2008) An Overview of the Child's Rights Act. Being a Paper Presented at the Conference on the Rights of Women and Children: Issues and Challenges from Human Rights and Islamic law perspective CILS ABU Zaria on 16 and 17 June 2008, p. 261

²³⁸² *ibid*

²³⁸³ Babaji, B. (2008) An Overview of the Child's Rights Act. Being a Paper Presented at the conference on the rights of women and children :issues and challenges from human rights and Islamic law perspective CILS ABU Zaria on 16 and 17 June 2008, p.261

²³⁸⁴ Elaine, E. S. (2015) *op cit*. p.4

the month of Ramadan should she be concerned that such fasting might harm her fetus. In fact, breaking the fast becomes a duty once a woman is informed by a trustworthy and credible doctor that fasting would cause harm to the fetus.²³⁸⁵ The prophet SAW said “Allah has exempted the traveler from observing the fast and licensed him to cut short his prayer to half. Pregnant women and breast feeding women have the license to break the fast.”²³⁸⁶

In essence the unborn child is entitled to some of the right of a child chief among which is the right to life and survival. The fetus has a right to be protected against all forms of harm, which may occur from malnutrition and especially terminating its life unduly.

1.3 Status of a child in Islam

Children under Islamic law are viewed as a source of pride and Joy. They are blessings from God and as such are to be accepted with joy and gratitude. In the same sense, children are an Amanah i.e trust from Allah.²³⁸⁷ Hence while Islamic law emphasized that children should be treated with kindness and mercy, they should also be given sound moral upbringing in order for them to serve the ultimate purpose of their existence; to know and serve Allah. It has been observed that:

The Quran recognizes that children are joys of life as well as sources of pride and strength, seeds of verity and false security, fountains of distress and temptation. So it has hastened to point out the greater joys of the spirit and to warn parents not to be deceived by the multiplicity of their children to go astray on their account.²³⁸⁸

It is one of the most important obligations in Islam that parents should love and nurture their children. In the same vein and most importantly parent are enjoined to teach their children the duties of Islam. Parents are urged to inculcate into their children sound moral standards as well as attentiveness to the worship of their creator,

²³⁸⁵ ²³⁸⁵ Al – Azhar University (2005) Children in Islam: Their Care, Upbringing and Protection. AL-Azhar and UNICEF, p. 11

²³⁸⁶ Narrated by Abu Dawud in Sunan. Kitabul Sawm Hdith no.2408

²³⁸⁷ Ahmed M E (2011) The Rights of Children.AL Atheer Islamic Centre Hyderabad ,India, p. 5

²³⁸⁸ Idris S (1996) The Rights of Children in Islam. An unpublished LLM Thesis submitted to the Faculty of Law ABU Zaria, p.52

Allah SWT. Allah says in the Qur'an, "O ye who believe save yourselves and your families from hell fire"²³⁸⁹

1.4 The Right to Survival of the Child

Preserving life is one of the essentials intended by the shariah. The protection of the right of the child to survival under Islamic law has two basic principles. Firstly, Islamic law prohibits destruction of life as well as any action that may lead to loss of life. Secondly, Islamic law has laid down rules that are intended to encourage preservation of life as well as any action that will lead to the preservation of life. In this sense it can be said that Islamic law protects and promotes the right of the child to survival. These two approaches shall be examined in detail.

1.4.1 Protection of the right of the child to survival

Islamic law guarantees absolute right to life. Thus the prophet (SAW) said:

“shedding blood of a Muslim is not permissible except in three cases: Life for life, a married person committing adultery and a Muslim who apostate.”²³⁹⁰

The Shariah has laid down general and specific prohibition of terminating the life of a child. The general prohibition protects the right to life of every human being which a child by virtue of being human also enjoys. The Shariah also specifically prohibits the killing of children. The specific provision of the Shariah protecting the right of the child to life therefore made the right of the child to life inalienable with a warning to parents not to take the lives of their children for whatever reason. This, the Shariah did in order to put a stop to infanticide that was prevalent in the pre- Islamic Arabia.

Allah (SWT) said in the Holy Qur'an:

“Whoever kills a human being without (any reason like) manslaughter or corruption, it is as though he had killed all mankind”.²³⁹¹

²³⁸⁹ Holy Quran. Q66: 6

²³⁹⁰ An – Nawawi. Forty Hadith Collection. No. 14 reported by Abdullah bn Masu'd.

²³⁹¹ Holy Quran 5:32

In another verse, the Qur'an states

“Do not kill a soul, which Allah has made sacred except through the due process of law”.²³⁹²

In the verses above, Allah guarantees an absolute and inalienable right of every human being to life. Thus a person should not be deprived of his right to life except through the means that Allah has sanctioned i.e. where a person intentionally kills another and even then the principles laid down by the shariah must be followed in order to avoid taking of life unjustly. In the verses quoted above children by virtue of being human beings are also granted absolute and inalienable right to life.

However, in order to show the enormous concern and emphasis that Islamic law places on safeguarding the life of children, The Qur'an and the Sunnah also laid down specific legislations prohibiting the killing of children under any kind of situation and for whatever reason. The Qur'an says:

“Say come, I will rehearse what God hath (really) prohibited you from. Join not anything as equal with Him, be good to your parent, kill not your children on a plea of want”²³⁹³

In another verse, Allah SWT says:

“kill not your children for fear of want, we shall provide sustenance for them as well for you. Verily, the killing of children is a great sin”²³⁹⁴

From the foregoing verses, it is clear that Islamic law places premium on protecting the right of the child to life and survival. The wording of these verses shows the magnitude of concern that Islamic law has for children. In fact, no human made document has specifically in clear and unequivocal terms prohibited the killing of children as the Qur'an does. The Qur'an addressed the main cause of infanticide; that is fear of poverty and concern for providing for children and went ahead to assure parents that it is Allah that provides for them and their children. In this sense, the Qur'an issued a stern warning against killing of children and also allays the fear of sustenance which is the

²³⁹²Ibid 6:151

²³⁹³ Ibid

²³⁹⁴ Ibid, 17:31

most common reason why people commit infanticide. The protection of right to life of the child in Islamic law is thus very potent and compelling.

The prophet SAW also affirm the sanctity of life especially of children when he was asked:

“What is the greatest sin? He replied: To ascribe divinity to someone other than Allah, when He is the one who created you. What next? He replied, to kill your child out of fear that he will share your food”²³⁹⁵

This tradition reaffirms the provision of the Qur’an that infanticide is a grievous offence in the sight of Allah. The Messenger of Allah SAW made infanticide the worst crime after the offence of ascribing partner to Allah. It is therefore manifestly clear that Islamic law apart from recognizing and guaranteeing the right of every human being to life also recognizes and protects the right of the child to survival. This it did by the means of some special provision safeguarding the right of the child to survival by warning parents not to commit infanticide and also promising the help of Allah in providing for parents and their children.

1.4.2 Promoting the Right to Survival of the Child.

Islamic law has laid down general principles in promoting the right of the child to survival. This is contained in the Qur’an and the Sunnah of the prophet SAW. These guidelines are meant to ensure that the child is not exposed to those factors that are responsible for neo-natal, post-natal and under-five deaths, as such failure to adhere to these rules and guidelines constitute a major sin. The following are some of the provisions in the Qur’an and the Sunnah that makes it incumbent on Muslims to preserve the life and health of the child.

The Qur’an states as follows:

²³⁹⁵ Narrated by Abdullah and reported by Bukhari and Muslim

“And do not throw yourselves into destruction (by not spending your wealth in the cause of Allah) and do good. Truly, Allah loves those who do good.”²³⁹⁶

The Prophet in a Hadith said:

“It is a great sin for one to neglect a person whom he is responsible for sustaining.”²³⁹⁷

He (S.A.W) also said

“Each of you is a shepherd and each of you is accountable for his or her flock.”²³⁹⁸

The responsibility of parents to promote the right to life of their children is derived from the above quoted authorities. Children by reason of tender age cannot cater for themselves; they rely on their parents for care and their every need. The shariah entrusts parents with the responsibilities of preserving the life and health of their child, and providing care as they grow. Therefore parents will be called to account by the Almighty about the discharge of this important trust placed on them.

In the verse quoted above, Allah warns us against throwing ourselves into destruction. This means protecting ourselves from ruin and harm which in general includes protecting one's self and dependents. Protecting one's self and family extends to protection from and prevention of illness and diseases. Islam places a duty on parents to protect their youngsters from sickness and preserve them from dangers that may threaten their lives and impede their growth. This is because, children are not aware of the existence of the threat to their life in the form of diseases and illness and such lack the ability to protect themselves against such. Also included in the duty of protection against diseases is the duty of providing preventive measures against fatal diseases and other child-killer illnesses such as HIV/AIDS, malaria, malnutrition, etc. Thus it is the duty of parents to immunize their children against these diseases that may either kill or incapacitate a child e.g. measles and Polio. This is because the prophet (SAW) said:

²³⁹⁶ Holy Quran 2:195

²³⁹⁷ Narrated by Abu Dawud in Sunan on the authority of Abdullah bn Amr.

²³⁹⁸ Narrated by AL-Bukhari in Sahih Jami on the authority of Abdullah bn Umar and Muslim in his Sahih on the authority of Abdullah bn Umar

“A strong believer is better and more beloved to Allah than a weak believer”.²³⁹⁹

The shariah warns of the consequences of neglecting the duty of taking care of children, hence the prophet SAW said every person shall be taken to account on the discharge of his or her responsibilities towards those under his or her care.

Islamic law promotes the right of the child to survival at different stages. Thus, Islamic injunctions start as early as prior to marriage; prior to pregnancy; during pregnancy; at the point of delivery and at the early stage of child development. The import of the Sharia provisions on promoting the right of the child to survival shall be examined at the different stages mentioned above.

1.4.2.1 Prior To Marriage

Islamic law enjoins parents to conduct medical examination before marriage. This is to prevent the spread of diseases such as HIV/AIDS and also to prevent hereditary diseases such as Sickle Cell Anemia. Medical consultation at this stage helps to determinate the medical compatibility of the intending couples and as such help prevent the occurrence of some child killer diseases such as HIV/AIDS and Jaundice. This is in line with the objective and intendment of the vase “and do not throw yourselves into destruction”.²⁴⁰⁰

1.4.2.2 Prior To Pregnancy

After marriage, couples are expected to delay first pregnancy until the social and health condition are appropriate²⁴⁰¹. There is a greater likelihood of girls under the age of 18 to deliver low weight infants who are more susceptible to sickness and death. It is also recommended that a woman take healthy and nutritious food required for maintaining her health. Appropriate spacing between pregnancies is also encouraged. Islamic law supports spacing pregnancies if it is done with the aim of providing children with the care they need and to protect the mother against the dangers of frequent pregnancies

²³⁹⁹ Narrated by Muslim in Sahih on the authority of Abu Hurayrah

²⁴⁰⁰ Holy Quran 2:195

²⁴⁰¹ ²⁴⁰¹ Al – Azhar University (2005) Children in Islam: Their Care, Upbringing and Protection. AL-Azhar and UNICEF, p. 35

without sufficient rest²⁴⁰². The authority in the Sunnah that supports this is the hadith of Jabir bn Abdullah who said:

We used to practice withdrawal during the time of the Messenger of Allah, peace be upon him and while the Quran was still being revealed²⁴⁰³.

In another narration of this hadith:

The prophet, peace be upon him knew about it and did not forbid us.

This method is the primitive technique of prevention of pregnancy when it is not desired. Thus the companions used to practice withdrawal as a means of preventing pregnancy during the time of the prophet SAW and he did not prohibit it. By analogy any method of contraceptive is permissive in Islam so my as it does not harm the woman.²⁴⁰⁴

1.4.2.3 During Pregnancy

Pregnant women are enjoined to attend pre-delivery medical consultation and examination. Thus attendance of ante-natal care is very central to the duty imposed on parents by Shariah to prevent any harm from befalling their children. In ante-natal session expecting mothers are counseled and guided on the most effective manner a mother can care for herself and her unborn baby. Any health problem and complications that may affect the mother and her child is detected early and treated. It is therefore a great sin for a pregnant woman to neglect the attendance of ante natal care provided by a qualified and well trained medical personel as this gives contrary to the letter and spirit of the Quranic injunction 'and do not throw yourself into destruction'.

A woman who fails to attend ante-natal care without a justifiable reason is compromising her health as well as the life and wellbeing of her unborn baby. She has

²⁴⁰² Ibid

²⁴⁰³ Narrated by AL-Bukhari in Sahih on the authority of Jabir bn Abdullah

²⁴⁰⁴ ²⁴⁰⁴ Al – Azhar University (2005) op. cit., p. 35

by so doing neglected to take care of the one placed under her care and Allah will call her to account for such negligence.

1.4.2.4 At Delivery

Delivery should take with the assistance of well trained and qualified medical personnel in a well equipped and conducive facility. The number of neo-natal and maternal mortality rate can greatly be reduced if deliveries are conducted by qualified medical personnel in a well equipped hospital as any complication that may arise from child birth would be promptly attended to. The practice of delivery at home accounts for high rate of maternal child mortality rates in Nigeria

1.5 Early Stage of Child Development

The early stage of child birth and development can be classified into neonatal, infant and under-five stages. Neo-natal period is the first 28 days of life of a newborn. This period is the most vulnerable time as well as the determinant of a child's survival. Majority of neonatal deaths occur in the first day and week of birth. It is therefore incumbent on parents to take appropriate steps to ensure the survival of neonates.

The most important ways of preventing death in neonatal stage is through vaccination and exclusive breastfeeding. Vaccination against diseases serves the purpose of the Shariah with regard to preserving life by defending it against threats from diseases²⁴⁰⁵. In Islam, whatever parents harm from afflicting children is sanctioned by the Shariah since Allah has commanded us to avoid harm. Some Muslims especially in Northern Nigeria view vaccination with suspicion and in some cases outright rejection. They claim that the vaccines being administered to Muslims in Northern Nigeria is not fit to be used on humans. They also allege that the vaccines are intended to curse harm to Muslims as it is targeted at reducing their population. This view is not only held by the ignorant masses and illiterates but also by some elites and religious scholars. However, none of the proponents of this view has been able to prove this allegation. Muslim doctors, medical experts and religious scholars with international exposure

²⁴⁰⁵ Ibid

have made categorical statements that all vaccines are subjected to all types of tests conducted under international supervision²⁴⁰⁶. These Muslim experts have also affirm the falsehood of the rumors that allege that vaccines reduces fertility or lead to infertility²⁴⁰⁷.

The rejection of vaccine and consequent failure to vaccinate children is contrary to the general spirit and intendment of the Shariah as it has led to serious consequences ranging from high rate of neonatal, infant and under-five mortality rate to high level of widespread cases of polio which causes disabilities in children. Although, there is improvement in the rate of vaccination and immunization, there is a need for continuous enlightenment and awareness campaign to rid our society of preventable child-killer diseases such as measles, diarrhea, pneumonia and malnutrition.

Medical experts have also stressed the need for exclusive breast feeding in the first six months of birth. Breast milk constrains antibodies that help neonates fight off viruses and bacteria²⁴⁰⁸. Babies who are breastfed exclusively for the first six months have fewer ear infections, respiratory illnesses and bouts of diarrhea²⁴⁰⁹. After six months, other complimentary foods which contain sufficient calories and the required amount of protein, vitamins and minerals should be added to the mother's milk. This serves the purpose of the shariah of preventing harm from afflicting the child since the body is fortified against illness causing germs and bacteria, thus the child is able to fight off diseases.

Infants are children under the age of one, while under-five are children under the age of five. The Shariah imposed duty of preserving the life of children entails the following for this category.

1. The Shariah enjoins taking of complete diet containing nutrients that will nourish the body. Allah says "And eat and drink but waste not by extravagance, certainly He (Allah) likes not those who waste by extravagance".²⁴¹⁰

²⁴⁰⁶ Ibid

²⁴⁰⁷ Ibid

²⁴⁰⁸ Causes of Neonatal and Postneonatal mortality at www.tandfonline.com accessed on 29 June, 2024 @1200 pm

²⁴⁰⁹ Ibid

²⁴¹⁰ Holy Quran 7:31

2. As noted earlier the Shariah sanctions and encourage regular and periodic vaccination and immunization.
3. The use of insecticide treated nets (ITNS) is also encouraged in order to prevent the transmission of the malaria parasite. Malaria is one of the leading causes of death among children.
4. The Shariah enjoins Muslims to observe personal cleanliness and hygiene. Cleanliness provides protection against many diseases as disease causing germs and bacteria's grow in a dirty and filthy environment. The prophet SAW said: "Cleanliness is half of faith"²⁴¹¹. He SAW also said: "Allah is good and loves good things; He is clean and loves cleanliness; He is munificent and loves munificence; He is generous and loves generosity; so keep your courtyard clean."²⁴¹²

1.6 Conclusion

It is clear from the discussions of this paper that Islamic law protects and promotes the right of the child to survival. There are general as well as specific provisions in the Quran and the Sunnah that promotes the preservation of the life and survival of children. The right to survival of the child in Islam places both negative and positive obligations on parents and care givers. The negative obligations flowing from the right to survival of the child are those things parents should not do which is essentially that they should not take the life of the child under whatever guise. It also includes that parents should avoid actions capable of jeopardizing the right of the child to survival. The positive obligation of the right of the child to survival is the duty placed on parents to take all possible measures to reduce infant mortality and promote the preservation of the life of the child. It is worthy of note that negative obligations are contained in the specific provisions of the Shariah and are therefore more likely to be obeyed as their import are very clear and their punishments are clearly stated. In contrast positive obligations are derived from the general provisions and the general spirit and intendment of the Shariah. This makes the positive obligations of the right of the child for example the duty of a pregnant woman to attend ante natal exercise and the duty of immunizing children against diseases more likely to be neglected.

²⁴¹¹ An Nawawi Fourty Hadith Collection on the authority of Harith bn Asim Al- Ashari.

²⁴¹² Narrated by AL Tirmidhi in Sunan on the authority of Sa'id bn Musayyab

This paper therefore is of the view that Muslim scholars and imams have enormous responsibility of creating awareness and educating the Muslim Ummah on the need to comply with the positive obligation placed on them by the Shariah. This is seriously needed in this time when failure to comply with positive obligations to preserve the life of children portends great danger to the Muslim Ummah. To illustrate the point being made, findings have shown that malnutrition and malaria accounts for over 50 percent of death of children under the age of five in Nigeria²⁴¹³. While most Muslim parents are mindful of the negative obligation of prohibition of taking the life of their child, they do not consider failure to provide observe the positive obligation for example use of insecticide treated mosquito net and immunization of their children as a violation of any divine command.

²⁴¹³ Neonatal Mortality- UNICEF DATA @www.data.unicef.org accessed on 30 June 2024 2:45 pm