

THE NIGERIAN JURIDICAL REVIEW

Vol. 16

DOI: <https://doi.org/10.56284/tjnr.v16i1>

(2020- 2021)

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NIGERIAN JURIDICAL REVIEW

VOLUME 16

(2020 – 2021)

ISSN: 2651 - 6055



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NIGERIAN JURIDICAL REVIEW

VOLUME 16 (2020 - 2021)

To be cited as: **(2020-2021) 16 Nig J R**

ISSN: 2651 - 6055

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CONTRIBUTIONS

The Nigerian Juridical Review welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

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E-mail: editor@tnjr.uneclaw.ng

PUBLISHED BY

Faculty of Law, University of Nigeria,
Enugu Campus

REGULATION OF NON-GOVERNMENTAL ORGANISATIONS UNDER THE COMPANIES AND ALLIED MATTERS ACT, 2020

John Oluwatomisin Akinselure*

Abstract

The Companies and Allied Matters Act, 2020 (CAMA 2020), seems to have revolutionized the face of corporate practice in Nigeria in recent time. The sweeping reforms enshrined in CAMA 2020 will undoubtedly accelerate economic growth and rapidly promote the ease of doing business in Nigeria. In one breath, the remarkable reforms entrenched in the Act, particularly with respect to incorporation, commencement operation of companies and business names, have been widely applauded by Nigerians. On the other hand, religious bodies, associations and other incorporated trustees (ITs) have heavily condemned some provisions in the Act, especially Part F that deals with operations of ITs and in fact some associations have called for an outright amendment of section 839 of the new Act because of the enormous powers given to the Corporate Affairs Commission (CAC) to suspend, remove and install interim managers for any incorporated trustee (IT) found wanting. This work examines the legal implications of the novel provisions embedded in CAMA 2020 as it relates to regulation of ITs in Nigeria. A brief review is made of the Charities Act, 2011 of the United Kingdom (CA 2011), which appears to be the model for the controversial provisions CAMA 2020. The research methodology adopted in this article is doctrinal and comparative. This paper concludes that while accountability of ITs is desirable and expedient, the Commission should operate within the purview of the rule of law and eschew any tyrannical tendencies that will stifle legal operations of non-governmental organizations (NGOs) incorporated in Nigeria.

Keywords: Incorporated trustees, company law, church, association, charity law

1. Introduction

The Nigerian Companies and Allied Matters Act (CAMA) witnessed an auspicious day on 7 August 2020.¹ The new CAMA 2020 repealed the old CAMA² and in its stead, enacted novel provisions for the incorporation of companies, limited liability partnerships, limited partnerships, registration of business names as well as incorporation of trustees of associations, charitable bodies,³ which are generally referred to as incorporated trustees (ITs) in legal

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¹ See Andersen Tax, 'President Buhari Signs the CAMA Bill 2020 into Law' <<https://andersentax.ng>> accessed 29 August 2020.

² Cap C2 LFN 2004 (CAMA 2004).

³ See to Explanatory Memorandum to CAMA 2020. See also Part F of CAMA 2020 for the incorporation of associations.

parlance. CAMA 2020 was greeted with a lot of accolades by businessmen, legal experts and many top government officials. The rationale for this overwhelming encomium on the new legislation is attributed to the expectation that it will accelerate economic growth and radically advance the ease of doing business in Nigeria. At the initial stage after President Muhammadu Buhari assented to Act, most Nigerians were greatly impressed because of the innovative reforms enshrined in it but as the months went by, and there arose different shades of criticisms and backlash on some provisions relating to ITs.⁴ This work intends to examine the regulation of NGOs under CAMA 2020 as well as the legal implications of these sweeping reforms on the continued existence of ITs in Nigeria.

This work is divided into six parts. Part I is a general introduction of the subject matter. Part II examines the operation of Incorporated Trustees under the repealed CAMA 2004. Part III explores the sweeping reforms introduced by CAMA 2020 in respect of ITs. Part IV x-rays the regulation of NGOs and the legal implications of the innovative reforms on ITs in Nigeria, including religious bodies and associations. Part V compares the relevant provisions of CA 2011 and its influence on Part F of CAMA 2020. This part also deals with accountability of charity organizations in the UK. Part VI is a general conclusion and recommendation.

2. Operation of Incorporated Trustees under Repealed CAMA 2004

It is important that a brief overview of the legal regime in CAMA 2004 be undertaken before delving into the sweeping reforms introduced by CAMA 2020 especially as it concerns ITs now recognised under Part F.⁵ Cultural associations, religious bodies, clubs, social associations, educational bodies, sporting association, charitable bodies (like NGOs), etc could be registered as an IT under Part C of the repealed CAMA.⁶ The legal effect of registration by the Commission is the conferment of legal personality on such incorporated body.⁷ In essence, the Certificate of Incorporation confers perpetual succession and bestows on such IT the power to sue and be sued in its corporate name.⁸ It is of great importance that the appropriate IT of an association be sued otherwise

⁴ See CAMA 2020, s 839 as to the power of the Commission to suspend trustees of an association.

⁵ CAMA 2004, s 590(1).

⁶ Ibid.

⁷ Ibid s 590(2); See also *Okatta v Regd Trustees, OSC* (2008) 13 NWLR (Pt 1105-632) where the court held that an incorporated association is a different legal entity from its directors or management; s 590(1).

⁸ T Akinloye, 'Incapacitation of Incorporated Trustees and Governance of Churches and NGOs in Nigeria: A Commentary of *Omomobi v Adeoye* (2018) 9(2) *The Gravitas Review of Business & Property Law* 6.

such action is fatal.⁹ There were modalities for registration of ITs in CAMA 2004.¹⁰ For instance, infants, persons adjudged by the court to be of unsound mind, un-discharged bankrupt and persons convicted of offence bordering on fraud or dishonesty, within five years of proposed appointment as trustees, were disqualified from such appointment.¹¹

The procedure for the formation of ITs under CAMA 2004, its mode of operation and statutory requirements that must be complied with are well articulated by a learned scholar.¹² It has been opined that orthodox churches are corporation under common law.¹³ As such, it has been posited that such common law corporations which include the Anglican, Baptist, Roman Catholic churches are corporations already endowed with legal personality by force of custom and no one ‘bestows’ that status to the corporate body.¹⁴ Hence, it has also been argued that it may not be compulsory or essential for common law institutions to statutorily register before being vested with juristic personality.¹⁵ One of the obvious defects in CAMA 2004 was the absence of accountability clauses for ITs. Besides, the sources of funds of associations were not monitored by the Commission. In addition, the sanctions for violations of provisions enshrined in CAMA 2004 seemed rather mild. There were, however, some measures for regulating NGOs under the now repealed CAMA 2004. For example, there were efforts such as filing of Annual Returns by ITs with the Commission and tax exemptions certificate as well as Statement of Affairs of NGOs filed with the Federal Inland Revenue Service (FIRS). Nevertheless, the regulation of NGOs under CAMA 2004 was inadequate.

3. Novel Reforms for ITs under CAMA 2020

The inadequacy and lapses in CAMA 2004 led to a number of innovations in CAMA 2020. Some of these reforms are geared towards promoting the ease of doing businesses in Nigeria particularly for companies and business names. For incorporated trustees the new provisions seem to aim at promoting accountability, transparency and minimizing any form of corruption by trustees. One of the new provisions enshrined under CAMA 2020 empowers the Corporate Affairs Commission with the duty of classifying the associations that

⁹ See the case of *Dairo v The Registered Trustees of the Anglican Diocese of Lagos* (2017) LPELR 42573 (SC).

¹⁰ CAMA 2004, ss 591, 593, 594, 595.

¹¹ *Ibid* s 592(1).

¹² IE Ekwo, *Incorporated Trustees: Law and Practice in Nigeria* (Lexis Nexis, 2007).

¹³ A Emiola, *Corporation Law* (Emiola Publishers, 2005) 99-100.

¹⁴ IA Akinloye, ‘Dairo v Registered Trustees of the Anglican Diocese of Lagos (2017) LFELR – 42573 SC: An Evaluation of the St Saviour’s Church (Miscellaneous) Act, 1991 and its Implication for the Legal Status of the Anglican Diocese of Lagos’ (2019) 8(1) *Oxford Journal of Law and Religion* 1-7.

¹⁵ *Ibid*. See also Emiola (n 13).

intend to register under Part F.¹⁶ In the classification of associations, such decision must comply with the aims and object of the association.¹⁷ It is submitted this provision will reduce the multiplicity of associations with similar objects and it will bring about easy identification of association specialized in a given area of strength.

Quite interestingly CAMA 2020 now permits two or more associations with similar aims and objects to merge under terms and conditions as Commission may prescribe by regulations.¹⁸ It is assumed that the rationale for merger of association with similar aims and objects is to save a distressed association from total collapse. Although there could be a number of reasons for mergers,¹⁹ the author thinks the merger of associations under Part F is to protect a sinking association.

Another unique innovation enshrined in CAMA 2020 is the mandatory requirement that the trustees of an association shall submit a bi-annual statement of affairs of the association to the Commission.²⁰ It is submitted that this provision will promote accountability and probity of trustees in any association. For any default in complying with the submission of bi-annual statement of affairs, the trustees are liable to penal sanction.²¹ The regulation of NGOs by CAMA 2020 has generated a lot of criticisms from the religious leaders in Nigeria. In particular, section 839 of CAMA 2020 provides thus:

- (1)The Commission may be order suspend the trustees of an association and appoint an interim manager or managers to manage the affairs of an association where it reasonably believes that –
- (a) there is or has been any misconduct or mismanagement in the administration of the association;
 - (b) it is necessary or desirable for the purpose of –
 - (i) protecting the property of the association,
 - (ii) securing a proper application for the property of the association towards achieving the objects of the association, the purpose of the association of that property or of the property coming into the association.
 - (iii) public interest; or
 - (c) the affairs of the association are being run fraudulently.

The above section has been heavily criticized by Non-governmental Organisations in Nigeria and many religious leaders. The legal consequences of this section and many other controversial provisions in CAMA, 2020 shall be examined in great detail in Part V of this work. Another relatively new

¹⁶ CAMA 2020, s 824.

¹⁷ Ibid.

¹⁸ See CAMA, 2004; s 849.

¹⁹ N Dimgba and others, Law and Practice of Mergers and Acquisition in Nigeria <<http://ssrn.com/abstract=2652362>> accessed 01 September 2020.

²⁰ CAMA 2020, s 845(1).

²¹ Ibid s 845(2).

provision is the power given to the Commission to direct the transfer of credits in dormant account of an association upon notice by the bank of such dormant account and upon the expiration of fifteen days' notice by the Commission to the association to provide details of its activities.²² Where the association fails to respond satisfactorily, the Commission can then exercise this power enshrined in the law.²³ Again, this section has also received serious backlash from NGOs in Nigeria.²⁴

It is submitted that, this section is aimed at curtailing any form of mismanagement of financial resources of an association and it is also targeted at ensuring that dormant monies belonging to an association are put to proper use. However, it seems this provision will whittle the powers and liberty of an association to save money in a bid to execute capital project of the association. This section also confers enormous power on the Commission although the Minister of Trade and Investment must approve the action taken by the Commission before such powers are exercised.²⁵ In the event that any association account ceases to be dormant, the bank which maintains the association's account must notify the Commission.²⁶ The Commission under CAMA 2020 does not condone secrecy or non-disclosure by bank as to the status of dormant account kept by an association.²⁷ This provision is directed at promoting accountability and transparency.

Furthermore, aside from the trustee's duty to submit bi-annual statement of affairs, there is also an obligation imposed by the Commission which requires the trustees of an association to ensure that accounting records and statement of accounts are properly kept.²⁸ These accounting records of the association must be preserved by the association for six years from the date on which they were made.²⁹ Once again, it is submitted that all these provisions discussed above, are enshrined to enhance the credibility, transparency and probity of associations incorporated in Nigeria. This is quite commendable as these novel provisions

²² SERAP writes Buhari, wants controversial CAMA law revised reported in Premium Times, August 23, 2020 Press release , <<https://www.premiumtimesng.com/news/more-news/4/03/5-serap-writes-buhari-wants-controversial-cama-law-reviewed.html>> accessed 02 September, 2020.

²³ CAMA 2020, S 842(1)(2)(3). See also Olaniwu and Ajayi, 'Companies and Allied Matters Act, 2020: Snapshot of the Amendments to the Act' <www.olaniwunajayi.net> accessed 02 September 2020.

²⁴ SERAP (n.22).

²⁵ CAMA 2020, s 842(6).

²⁶ Ibid; S.843(a)(b).

²⁷ CAMA 2020, s 844(1); See also, R. Islam 'Banker's Reference and the Bank's Duty of Confidentiality under Common Law Reappraised' (2016) 4 *Jahangirnagar University Journal of Law*.

²⁸ CAMA 2020, s. 846(1) (2) 8(3).

²⁹ Ibid. s 847.

were not entrenched in CAMA 2004. These innovations could bring stability and promote efficiency in the operations of registered trustees in Nigeria.

4. Regulation of NGOs and the Legal Implications of Reforms Relating to ITs under CAMA 2020

Some provisions in CAMA 2020 hold grave consequences for the continued existence of incorporated trustees in Nigeria. The sections implicated in restrictions of liberty of incorporated trustees are sections 839, 842, 843 and 844. Each section will be examined seriatim and the far reaching legal consequence of each section will also be considered. The section that has received the most severe backlash is section 839. One of the implications of section 839 of CAMA 2020 is that it could generate or foist insecurity of tenure for the trustees of an association. This can be severe if the Commission in the exercise of its powers enshrined in the above section removes the Founder of the NGO or the General Overseer of a Church. This could lead to a decline or massive reduction in the population of the congregation or in the membership of NGOs. In order to reveal the startling impact of section 839 of CAMA 2020, it is important to reproduce some parts of this section and appraise the far reaching consequences. The said section provides as follows:

(1) The Commission may by order suspend the trustees of an association and appoint an interim manager or managers to manage the affairs of association where it reasonably believes that –

- (a) there is or has been any misconduct or mismanagement in the administration of the association;
- (b) it is necessary or desirable for the purpose of –
 - (i) protecting the property of the association,
 - (ii) securing a proper application for the property of the association towards achieving the objects of the association, the purposes of the association of that property or of the property coming to the association,
 - (iii) public interest; or
- (c) the affairs of the association are being run fraudulently.

(2) The trustees shall be suspended by an order of Court upon the petition of the Commission or members consisting one-fifth of the association and the petitioners shall present all reasonable evidence or such evidence as requested by the Court in respect of the petition.

Suspension of trustees of an association and the subsequent appointment of interim manager(s) must fall under any of grounds highlighted above and must be backed by an order of Court pursuant to petition from the Commission or members comprising one-fifth of the association and such must be based on evidence that can be objectively proven.³⁰ It appears that the procedure for suspending trustees of an association and appointing interim managers under section 839(1)(2) is in accordance with the cardinal principle of fair hearing as

³⁰ See CAMA 2020, s 839(1)(a)(b)(2).

entrenched in the 1999 Constitution of Federal Republic of Nigeria (as amended).³¹

In spite of the foregoing, the above section will likely disrupt the security of tenure (office) of the trustees of any religious bodies or association. The age-long tradition in some NGOs or Nigerian Churches is that the founder is always part of the trustees and may not be removed or suspended by the other trustees. Most time, the founder of a Church can name his successor during his lifetime or after the demise of the founder, a new leader is appointed by the Church.³² It has been observed that there could be dispute if the founder of a Church does not appoint his successor before his demise.³³ Since section 839 promotes suspension of trustees and appointment of interim managers by the Commission, it then follows that the tenure of most trustees could be transient as they can be removed, replaced contrary, to the security of tenure or permanence in office which most trustees of NGOs enjoyed before the enactment of CAMA 2020. In putting a fatal blow to trustees' security of tenure, CAMA 2020 provides that:

Where, at any time after the Commission has made an enquiry into the affairs of the association, it is satisfied as to the matters mentioned in subsection (1), it may suspend or remove –

- (a) any trustee who has been responsible for or privy to the misconduct or mismanagement or whose conduct contributed to or facilitated it³⁴

The above section gives the Commission wide power to suspend or remove any trustee without recourse to Court Order. This could make the Commission extremely powerful and could lead to abuse of power by removing or suspending trustees abruptly and arbitrarily.³⁵ This does not augur well for security of trustees' tenures. The Vice President, Prof. Yemi Osibanjo while commenting on CAMA, 2020 in respect of Incorporated Trustees, obviously observed that the problems that they (trustees, pastors) may have in ensuring that the processes are not abused in such a way as to compromise the entire organization.

³¹1999 CFRN (as amended) s 36.

³²IA Akinloye, 'Human Flourishing, Church Leadership and Legal Disputes in Nigerian Churches' in MC Green (ed) *Law, Religion and Human Flourishing in Africa* (African Sund Media, 2019) 25-41.

³³*Owodunmi v Registered Trustees of Celestial Church of Christ* (2000) 10 NWLR (Pt 675) 315; See also *Rev Paul Emeka v Rev Chidi Okoroafor and Others* (2017) LPELR-41738 SC.

³⁴See CAMA 2020, s 839 (7)(a).

³⁵Y Akinpelu, 'Osibanjo to Churches: Concerns about CAMA can be Resolved through Legislative Amendment' reported in *Premium Times*, August 28, 2020 <<https://www.premiumtimesng.com/news/more-news/411228-osinbajo-to-churches-concerns-about-cama-can-be-resolved-legislative-amendmenthtml>> accessed 29 August 2020.

Corollary to the foregoing consequence of section 839 of CAMA 2020 is that it could breed room for ‘stranger’ to pollute the doctrine and core values of an association. Since section 839 gives the Commission the power to suspend trustees and appoint interim manager(s) for the association, it is very much possible that a ‘misfit’ or a ‘stranger’ who is not grounded in the doctrinal teaching of a church or mosque could be appointed as interim manager(s)³⁶ of a religious body/association thereby causing distortions in core values or sound spiritual teaching of an association. The Vice President also acknowledged this fact when he said that:

The concern of the Churches is that it could lead to a situation where practically anybody could be appointed as a trustee to oversee the Church and a Church or a Mosque is a spiritual organization and if you do not share the same faith with the Church or Mosque, you may be the wrong person and if a wrong person is appointed, you may create more trouble for the organization.³⁷

There is a high possibility that a wrong person could be appointed as interim manager(s) under section 839 because the word ‘Interim Manager(s)’ was not defined under CAMA, 2020.³⁸ Assuming the word ‘interim manager(s)’ connotes person of same faith or person who shares the same ideology as the association then the problem could have been partly resolved.

Another repercussion of section 839 is that it can lead to instability, disintegration and total collapse of the association if not well managed. This consequence is possible because CAMA 2020 now empowers the Commission³⁹ to unilaterally remove trustee of association without recourse to any form of court order justifying such removal.⁴⁰ In Nigeria, there are many members of religious bodies who worship in churches because of the profound respect for the Founder who in most cases doubles as trustees. Members of such religious body or even NGOs could disintegrate if their Founder were removed or suspended abruptly by the Commission. In extreme cases, the association may even collapse completely if the Commission removes the Founder of an NGO or a General Overseer of a Church without recourse to court order or fair hearing.

In vehement opposition to CAMA 2020, the Social Economic Rights Accountability Project (SERAP) believes by seeking to suspend and remove trustees and appoint interim managers for associations, government seems to want to place itself in a position to politicize the mandates of such association and to undermine the ideas that the right to freedom of association and related rights are supposed to be protected in a democratic society.⁴¹ SERAP frowns at the incursions posed by the provisions of CAMA, 2020 particularly those

³⁶ Ibid.

³⁷ Ibid.

³⁸ CAMA 2020, s 868.

³⁹ CAMA 2020, s 839(7).

⁴⁰ Ibid.

⁴¹ SERAP (n 22).

relating to Part F because it is assumed that these sections will adversely affect the rights and smooth running of the association.

In addition, SERAP also asserts that the government granting itself the powers to suspend and remove trustees of legally registered associations and to also take control of their bank accounts⁴² constitute an effective restraint on human rights. It is submitted that permitting the Commission to take control of bank accounts of association pursuant to sections 842, 843 and 844 of CAMA 2020 would significantly impact on the rights of the association, its sustainability, and operations and would adversely affect civil, cultural, economic, political and social rights in general. Granted that the primary reasons for introducing these novel provisions include curtailing fraud, mismanagement, corruption, money laundering by different associations, however, in a bid to forestall these societal ills, legal restrictions imposed should be stipulated within the confine of the law bearing in mind the fundamental rights of Nigerians as enshrined in the 1999 CFRN as amended).⁴³ In firm opposition to the application of CAMA, 2020, it was reported that SERAP had even served the Commission a pre-action notice⁴⁴ in preparation of instituting legal action should the Nigerian government persist and insist on enforcing the provisions of the new CAMA.⁴⁵

There has also been a barrage of criticisms against CAMA 2020 especially on section 839 relating to the power of the Commission to suspend, remove trustees of association and appoint interim manager(s) in place of the suspended trustee.⁴⁶ It is submitted that, this section also usurps the internal powers of incorporated trustees. In the registration process, applicant seeking to incorporate a NGO or religious body is bound to file a constitution. The said constitution contains internal mechanism for removing or suspending trustees. The author thinks this should suffice. Surprisingly, section 839(7) of CAMA, 2020 gives the Commission an overly broad and discretionary power to suspend and remove trustee singly based on an inquiry alone without recourse to any court order. This section calls for an amendment.

The Pentecostal Fellowship of Nigeria also contended that sections 839, 842, 844 of CAMA, 2020 among other provisions could leave the door open to abuse, denial of fair hearing, arbitrariness and dubious use of power by the

⁴² CAMA 2020; ss 842, 843 and 844 gives the Commission (CAC) the power to direct transfer of credits in dormant bank.

⁴³ 1999 CFRN (as amended) chaps II and IV.

⁴⁴ CAMA 2020, s 17(2).

⁴⁵ SERAP (n 41).

⁴⁶ S Oamen, 'Our Reservations against CAMA by PFN' *The Nations* (28 August 2020) <<https://www.google.com/amp/s/thenationsonlineng.net/our-reseration-against-cama-by-pfn/amp>> accessed 29 August 2020.

Commission.⁴⁷ The fear entertained under section 839(1)(2)(3) may not be justified because this subsection provides for fair hearing before any order of court is obtained to suspend trustee.⁴⁸ One of the real snags in CAMA, 2020 is section 839(7)(a) which empowers the Commission upon enquiry into the affairs of the association to suspend or remove any trustee culpable of misconduct or mismanagement even with no recourse to the court.⁴⁹ This could make the Commission wield enormous powers in determining who survives as trustees and could also make trustees of association act, and live in fear of the overbearing power conferred on the Commission. The author submits that a flexible control of NGOs is preferable instead of exerting strict regulation of NGOs, it should be done on a case by case scenario considering the peculiarity of the NGO in question and freedom of association of the NGO.

4.1 Regulation of the Operations of NGOs in Nigeria under Some Proposed Bills and Some Extant Laws

As to the regulation of NGOs in Nigeria, some Nigerian Bills were proposed by the legislature to checkmate the operation of NGOs in Nigeria. For instance, the National Assembly had made two unsuccessful attempts to regulate NGOs in Nigeria.⁵⁰ The first attempt was in 2013 when the ‘Bill to Regulate the Acceptance and Utilization of Financial/Material Contributions of Donor Agencies to Voluntary Organisations’ was then sponsored by one of the legislators in the 7th National Assembly. The second effort was the Bill meant to provide for the Establishment of NGOs Regulatory Commission which was then referred to as the NGO Bill, 2016. This Bill did not see the light of the day before the dissolution of the 8th Assembly. Some cardinal features of the 2013 Draft NGO Bill include provision for prior permit to NGOs from the Independent Corrupt Practices and Other Related Offences Commission (ICPC) before the NGO could accept funding from foreign donors.

Again, NGOs were under obligation to submit periodic information to the ICPC on the manner which the funds were utilized.⁵¹ Similarly, the proposed Bill, by virtue of section 5(1)(a)(i)&(ii) provided wide and broad powers for the regulation of NGOs because the ICPC could refuse the approval to receive

⁴⁷ Ibid; See also, CAMA CHAOS, ‘CAN Mulls Legal Actions, Briefs Top Lawyers’ *Vanguard* (23 August 2020) <<https://www.google.com/amp/s/www.vanguardngr.com/2020/08/cama-chaos-can-mulls-legal-action-brief-top-lawyers/amp/>> accessed 4 September 2020.

⁴⁸ CAMA 2020, s 839(1)(2)(3) provides for an order issued by Court after hearing of the Commission’s petition.

⁴⁹ Ibid s 839(7)(a).

⁵⁰ See B Maigari and JI Coady, ‘Nigeria NGO Which Way Forward Self-Regulation or Government Regulation’ (2016) <<https://www.researchgate.net/publication/339697381>> accessed 7 April 2021.

⁵¹ See for instance, section 2 of the Bill to Regulate the Acceptance and Utilization of Financial/Material Contributions of Donor Agencies to Voluntary Organisations, 2013.

funding for an NGO if it thought that the funding was likely to affect the sovereignty and integrity of Nigeria or adverse diplomatic relationship of any foreign country. This 2013 Draft NGO Bill also permitted the ICPC to obtain court orders restraining the NGO from withdrawing, transferring or making use of any monies it deemed was not obtained with its approval.⁵² The ICPC could also render the bank account of NGOs unusable because it could seize the account of an NGO for four months even without necessarily commencing legal action in court for proper determination.⁵³ It is submitted that all these provisions in the Draft 2013 NGO Bill expanded the scope of oversight control of NGOs and this might likely stifle the smooth running of NGOs in Nigeria if there were implemented.

The 2016 Draft NGO Bill also made some vital provisions with respect to regulating the activities of NGOs in Nigeria. For instance, section 11 of the proposed Bill required all NGOs to be registered with the NGO Commission established under the Bill before they could operate in Nigeria. Surprisingly, section 13(1) of the proposed Bill gave wide powers to the NGO Commission to receive, approve or refuse registration of NGO, if it pleased. Therefore, it is submitted that it almost made it difficult to freely associate with others. This provision will certainly infringe on the right to freedom of association enshrined in the 1999 Constitution of the Federal Republic of Nigeria (as amended). Quite disheartening, the 2016 Draft NGO Bill did not recognize the registration of NGO under CAMA 2020 because an unregistered NGO which was refused registration under the NGO Commission could not operate in Nigeria despite the fact that such NGO had been duly registered by CAC.⁵⁴ Similarly, the Bill provided for refusal of registration based on national interest.⁵⁵ It is submitted that this ground of refusal is rather ambiguous and overbearing.

The Financial Reporting Council of Nigeria (FRCN) also made some regulatory interventions in respect of the National Code of Corporate Governance (NCCG) for Not-for-Profit Organisations operating in Nigeria.⁵⁶ Paragraph 7.2 of NCCG, clearly provides that the NCCG was empowered to regulate charitable bodies, churches, philanthropic organizations and all NGOs in Nigeria. In particular, paragraph 9 of the of NCCG required a Founder or Leader to cease to occupy any of the three governance position of Chairmanship of the Board of Trustees, the Governing Board or Council and the Headship of the Executive Management (or their governance equivalent) simultaneously from 16 October 2016. It is submitted that this paragraph of NCCG is aimed at

⁵² Ibid, s 3.

⁵³ Ibid, s 9.

⁵⁴ The 2016 Draft NGO Bill; s.13.

⁵⁵ Ibid, s 15.

⁵⁶ J Onele, 'The Financial Reporting Council of Nigeria and Her Misguided Regulatory Approach: A Classic Example of How Not to Be a Regulator' (2017) 1(1) *UNILAG Law Review* 1-21.

curtailing the enormous power which some Heads of NGOs possess. One of the most contestable provisions of NCCG was probably paragraph 9.3 which stated that:

where the Founder or Leader had occupied all or any of the three governance positions referred to in the preceding paragraph for more than twenty (20) years as from 10 October, 2016, or was aged seventy (70) years or above from the same date, the Founder or Leader may only be considered for advisory or spiritual role by creating a Board of Trustees for which the original Founder or Leader can become the first or Life Chair and no more.

From a careful analysis of the foregoing, it seemed paragraph 9.3 of the NCCG was directed at removing all long standing Founders or Leaders who had occupied the position of Founder or Leader or any of the positions of Chairmanship of the Board or Council and the Headship of the Executive Management from 16 October 2016. Many NGOs and religious bodies frowned at the provisions enshrined in FRCN because it also had the possibility to stifle the smooth operations of NGOs. FRCN 2011 provided basis for the regulation of NGOs under its objectives stated in FRCN Act. It is in pursuance to the Act that the FRCN Codes were established. It is contended that FRCN contemplated the regulation of all Not-for-Profit Organisations in Nigeria. But it appeared that this has not been implemented. In fact, the FRCN Codes were suspended.

5. Relevance of CA 2011 to the Administration of ITs under CAMA 2020

In respect smooth administration and control of ITs in Nigeria, Charities Act 2011 of the UK (CA 2011), shares a lot of similarities with Part F of CAMA 2020. However, there are also a number of differences between the two statutes. The relevance and similarities of CA 2011 in relation to some provisions enshrined in Part F of CAMA 2020 are highlighted in the following paragraphs. This is in a bid to show the gaps in the new CAMA. It is important to examine the definition of ‘charities’ under CA 2011 and the spheres which the definition covers.

5.1 Conceptual Appraisal of ‘Charity’ under CA 2011

Under the above legislation, ‘charities’ means an institution which is established for charitable purposes only, and falls within the subject in the control of the High Court in the exercise of its jurisdiction with, respect to, charities.⁵⁷ The meaning of ‘charitable purpose’ is properly described under CA 2011. For any charity to qualify for registration, it must fall within the coverage of “charitable purpose” under CA 2011.⁵⁸ A purpose falls within charitable purpose if it features or falls within any of the purposes described below:⁵⁹

- (a) the prevention or relief of poverty;
- (b) the advancement of education;

⁵⁷ CA 2011, s 1(1)(a)(b).

⁵⁸ Ibid s 2(1)(2).

⁵⁹ Ibid s 3(1).

- (c) the advancement of religion;
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolutions or reconciliation of the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the crown or of the efficiency of the police, fire and rescue services or ambulance services.

In summary, all the entities, purposes, persons, bodies, groups, associations enshrined under Part F of CAMA, 2020 are almost synonymous with the term ‘charitable purpose’ under CA 2011. In Nigeria, some changes were introduced to the tax regime under the Finance Act, 2020. The Federal Inland Revenue Service (referred to as the FIRS) also issued two information Circulars dated 31 March 2021 specifying the rules that would guide its tax liability of NGOs in Nigeria. Before the enactment of the Finance Act, 2020, NGOs were exempted from taxes which were not derived from activities of a commercial nature.⁶⁰ One of the circulars entitled, the Guidelines on the Tax Treatment of Non-Governmental Organisations. The Guidelines state that tax exemption would not apply where non-profit entities derive their incomes or gains from activities of a commercial nature. It also required NGOs to file their tax returns as at when due by ensuring compliance with applicable tax procedures and maintaining accurate accounting records. Other liabilities of NGOs under the Guidelines include: registration with the FIRS for listing under the Fifth Schedule to the Companies and Income Tax Act (CITA) for the purpose of eligibility to receive tax-deductible donations under section 25 of CITA and registration with FIRS for tax purposes among others. Section 823(1) of CAMA 2020 provides for the incorporation of trustees of different forms of charitable organisations which is also similar with those organization recognized in CA 2011. As such, the term ‘incorporated trustees’ in Nigeria can also be likened to the term ‘charity’ under CA 2011. Some salient provisions of CA 2011 deserve to be considered because they share a lot of similarities with some provisions of Part F of CAMA 2020.

⁶⁰ See the Companies Income Tax Act; s 26(1)(a).

5.2 Similarities between the UK Charities Act and CAMA, 2020

The Charity Commissions (CC) in England is responsible for registering, encouraging and facilitating the better administration of charities.⁶¹ CC is empowered to remove any institution which it no longer considers as a charity and any charity that has ceased to exist.⁶² In the same vein, in Nigeria, CAC also has the statutory power to dissolve a corporate body under Part F⁶³ if the purpose for which it was formed had expired and it is unnecessary for it to continue to exist. This power is also exercisable by the Commission where all the aims and objects of the association have become illegal or otherwise contrary to public policy.⁶⁴ One of the similarities between the two statutes is that under section 46 of CA 2011, CC has general powers to institute inquiries with regard to charities or a particular charity or class of charities for any particular purposes.⁶⁵ Similarly, section 839(7) gives CAC the power to conduct an enquiry into the affairs of the association. But it is not as elaborate and effective as the provisions enshrined in CA 2011. In the UK, an inquiry may be conducted by CC *suo moto* or it may appoint a person to conduct the inquiry and receive the report.⁶⁶ CC is also empowered to request for relevant documents, execute search warrants and publish the results of inquiries.⁶⁷

In the *Inquiry Report of Kingsway International Christian Centre*,⁶⁸ CC among other conclusions observed that the conflicts of interest between the ex-trustee and the decision making trustees were not properly managed. It also noted that there was mismanagement in the administration of the charity. Therefore, the inquiry appointed interim manager pursuant to section 76(3)(g) of CA 2011 so as to work alongside the existing trustees of the charity in the day to day running of the charity. The Commission also gave a restitution order to minimize the loss of this charity.

In *Charity Commission v Thrift Urban Housing Limited*,⁶⁹ CC succeeded in winding up the charity in question. One of the main grounds relied upon to show that it was just and equitable to wind up Thrift included mismanagement of charity money, non-existent or missing records, and breaches of the Companies Act, 2006 including inconsistent information, failure to keep proper accounting records, confusion, aliases and forgery of signatures. In the case of

⁶¹ CA 2011, ss 15 and 16.

⁶² Ibid s 34.

⁶³ CAMA 2020, s 850.

⁶⁴ Ibid. See also, *Bhadmus on Corporate Law Practice* (Chenglo Limited, Enugu, 2009) 539.

⁶⁵ See CA 2011, s 46(1).

⁶⁶ Ibid s 46(3).

⁶⁷ Ibid ss 47, 48, 49, 50 and 52.

⁶⁸ Registered Charity Number 1102114.

⁶⁹ [2019] EWHC 1403 (Ch).

Charity Commission v Raymond Wright and Susan Wright,⁷⁰ the court made a finding of contempt of court against the respondents, Mr and Mrs Wright, trustees of Darren Foundation, for failure to comply with the Commission's direction made pursuant to section 47 of CA 2011 to supply evidence and documentation to assist with the Commission's inquiry.

Furthermore, under section 839(1) of CAMA 2020, CAC has the power to suspend trustees and appoint of interim manager(s) in the event of mismanagement of an association. It is important to state that section 76(1) of CA 2011 is almost synonymous with the Nigerian corporate law. For the avoidance of doubt, it provides thus:

- ...where, at any time after it has instituted an inquiry under section 46 with respect to any Charity, the Commission is satisfied-
- (a) that there is or has been any misconduct or mismanagement in the administration of the charity, or
 - (b) that it is necessary or desirable to act for the purpose of-
 - (i) protecting the property of the charity, or
 - (ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity

When the above situation arises, CC may of its own motion do one or more of the following:

- (i) by order suspend any person who is a trustee, charity trustee, officer, agent or employee of the charity from office or employment pending consideration being given to the person's removal;
- (ii) by order appoint such number of additional charity trustees as it considers necessary for the proper administration of the charity
- (iii) by order appoint (pursuant to section 78) an interim manager, to act as receiver and manager in respect of the property and affairs of the charity.⁷¹

It should be emphasized that the Charity Commission may still make some other far reaching orders in a bid to regulate the administration and operation of any charity. *Samson Ochieng v The Charity Commission for England and Wales*,⁷² was an appeal against a Commission order disqualifying Mr Ochieng from being a charity trustee for a charity and management position, for a period of eight years in relation to any charity. The Commission disqualified Mr Ochieng based on the findings of mismanagement and or misconduct in the administration of a charity. The appellate Tribunal upheld the Commission's findings of mismanagement and or misconduct and further found that the period of disqualification to be reasonable and proportionate. As such, the appeal was dismissed.⁷³

⁷⁰ [2019] EWHC 3375 (ChD).

⁷¹ See CA 2011, s 76(3).

⁷² CA/2019/0017.

⁷³ See also *Phelps v Charity Commission for England and Wales*, CA/2019/0004.

In addition, section 843 of CAMA 2020 places some restrictions on dormant accounts of an association. Similarly, CC is also empowered to give directions about dormant bank accounts of charities.⁷⁴ Some of the directions which CC can order include: the transfer of the amount standing to the credit of the charity to such other account as specified in the CC's direction,⁷⁵ freezing of the charity's account among others. In *ICRI Ltd v Charity Commission*⁷⁶ the Commission ordered freezing of a bank account. The appeal was against the Commission's decision which objected to the discharge of an order requiring Barclays Bank Plc to part with the property which it held in two third party bank accounts; thereby protecting charity funds belonging to Enfield Island Village Trust (the Trust). The appeal was bought in the name of the third party ICRI Ltd which was connected to the Trust by virtue of having the same director. The appellate Tribunal dismissed the appeal and upheld the Commission's directive.

Aside from the similarities between both legislations especially in respect of the administration of charities, CA 2011 differs in many aspects when compared with CAMA 2020 on the same subject matter. CA 2011 is far broader in scope and it covers a number of different issues which Part F of CAMA 2020 does not incorporate. Quite remarkably, CC publishes annual reports of its investigations, achievement and its activities.⁷⁷ Moreover, the enforcement mechanism enshrined in CA 2011 is much more effective unlike what operates under CAMA 2020. So it is really doubtful if the docility of CAC will not affect the proper enforcement of CAMA 2020.

5.3 Criticisms of the Charity Commission (CC)

In spite of the remarkable feats of CC,⁷⁸ there are a number of lapses observed in the Commission's operations. Sometime in 2013, the Commission was heavily criticized by the UK National Audit Office.⁷⁹ The manner in which the Commission handled some high profile cases also led to the publication of several critical reports on the work of the Commission.⁸⁰ Most of the criticisms against CC were centred on its poor compliance and enforcement as well as its

⁷⁴ CA 2011, s 107.

⁷⁵ Ibid s 107(2).

⁷⁶ CA/2018/0014.

⁷⁷ See for instance, see Charity Commission 2012-13 *Report on Tackling Abuse and Mismanagement of Charity* and Charity Commission *Annual Report 2019-2020* (APS Group, UK, 2020) 1-47.

⁷⁸ See the Charity Commission Strategy for Dealing with Fraud, Financial Crime and Financial Abuse of the Charity Sector; See also The Charity Commission's Policy on Restitution and the Recovery of Charitable Funds Misappropriated or Lost to Charity in Breach of Trust, Policy Paper, 2013.

⁷⁹ The UK National Audit Office Report titled, *The Regulatory Effectiveness of the Charity Commission*: HC 813, 2013-14 Session 926 (Crown Stationary, UK, 2013).

⁸⁰ D. Morris, 'The Charity Commission for England and Wales: A Fine Example or Another Fine Mess?' (2016) 91(3) *Chi Kent L Rev* 965-990.

perceived reluctance to use available powers, and its seeming lack of focus on dealing with serious wrongdoing.⁸¹ The criticism became very severe when it was apparent that CC was unable to regulate tax evasion involving charities.⁸² It was also observed that CC was politicized and so could not act independently as it was subject to the dictate of the appointing political party.⁸³ The ineffectiveness of CC was also due to a sudden decline in the Commission's budget and gross underfunding.

Hence, there was a need for a holistic reform and strict adherence to the tenets of charitable accountability.⁸⁴ So in a bid to resolve the problems that bedevilled CC, the British Parliament enacted the Charities (Protection & Social Investment) Act, 2016. This Act introduced new powers which enabled the Commission to consider disqualifying an individual from holding the position of charity trustee where some fundamental requirements are not fulfilled. Accordingly in the *Cup Trust*,⁸⁵ the Commission made an order under section 181A of the Charities (Protection and Social Investment) Act 2016 to disqualify Mountstar (PTC) Limited (Mountstar) from being a charity trustee for a period of fifteen years. The decision was taken after the Commission found that Mountstar as trustee, was responsible for misconduct and/or mismanagement in the administration of the charity; that Mountstar, as trustee was unfit to be a charity trustee; and that it was desirable to make the disqualification order in the public interest so as to protect public trust and restore confidence in charities.

6. Conclusion and Recommendations

Ever since the enactment of the Charities (Protection and Social Investment) Act, 2016, CC has been very effective. It is hoped that the innovations enshrined in CAMA 2020 will also spur CAC to efficiency and restore transparency as well as accountability of ITs registered in Nigeria. In this regard, CAC has to be astute in regulating the operation and administration of ITs in Nigeria. While CAC is commended for taking some bold steps⁸⁶, however a lot of lessons can still be garnered from the way and manner CC administers the charity legislations in England. For optimal efficiency of CAC, it is recommended that a separate legislation should be specifically enacted for

⁸¹Morris (n. 80).

⁸² See the *Cup Trust* [2016] EWHC 876 (Ch). This was a former registered charity that the charity trustee used for tax avoidance. See also the House of Commons, Committee on Public Accounts: *Charity Commission: The Cup Trust and Tax Avoidance, Seventh Report of Session 2013-14* (The Stationery Office Ltd, London, 2013) 3-14.

⁸³R Mason, 'Charities Should Stick to Knitting and Keep out of Politics, Says MP, reported in UK Guardian on 3 September, 2014.

⁸⁴ JJ Fisherman, 'Charitable Accountability and Reform in the Nineteenth Century England: The Case of the Charity Commission' (2005) 80 (723) *Chi Kent L Rev* 723.

⁸⁵[2016] EWHC 876 (Ch).

⁸⁶ See the *Corporate Affairs Commission v United Bank for Africa Plc and Ors*, (CA/L/443A/2014); [2016] NGCA 76 (30 March 2016).

smooth operation and administration of ITs in Nigeria. The present position under CAMA 2020 is that companies, limited partnership, business names and charities are all regulated under one single Act. This may not augur well for effective administration of ITs in Nigeria. A special Commission different from CAC, should be set up for proper administration of various charities in Nigeria. In this regard, CAC should concentrate on the regulation of business entities under CAMA while a special charity commission should be established to focus only on regulating the activities and operations of ITs in Nigeria. The reason adduced for the creation of a special charity commission is because CAC seems to be overwhelmed by the activities of the business entities thereby leaving little room for proper administration of ITs in Nigeria. The author submits that establishing a specialized charity commission in Nigeria bring about efficiency in the incorporation, administration and regulation of ITs in Nigeria.

STATE-EMBEDDED ACTOR SYNDROME AND ORGANIZED CRIME TRENDS IN AFRICA

Sylvester Ndubuisi Anya* & Godson Chibuzor Asogwa**

Abstract

Organized crime is any serious crime committed by an organized criminal group within a state or across international borders for economic gain. State-embedded actor syndrome exists where state officials commit organized crimes. There is a trend in Africa whereby states with high resilience to organized crime simultaneously record high organized criminality. While arguing that high resilience should result in low criminality, this paper seeks to ascertain whether the state-embedded actor syndrome is responsible for the high-criminality and high-resilience organized crime trends in Africa. Accordingly, the question underlying this research is: Is state-embedded actor syndrome responsible for the high-criminality and high-resilience (HC-HR) organized crime trends in Africa? The objectives of the study are to ascertain whether state-embedded actor syndrome is responsible for the HC-HR trends in Africa and recommend ways of reversing or averting the trend. The paper uses quantitative and qualitative methods as well as a non-experimental design. Data for the research are collected from secondary sources and manipulated by quadrant analysis. The paper finds that state-embedded actor syndrome negates state resilience and that is why criminality increases despite high resilience. The paper recommends that African states should avoid holding onto the heavy police approach to combating organized crime, but adopt a comprehensive policy response that will boost state resilience and check organized criminality.

Keywords: Organized crime, Africa, state-embedded actor syndrome, high criminality, high resilience

1. Introduction

Organized crime is any serious crime committed by an organized criminal group internally within a state or across international borders for economic gain. States experience organized crime in various ways, for they have varying vulnerabilities and resilience factors. The market for organized crime in Africa includes human trafficking/smuggling and arms trafficking; trade in heroin, cocaine, cannabis and synthetic drugs; flora and fauna crimes; as well as non-renewable resource crimes.¹ The criminal actor types that operate in this market

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¹ Enhancing Africa's Response to Organized Crime (ENACT), 'Organized Crime Index—Africa 2019' <www.enactafrica.org> accessed 7 October 2020).

are the mafia-type groups, criminal networks, state-embedded actors and foreign criminal actors.² In bid to withstand and disrupt organized crime, states develop resilience factors ranging from leadership and governance, criminal justice and security, economic and financial mechanisms, as well as civil society and social protection.³

Criminality and resilience are thus two forces that interplay in organized crime trends in any state. The traditional trend in crime and criminal justice is that criminality reduces as state resilience increases. However, some unusual trends of organized crime have emerged mostly in Nigeria, Kenya and South Africa whereby, despite high state resilience, there is high organized criminality. In addition to these three states already in this high-criminality and high-resilience (HC-HR) trend, Ghana, Senegal and Morocco (currently having low-criminality and high-resilience) are at the brink of falling into the HC-HR situation with large economies, good infrastructure for trade and communications, but rising levels of corruption and socio-political unrest.⁴ Ascertaining the cause of this strange trend will help Nigeria, Kenya and South Africa reverse the trend, just as it will enable Ghana, Senegal and Morocco avert the trend.

While arguing that high state resilience should result in low criminality, this paper seeks to ascertain whether the state-embedded actor syndrome is responsible for the HC-HR organized crime trend in Africa. Accordingly, the question underlying this research is: Is state-embedded actor syndrome responsible for the HC-HR organized crime trends in Africa? The objectives of the study are to ascertain the cause of this unusual trend and make recommendations that will enhance the capacity of these African states to respond more effectively to organized crime. The paper uses quantitative and qualitative methods as well as a non-experimental design. Data for the research are collected from secondary sources and manipulated by quadrant analysis. The paper proceeds with a review of theory and existing literature. Data collection follows, leading up to the discussion, recommendations and conclusion.

2. Theory and Literature Review

2.1 *The Relationship between Criminality and Resilience*

Organized crime is a concept that is resistant to generally acceptable definition, although the various definitions emphasize on the elements of criminal activities and criminal organizations.⁵ The United Nations Convention against

² Ibid.

³ Ibid 13.

⁴ Ibid 100.

⁵ M Newman and C Elsenbroich, 'Introduction: the Societal Dimensions of Organized Crime' (2017) 20 *Trends Organ Crim* 1, 2; K von Lampe, 'Was istorganisierte Kriminalität?' (2013)63(38/39) *Aus Politik Zeitgesch* 3; Van Duyne, 'Organized Crime, Corruption and Power' (1997) 26 (3) *Crime, Law and Social Change* 3.

Transnational Organized Crime (UNTOC) 2003 offers two baselines for a definition of organized crime: ‘organized criminal group’ and ‘serious offence’. The first baseline sees to it that only notable criminal associations or similar criminal actors qualify as organized criminal group; while the second ensures that only crimes qualified as ‘serious’ constitute organized crime. All the HC-HR African states and those at the brink have ratified UNTOC 2003. The Organized Crime Index—2019 defines organized crime as ‘illegal activities, conducted by groups or networks acting in concert, by engaging in violence, corruption or related activities in order to obtain, directly or indirectly, a financial and material benefit. Such activities may be carried out both within a state and across state borders.’⁶

Criminality with regard to organized crime comprises two factors: the criminal market and the criminal actor. The criminal market is a range of activities comprising the political and economic systems surrounding all stages of the illicit trade and/or exploitation of commodities or people. To be comprehensive, the criminal market should include cybercrime,⁷ money laundering, terrorism, and trans-border trade in live human blood,⁸ which incidentally were excluded in the Organized Crime Index –Africa 2019. These later set of crimes are rampant in Africa.

In spite of its rich content, the Organized Crime Index—Africa 2019 does not include terrorism as one of the criminal markets for organized crime. Terrorism is about the most serious crime committed by organized criminal groups against Nigeria and her people today.⁹ The terrorism in north-eastern Nigeria accounts largely for and is intertwined with arms trafficking in Nigeria. Terrorism is also prevalent in other African countries from Cameroon, Central African Republic, the Democratic Republic of Congo, Libya, Sudan, South Sudan, Kenya, to Somalia.¹⁰ The connection between organized crime and terrorism is a serious challenge and an evolving phenomenon.¹¹ Terrorism is deemed an ideological crime in the sense that it has political undertone and aims

⁶ ENACT ‘Organized Crime Index—Africa 2019’ (n 1) 27.

⁷ KAR Munro, ‘Cyberpayments: Internet and Electronic Money Laundering: Countdown to the Year 2000’ (1996) 4 (2) *Journal of Financial Crime* 159; M Daghar, ‘Is Kenya the new Playground for Cyber Criminals’, (4 February 2020) <<http://www.ocindex.net>> accessed 20 June 2021.

⁸ D Gumba and M Daghar, ‘Kenya’s Blood is hot Commodity for Regional Criminal Networks’ (27 August 2021) <www.ocindex.net> accessed 1 September 2021.

⁹ Institute for Economics & Peace (IEP), ‘Global Terrorism Index 2019: Measuring the Impact of Terrorism (Sydney, November 2019)’ <<http://www.visionofhumanity.org/reports>> accessed 2 April 2020, 8; C Felter, ‘Nigeria’s Battle with Boko Haram. Council on Foreign Relations’ (2018) <<https://www.cfr.org/backgrounder/nigerias-battle-boko-haram>> accessed 8 April 2021.

¹⁰ IEP (n 9).

¹¹ R Dhaouadi, ‘What Drives Illicit Trade in North Africa’ (5 July 2019) <www.ocindex.net> accessed 31 August 2020.

at terrorizing a government and her people without necessarily striving to make economic gain.¹² Organized crime, on the other hand, is deemed a non-ideological crime, with the criminal actors aiming only at economic gain. This distinction notwithstanding, both organized crime and terrorism are serious crimes committed by organized criminal groups within a state or across international borders. Terrorists also make economic gain¹³ in the sense of grabbing land on which they exert sovereignty, pillaging, and taking ransom money to release their kidnap victims. It is for this similarity that one may treat terrorism as a criminal market for organized crime.

The second factor of criminality is the criminal actors committing organized crime. There are mafia style groups, criminal networks, state-embedded actors and foreign criminal actors. Mafia-style groups are durable, have strong organizational structure, jealously guard the territories they control, are prone to use violence, and may seek to legitimize their operations and proceeds.¹⁴ Criminal networks comprise a number of people who transact regularly in diverse markets,¹⁵ seek to control their supply chain, with a penchant for laundering their profits.¹⁶ On their part, state-embedded actors are a number of officials with significant level of state influence, acting with impunity in the use of their influence on the distribution of state resources.¹⁷ State-embedded actor syndrome rides on the back of corruption,¹⁸ which affects people's finances as well as their safety and security.¹⁹ State-embedded actor syndrome can get so entrenched that officials commit organized crimes,

¹² D Imhonopi and UM Urim, 'The Sceptre of Terrorism and Nigeria's Industrial Development: a Multi-Stakeholder Imperative' (2016) 9(1) *African Journal of Criminology and Justice Studies (AJCJS)* 20.

¹³ IEP (n 9) 6.

¹⁴ ENACT, 'Organized Crime Index—Africa 2019' (n 1) 66; D Gambetta, *The Sicilian Mafia: the Business of Private Protection* (Harvard University Press, 1996) 4.

¹⁵ P Williams, 'Transnational Criminal Networks', in J Acquilla and DF Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime and Militancy* (Rand Corporation, 2001).

¹⁶ ENACT, 'Organized Crime Index—Africa 2019' (n 1); T Forrest, *The Advance of African Capital: The Growth of Nigerian Private Enterprise* (University Press of Virginia, Charlottesville, 1994) 12; EEO Alemika, 'Organized Crime: Nigeria', paper presented at UNODC seminar, Dakar, 2 April 2004, 8; Organisational Intelligence Unit, Federal Bureau of Investigation, *Overview of International Organized Crime*, 1995, 40; D Gumba, 'Armed Gangs are Perpetuating Mombasa's Narco-City Image' (9 September 2020) <www.ocindex.net> accessed 26 October 2020.

¹⁷ Ibid.

¹⁸ C Fijnaut, 'Empirical Criminological Research on Organized Crime: the State of Affairs in Europe', paper presented at the Round Table 'The "new" Field of Security in Europe: Internal and External Security Concerns', Centre D'Etudes Et De Recherches Internationales, Fondation National des Sciences Politiques, Paris 1996.

¹⁹ JB Yahia, 'Corruption is more than a Financial Threat' (3 May 2019) <www.ocindex.net> accessed 19 July 2020.

oblivious of their illegality.²⁰ This weakens state institutions and makes criminal networks emerge as service providers for the citizens.²¹ This panned out in Somalia where al’Shabaab has been designated a terrorist as well as an organized crime group.²² Lastly, foreign criminal actors comprise people from other states, who may enjoy some political protection as they operate in the criminal markets of host state and launder their proceeds in their home states. State-embedded actors constitute the dominant criminal actors in Africa, having significance in all aspects of society.²³ Criminal networks and foreign criminal actors have moderate while mafia-style groups have only little influence on the average on the continent.²⁴

Taken as a whole, criminality juxtaposes with resilience. Resilience means states’ ‘ability to withstand and disrupt organized criminal activities as a whole, rather than individual markets through political, economic, legal and social measures.’²⁵ The political measures of state resilience address the penchant of a state to cooperate with other states to disrupt organized crime; a state’s ability to protect her territorial integrity; political leadership and governance; as well as government transparency and accountability. The economic measures relate to the economic regulatory environment and anti-money laundering. The Organized Crime Index—Africa 2019 does not recognize money laundering as a criminal market, but it includes anti-money laundering as a state resilience factor.²⁶ This is problematic, as this particular resilience factor has no criminal market with which to counteract. Money laundering is a notable organized crime in Africa²⁷ and its inclusion in the Index will enhance the measuring of the actual state of criminality on the continent. Since this is a crime mostly committed by state officials, data on it will help determine how the involvement of state-embedded actors influences resilience and its relationship with criminality. The legal measures of state resilience pertain to national policies and laws in place to withstand and disrupt organized crime, law enforcement,

²⁰ United Nations Office on Drug and Crime (UNODC), ‘Transnational Organized Crime in the West Africa Region, 2005’ <https://www.unodc.org/pdf/transnational_crime_west-africa-05.pdf> accessed 10 June 2021.

²¹ K Aning, SB Kwarkye and J Pokoo, ‘Getting Smart and Scaling Up: The Impact of Organized Crime on Governance in Developing Countries – a Case Study of Ghana’ (New York University, June 2013).

²² T Reitano, C Clarke and L Adal, ‘Examining the Nexus between Organized Crime and Terrorism and its Implications for EU Programming,’ (International Centre for Counter-terrorism, April 2017), <<https://icct.nl/wp-content/uploads/2017/04/OC-Terror-Nexus-Final.pdf>> accessed 5 May 2021.

²³ Ibid 45, 59.

²⁴ Ibid.

²⁵ Ibid 29.

²⁶ Ibid 9.

²⁷ UNODC(n 20).

prevention as well as judicial system and detention. Lastly, the social measures are about the role that non-state actors play to withstand and disrupt organized crime as well as measures put in place to support victims and witnesses. AS it relates to the criminality of state-embedded actors, its relationship with resilience is ascertainable and this paper seeks to ascertain it.

The difficulty in ascertaining the relationship between criminality and resilience arises from a failure to measure and mix state vulnerabilities into the equation of criminality-resilience relationship. State vulnerabilities are the economic, physical geography and natural resources, social cohesion²⁸ and conflict,²⁹ socio-demographics, and trade factors that make a state vulnerable to organized crime.³⁰ Robust oil production in a state can make her vulnerable to oil bunkering.³¹ A state with long and porous border is vulnerable to organized crime, arising from unregulated cross-border trade.³² Robust cross-border trade increases the opportunity for illicit trade to pass through channels meant for legal commerce,³³ thereby eliminating the luminal state between legitimate and illegitimate markets.³⁴ Large flora concentration may make a state vulnerable to illicit logging.³⁵ Some vulnerabilities like high youth population in a state and artificial restrictions to legitimate trade that warrant the exodus of people into illegal trade have significant impact on criminality.³⁶ Some other vulnerabilities like economic inequality, natural resources revenue allocation and internal conflict adversely affect the strength and real value of state resilience.³⁷

²⁸ C Okafo, *Beyond the Rule of Law: Grounded Law and Personal Responsibility as the Catalysts for Effective and Efficient Crime Control in Nigeria* (Professorial Inaugural Lecture) (Nsukka, Nigeria: University of Nigeria Press 2017).

²⁹ S Dudley and J Bargent, 'The Prison Dilemma: Latin America's Incubators of Organized Crime, January 2017', <<http://www.insightcrime.org/investigations/prison-dilemma-latin-america-incubators-organized-crime>> accessed 2 September 2021.

³⁰ ENACT (n 1) 86.

³¹ UNODC (n 20).

³² Gumba (n 16).

³³ UNODC, 'The Globalization of Crime: A Transnational Organized Crime Threat Assessment, 2010' <https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 1 September 2021.

³⁴ Alexeev and others, 'Taxation and Evasion in the Presence of Extortion by Organized Crime' (2004) 32 (3) *Journal of Comparative Economics* 375.

³⁵ ENACT, 'Razing Africa: Combating Criminal Consortia in the Logging Sector', (September 2018), <<https://enactafrica.org/research/research-papers/razing-africa-combatting-criminal-consortia-in-the-logging-sector>> accessed 10 October 2021.

³⁶ Gumba (n 16).

³⁷ K Blackburn, KC Neandis and MP Rana, 'A Theory of Organized Crime, Corruption and Economic Growth' (2017) 5(2) *Economic Theory Bulletin* 1; Global Initiative, 'Organized Crime and its Role in Contemporary Conflict', Policy Note, September 2018; J Vorrath, 'Containing Illicit Flows at African Borders', (SWP International, July 2017).

State vulnerabilities generally take the sail off state resilience. A state may have adequate national policies and laws in place, but is unable to enforce them because the law enforcement process and system are either absent or grossly ineffective. Kenya banned the drug trade twice in a decade: first, via the enactment of the Prevention of Violence Act 2010 section 22(1) and second in 2016, yet the law is not implemented and the trade continues openly.³⁸ South Africa enacted the Public Services Act 1994, the Public Finance Management Act 1999 and the Prevention and Combating of Corruption Act 2004 to combat corruption. Yet, corruption and conflict of interest cases involving senior state officials continue unabated.³⁹ In spite of the existence of legal and institutional frameworks for anti-money laundering and economic regulatory environment, state-embedded actors in Nigeria still stash away public funds in overseas personal banks accounts.⁴⁰ Similarly, in 2011, Morocco included the goldfinch in Annex IV of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and consequently enacted Law No. 29-05 on the protection of the goldfinch, yet the industrial poaching and trafficking of this noble songbird has continued because the laws are not enforced.⁴¹

The police are reactive⁴² and centralized,⁴³ hence poor at crime prevention; they still use illegal detention in most African states and the judiciary is not independent to the extent that a president can remove a chief judicial officer at will.⁴⁴ Most of these states pay only lip service to victim and witness support and this derogates from successful prosecution of organized crimes, leading to the re-victimization of the victims of these crimes. Governments in these states are hardly transparent and accountable, which accounts for the poor political leadership and governance. A state may sign and ratify organized crime treaties, giving a façade of international cooperation, but will refuse to domesticate them; or domesticate them without effectively enforcing them.⁴⁵

The states in the HC-HR trend and those at the brink have large borderline that they cannot control, making the infiltration of criminal markets and actors

³⁸Gumba (n 16).

³⁹R Chelin, 'The Rush for Cash during COVID-19 Highlights Conflicting Interests in South Africa' (5 October 2020) <www.ocindex.net> Accessed 10 October 2021.

⁴⁰AA Nwankwo, *Nigeria, the Stolen Billions* (Fourth Dimension, Enugu, 1999).

⁴¹JB Yahia and O Abaouss, 'Can Morocco Save the Mythical Goldfinch in the Maghreb?' (11 September 2019) <www.ocindex.net> accessed 20 October 2021.

⁴²L Johnston and CD Shearing, *Governing Security: Explorations in Policing and Justice* (Routledge 2003) 23.

⁴³A Hills, *Policing Africa: Internal Security and the Limits of Liberalization* (Lynne Rienner, Boulder CO and London, 2000) 11.

⁴⁴J Ogunye, 'Analysis: Suspension of Chief Justice of Nigeria Onnoghen: An Illegal Executive Coup against a Recalcitrant Chief Judicial Officer', *Premium Times* 16 January 2019.

⁴⁵SN Anya, MC Anozie and JF Olorunfemi, 'Amid Domestication and Afriexit: Whither Nigeria and South African on the International Criminal Court?' (2020) 46 (1) *Commonwealth Law Bulletin* 1.

easy, directly or indirectly counteracting the state's resilience.⁴⁶ On paper, non-state actors like civil society organizations (CSOs) and non-governmental organizations (NGOs) may exist in some states, but are in reality cronies and appendages of government, which pays them off to be silent and inactive on issues they are supposed to pursue actively. Or government may just emasculate and gag them. This is why in Nigeria, for instance, the present administration of President Muhammadu Buhari (2021) has refused to constitute the board of the National Human Rights Commission; a body that ought to investigate human rights abuses and hardly anyone is talking about it.

These negativities operate at the background to sap state resilience factors of strength, with the result that these so-called resilience factors are indeed negative, not positive, resilience. Resilience can be positive or negative. Positive resilience is the attitudes, institutions and structures that create and sustain a state's ability to withstand and disrupt organized crime; whereas, negative resilience is a poor camouflage of resilience structure without the requisite ability to withstand and disrupt organized crime. Negative resilience is in fact a shade of criminality, which is why it can go high simultaneously with criminality. This can be likened to negative peace and positive peace.⁴⁷ So the reason a state with high resilience may simultaneously experience high criminality may be that the so-called resilience is negative resilience, not positive resilience.

2.2 Literature Review

Organized crime was hitherto not a term applied to Africa.⁴⁸ However, globalization dynamics and emerging political economy have made this crime rife on the continent.⁴⁹ Organized crime is dynamic and this manifests in evolving criminal markets, with discovery in February 2020 of trafficking in new synthetic cannabinoid called WIZ in Durban, South Africa targeted at schoolchildren.⁵⁰ Similarly, a brand of human smuggling is emerging in which unscrupulous football agents smuggle and exploit young African footballers in search of clubs in Europe and Asia.⁵¹ Kenya's blood is smuggled to Somalia, causing shortage in Kenyan hospitals.⁵² Elected political office holders engage

⁴⁶Gumba (n 16).

⁴⁷ Economist Intelligence Unit (EIU) Limited, 'Democracy Index 2019: A Year of Democratic Setbacks and Popular Protests' <<https://www.eiu.com>> accessed 20 March 2020, 66.

⁴⁸ M Shaw, 'Africa's Changing Place in the Global Criminal Economy', ENACT Continental Report, September 2017.

⁴⁹ EEO Alemika, 'United Nations Transnational Organized Crime Assessment Form: Nigeria' April 2004, 9.

⁵⁰ R Chelin, 'New WIZ Drug target South African Youth' (20 July 2020) <ocindex.net> accessed 30 September 2021.

⁵¹ PR Oyono, 'African Young Footballers Caught in a Web of Crime and Abuse' (26 February 2019) <www.ocindex.net> accessed 20 September 2021.

⁵²Gumba and Daghar (n 8).

in corruption racket in Nigeria, where they steal government funds in the name of security votes.⁵³ These new brands of organized crime add to already high criminality.

This increase in criminality correlates with emerging crop of criminal actors. For instance, Niger-Delta militants, with the connivance of state-embedded actors and foreign criminal groups drive oil bunkering along the Gulf of Guinea.⁵⁴ State-embedded actors back criminal networks trading on drugs in Kenya.⁵⁵ State-embedded actor syndrome in South Africa manifests at the highest level, where Khusela Diko, former aid to South African President Cyril Ramaphosa is under investigation for corruption/conflict of interest in procuring personal protective equipment during COVID-19. Criminal networks illegally obtain commercial explosives in the Southern African Development Community (SADC) and smuggle them into South Africa, where they are used in cash-in-transit armoured-vehicle robberies, ATM bombings and illegal mining.⁵⁶ Organized criminal transactions on drugs are carried out in Africa by loosely organized criminal network, in contrast to Latin America where these transactions are dominated by highly organized mafia-type groups.⁵⁷ Criminal networks conspire with foreign criminal groups (Chinese and Ghanaians) to illegally mine gold in Kédougou and Niokolo-Koba Park in Senegal.⁵⁸

Organized criminal markets and actors are fuelled by interstate and intercontinental travel and transaction. Nigeria is a trans-shipment route for cargoes of heroin and cocaine produced in South Asia and South America respectively, which are destined for Europe and the United States.⁵⁹ Nigerian and Ghanaian cybercrime networks operate from Sierra Leone, and defraud victims anywhere in the world.⁶⁰ The heroin that makes South Africa a transit zone and consumption market for this drug is shipped from Central Asia.⁶¹

⁵³ JN Ezeilo, U Nwoke and SN Anya, 'Legal Structures for the Prevention of Misspending and Embezzlement of Security Vote' (2018) 62(2) *Jour of Afri Law* 45.

⁵⁴ M Ogbonnaya, 'Is Nigeria's New Anti-Piracy Law enough to Combat Piracy?' (7 May 2020) <www.ocindex.net> accessed 2 September 2021.

⁵⁵ Gumba (n 16) 119.

⁵⁶ R Chelin and W Els, 'South Africa's Growing Threat of Explosives Smuggling is a Ticking Time Bomb' (2 September 2020) <www.ocindex.net> accessed 20 September 2021.

⁵⁷ J Bello-Schünemann and L Wellborn, 'Responding to Drug Demand in West Africa', ISS, August 2019.

⁵⁸ M Kane, 'How Corruption is fuelling Illegal Mining in Senegal' (22 August 2019) <ocindex.net> accessed 3 September 2021.

⁵⁹ UNODC (n 20) 13.

⁶⁰ M Lengor, 'United Nations Transnational Organized Crime Assessment Form: Sierra Leone', April 2004, 11.

⁶¹ S Haysom, P Gastrow and M Shaw, 'The Heroin Coast: A Political Economy along the Eastern African Seaboard', (2018) <<https://globalinitiative.net/wp->

Timber illegally logged in the Congo Basin region is shipped to Asian Markets.⁶² Nigerian ladies are being increasingly trafficked to Mali, where they are forced into prostitution.⁶³ Donkey rustled in Ethiopia, Tanzania, Somalia, Uganda and South Sudan are taken to Kenya, where they are killed and their skin shipped to China for the production of medicine and cosmetics.⁶⁴ Morocco's rare fossils are trafficked and end up in auctions and collections in faraway Paris and Mexico City.⁶⁵ Cocaine shipped from Brazil and destined for Europe transits the Autonomous Port of Dakar, Senegal.⁶⁶ Illegal migrant from Senegal, destined for Spain, are smuggled via Morocco.⁶⁷ Children trafficked from Guinea-Bissau are forced to beg in Senegal.⁶⁸ This interconnectivity of crimes and places means that measuring criminality in states gives the best result when done in recognition of the transnational nature of organized crime.

Again, the prevalence of one organized criminal market may correlate with that of another. Human trafficking, for instance, correlates highly with human smuggling,⁶⁹ indicating that people being smuggled can be exploited as situations arise. This can be exploitation for prostitution,⁷⁰ forced labour services, slavery or organ harvest.⁷¹ There is high correlation between human trafficking and trafficking in arms, indicating that people who are being trafficked also traffic arms alongside or arms are taken together to facilitate human trafficking.⁷² The point here is that measuring criminal markets in isolation may yield wrong or indeterminate result, and this can be avoided by paying attention to the correlations between markets.

content/uploads/2018/07/2018-06-27-research-paper-heroin-coast-pdf.pdf.> accessed 14 October 2021.

⁶² ENACT (n 35).

⁶³ M Kane, 'Trafficked from Nigeria for Sex Work in Mali' (25 October 2019) <www.ocindex.net> accessed 22 October 2021.

⁶⁴ M Daghar, 'Donkey Rustling in East and Horn of Africa' (13 October 2020) <www.ocindex.net> accessed 20 October 2021.

⁶⁵ JB Yahia, 'Morocco's Surging Trade in Fossils' (7 January 2019) <www.ocindex.net> accessed 1 September 2021.

⁶⁶ M Kane, 'Is Dakar the new Destination of Choice for Drug Traffickers?' (16 January 2020) <www.ocindex.net> accessed 24 October 2021.

⁶⁷ M Kane, 'Senegal's Multimillion-Dollar Migrant Smuggling Trade Goes On' (15 January 2020) <www.ocindex.net> accessed 12 September 2021.

⁶⁸ M Kane, 'Trafficked from Guinea-Bissau and Forced to Beg in Senegal' (24 October 2019) <www.ocindex.net> accessed 22 October 2021.

⁶⁹ International Organization for Migration (IOM), 'World Migration Report 2018'; UNODC, 'Global Report on Trafficking of Persons 2018'; ENACT (n 1) 64.

⁷⁰ UNODC, 'Trafficking in Persons: Global Patterns, the UNODC Anti-Human Trafficking Unit Report 2006', 1.

⁷¹ Alemika (n 49) 36-37.

⁷² L Bird and T Reitano, 'Trafficking in Persons in Conflict Contexts: What is a Realistic Response from Africa?' ENACT, June 2019.

Criminality and resilience do not stand alone, but have to be coupled with state vulnerabilities to give accurate result on the organized crime status of a state.⁷³ Organized criminal groups exploit conditions like armed conflict, absence of social cohesion, social and economic inequality, porous border to bolster their activities. Economic crises pave way for organized criminal organizations to infiltrate businesses.⁷⁴ A state's business regulatory environment determines investment risk therein.⁷⁵ A strong business regulatory environment can make it conducive for citizens to pursue legitimate businesses and shun organized crime.⁷⁶ Such environment, when too restrictive and coupled with economic inequalities,⁷⁷ may serve to edge out willing businesspeople and turn their interest to organized crime.⁷⁸

No existing literature to the best of authors' knowledge has pursued the research question posed in this study. This study is therefore the first to do so. Data are collated and analysed below to answer the research question.

3. Data

Empirical data for criminality and resilience are obtained from the Organized Crime Index—Africa 2019. Data scores range from one to ten. For criminality, a score of one represents a perfect situation where criminal markets and criminal actors do not exist or have negligible impact; a score of ten, on the other hand, signifies the worst situation where criminal markets and actors permeate every facet of society.⁷⁹ The scores for resilience have the inverse value as one represents the weakest resilience and ten signify the strongest resilience.⁸⁰

⁷³ Global Initiative (n 37) 86; Vorrath, (n 37) 86; Blackburn et al (n 37) 86.

⁷⁴ Global Agenda Council on Organized Crime, 'World Economic Forum 2011' <http://www3.weforum.org/docs/WEF_GAC_OrganizedCrime_Report_2010-11.pdf> accessed 26 September 2021.

⁷⁵ World Bank Group, 'Doing Business 2017: Equal Opportunity for All Report, 2017' <http://www.doingbusiness.org/~/_media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> accessed 10 October 2021.

⁷⁶ R Locke, 'Organized Crime, Conflict and Fragility: A New Approach' (International Peace Institute, July 2012) <https://www.ipinst.org/wp-content/uploads/publications/epub_organized_crime_conflict_fragility.pdf> accessed 2 October 2021.

⁷⁷ Blackburn et al (n 37); Global Initiative, (n 37); Vorrath (n 37).

⁷⁸ Vulnerabilities to Trafficking, <http://www.labourexploitation.org/sites/default/files/publications/Vulnerabilities%20to%20trafficking_final.pdf> accessed 3 September 2021.

⁷⁹ ENACT (n 1) 45.

⁸⁰ Ibid.



Figure 1: Criminal Actor Score Distribution. Source: ENACT, Organized Crime Index—Africa 2019.

Figure 1 shows that 42 out of the 54 African states (77.7 per cent) score one to five (low) on mafia-style criminal actor groups,⁸¹ indicating that this criminal actor group has non-existent, negligible or moderate impact on criminality. Out of the remaining 12 states, the impact of mafia-type groups is significant in seven states and severe in five states. No state in Africa scores above 8.5 on this criminal actor type. The inference is that the impact of this criminal actor type, without high state-embedded actor scores will not skew the relationship between criminality and resilience to the HC-HR trend.

Conversely, only 18 out of the 54 African states (33 per cent) score between one and five on criminal networks. Criminal networks have non-existent or insignificant influence in three out of these 18 states, and moderate influence in 15 states. Out of the remaining 36 states, criminal networks have significant influence in 24 (44.4 per cent) and severe influence in 12 (22.2 per cent). Only one African state scores above 8.0 on criminal network. The inference here is that criminal networks, without the overbearing influence of state-embedded actors are unable to generate the HC-HR organized crime trend.

Although foreign criminal actors are the least prevalent on the continent, it is only in six out of the 54 states (11.1 per cent) that this criminal type has non-existent or negligible influence on organized crime. In 18 out of the 54 states (33.3 per cent), foreign actors score 3.5—5, having little or moderate influence. In the remaining 30 states, foreign actors have significant influence in 26 (48.1

⁸¹ Ibid.

per cent) and severe influence only in four states (7.4 per cent). No African state scored above 8.0 on foreign criminal actor type.⁸² The inference is that, owing to the non-prevalent nature of foreign criminal actors on the continent, this actor type, without the connivance of state-embedded actors cannot slant the relationship between criminality and resilience to the HC-HR trend.

Then comes the state-embedded-actors, who are the most prevalent criminal actor type, with just four out of the 54 states (7.4 per cent) having non-existent or insignificant impact on criminality. State-embedded actors have moderate influence in nine out of the 54 states (16.6 per cent), with scores of 3.5—5.⁸³ Interestingly, state-embedded actors are the most prevalent criminal actors in 40 out of the 54 African states, scoring 6 to 10 on criminality, having significant or severe influence on the continent. This is the only criminal actor type that has severe influence in up to 19 African states (35.1 per cent). Only state-embedded actors and criminal networks record a score of 9.5 each in a state. The foregoing criminal actor scores are hence particularized to states under study and merged with the criminal market score to get the criminality scores, which are juxtaposed with resilience scores below.

State	Criminality Score	Criminal Market Score	Criminal Actor Score	Resilience Score
Nigeria	7.70	7.65	7.75	5.67
Kenya	6.14	5.65	6.63	5.04
South Africa	6.16	5.20	7.13	5.58
Ghana	4.89	5.15	4.63	5.48
Senegal	4.60	4.45	4.75	6.04
Morocco	4.88	4.50	5.52	6.33

Table 1: Criminality and Resilience Scores of select States. Source: Adapted from ENACT, Organized Crime Index—Africa 2019.

Of the ten indicators of the criminal market in Nigeria, none has non-existent or little influence, just like none has moderate influence on society. The least score for any of these indicators in Nigeria is 6.5 on heroin trade and cocaine trade, which still has significant influence on criminality. Five out of these ten criminal markets score above 8.0, having severe influence on criminality. Out of these severely influential five, non-renewable resource crimes have the highest score of 9.00.⁸⁴ This most prevalent criminal market in Nigeria is dominated or engineered by state-embedded actors, who illegally award to themselves oil wells in the Niger-Delta and illegally mine gold in

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

Zamfara State and some other states of northern Nigeria.⁸⁵ The inference is that state-embedded actors dominate the most widespread criminal market and this militates against positive resilience.

Six out of the 12 resilience indicators score between 4.0 and 5.5, being moderately effective in Nigeria. These are political leadership and governance, government transparency and accountability, judicial system and detention, territorial integrity, victim and witness support as well as prevention. These are resilience indicators anchored directly by state officials, and their mere moderate effectiveness indicates that Nigerian state officials are lax in the performance of their duties at resilience-building. Non-state actor resilience is sufficiently effective in Nigeria (6.5),⁸⁶ indicating that the CLOs and NGOs are ready to play their parts when state officials seriously face the duty of resilience-building. Nigeria's highest score on the 12 resilience indicators is 8.0 on national policies and laws, showing that she has a robust set of laws to counter organized crimes.⁸⁷ However, these laws are not effectively enforced, largely because senior state officials are themselves the dominant organized criminals (8.0), partnering criminal networks (9.5), whose interests are protected by deliberately ineffective law enforcement.

Kenya has a criminal market score spectrum slightly different from Nigeria. Unlike in Nigeria where five out of the ten criminal markets have severe influence on criminality, no criminal market in Kenya has severe influence on criminality. However, five out of the ten criminal markets, to wit: human trafficking, human smuggling, fauna crimes, non-renewable resource crimes, and cannabis trade have significant influence on criminality, with scores between 6.0 and 6.5.⁸⁸ Arms trafficking and heroin trade top the list, by scoring 7.0 on criminal market; and only cocaine trade and synthetic drugs trade have moderate influence (4.0) in the East African state.⁸⁹ Arms trafficking in Kenya make weapons available for ethnic crisis and election conflicts, and these conflicts are engineered or sponsored by senior state officials for political gain.⁹⁰ State-embedded actors (7.5) lead criminal networks (7.0), foreign criminal actors (6.0) and mafia-style groups with significant influence on criminality in Kenya. The prosecution of President Uhuru Kenyatta and Vice President William Ruto at the International Criminal Court following the 2008

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid 124.

⁸⁸ Ibid.

⁸⁹ Ibid 118.

⁹⁰ SJ Ndlovu-Gatsheni, 'Beyond the Equator there are no Sins: Coloniality and Violence in Africa' (2012) 28(4) *Journal of Developing Societies* 419.

post-election crises, though botched,⁹¹ is a testament of the role that state-embedded actors play in aggravating criminality and vitiating state resilience.

This averment is vindicated by the fact that no resilience indicator for Kenya is highly effective. Only non-state actors and national policies and laws score up to 7.0, showing that Kenya makes anti-organized crime laws that are not enforced, and that there are viable CLOs and NGOs ready to partner the state in resilience-building. The fact that Kenya's laws are not enforced reflects in her poor score of 1.5 on prevention,⁹² which shows that the laws are extremely ineffective at crime prevention. Kenya's law enforcement score of 6.0 is mere negative resilience. The extreme ineffectiveness of Kenya's laws⁹³ is also indicated by her low score (2.0) on victim and witness support. A criminal justice system that is unable to support victims of crime and protect witnesses will only fare poorly at crime prevention and prosecution. The resilience indicators of political leadership and governance, government transparency and accountability, judicial system and detention, territorial integrity, anti-money-laundering systems, as well as economic regulatory environment have only moderate effectiveness in Kenya. The poor scores on these core government functions potentially bolster criminality, just as they testify to the unwillingness of the state to build positive resilience, and this is traceable to the effect of state-embedded actor activities.

For South Africa, flora crimes, cocaine trade and cannabis trade have non-existent or little influence on society as they score 3.0 and below.⁹⁴ Human trafficking (3.5) and human smuggling (4.0) have only moderate influence on criminality.⁹⁵ Four out of the 12 criminal markets have significant influence on criminality; they are arms trafficking (7.0), fauna crimes (7.5), heroine trade (7.0) and synthetic drugs trade (7.0). The criminal market that has severe influence on society in South Africa, just like in Nigeria, is non-renewable resource crimes (8.0).⁹⁶ State-embedded actors (7.5) participate most actively in this market either alone or in conjunction with foreign criminal actors (7.5) and criminal networks (7.0), with the implication that state resilience is destroyed from within.

⁹¹ Amnesty International, 'Crying for Justice: Victims' Perspectives on Justice for the Post-election Violence in Kenya' (2014) <<https://www.amnesty.org/en/press-releases/2014/07/kenya-victims-still-seeking-justice-post-election-violence>> accessed 23 September 2021; C Meloni, 'Kenya and the ICC: a Boomerang Effect?' (May 2014) <https://www.academia.edu/6972975/Kenya_and_the_ICC_A_Boomerang_Effect> accessed 29 September 2021.

⁹² ENACT (n 1) 125.

⁹³ Gumba (n 16).

⁹⁴ ENACT (n 1) 118.

⁹⁵ Ibid.

⁹⁶ Ibid 19.

South Africa's resilience table vindicates this averred complicity of state-embedded actors, as only the non-state actors resilience indicator scores up to 7.0;⁹⁷ kudos to South Africa's viable CLOs and NGOs. South Africa scores poorly on victim and witness support (3.0) as well as prevention (2.0), on which she has non-existent or extremely ineffective resilience. Her resilience indicator on international cooperation is only moderately effective (5.5),⁹⁸ which suggests that she is yet to maximize her potentials to galvanize cooperation among the SADC states and beyond, to combat organized crime. Although slightly better than Nigeria, South Africa is not highly effective on the core state function of building resilience through political leadership and governance, government transparency and accountability, national policies and laws, judicial system and detention, law enforcement, territorial integrity, anti-money-laundering systems and economic regulatory environment. The minus on this point is an indictment on state-embedded actors and it goes to show that these actors, through complicity and inaction, deliberately bolster criminality and stifle resilience.

The three states at the brink of the HC-HR trend (Ghana, Senegal and Morocco) share similar criminal markets and resilience features with Nigeria, Kenya and South Africa, which puts them at a risk of also entering this trend. Ghana's non-renewable resource crime score of 7.5 is her highest score for criminal market.⁹⁹ This crime has the tendency to deepen state-embedded actor syndrome and escalate criminality, thereby bringing Ghana into the HC-HR trend. State-embedded actors are already the most dominant players in Ghana (6.5) followed by active criminal networks (6.0).

Senegal has a current criminality score of 4.60, with flora crimes (7.0) and fauna crimes (6.5) having significant influence on society. Flora and fauna are naturally occurring criminal markets that promise to inure, coupled with emerging indications that Senegal is the new destination of choice for drug traffickers,¹⁰⁰ which have a tendency for increasing criminality. Beyond this, none of the criminal markets has non-existent or little influence in Senegal. With foreign criminal actors having significant influence and criminal networks having moderate influence, there is a chance that these actors will consistently exploit these markets and increase criminality in Senegal, and thereby push her into the HC-HR trend. It is imperative for Senegal to make a law pursuant to the Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children 2000 Article 5, to criminalize human smuggling, as a strategy to reduce her criminality.

On her part, Morocco's cannabis trade score of 9.0 is her highest for criminal market. She is among the world's largest producer and consumer of cannabis. This coupled with the significant influence of cocaine trade, synthetic

⁹⁷Ibid 25.

⁹⁸Ibid.

⁹⁹Ibid 119.

¹⁰⁰Kane (n 66).

drug trade and human smuggling (all at 6.0), has propensity to bolster her criminality from the current 4.88 to 5.0 and above, thereby plunging her into the HC-HR trend. The fact that criminal networks (6.5), state-embedded actors (7.5) and foreign criminal actors (6.0) currently have significant influence in Morocco only guarantees speedy degeneration of the North African state into high criminality.

4. Discussion

4.1 Quadrant Analysis

Quadrant analysis is used here to place the states into four categories to discuss their criminality-resilience relationships. Accordingly, they are states in the high criminality and low resilience, low criminality and low resilience, high criminality and high resilience, as well as low criminality and high resilience trends. The first two trends are not central to the objectives of this paper and receive only tangential explanation here. Twenty African states have high criminality and low resilience to counter the threat.¹⁰¹ Most of the states in this trend are experiencing conflict, which suggests that conflicts in states increase chances of organized criminality and lower the states' resilience to counter the threat. Similarly, 20 African states have low criminality and low resilience. This implies that criminal markets and actors are absent in these states and government see no need to put resilience mechanisms in place. The right approach however will be for such states to build resilience all the same, as criminal actors, sensing the existing low resilience may seek out or develop criminal markets in these states, where they can operate and be protected under the low resilience scenarios.

Nigeria, Kenya and South Africa are arguably the biggest economies of their regions as well as the states with strong democratic traditions and institutions. Yet the trio has high organized criminality and high resilience. It means that these states know of the prevalence of organized crime within their borders, have made laws and policies among other resilience factors to the point that they are recognized as high resilience states, yet they continue to experience increased organized criminality. The implication is that the states have reached a saturation point where their high resilience no longer effectively counters criminality. Thus, these states have perfect examples of cases of the concept of negative resilience discussed above. The states' laws are weak and inadequate. Yet, the states do not effectively implement the laws or do not implement them at all? The states should amend existing laws to make them sufficiently pragmatic to curb organized criminality. The relevant law enforcement machinery in the state should be strengthened. Since the prevalence of state-embedded actors has correlation with this HC-HR trend, the states should go tough on state officials and purge the public service of corrupt elements that spearhead or partner other criminal actors to increase organized criminality.

¹⁰¹ ENACT, 'Organized Crime Index—Africa 2019' (n 1) 13.

Nigeria leads West Africa on criminality with a score of 7.70. Nigeria has the highest scores on criminal markets (7.65) and criminal actors (7.75) in the region. The on-going armed conflict between Boko Haram insurgents and government security officials¹⁰² as well as prevailing banditry in Nigeria¹⁰³ may further increase her criminality scores. Illegal mining of gold in north-western Nigeria, sponsored by Chinese criminal networks backed by state officials, is driving non-renewable resource crime.¹⁰⁴ Despite Nigeria's recent Suppression of Piracy and other Maritime Offences Act 2019, oil bunkering and piracy thrive along the Gulf of Guinea.¹⁰⁵ Close neighbours of Nigeria, to wit: Ivory Coast (6.23), Guinea (5.39), Niger (5.74), Sierra Leone (5.00) and Togo (5.56) are already high criminality states, with a tendency that this may spread further and worsen Nigeria's criminality rating. Nigeria's high resilience score of 5.76 is unable to withstand and disrupt organized crime in the state because she has a prevalence of state-embedded actors at score 8.0 and their collaborating criminal networks at score 9.5. The way forward for Nigeria is to sanitize the public service by flushing out corrupt state officials and effectively enforcing the law against organized crime. To be able to achieve this, Nigeria need to strengthen her inadequate law enforcement machinery by sufficiently funding the police and other relevant law enforcement agencies as well as making the judiciary truly independent and autonomous.

Similarly, in Kenya, state-embedded actors dominate organized crime. These actors control blood trafficking in Kenya,¹⁰⁶ back criminal actors trafficking in drugs in Kenya¹⁰⁷ and participate actively in fauna crimes in the East African state.¹⁰⁸ Thus, although, Kenya scores high (5.04) on resilience,¹⁰⁹ it is but negative resilience without actual capacity to roll back criminality. Kenya is surrounded by neighbours with high criminality and low resilience. For instance, Somalia's criminality-resilience ratio is 6.40:1.42. South Sudan's is 6.40:1.50. Sudan's is 6.38:2.83.¹¹⁰ These are very poor and dangerous rankings, with propensity to spread criminality into Kenya and worsen her

¹⁰² O Adetayo, 'Boko Haram: Buhari approves Release of \$1bn for Security Equipment' *Punch Newspapers* (2018), available at <<https://punchng.com/breaking-boko-haram-buhari-approves-release-of-1bn-forsecurity-equipment>> accessed 8 September 2021.

¹⁰³ DE Agbibo, 'Boko Haram and the Global Jihad: Don't Think Jihad is Over. Rather, Jihad Has Just Begun' (2014) X(X) *Australian Journal of International Affairs* 1.

¹⁰⁴ M Ogbonnaya, 'Illegal Mining Drives Nigeria's Rural Banditry and Local Conflicts' (28 May 2020) <www.ocindex.net> accessed 10 October 2021.

¹⁰⁵ Ogbonnaya (n 54); A Ebo'o and D Olorunyomi, 'Data Conundrum in the Gulf of Guinea' (25 July 2019) <www.ocindex.net> accessed 10 September 2021.

¹⁰⁶ Gumba and Daghar (n 8).

¹⁰⁷ Gumba (n 16).

¹⁰⁸ Daghar (n 64).

¹⁰⁹ ENACT (n 1) 73.

¹¹⁰ Ibid.

situation.¹¹¹ The fact that East Africa has the lowest average regional resilience score on the continent¹¹² proves that Kenya's is but negative resilience without the actual ability to roll back criminality.

On her part, South Africa leads the Southern African region on criminality with a score of 6.16.¹¹³ This score could have been higher if South Africa had not legalized private-use cannabis¹¹⁴ and the score for this criminal market was added to her overall criminality. The discovery in February 2020 of new synthetic cannabinoid called WIZ targeted at school children in Durban,¹¹⁵ the growing threat of explosives smuggled into South Africa¹¹⁶ and the deadly impact of the smack of heroin on development in South Africa¹¹⁷ – all poised to increase criminality in South Africa. Recurrent street violence damages social cohesion and threatens peace, which may invariably worsen South Africa's criminality rating in the future. South Africa's resilience of 5.58 is bolstered by active non-state actors like the civil society and the media, which play a role in withstanding and disrupting organized crime. The contribution of these non-state actors is technically wiped out by the prevailing activities of state-embedded actors, who score 7.5. Then President Jacob Zuma's role in a corruption case in 2019 indicates a link between senior state officials and criminal networks; it is particularly damaging in this regard,¹¹⁸ as it serves to negative resilience. This negative trend has not abated as a former aide to current South African President Cyril Ramaphosa is under investigation for corruption/conflict of interest on how government procured personal protective equipment during COVID-19.¹¹⁹

Ghana has low criminality and high resilience, with high propensity for increased criminality in the future.¹²⁰ In the literature review section, it was noted that organized crime in one state easily spreads into neighbouring or even far-flung states. West Africa has the highest average score for criminal markets (5.22) among all the five regions of the continent.¹²¹ On the average, West Africa scores 5.29 and 5.35 for overall criminality and criminal actors

¹¹¹ ENACT, 'Heroin is now a Major Urban Development Challenge in Africa' (13 August 2020) <www.ocindex.net> accessed 20 September 2021.

¹¹² ENACT (n 1) 73.

¹¹³ *Ibid* 75.

¹¹⁴ A Harding, 'Court Brushes aside Opposition' (18 September 2018) <www.bbc.co/news/world-africa-45559954> accessed 20 September 2021.

¹¹⁵ Chelin (n 50).

¹¹⁶ Chelin and Els (n 56).

¹¹⁷ ENACT, 'The Smack of Heroin: Deadly Impact of an Illicit Market on Development' (12 August 2020) <www.ocindex.net> accessed 20 September 2021.

¹¹⁸ ENACT (n 1) 99.

¹¹⁹ Chelin (n 39).

¹²⁰ ENACT (n 1) 91.

¹²¹ *Ibid* 66.

respectively, coming second only to East Africa.¹²² Nigeria has the highest score for criminality in Africa.¹²³ The propensity for criminality to spread from Nigeria and indeed other high criminality West African states like Ivory Coast, Guinea, Mali, Togo, Niger, and Sierra Leone to Ghana is high, putting Ghana at a very high risk of increased criminality. Criminality is equal to criminal market and criminal actor. Interestingly, Ghana's score for criminal markets (5.15) is already high. It took a low score of 4.63 on criminal actors to bring Ghana down to a low average of 4.89 on criminality.¹²⁴ The criminal market is already there waiting for sufficient criminal actors to engage it. Being at a criminality score of 4.89, it will take just a little for Ghana to hit five points and cross over to a high criminality state. This is the basis for the prediction that Ghana may soon enter the HC-HR trend.

This analysis for Ghana largely applies to Senegal, also a West African state. However, Senegal has a criminality score of 4.60, and a low state-embedded actor score of 4.0,¹²⁵ so it will take more for Senegal than for Ghana to hit five points and cross over to a high criminality state. Moreover, Senegal's resilience point (6.04) is higher than Ghana's; and if the resilience were positive, Senegal may have stronger capacity than Ghana to push back criminality.

Morocco is indeed at the brink of falling into the HC-HR trend. With poor governance, corruption and porous border constantly escalating illicit trade in the region, Morocco comes third on criminality in North Africa, scoring 4.88 (low).¹²⁶ This score is so close to the five point's threshold that Morocco can easily cross over to a high criminality state. Morocco and the Maghreb have no dedicated strategy to address industrial poaching of the mythical goldfinch, which is poised to increase the criminal market for fauna crime in the region.¹²⁷ The cannabis market is robust in North Africa, with Morocco reckoned as one of the highest cannabis producing states of the world.¹²⁸ The cannabis trade has a criminal market score of 9.0 in Morocco and its consumption is high among Moroccans,¹²⁹ predisposing them to criminality. Similarly, Morocco's criminal market for synthetic drugs trade (particularly tramadol) scores high at 6.0. Being a transit hotspot to Europe, Morocco already scores high (5.75) on the human

¹²² Ibid 76.

¹²³ Ibid.

¹²⁴ Ibid 77.

¹²⁵ Ibid.

¹²⁶ Ibid 70.

¹²⁷ Yahia, 'Will the Melody Linger on? Morocco Moves to Save the Goldfinch' (20 March 2020) <www.ocindex.net> accessed 12 October 2021.

¹²⁸ UNODC, 'World Drug Report 2019' <<https://www.unodc.org/unodc/en/frontpage/2019/June/world-drug-report-2019>> accessed 17 October 2021.

¹²⁹ ENACT (n 1) 70.

trafficking/smuggling criminal market.¹³⁰ State-embedded actors are the most prominent criminal actors in Morocco, scoring 6.33. These criminal state officials benefit from the criminal market and are expected to do little or nothing to withstand and disrupt growing criminality in the Sahara state. As it stands, there is little or nothing on the way to stop Morocco from joining the HC-HR trend, as her resilience score of 6.33, although the highest in North Africa, is but negative resilience, where state-embedded actors are the major players in the criminal markets.

4.2. Is State-embedded Actor Syndrome responsible for the HC-HR Trend?

Evidence from Central Africa suggests that the state-embedded actor syndrome does not necessarily cause HC-HR trend. The region scores the highest on state-embedded actors in Africa with an average of 7.09, with Burundi (8.5), Equatorial Guinea (9.0) and Angola (8.5) scoring extremely high on this criminal actor type. Yet, none of these states is in the HC-HR trend. It is instructive however, that Burundi and Equatorial Guinea with very high state-embedded actor scores have non-existent or extremely ineffective resilience scores at 1.88 and 2.04. This corroborates the notion that high state-embedded actor situations detract from the effectiveness of state resilience. However, despite their high state-embedded actor scores, Burundi and Equatorial Guinea score lowly 3.5 and 2.5 respectively on criminal networks, which suggest that high state-embedded actor scores need correspondingly high criminal networks score to be able to cause the HC-HR trend. It is a combination of state-embedded actors and criminal networks that dominate organized criminality in Africa.¹³¹ State actors play direct as well as indirect roles in organized criminality. By direct roles, state officials participate in organized crimes,¹³² such as the participation of Maurice Ibekwe, then serving member of the Nigerian House of Representatives in 2003 in defrauding the International Finance Banco Nordeste in São Paulo, Brazil of US\$240 million.¹³³ By indirect participation, state official corruptly aid, procure or abate criminal networks.¹³⁴ All the three African states on the HC-HR trend as well as Columbia and Albania also on the HC-HR trend (but outside Africa) have high scores for state-embedded actors correlating with high scores for criminal networks. This suggests that it may take a correlation with criminal networks for the state-embedded actor syndrome to cause the HC-HR trend. Ghana and Morocco at the brink of the HC-HR trend also have similar correlation between state-embedded actor and criminal networks.

¹³⁰ Ibid.

¹³¹ Ibid 18.

¹³² Gumba and Daghar (n 8).

¹³³ Alemika (n 49) 15.

¹³⁴ Gumba (n 130).

Again, the breadth of the criminal market may be an underlying reason why state-embedded actor syndrome will cause the HC-HR trend. For instance, the states with the highest criminality in Africa are Nigeria, the Democratic Republic of Congo and the Central African Republic. Yet, each of these three states shows the highest breadth of criminal markets.¹³⁵ The implication of this for Nigeria is that the breadth of the criminal market correlates with the HC-HR trend. This explanation does not however hold for the Democratic Republic of Congo and the Central African Republic, who do not share the HC-HR trend with Nigeria. This leads to another significant correlation, to wit: high score for non-renewable resource crimes as well as flora and fauna crimes in a state with high score for state-embedded actors may enhance the emergence of the HC-HR trend. Nigeria, Kenya and South Africa have high scores for non-renewable resource crimes; they also have high score for either flora or fauna crime or both. This correlates with high scores for state-embedded actors. Outside Africa, evidence from Columbia (a HC-HR state) shows high scores for non-renewable resource crimes (9.5), flora crimes (8.0) and fauna crimes (6.5), which correlates with a high score for state-embedded actor (8.0). The same correlation is found for Albania (another HC-HR state outside Africa) with a high state-embedded actor (7.0) and a high score for non-renewable resource crimes (6.0).¹³⁶ These are resources that yield high revenue, exploited by state-embedded actors in cahoots with criminal networks.¹³⁷ It therefore seems that criminal state officials find it easy and lucrative to illegally exploit these state-owned-and-controlled resources for private gain and they stifle state resilience from within to achieve their goal.

State-embedded actors undermine the resilience factors built by the state to reduce criminality. Acting as insiders, state-embedded actors directly water down policies and processes aimed at reducing criminality. They will truncate political leadership and governance by refusing to take action to withstand and disrupt organized crime. They will pervert criminal justice and divert funds meant to equip security agencies with necessary technology to fight crime.¹³⁸ Through corruption, they will commit economic and financial crimes, such as money laundering. By administrative sensor or brazen intimidation, they will muscle civil society who could have spoken up and thus, eviscerate social protection. When the foregoing is the case, of course, organized criminality by state-embedded actors heightens, and this will embolden criminal networks. The state's resilience factors will be nothing but empty shells, dogs that cannot bark,

¹³⁵ ENACT (n 1) 15.

¹³⁶ Ibid 119.

¹³⁷ A Vines, 'Light Weapons Proliferation in West Africa' paper presented at UNODC seminar, Dakar, 3 April 2004; Alemika (n 16) 8.

¹³⁸ JS Ojo et al, 'Enemy within the State: the Pathology of Boko Haram Insurgency, Military Corruption and Fallacy of Arms Procurement in Nigeria' (2020) 43(12) *International Journal of Public Administration*.

and white elephant projects merely present to adorn the scenery but incapable of reducing criminality.

5. Conclusion

The paper finds that state-embedded actor syndrome does not ordinarily cause the HC-HR trend. However, this syndrome may cause the trend when two correlating conditions are present. The first condition is that in addition to high score on state-embedded actors in a state, the state also has to score high on criminal networks for the state-embedded actor syndrome to be able to cause the HC-HR trend. The second condition is that the state-embedded actor syndrome will cause the HC-HR trend only in states with high scores for non-renewable resource crimes, flora crimes and or fauna crimes. These two conditions are present and correlate with high scores for state-embedded actor scores in the three HC-HR trend states in Africa (Nigeria, Kenya and South Africa), as well as the only two HC-HR trend states outside Africa, to wit: Columbia and Albania. These two conditions are also present and correlate with high scores for state-embedded actors in Ghana and Morocco, indicating that these two states may soon join the HC-HR trend. Incidentally, these two conditions are not present in Senegal, for she scores low on state-embedded actors but high on criminal networks. Senegal scores high for flora and fauna crimes but low for non-renewable crimes. These scores leave the result indeterminate as to whether Senegal will soon join the HC-HR trend.

The HC-HR trend in Nigeria, Kenya and South Africa indicates that the states have done their best at resilience-building, but their best is not good enough to roll back organized criminality. These states should aim at dismantling state-embedded actor syndrome as strategy to turn their negative resilience into positive resilience. This can be achieved by sincerely combating corruption, ensuring the independence of the judiciary and entrenching the rule of law. This will require political will, committed leadership and good governance. If an effective means of checking infraction is established, senior state officials will think twice before engaging in organized crime. When these officials no longer engage in or benefit from organized crime, they will develop the moral strength to push for the prosecution of other criminal actors, especially, criminal networks. Upon achieving this, these states should work to overcome their respective vulnerabilities by stifling the criminal markets, especially the non-renewable resource crime as well as flora and fauna crimes. This will reduce criminality and boost resilience.

There is need for these states to attenuate heavy police and security frameworks, which, by the way, they never meant to be effective, for softer response mechanisms that integrate political, sociological, economic and environmental factors to militate against criminality. They should deploy modern technology to guard their long and porous borders. They should adopt an approach to resilience that integrates social, economic and political measures.

They should pursue bilateral, regional and international cooperation on extradition, intelligence gathering, and asset forfeiture, mutual assistance in criminal, judicial and legal matters with renewed commitment, including adopting a moratorium on the importation, exportation and manufacture of light weapons. Law enforcement agencies of these states should cooperate to strengthen and improve national capabilities, including technical assistance and strategic coordination to combat organized crime. The states should invest heavily in building the capacity of and protecting the media, CLOs and NGOs so that these non-state actors can partner with state officials in developing positive resilience to organized crime. This will ensure that resilience focuses on the wider ramifications of criminal actors and markets. Strong state resilience to organized crime can only be built by a multi-faceted approach. When resilience becomes positive, criminality will naturally drop. This will help to reverse the HC-HR trend for Nigeria, Kenya and South Africa as well as avert the trend for Ghana, Morocco and possibly Senegal.

EVOLVING ROLES OF THE UNITED NATIONS AGENCIES ON THE IMPLEMENTATION MECHANISMS OF THE RULES OF INTERNATIONAL HUMANITARIAN LAW

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Abstract

The dire need to expand the frontiers of the enforcement mechanism of the rules of international humanitarian law through the Agencies of the United Nations has for ages been of a global concern. Driven primarily by efforts to enforced and promote the rules of international humanitarian law, there is need to develop measures capable of promoting the rules of international humanitarian law through the agencies of the United Nations (UN). The objective of this paper is to analyse and establish that expanding the frontiers of the enforcement mechanism of the rules of international humanitarian law through the agencies of the UN bordering on individual or state responsibility will further strengthen the low level of enforcement of these rules. However, this paper noted that there is a significant enforcement gap both at the regional and international levels. Further, this paper argues that in other to guarantee a high level of enforcement of these rules both at the regional and global levels, a more integral approach on the role of non-governmental organizations is capable of addressing the enforcement gap of the rules of international humanitarian law. This paper adopts a diagnostic approach based on a review of literatures, which is achieved by synthesis of ideas. This paper concludes with recommendations among others that in order to boast the purpose for which the rules of international humanitarian law were made the level of enforcement of these rules should be expanded to fill the enforcement gaps at the domestic, regional and international levels.

Keywords: International humanitarian law, rules of international humanitarian law, implementation of international humanitarian law, United Nations agencies

1. Introduction

This paper arose out of the compelling need to re-examine the principles of international humanitarian law and the institutional discourse relating to the practicability of promoting the principles of international humanitarian law through the agencies of the United Nations (UN). Different approaches have

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been adopted in effecting the realization and for effective implementation and respect of the principles of international humanitarian law amongst nations.

Despite the various attempts and approaches in the implementation of international humanitarian law, it may therefore be understood from the perspectives of traditional layer consisting of the law regulating co-existence and cooperation between the members of the international society, that is the States, and the law of the community of several human beings. Although, it must be emphasized that international humanitarian law emerged as part of the traditional layer, that is, as law regulating belligerent inter-State relations, but it has today becomes nearly irrelevant unless understood within the second layer, namely as a law protecting war victims against States and others who may wage war. Thus, in line with the relevance of the principles of international humanitarian law, it must be emphasized that UN agencies have played a significant role in ensuring that these fundamental principles are respected and as well promoted. In light of the above, it should be noted that some provisions of UN charter, particularly with reference to articles 2(4)¹ provides that:

All members shall restrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the UN.

In a similar vein, article 2 (7)² further provides thus

Nothing contained in the present Charter shall authorized the UN to intervene in matters which are essentially within the domestic jurisdictions of any State or shall require the members to submit such matters to settlement under the present Charter, but this principle prejudice the application of enforcement measures under chapter vii of the Charter.

It might sometimes be argued that for states and international organizations to enforce the compliance of the rules of international humanitarian law, the apprehension created by the above provisions has made it a bit challenging. In addition, there is a serious argument that since the UN does not have international police, neutral states during armed conflicts between belligerent parties that would ordinarily interfered to broker peace with all means and methods are of course prevented from doing so because of the above provisions in section 2(4) of the UN Charter.³ This paper focuses on some of the practical or most effective means and methods of enforcing international humanitarian law principles in modern time.

¹ United Nations Charter (adopted 24 October, 1945 by the United Nations General Assembly Resolution 1991A and B(XVIII) and entered into force 31 August 1965), art 2(4) <<https://www.refworld.org/docid/3ae6b3930.html>> accessed 7 April 2022.

² Ibid art 2(7).

³ Ibid art 2(4).

In any case, it must be emphasized that since states have defied the principles of article 2(4) and 51 of the UN Charter⁴ to make wars and other form of forcible measures a fact of their international relations, all the laws of warfare finds application for ‘a war is still war in the eyes of international law even though it has automatically arisen from acts of force which were not intended to be act of war.’⁵

In other words, the fact that States do not impute the character of war in their acts of force does not preclude the application of the laws of war. It is the writer’s belief that this is for the common rationale of humanizing wars or forcible measures, through the balancing of military necessity with concerns for humanity.⁶ In addition, this paper noted that article 3 Common to all the Four Geneva Conventions⁷ and article 1 of the Additional Protocols to the Four Geneva Conventions⁸ states that the provisions of the Conventions shall apply in all situations. In the light of the above, this paper thus seeks to examine the promotion of the principles of international humanitarian law through the agencies of the UN from a holistic perspective and attempts a critical, realistic and contextual assessment of the socio-legal and cultural assessment of the role of these agencies to the realization of the promotion and respect of the principles of international humanitarian how with a view to identifying the commonalities and divergences in ensuring full compliance with these principles and law they could constitute a coherent framework for adequate protection of both combatants and non-combatants in an armed conflicts or internal disturbances.

2. UN Agencies and their Contributions to the Promotion and Respect of the Rules of International Humanitarian Law

Recent challenges and developments have made the writer to examine several arguments arising from the contributions of the various UN agencies in the respect and promotion of the principles of international humanitarian law around the globe since it is true that both the states and individuals are under obligation to comply with international humanitarian law in such that non-compliance can, in some cases, render the individuals liable under penal law, as many national and international courts have recognized.⁹ In this sense, it is important to highlight that the under listed agencies of the UN are primarily

⁴ Arts 2(4) and 51.

⁵ L Oppenheim in H Lauterpacht *International Law, A Treatise: Disputes, War and Neutrality* 11 (7th edn; London Longmans, 1952) 299.

⁶ C Jochnick and R Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35 *Harvard international Law Journal* 52.

⁷ Art 3 Common to all the Geneva Conventions 1945.

⁸ Art 1 of the Additional Protocols to the Four Geneva Conventions 1977.

⁹ See Inter-Parliamentary Union Declaration Adopted without a vote by the 90th Inter-Parliamentary Conference (Canberra 18 September 1993).

concerned in ensuring respect for humanity in time of war and as well guarantee that humanity will be upheld in circumstances that threaten it.

2.1 UN Security Council

Basically, the UN took a decision on the implementation of international humanitarian law since 1967. However, it should be noted that Security Council (SC) activities in this regard is quite extensive and is increasing. Notably, the first express mentioned by the SC of the Geneva Conventions was not couched in strong terms. More importantly, by the Resolution 237, relating to the Middle East, the SC recommended to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949¹⁰. Also, the SC has taken a very large number of actions with respect to the implementation of international humanitarian law which are seen from the Call and Demands for respect of international humanitarian law,¹¹ and the determination that certain Acts constitutes violations of international humanitarian law.¹² Interestingly, the importance of the pronouncement by the SC on certain acts constituting violations of international humanitarian law lies in the public pressure and however, creates responsibility on the States.¹³

That being the case, it must be emphasized that in two resolutions underway, the SC unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held “individually responsible” for them.¹⁴ Be that as it may, questions are sometimes raised as to whether expanding the role of the SC in the area of enforcement of the rules of international humanitarian law ever be a progressive development in the enforcement of the rules of international humanitarian law, due to suggestions that SC’s auxiliary role to the enforcement of the rules of international humanitarian law may at times be incompatible with its independence.

Drawing from the central role assigned to the SC by the UN Charter which is made manifest in the prohibition of the use of force in article 2(4)¹⁵ and the conferral of ‘primary responsibility for the maintenance of international peace and security’ on the Council in article 24(1) of the Charter,¹⁶ this paper argues

¹⁰ See Security Council Resolution 237 UNSCOR 1361st Meeting 13 (14 June 1967).

¹¹ See Security Council Resolution 307 3 UNSCOR 1621st Meeting (21 December 1971).

¹² See Security Council Resolution 452 UNSCOR 2159th Meeting 3 (20 July 1979).

¹³ Ibid.

¹⁴ *International Criminal Tribunal of Former Yugoslavia (ICT) the Prosecutor v Dusko Tadic (Jurisdiction)* IT -94-1-AR72 (1995) para 133.

¹⁵ United Nations Charter 1945 art 2 (4).

¹⁶ Ibid art 24 (1).

that the importance accorded to the Council by the San Francisco conference in 1945 was nevertheless, tampered by political realism or is more than just normative aspirations. More so, in order to provide an effective response, article 40 of the Charter¹⁷ provides that, before making recommendation or deciding upon measures provided for in article 39, SC may ‘call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.’ Also, article 41 of the Charter¹⁸ empowers it to decide what measures not involving the use of armed force are to be employed to give effect to its decisions.

It goes without saying that article 42 of the Charter¹⁹ allows the SC to take such actions as may be necessary to maintain or restore international peace and security. However, prior to 1990, action under Chapter VII of the UN Charter²⁰ was as inconsistent as it was infrequent. Furthermore, it is much more realistic and common place in practice to maintain that in recent times, the intents of the SC in the enforcement of the rules of international humanitarian law is to promote a peaceful resolution of the conflict without pronouncing upon the question of its international or internal nature as reflected by the Report of the Secretary General of 3 May 1993 and by the statements of SC members regarding their interpretation of the statute. This argument ignores, however that as often as the SC has invoked the grace breaches provisions, it has also referred generally to ‘other violations of international humanitarian law,’ an expression which covers the law applicable in international armed conflicts as well.²¹

Against this backdrop, and judging from the enforcement of the rules of international humanitarian law by the SC, it is understandable from the above provisions that in the absence of agreements under article 43 of the charter, 9 the command and control of the secretary general should prevent. It is important to note that the UN peace keeping force in the Congo was authorized to use force to end the civil war between 1961 and 1964, but remained under the command and control of this Secretary – General. It has been argued that this constituted an enforcement action under chapter VII of the Charter,²² but this is a minority position. The rationale behind the use of force according to the Secretary – General was essential an internal security measure taken by the SC at the invitation of the Congolese government, perhaps implicitly under article 40.²³

¹⁷ Ibid art 40.

¹⁸ Ibid art 41.

¹⁹ Ibid art 42.

²⁰ Ibid Cap VII.

²¹ *Prosecutor v Tadic*, IT-94-1-AR72, Appeal Chamber, 2 October, 1999, paras 74-75.

²² Art 43 of the United Nations Charter 1945.

²³ F Seyersted, ‘United Nations Forces: Some Legal Problems’ (1961) 37 *British Year Book of International Law* 351, 446.

With regard to the procedure that came to characterized United Nations' involvement in peace and security during the cold war, however, was peacekeeping which its operations were traditionally non-threatening and impartial, governed by the principles of consent and minimum force. It may be argued that the legality of peacekeeping operations on the basis that chapter VII must be read as providing the only legitimate basis for the decision to use military is very difficult to accept. It should be noted that with the above characteristics, peacekeeping operations have expanded in number and scope as well as enforcement actions of the rules of international humanitarian law. It is submitted that the most basic transformation in the use of SC powers is that, it now appear to be broadly accepted that a civil war or internal strife may constitute a threat to international peace and security within the meaning of article 39.

2.1.1 *United Nations Peace Keeping Force*

Generally, it should be noted that the idea of the UN Peace Keeping Operations or Forces was developed by the UN whereby the presence of national or multi-national troops in an area of hostility can reduce tension and pave way for negotiations that would bring about sustainable peace and re-unity. This positive obligation under the UN, of course, imposes obligations on State parties to international humanitarian law treaties to ensure respect and compliance with the rules thereof. More so, it must be emphasized that the main reason for the emergence of Peace Keeping Operations or Forces as developed by the UN is to ensure that through this national or multi-national troops, hostilities can be reduced thereby paving way for negotiations that would bring about sustainable peace and re-unity. From an operational point of view, and in literal terms, this paper argues that since not all States are parties to the international humanitarian law treaties, how then can the rules of international humanitarian law be universally applied and respected and/or be legally bound on such State who have not ratified the treaty? However, as the respect and compliance with the rules of international humanitarian law becomes more complex given the above scenario, the challenges of understanding the phenomenon of peace keeping operations under international law becomes more daunting.

Admittedly, it must be emphasized that peacekeeping operations are not only geared toward assisting the host nations to rebuild and provide security and public order, but also to help them restating essential service and also tackle the root causes of the conflict thereby achieving an enduring peace and unity. On the other hand, while the relevance of peacekeeping operations cannot be overemphasized, one might argue that peacekeeping has been looked at as an instrument of choice in international conflict management after the cold war. In a similar vein, this paper also noted that the application of international humanitarian law to UN Forces or Peace Support Operations as they are often

conservatively styled has drawn considerable contentions over the years.²⁴ The thrust of this argument is that, as an organization, the UN and many Regional International Organizations and peace support organizations are not signatories or part of the High contracting parties to the existing conventions, even though the UN itself, by the authority given to it to create and employ armed forces has the correlative authority to make treaties to protect such forces.²⁵

In this respect, it should be pointed out that if peacekeeping troops protect civilians and disarm combatants, they will promote greater respect for international humanitarian law. However, this is exemplified when peacekeeping forces facilitate the provision of humanitarian assistance to non-combatants in the form of food, shelter, health care, and sanitation. But conversely, it should be fairly uncontroversial to state that given the increasing pace of peacekeeping operations in ensuring maximum compliance of the rules of international humanitarian law, the idea espoused in this paper is situated within the context of different understanding of the concept of peacekeeping operations. Interestingly, it is widely accepted that peacekeeping forces have also been implicated in sexual exploitation and sexual violence against war-affected populations, including the abuse of women, who were living in refugee and displaced persons camps and under the care of those very peacekeepers.²⁶

Put differently, it should be borne in mind that, the changing character of peacekeepers as international policemen in war times, considering the volatility and complexity of their job, a wide range of appropriate and powerful mandate is given to them to enable them handle and responsively approach parties that oppose or obstruct peace. This is the assumption underlying the fact that this is where international humanitarian law applicability comes to play. This dominant view suggests in an attempt to sustain or address the issue and for the purposes of setting out fundamental principles and rules of international humanitarian law that apply to forces conducting operations under the UN Command and Control, the UN Secretary General released a bulletin.²⁷

Thus, section 1 of the bulletin provides that:

The fundamental principles of international humanitarian law set out in the bulletin are applied to the United Nations Forces when in situations of armed conflicts, they are actively engaged therein as combatants to the extent and for the duration of their engagement.

²⁵ DF Bowelt, *The Law of International Institutions* (London Institute of World Affairs London: Stevens & Sons, 1964) 224.

²⁶ United Nations Security Council Adopted Resolution 1188 (2009).

²⁷ United Nations Document St/SGB/1999/13 of 6 August, 1999.

2.1.2 *International Court of Justice (ICJ)*

Again, opinions on this issue will differ, but even if it does not justify any reason given by the UN Charter, the obvious reason remains that according to article 93 of the Charter²⁸ all members of the UN are automatically parties to the court, even non-members of the UN may also become parties to the court's statute under articles 93 (2) of the charter.²⁹

Pursuant to the above provisions of the charter, it must be acknowledge that in keeping with the burning desire in ensuring that the rules of international humanitarian law are respected and promoted accordingly by state parties and individuals, it should be noted that ICJ has had occasion to deal with questions of humanitarian law in two highly notable cases concerning military and paramilitary activities in and against Nicaragua, the Corfu Channel case and the Adversary Opinion on Reservation to the crime of Genocide in Bosnia, Yugoslavia and Herzegovina in International Court of Justice Report.³⁰

In light of the above development, it is important to underline that the International Court of Justice through its decisions and advisory opinions has contributed in the enforcement and promotion of the rules of international humanitarian law as well as international law. The important aspect of this section is to further highlight the fact that prior to the emergence of the International Criminal Court (ICC), ICJ entertained matter bothering on offences of genocide and crimes against humanity as demonstrated in the past where there were several cases of violation of international humanitarian law.

2.1.3 *International Criminal Court (ICC)*

Absolutely, ICC is a permanent tribunal established by the international community to prosecute individuals for genocide, crimes against humanity, war crimes and the crimes of aggression. It is important to highlight that international criminal court is a new mechanism for the enforcement of international humanitarian law.³¹ A key concern is that, this court was established on the 17 July 1998 in Rome with the primary purpose of arresting and trying all persons involved in violating the rules of international humanitarian law. In that sense, it is a properly constituted court of competent jurisdiction.

²⁸ United Nations Charter 1945, Art 93.

²⁹ Ibid, art 93(2).

³⁰ International Court of Justice Report, Advisory Opinion Concerning Reservation to the Convention on the Preservation and Punishment of the Crime of Genocide, ICJ May 1951 <<https://www.refworld.org/cases, ICJ, 4023a7644.html>> accessed 5 April 2022.

³¹ See Rome Statute of International Criminal Court 1998, art 126 UN DOC PCNICC/1999/INF/3.

Generally, aside from being a court of competent jurisdiction, there are other emerging challenges ranging from the tension inscribed in the statute between the particular interests of states and the normative interest of the international community as a whole in repressing crimes under international law which of course, lies at the heart of the international criminal system. It could be argued that how successfully the drafters of the statute struck the balance between these two competing impulses will ultimately determine the effectiveness and legitimacy of the Court. In other words, this paper noted that, in a technical sense, it is worth emphasizing that this tension of dichotomy is itself the product of the fact that the statute is a treaty, and not some other form of instrument.

Furthermore, it must be borne in mind that the Preamble and article 1 of the Rome statute³² declare that ICC is to be ‘Complementarity’ to national Jurisdictions. It is in the context of complying with the provisions of article 1 of the Rome statute that the notion of ‘Complementarity’ was overwhelmingly agreed upon at every stage of the negotiations from the international law commission draft to the Rome Statute, thus ensuring that ICC would not supersede national courts, which are to retain primary responsibility for investigation and prosecuting international crimes.³³ However, it would be argued that notwithstanding the agreement in principle to complementarity, the question of whether national authorities or the ICC should decide the admissibility of a case before the court and of the criteria to be applied, remained contentious. The same can be said that the authority to decide the admissibility of cases before ICC often times are carefully circumscribed to make them acceptable to states. Thus, it can be seen therefore, that the resulting balance has made the complementarity regime ‘one of the cornerstones on which the future international criminal court will be built’,³⁴

Another crucial point to note in this paper is that international law prescribes certain rules of behaviour for states, and it is up to every state to decide on practical measures or penal or administrative legislation to ensure that individuals whose conduct is attributable to it, or under some primary rules, and or even all individuals under its jurisdiction comply with those rules. Indeed, only human beings can violate or respect rules. Aside from this substantive requirement, it should be pointed out that international humanitarian law obliges states to suppress all its violations that amount to war crimes which of course, are criminalized by international humanitarian law. However, this concept of war crimes includes, but not limited to the violations listed and defined in the

³² Ibid Art 1.

³³ JT Holmes, ‘The Principle of Complementarity’ in RS Lee (ed) *The International Criminal Courts: Issues Negotiation* (1999) 41, 73.

³⁴ JL Bleich, ‘Complementarity’ in MC Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Irvington-on-Hudson, NY Transnational, 1997) 231.

conventions and protocol 1 as grave breaches³⁵ More so, it must be emphasized that international criminal court represents a delicate balancing act in the enforcement and promotion of the rules of international humanitarian law. However, this perspective is particularly significant for the understanding that the Rome statute of the international criminal court has also criminalized widespread and severe damage to the natural environment,³⁶ the recruitment of child soldiers³⁷ and all violation of common article 3 of the Four Geneva Conventions of 12 August 1949, particularly in armed conflicts not of an international character.³⁸

In the context of the above development, and on the account of the seriousness that the international criminal court attaches to the enforcement of international humanitarian law in non-international conflicts or civil wars that the first “Rome statute, which came up in Kampala, Uganda proposed inclusion of the use of certain weapons as war crimes in the context of an armed conflicts not of an international character. The reason behind this is to achieve military objective without causing a superfluous or unnecessary suffering or damage to the civilian or his objects.³⁹ Essentially, it must be understood that another unique aspect of the international criminal court as far as the violation and promotion of international humanitarian law is concerned, lies in the Rome statute’s extension of acts of criminality in warfare to gender crimes, comprising rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence, including trafficking in women and children.⁴⁰ For purposes of clarity of the above section, it may however be safe to hold that these gender crimes are now characterized as crimes against humanity which makes the international criminal court the most far-reaching institution of international criminal justice addressing gender and sexual violence.⁴¹

It goes without saying that one of the most formidable aspects of the international criminal court’s problems is its contamination by political sentiments and as a result, lack of wide spread global acceptance. Thus, given these realities and all efforts to rid the international criminal justice of the political smear, this taint is still very much visible, now prompting a situation in

³⁵ Geneva Convention 1-IV 1949, Articles 50/51/130/147 of Geneva Convention 1949, arts 11(4), 85 and 86 of Additional Protocol 1 of 1977.

³⁶ Art 8(2) (b) (iv) of the Rome Statute of the International Criminal Court 1998.

³⁷ Ibid, art 8(2) (b) (xxvi).

³⁸ Ibid, Art 8(2) (c).

³⁹ C Greenwood, ‘Historical Development and Legal Basis, in the Handbook of Humanitarian Law In Armed Conflict’ 1995, 30-31.

⁴⁰ Arts (1) (c) and 7 (2) (c) of Rome Statute of ICC (1998).

⁴¹ Ibid.

which some of the culprits of the international humanitarian law violations are not brought to justice,⁴² especially those perpetrated by the superpowers.

In another vein, it is also crucially important to note that the jurisdiction of the court rests on the assumption that it compliments national criminal jurisdictions.⁴³ This means that the court is not allowed to exercise its jurisdiction over a case if a state has exercised its domestic criminal jurisdiction over the same case. Thus, the rule of complementarity in the ICC differs from the cases in International Criminal Tribunal of Former Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR) whose jurisdictions take precedence over the national criminal jurisdictions of the relevant states.⁴⁴

2.1.4 *International Financial Institutions*

Basically, it is obvious and well settled that apart from the respective role played by the above mentioned agencies of the UN in the development and promotion of the rules of international humanitarian law through their involvement in resolving crisis between the parties to an armed conflict which has been repeatedly mentioned in all the agencies of the UN, it can therefore be said that other international organizations like the international financial institutions are increasingly involved in conflict situations and countries which the violations of international humanitarian law are widely spread and devastating to civilian population and the Country's economic prospects. In this sense, its establishment is rooted in the Bretton Woods Conference⁴⁵, alongside the creation of the International Monetary Fund. It must be stressed that it was envisaged as one of the three pillars of the international economic system focusing on the outset on the financing of post-war reconstruction and development.

It is submitted here that international Financial Institutions assistance can take a number of forms through aid, loans; and or other measures to encourage of facilitate the promotion of international humanitarian law during armed conflict between parties to the conflict. According to World Bank Report,⁴⁶ there are now over 150 agencies involved in development assistant including South-South exchanges of financial resources. However, it has been widely noted that although the articles of Agreement of the major International Financial Institutions prevents them from involvement into political affairs of

⁴² KC Moghalu, *Global Justice: The Politics of War Crimes Trials* (California, Stanford University Press 2008) 4.

⁴³ Art 17 of the Statute of the International Criminal Court.

⁴⁴ Art 9 para 2 of the Statute of the ICTY and Art 8, para 2 of the Statute of the ICTR.

⁴⁵ United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, United States of America, 1944.

⁴⁶ World Bank: 'New World, New World Bank Group: Post Crisis Direction,' 2010, para 6 (DC 2010-0003).

member states,⁴⁷ but this paper noted that sometimes the UN may jettison this provision. To an extent, it could be argued that the influence of the International Financial Institution like the World Bank and International Monetary Fund led to the promotion of international humanitarian law during the apartheid regime of South Africa wherein, the World Bank and International Monetary Fund were prevailed upon to stop dealing with the apartheid regimes.

Indeed, the World Bank Group plays an important role in development assistance such that it is generally described as the ‘Premier development Institution’ in International economic relations. Against this background, this paper however, asked whether international financial institutions are appropriate agents for the promotion, adherence to and enforcement of international humanitarian law? Are they capable to do so? These questions are extremely importance to the issue of promoting the rules or international humanitarian law.

Given the significant constraints on the structural and political concerns which has posed obstacles to the development of a role and function international financial institutions with respect to international humanitarian law, it may be argued that the role and function of the international financial institutions in the international community enable then to make some contributions to the implementation and enforcement on international humanitarian law and that factoring humanitarian law violations into their decision making processes which can actually be essential to the effective implementation of their own mandates of greater concern is that international financial institutions involvement in international humanitarian law can also support efforts by the UN and the international community in preventing and limiting violations of international humanitarian law and as well enforce the law against those suspected of committing atrocities. It must be emphasized that the World Bank and the international monetary fund are specialized agencies of the UN and function as independent international organizations not bound by most United Nations decisions, but are bound by United Nations SC resolutions.⁴⁸

Acknowledging the above provisions of the UN charter, this charter however, imposes strict obligation on the international financial institutional financial institutions which their activities should be tailored towards the provisions of chapter vii resolutions in order to ensure that they do not contravene the binding decisions and actions of the UN. This threshold is understood to imply that any effort aims at promoting a role for the international financial institutions in international humanitarian law must be capable of addressing the accountability and political questions raised by the international financial institutions governance structures and the legal questions raised by the

⁴⁷ S 10 World Bank Articles of Agreement (adopted 20 July 1956).

⁴⁸ See Cap vii of the United Nations Charter (1945).

limited mandates of the international financial institutional financial institutions as special economic organizations.

It is wide agreed that international financial institutions in the implementation and enforcement of international humanitarian law should not always withdraw or reduce funding, but rather should consider the impact of international humanitarian law violations as a factor in making policy and decisions.⁴⁹

2.1.5. International Tribunals

The establishment of the International Tribunals as a measure under Chapter vii of the UN charter⁵⁰ cannot be overemphasized. The SC acting under chapter vii of the UN charter, has established two International Criminal Tribunals. Thus, these tribunals are ‘*ad hoc*’ which have the responsibilities of punishing war crimes committed in relation to two specific contexts; the former Yugoslavia and Rwanda. It is worth mentioning the fact that since international humanitarian law seeks to protect the victims of armed conflict and to limit the means and methods of warfare, serious violations of this law constitutes war crimes.

While there are serious questions on the establishment of the International Tribunals, it should be noted that the Appeals Chamber in *Prosecutor v Tadic*⁵¹ stated that:

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regards, and it have been otherwise, as such as a choice involved political evaluation of highly complex and dynamic situations.

Beyond this work, it is becoming increasingly clear that the work of both Tribunals has shown that international investigation and international prosecution of persons responsible for serious violation of international humanitarian law are possible and realizable. Crucially important in this regard is that these developments have given new vigour to the principles of universal jurisdiction, and have encouraged at least some prosecutions by various states of persons responsible for gross violations of the rules of international humanitarian law. It should be noted that the contribution of the Hague Tribunal was to advance the concept of the applicability of the Hague law to non-international conflicts. In addition, the Hague Tribunal has also given a very expansive, yet credible, reading to international customary law.⁵²

⁴⁹ LR Blank, ‘The Role of International Financial Institutions in International Humanitarian Law,’ *Peace Works*, 42-2002.

⁵⁰ See Cap vii of the United Nations Charter.

⁵¹ IT – 94-1-AR72 Appeals Chamber decision, 2 October 1995, para 39.

⁵² See The Appeals Chamber in *Prosecutor v Tadic*, IT-94-1-AR72 (1995) para 39.

More so, in examining the import of article 3 of the Geneva Conventions⁵³ the Appeal chamber held that:

Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the Jurisdictions of the International Tribunal.

This construction of articles 3 is also corroborated by the object and purpose of the provision. In terms of the legal acceptability of these systems, the SC when establishing the international tribunal did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and in Rwanda. Thus, Article 3 is intended to realize that undertaking by endowing the international tribunal with the power to prosecute all 'serious violations' of international humanitarian law.

From the foregoing, it could also point to fact that the Nuremberg Tribunal emphasized the relationship between the treaty-based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and its institution as a court with a mandate to apply that positive legal order. Another important aspect is that the 1949 Geneva Conventions for the protection of the victims of armed conflicts define a series of acts as grave breaches of their rules and stipulate that the state parties are under the obligation to search for peace persons alleged to have committed them or to have ordered them to be committed, and to bring them before their own courts or, in they prefer, to hand them over for trial to another state provided that the state have made out a prima facie case against theme.⁵⁴

With these considerations in mind, the statutes of the ICTY⁵⁵ and the ICTR⁵⁶ and the Rome Statute of ICC⁵⁷ also collaborate on the assumption of individual criminal responsibility. Basically, this type of responsibility has been accepted generally in the absence of any controversy. It has become part of international law which originally only regulated relations between states and under which only states could be held accountable for the commission of an internationally unlawful act, even though the responsibility may be civil in appearance.⁵⁸

On the other hand, it is important to understand that criminal responsibility rest on national persons who commit an act specifically defined as a crime by international law. It is important to understand that international Tribunals in the enforcement of the rules of international humanitarian law have expanded the

⁵³ Art 3 of the Geneva Convention 1949.

⁵⁴ Art 49 GC I, art 50 GC II, art 129 GC III, art 146 GC IV of 1949.

⁵⁵ International Criminal Tribunal for the former Yugoslavia (ICTY) 1993.

⁵⁶ International Criminal Tribunal for Rwanda 1994.

⁵⁷ Art 25 Rome Statute of International Criminal Court.

⁵⁸ See The United Nations General Assembly Resolution A/56/83 on the Responsibility of States for Internationally Wrongful Act.

notion of over crimes. Indeed, since the material jurisdiction attributed to the ICTY by the SC borders on rules that, at some point of its establishment formed part of both international custom and treaty-based law, however, in this context, ICTY's decisions will explain better on the institution of the Nuremberg Tribunal on whether the notion of war crime has been expanded or not.

Notwithstanding, these important advances in terms of the expanded notion of war crimes, the fact remains that this notion applies not only to grave breaches of the rules of international humanitarian law committed in the context of a war as such, but also to acts perpetrated in connection with an armed conflict, be it international or internal.

3. Levels of Enforcement of the Rules of International Humanitarian Law

It is obvious from the preceding sections that international humanitarian law is a set of rules designed to protect persons who are not, or longer, participating in hostilities and to limit the methods and means of waging war. That is to say that, it also sets out mechanisms designed to ensure compliance with the rules of this branch of law. However, in order to meet these obligations, this paper will henceforth examine the level of enforcement of these rules at different levels.

3.1 National Level of Enforcement of International Humanitarian Law Rules

In view of the challenges frequently encountered in the enforcement of the rules international humanitarian law at the national level consideration should be given to the nature and extent of the responsibility for violations of the rules. Thus, such responsibility may raise numerous legal questions, including whether the perpetrators bear individual responsibility for the violations they commit and the guilty of serious violations must be prosecuted and punished. However, it is a common knowledge that the four Geneva conventions of 1949 (G CI-IV)⁵⁹, their Additional Protocol of 1977 (API)⁶⁰ and other treaties set forth the state parties explicit obligations regarding penal repression of serious violations of the rules they contain.

Firstly, in line with the provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977, this must be borne in mind when considering the nature of responsibility and analysis must be put in its proper context. An understanding that the state party to the Geneva Conventions and Additional Protocols of 1977 must prevent and halt any acts contravening these instruments no matter whether they are committed in an international or non-international armed conflicts is necessary to ensure that the measures that state must take to this end may vary in nature and may include penal sanctions if necessary. However, it is important to bear a number of considerations in mind. In the situations under review, it must be emphasized that at the National level of

⁵⁹ See the Four Geneva Conventions of 1949 (9C I-IV).

⁶⁰ Additional Protocol 1 (API) of 1977.

enforcement of the rules, the national government have further obligations relating to certain flagrant violations of international humanitarian law as well as the grave breaches. However, these precise acts are listed in the Geneva Conventions and Additional Protocol I,⁶¹ as wilful killing, torture and inhuman treatment, will fully causing great sufferings or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities.⁶²

Secondly, on repressing grave breaches of the Geneva Conventions and Additional Protocol I. in this context, it must be pointed out that the law is not of itself the answer, nor the only element to consider; policy and operational considerations are equally important. However, the Geneva Conventions and Additional Protocol I stipulate that “grave breaches” must be punished even at all levels. It is for these reasons that the states parties must search for persons accused of having committed or having ordered the commission of grave breaches, regardless of the nationality of the perpetrator or the locus of the crime, in accordance with the principle of universal jurisdiction. These perpetrators must be brought to their own court, or be handed over for trial in another state which has made out a *prima facie* case.⁶³ Also, it should be noted that additional protocol I⁶⁴ covers state party and grave breaches resulting from a failure to act when under a duty to do so.

It is now generally accepted that in order to meet up with these obligation, they should be a national legislation design to implement the Geneva Conventions which the state must adopt the legislative measures needed to punish persons responsible for grave breaches through the enactment of laws that will prohibit any repression and will apply to everyone irrespective of his status who has committed or ordered the commission of such offences and ensure that these laws relate to acts committed in national territory and or elsewhere. Legal position, as a motor practice, attention should be drawn to national legislation designed to implement the Geneva Conventions which this paper noted that some of which go so far as to make it possible for national courts to the persons responsible for violations of rules concerning internal armed conflicts. This holds true for the criminal code of the socialist Federal Republic of Yugoslavia, of 1999, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. In any event it must be stated that article 142 clearly provided for war crimes against the civilian populations⁶⁵, while article 143 expressly provided for war crimes, the

⁶¹ Geneva Conventions 1949(GC I) and Additional Protocols of 1977.

⁶² Geneva Convention GCI 1949 (GC I) art 39, 50, 129 and 146, Additional Protocol API 1977, art 85 para 1.

⁶³ Art 39 of Geneva Conventions (GC I) 1949, art 50 of the Geneva Conventions (GC II) 1949 art 129 Geneva IV, Art 146 GC IV and art 85 Additional Protocol 1 1977 para 1.

⁶⁴ Art 86 para 1 of Additional Protocol 1 1977.

⁶⁵ Art142, of the Geneva Convention 1949

wounded and the sick.⁶⁶ However, they above situations apply at the time of war, and armed conflict or occupation, this would seem to imply that they also apply to internal and conflict.

In view of the above, necessity could be invoked to justify this position. Without any ambiguity, Belgian law enacted in 1993 for the implementation of 1949 Geneva Conventions and the two Additional Protocols that Belgian court have jurisdiction to adjudicate breaches of Additional Protocol 2 to the Geneva Convention relating to the victim of non-international armed conflict. However, article 1 of this law⁶⁷ provide that the series of grave breaches of the four Geneva Convention and the two additional protocol listed in the same article 1, constitute international law crimes. Thus, to state the obvious, the legislator has a number of options for translating serious violations of international humanitarian law into National penal legislations and for making the criminal acts constituting them subject to domestic law.

3.1.1 International Levels of Enforcement of the Rules of International Humanitarian Law

The above overview of emerging challenges in the enforcement of the rules of international humanitarian law at all levels operation highlights that as enforcement become more complex and challenging, measures should be adopted by the UN in order to understand the complex manner in which the enforcement mechanism will be capable to address the level of violation of these rules at the international level. Perhaps the most important point to note is that the UN through its collaborative efforts with *ad hoc* international criminal tribunals and as well as the cooperation with the international criminal courts is capable of addressing these challenging.

Be that as it may, the UN set up international criminal tribunals to try crimes committed in the former Yugoslavia known as International Criminal Tribunals for the former Yugoslavia (ICTY) as well as in Rwanda International Criminal Tribunals for Rwanda (ICTR) respectively. In this context, these tribunals have primacy over national courts, which of any stages of the proceedings, they may formally request national courts to defer to their competence.⁶⁸ however, state are obliged to cooperate with these tribunals in the investigation and persecution of persons accused of committing serious violations of the rules of international humanitarian law that said, states must

⁶⁶ Ibid, art 143.

⁶⁷ Art of the Geneva Conventions 1949, International criminal tribune of former Yugoslavia (ICTY), *The Prosecutor v Dusko Tadic (Jurisdiction)* 1T-94-1-AR 72 Appeals Chamber, Decision (1995).

⁶⁸ Art 9(2) of the International Criminal Tribunal of former Yugoslavia (ICTY), 25 May 1993. *The Prosecutor v. Dusko Tadic(Jurisdiction)* IT-94-1-AR 72 Appeal Chambers, Decision (1995), Art 8 (2) of the International Criminal Tribunal of Rwanda (ICTR) 8 November 1994.

comply with the tribunal in arrears bothering on the identification and location of persons testimony and production of evidence, service of document the arrest and detention of persons, the surrender of the transfer of the accused to the tribunal in question. Thus the specific question that arises in the above context is whether states who are not parties to the treaty could be bound by this. The answer depends on the consent given by such state that may or may not be party to such treaty.

In a similar note, the enforcement of the rules of international humanitarian law could be done through a mutual cooperation with the International Criminal Court. In this case, international criminal court exercises its jurisdiction only when a state is unwilling or unable genuinely to carry out investigation or prosecution over alleged crime of violation.

This paper however, submits that the international criminal courts effectiveness is depended on the level of cooperation given to it by the state. In this sense, it must be acknowledged that states parties must cooperate fully with the international criminal court (ICC) in its investigation and prosecution of crime within its jurisdiction bothering on genocides, crime against humanity, war crimes, and the crime of aggression.⁶⁹ Also the international criminal court may as well invite any state not party to its statutes to provide assistance on the basis of an *ad hoc* arrangement an agreement or on any other appropriate basis.⁷⁰ More so, states parties must ensure that there are procedure available under their national laws for this form of mutual cooperation's to succeed.⁷¹ Thus, state cannot circumvent their obligations under the state by their own designation of the act.

Nonetheless, while it is true that in a specific situation and upon the request of a state party to the statue, the international criminal courts may provide assistance to the state in an investigation into or a trial in respect of conduct which constitutes a crime within the jurisdiction of the international criminal court or which constitutes serious crime under the national laws of the requesting state. In other words, the international criminal court may also grant a request for assistance from a state which is not party to the international criminal court statute.⁷² Against this background, it is important to recall that cooperation between state and with international jurisdiction is essential to the smooth running of the system as well as enforcement of the rules of international humanitarian laws at international level of operation of international criminal court 1998. Indeed, the need for mutual assistance is especially evident in the case of offences where these allegedly responsible must be brought to trial or extradited by state. According to article 88 of

⁶⁹ The Rome Statutes of International Criminal Court 1998, art 86.

⁷⁰ Ibid art 87 (5) (a).

⁷¹ Ibid art 88.

⁷² Ibid art 93 (10).

Additional Protocol 1, grave breaches of the Geneva Conventions or their Additional Protocols, and the specific obligations to cooperate in a matter of extradition, broadest possible mutual legal assistance among state parties in this regards, is necessary in a similar vein, it is particularly important to state that articles 18 and 19 of the second protocol to the Hague Convention of 1954,⁷³ for the protection of cultural property in the event of armed conflict also concerns extradition and judicial cooperation.

3.1.2 Regional Levels of Enforcement of the Rules of International Humanitarian Law

At this level of operation, this paper noted that regional human rights mechanism are however, increasingly examining violations of the rules of international humanitarian law. This would suggest that the European court of human rights is the centre piece of the European system of human rights protection under the 1950 European Conventions on Human Rights,⁷⁴ while in American, the Inter-American commission on human rights and the Inter-American Court of Human Rights⁷⁵ is in charge and of course, the African Commission on Human and People Rights is the supervisory body established under the 1981 African charter as a treaty establishing an African Human Rights Courts.⁷⁶

Generally speaking, the enforcement of the rules of international humanitarian law at the regional level takes places through different modes of non- judicial and judicial mechanisms which ensures that human rights are respected and promoted during armed conflicts, whether of international or none-international nature moreover, given the mutual relationship between inter-national humanitarian law and human rights law as well as the prevailing situations of armed conflicts around globe, it must be emphasized that regional institutions bothering on human rights have been able to address cases of breach of the rules of international humanitarian law. However, there is a strong argument that these regional human right courts are ill-equipped to handle mass atrocity crime which the paper is of the view that their case laws are important for the enforcement of the rules of international humanitarian law, especially when it has to do with state responsibility in an armed conflicts.

4. Conclusion

It is hoped that this paper will contribute to clarifying an essential aspect of international humanitarian law, and especially, that it will help to determine more precisely the level of commitment of the agencies of United Nations in ensuring that international Humanitarian law is respected and promoted. It argues that, several international bodies are involved in the development and

⁷³ Hague Convention 1954, art 18 and 19.

⁷⁴ European Convention on Human Rights 1950.

⁷⁵ Inter- American Commission on Human Rights 1959.

⁷⁶ African Charter on Human and People's Rights 1981.

promotion of international humanitarian law, but not all have the same capacity. In this sense, it can be justifiably concluded that the UN agencies involvement in the development and promotion of international humanitarian law is more recent, but has the capacity of ensuring respect to the rules of international humanitarian law if it so wish. However, the SC has primary responsibility under the UN Charter for the maintenance of international peace and security. It is for the SC to determine when and where a United Nations Peace Operation should be deployed. Fundamentally however, it is submitted that the on-going Russia's invasion of Ukraine has really exposed many grave weaknesses in the international order. One prominent flaw that needs to be addressed is the UN SC and its role in overseeing the multilateral system. The veto power of the SC's five permanent members constitutes a major stumbling block to global peace.

As broadly examined in this paper, it is further submitted that both Chapter VI and VII of the UN Charter entrusted the responsibility of preventing threats to peace, suppression of acts of aggression, and peaceful settlement of international disputes to the SC. But however, it must be emphasized that the absolute veto power granted by article 27 to each of the Council's permanent members (the P5, comprising China, France, Russia, United Kingdom, and the United States) has from the beginning been a key obstacle to the body's fulfilment of its mission. This is because the P5 have almost always been divided into rival geographical blocs, with a member of one bloc mostly Russia or the United States exercising its veto on many crucial decisions. It is right to say that in the current Ukraine conflict, Russia's SC veto means that the United States and its allies can impose sanctions only through a coalition of the willing. Furthermore, while it is accepted that the SC can impose sanctions on those States that violates international humanitarian law, it is imperative to suggest that these can be achieved through the authorization of military operations on them which of course, led to the establishment of *ad hoc* international criminal tribunals to prosecute violations of international humanitarian law. Finally, this paper argues that the fact that the SC prefers to establish its own *ad hoc* commissions to investigate violations of International humanitarian law rather than resort to the finding Commission provided in Article 90 of the Additional Protocol 1 which clearly shows that it has regards to international humanitarian law.

Ultimately, while it is clear that the United Nations are major role players in ensuring respect and promotion of the rules of international humanitarian law, it must be emphasized that they are faced with numerous challenges as the nature of armed conflicts and contemporary weapons of warfare evolves. That being said, armed conflicts, indiscriminate violence and acts of terror has continued to threaten the safety and security of innocent people and undermine efforts to bring about lasting peace and stability around the globe.

COMPARATIVE ANALYSIS OF THE LEGAL APPROACH TO MENTAL HEALTH IN NIGERIA AND NETHERLANDS

Iyadah John Viko* & Queen Ekanem Essien**

Abstract

Awareness on mental health is gradually gaining prominence around the globe as many people are beginning to speak up. Some persons suffering from these illnesses have reduced their encounters into books which have further been translated to movies and plays. Attention for mental health is now on the rise as Non-Governmental Organizations (NGOs) are supporting the cause, laws and policies are being put in place to promote mental wellbeing. The work brought about the enlightenment of the legal approach to mental health in Nigeria and the Netherlands, to ensure that more people are well-informed aware on how the wrong attitude to mental health can pose a great challenge to the cause, and to adopt a more advanced and working system for a better mental health approach in Nigeria. The paper adopted the doctrinal method of research, made use of primary and secondary sources of materials. The legal approach to mental health in Nigeria is developing slowly as there is a considerable distance in the level of awareness, response and treatment of mental health and wellbeing of most people in Nigeria. The paper concluded that there is the need for mental health policies in Nigeria to be in line with World Health Organization (WHO) guidelines especially the creation of mental health courts and adequate budgetary allocation for mental health facilities and service providers. It is recommended that for Nigeria to guarantee the highest standard of mental and physical well-being for its populace, the WHO guidelines must be adhered to.

Keywords: Mental health, mental health care, mental health law, lunacy law, insanity law, World Health Organization, Nigeria, Netherlands

1. Introduction

It can be said that the concept of mental health relates to the mind, the social and emotional well-being of people and communities. To understand mental health better, it is important to pay attention to the way one is thinking, feeling, attitude and disposition in general. It stretches to the physical health, productivity and the likes. As humans, there are times we feel resilient, strong and optimistic, regardless of the happenings around us. There are also times we do not feel resilient, strong or optimistic about life regardless of how beautiful or perfect things may seem. In situations where we feel low for a sustained period of time, it most often than not impacts significantly on how we think, feel and act in many parts of our lives, including relationships, productivity at work, sense of connection to peer groups, our personal sense of worth, physical health and

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motivation. If these feeling lingers, it could lead to the development of a mental health condition such as anxiety, depression, post-traumatic stress disorder, substance abuse etc. Mental health is concerned with wellness rather than illness and is not merely the absence of a mental health condition. It relates to the enjoyment of life, ability to cope with stress and sadness, the fulfilment of goals and potential, and a sense of connection to others. Just like our physical health, our mental health is not fixed¹. It exists on a continuum, or range from positive, healthy functioning at one end, through to a severe symptom of mental health conditions at the other.

Mental Health is an integral and essential component of health. The WHO states that “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”². An important implication of this definition is that mental health is more than just the absence of mental disorders or disabilities. Mental health is a state of well-being which individuals assess their abilities to cope or to balance the difficulties that come with everyday living and still make meaningful contribution to their community.³ Mental health is fundamental to our collective and individual ability as humans to think, emote, interact with others, earn a living and enjoy life. On this basis, the promotion, protection and restoration of mental health can be regarded as a vital concern of individuals, communities and societies throughout the world.⁴

Mental illness was originally considered supernatural and a reflection of the battle between good and evil. Hippocrates was a proponent of the idea that psychological disorders were biologically caused. Other well-known philosophers like Plato and Aristotle, wrote about the importance of fantasies, dreams, and this anticipated, to some extent, the field of psychoanalytic thought and cognitive science that were later developed. They were also the first advocates for humane and responsible care for individuals with psychological disturbances. In time past, people with mental health concerns were often seen to be insane or lunatic, and were subjected to situations that would be ethically questionable in today’s human right laws, as they were subjected to stigmatization, discrimination, victimization and criminalization. These treatments also extended to people within their social space.⁵

¹ United Nations Workplace Mental Health and Well-Being Strategy <<https://www.un.org/en/healthy-workforce/files/Understanding%20Mental%20Health.pdf>> accessed 6 July 2021.

² World Health Organisation <https://www.hsl.gov.uk/media/202146/5_kim_who.pdf> accessed 6 July 2021.

³ Ibid.

⁴ WHO <<https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response>> accessed 11 October 2021.

⁵ Ibid.

In present time, the relevance of mental health in the society is very much noticeable, and as a result of its germane nature, it is safe to say that people with mental health illness have had their human rights either protected or trampled upon as the case may be, leading to the emergence of laws and policies to regulate the cause. This continuous progress in mental health awareness has helped to debunk the myths and misconceptions of the medieval era as more people are not only heavily researching on it, but people with lived experiences are also telling their stories, thereby creating more awareness.

This paper will draw a comparative analysis of the legal attitude to mental health in Nigeria and the Netherlands, by first delving into the historical perspective of what fuelled the mass awareness in mental health. It will analyse the legal framework regulating the mental health space of the Netherlands and Nigeria, and how effective the legal attitude to mental health have been in these countries, and by so doing, proffer best practice options that will help shape the legal attitude to mental health in a positive light. To that effect parts one and two of the paper is comprised of introduction as well as a brief history of mental health awareness and how it has gained the attention of governments and people overtime. Parts three, four and five have a combined discussion on the legal approach to mental health in Nigeria and the Netherlands respectively while identifying gaps in their legal framework which formed the basis of the overall argument. Part six of the work concluding section of the paper.

2. History of Mental Health Awareness

Mental health awareness has its origin traced back to developments in public health, in clinical psychiatry and in other branches of knowledge. Although reference to mental health as a state can be found in the English language well before the 20th century, technical references to mental health as a field of discipline are not found before 1946⁶. In that year, the International Health Conference, held in New York, decided to establish the World Health Organization (WHO) and a Mental Health Association in London.⁷

Increased awareness about mental health can be traced to Clifford Beers' book titled 'A mind that found itself.'⁸ In the book, Beers shares his experience through his mental illness journey, where he gave details of the attitude of physicians and attendants in psychiatry homes and how patients were treated while on admission to three different hospitals. The impact of this book led to the creation of the National Mental Hygiene society in 1909. In 1919, the internationalization of activities of this commission led to the establishment of

⁶Jose Bertolote, 'The Roots of the Concept of Mental Health; Department of Mental Health Organization, Geneva, Switzerland' <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2408392>> accessed 1 July 2021.

⁷ Ibid.

⁸ Christopher W Beers, *A Mind that Found itself* (1st edn, New York, 1908 Doubleday, Draw & Co, 1937).

some national associations concerned with mental hygiene; in France and South Africa in 1920, and in Italy and Hungary in 1924. From these national associations, the International Committee on Mental Hygiene was established and later superseded by the World Federation of Mental Health.⁹ Mental hygiene movement was concerned with the humanization of the care of the insane; eradication of abuses, brutalities and neglect from which the mentally sick have traditionally suffered. The progress of the movement brought to the fore mental health disability and how it can be suppressed. As a result of this effort results showed that mental disorders are traced to early childhood and youthful experiences which is also in line with Sigmund Freud's psychodynamic theory. It further stressed that if preventive measures are applied at an early stage, it would be the most effective for mental health care.¹⁰

3. Legal Approach to Mental Health in Nigeria

There is a bad perception about mental health in Nigeria, which is largely rooted in the level of education, social status, culture/tradition, and religious beliefs - as we are a people who pray and wish every untoward thing away. The average Nigerian recognizes and connects more with the overt signs of mental disorder much more than covert signs. The belief is that a mental illness has to do with the loss of consciousness with reality, leading to the point of insanity, so if a person is brainsick on the street, with torn clothes and eating out of the bin, that fellow is indeed mentally ill.

Those with a good knowledge of mental illness encounter difficulties with gaining access to a mental health treatment system due to poor funding. The psychiatry hospitals are mostly located out of reach of the targeted patients and most often, poorly funded. This problem is further exacerbated by stigmatization of persons with mental illness and by their own inappropriate behaviour. For instance, the untold story of an ex-super eagle striker Rashidi Yekini, who died of depression in a herbal home which is seen as an issue of utmost neglect of special people in need of attention by the state.¹¹

It is also common tradition in Nigeria that before a person is given into marriage; a search is conducted to check for any history of insanity in the family. Once such investigation indicates a history of insanity, parties are usually advised against going through the process. The stigma associated with mental illness also prevents people with diagnosable mental illness from seeking treatment and by so doing, develop a great risk of substance abuse disorders and as such, increase visibility to law enforcement, with the likelihood that they would become mired

⁹ Jose Bertolote (n 6).

¹⁰ Ibid.

¹¹ The Rashidi Yekini Case and the State of Mental Health Law in Nigeria <<https://www.mondaq.com/nigeria/healthcare/293624/the-rashidi-yekini-case-and-the-state-of-mental-health-law-in-nigeria>> accessed 22 August 2021.

in the criminal justice system and could eventually be housed in jails or churches rather than in a mental health hospital.

3.1 The Lunacy Act of 1958

The federal law regulating mental health in Nigeria is the Lunacy Act of 1958. This law came into force to make provision with respect to the care, treatment and control of persons who are mentally ill and the management of their estates. Before this period, Nigeria's intervention approach was mainly traditional treatment, including the use of herbal medicine.¹² According to the Act, a mentally ill person 'is a person who, owing to mental illness requires care, treatment or control for his own good or in the public interest, and is for the time being incapable of managing himself or his affairs.'¹³ It is necessary to note that the Act uses terms like 'lunatic' and 'idiot' to refer to an insane person¹⁴ which is in itself derogatory to the human person and has a potential for broad fluid interpretation.¹⁵ These terms are no longer used to refer to mental illness in standard parlance today. The law in content and context violates the fundamental human rights of persons with mental health and psychosocial disabilities. There is no mention of prevention, promotion and treatment, and this derogates from the human right of everyone to enjoy the highest standard of physical and mental health.¹⁶

Section 12 of the Act provides for the procedure for admitting persons to admission centres. By this provision, a medical practitioner is authorized to make such findings, which begs the question of clarity, in that, merely stating a "Medical Practitioner" simply means that the law is not being specific on the kind of medical practitioner that should be responsible for this duty. It is submitted that a better designation would be a psychiatrist. Section 12(2) further vests the power of involuntary admission into an admission centre to a justice of oath in various circumstances, including:

- (2) Where a person informs a justice of oath that;
 - (a) He believes any other person to be a mentally ill person, and

¹² Paul Ugochukwu Ude, 'Policy Analysis on Nigeria's Lunacy Act (1958): The Need for a New Legislation' <www.longdom.org/open-access/policy-analysis-on-nigerian-lunacy-act-1958-the-need-for-a-new-legislation-2378-5756-1000343.pdf> accessed 16 August 2021.

¹³ Lunacy Act 1958, s 4.

¹⁴ Ibid s 5.

¹⁵ Andrew Hudson Westbrook, 'Mental health Legislation and Involuntary Commitment in Nigeria: A Call for Reform' Washington University School of Law <www.openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1022&context=law_global_studies> accessed 16 August 2021.

¹⁶ International Convention on Economic, Social and Cultural Rights (1966) art 12(1).

(b) such other person is without sufficient means of support, or is wandering at large, or is discovered committing an offence against the Law or in circumstances which may reasonably lead a person to suspect that such other person was about to commit some offence against the law, such justice may by order under his hand require a member of the police force to apprehend such other person and to take him to the nearest convenient exam centre.¹⁷

The above provision vests a justice of oath with the power to commit a person to an asylum involuntarily and by so doing, hindering the individual's physical freedom which is an infringement of the constitutional right to liberty¹⁸. According to Dicey, the right to liberty is the right not to be subject to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification¹⁹. This right is further emphasized in Article 9 of the Universal Declaration of Human Rights (UDHR)²⁰ which provides that no one shall be subjected to arbitrary arrest, detention or exile.

The Law provides for the detention of a mentally ill person without mentioning the provisions for treatment and the circumstances within which such treatment should be provided. By all indication, a mentally ill person who has committed a crime is best fit in a rehabilitation home, where adequate treatment will be provided as it will be futile to detain a mentally ill person with no treatment. The Lunacy Act of 1958 is not only moribund, but violates human right provisions, and is reflective of a period when mental illness was severely misunderstood.

3.2 1999 Constitution of the Federal Republic of Nigeria (as amended)

Section 34 of the constitution provides for the right to dignity of the human person and that no person shall be subjected to torture or to inhuman or degrading treatment.²¹ Section 42 deals with the right to freedom from discrimination. It provides that a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person, be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject: or be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens

¹⁷ Mental Health Act 45, 1958 <www.legislation.nsw.gov.au/view/pdf/asmade/act-1958-45> accessed 6 July 2021.

¹⁸ S 35 Constitution of the Federal Republic of Nigeria, 1999 (as amended).

¹⁹ Cited in *Oba Gabriel Okogie v AG Ondo State* [1982] 3 NCLR, 349 per Justice Orojo.

²⁰ Universal Declaration of Human Right 1948.

²¹ The various ways in which the mentally ill are often treated in the Nigerian society is a direct contravention of this provision.

of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions... this provision strengthens the protection of the right of the disabled. In spite of this provision, people with mental illness have continued to be stigmatized and subjected to inhumane treatment which is also a contravention of the Convention on the Elimination of all forms of Racial Discrimination and the Convention against torture to which Nigeria is a signatory.²²

3.3 Criminal Code 1990

The Nigerian Law absolves an insane person of the liability for his actions where the defence of insanity is proven. In the Criminal and Penal Codes, an accused is exculpated from criminal liability where it is shown that the person was of an unsound mind or deluded at the time of committing an offence. Section 28 of the Criminal Code provides:

that where such a person is in a state of mental infirmity as to deprive him of capacity to understand what he is doing, or capacity to control his actions or capacity to know that he ought not to do the act or make an omission. A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for act or omission to the same extent as if the real state of things has been such as he was induced by the delusions to believe to exist.

It can be seen from the above section the different levels of mental diseases that can be a justifiable reason for one not to be punished for what they hitherto did not know what they were doing or could not have controlled their actions even where it can be shown that they knew or understood what they were doing.

3.4 Penal Code 1960

Section 226 provides that any person who attempts to kill himself is guilty of a misdemeanour. The idea of criminalizing suicide without recourse to possible mental health conditions of the victim is not just a selfish act from the state, but a monstrous decision taken on a person who has already found life unworthy of living, and by subjecting such a person to further bitterness and degradation shows how perverse the current law is, as it omits the provision of therapy for the victim, and this is tantamount to the state reiterating that in an attempt at suicide, one must ensure not to fail and so by all means, must ensure to succeed in ending their lives regardless of the circumstance. One must also be careful not to think that anyone that is suicidal suffers from any mental disease. It can be said that people have different understanding and expectations about life and where certain expectations are not met or are cut short due to a huge loss one can exhibit some signs of mental diseases but in the real sense there is none.

²² Arts 1 and 5 the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965); art 5 the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); art 5 of the UDHR 1948.

The principle of criminalizing suicide is traced to the abolished common law doctrine of which, the reasoning behind it was spiritual²³ and temporal.²⁴ This doctrine goes on to promote the reasoning that, the state has some generalized and disembodied interest in the preservation of life.²⁵ It is rather appalling in this present age for a person who attempts suicide to be imprisoned by the state.

3.5 Mental Health Policy in Nigeria

Though not part of the legal framework in terms of its legal effect or force, the mental health policy was adopted in 1991 by the federal government to be implemented by the Federal Ministry of health²⁶. The policy reaffirms the commitment to provision of quality services to be accessible to people with Mental Neurological and Substance Abuse (MNS) disorder in the country. It placed the provision of mental health services at the Primary Health Care level. The policy addressed the stigma, discrimination and social exclusion that are commonly experienced by people with mental health problems through ensuring equitable access to care and specific activities aimed at challenging negative attitude to mental health in the communities²⁷. The protection of human right is also addressed in a separate legislation submitted to the Federal Government.

The policy provides that, government shall aim to;

- 1) Integrate MNS into primary care services,
- 2) Make provision for acute in-patient care for persons with mental and neurological disorders at every teaching hospital, general hospital, and every federal medical centre, while discouraging unnecessary long-term institutionalization;
- 3) Provide for out-patient care in all of these settings; and
- 4) Provide for rehabilitation services, including occupational service, social service and clinical psychological service at every facility where persons with MNS problems are treated. Hospital admissions shall be provided for those in need but for as short a duration as essential, and preferably on voluntary basis

²³ By spiritual, this implies evading the prerogative of the almighty, and rushing into his presence uncalled for and by temporal, violating the king's duty of ensuring protection for his entire subject.

²⁴ Lawrence T Hammond Jr, 'Criminal Law: Attempted Suicide' *North Carolina Law Review* <www.scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5997&context=nclr> accessed 6 July 2021.

²⁵ 'The State's Interest in the Preservation of Life: From Quinlan to Cruzan' <www.scholarship.law.missouri.edu/facpubs/323/> accessed 2 October 2021.

²⁶ National Policy for Mental Health Services Delivery (August 2013) <https://cheld.org/wp-content/uploads/2015/02/national_policy_for_mental_health_service_delivery__2013_.pdf> accessed 6 July 2021.

²⁷ Ibid.

except where otherwise permitted by the application of the appropriate sections of the Mental Health Act.²⁸ It is worthy of note that the policy was not only suspended, but is yet to see the light of day.

4. Legal and Institutional Framework for Mental Health in the Netherlands

The Netherlands has a robust mental health policy covering several areas like awareness, response, treatment of mental health/wellbeing, insurance, employment etc. There are presently seven hundred and fifty thousand patients of all ages who receive mental health care from fifty-thousand professionals annually, which is usually organized in thirty different professional organizations. Mental health care is now available all over the country and is well financed, mainly from insurance²⁹. On March 30, 2007, the Netherlands was amongst the first countries to sign the UN Convention on the Rights of Persons with Disabilities, but is yet to ratify its optional protocol³⁰, by which redress for violations can be obtained. The country also has an extensive framework on anti-discrimination legislation, consisting of a general equality and anti-discrimination clause in the Constitution, as well as the 2003 Act on equal treatment on grounds of disability or chronic illness.³¹

Various anti-discrimination provisions in the Dutch Criminal Code most especially Section 137³² uses different terms to refer to persons with a mental disorder or intellectual disability, and the term applied would usually depend on the context the person finds themselves, and the type of law involved. People with this disability are equally entitled to all other human rights recognized under the Constitution and other human rights treaties the Netherlands is a party to. However, the anti-discrimination provisions of the Criminal Law with respect to mental disorder or intellectual disability are yet to be invoked in criminal law cases.

4.1 Equal Treatment on Grounds of Disability or Chronic Illness Act 2003 of Netherlands

The equal treatment Act offers general protection against discrimination on grounds of religion, beliefs, political opinion, race, sex, nationality, heterosexual

²⁸Ibid.

²⁹ AH Chene and others, 'Mental Health Care Reform in the Netherlands' <<https://onlinelibrary.wiley.com/doi/full/10.1034/j.1600-0447.2001.1040s2074.x>> accessed 16 August 2021.

³⁰ Nigeria ratified both the Convention and the Optional Protocol.

³¹ Jan Tymowski, 'The Employment Equality Directive: European Implementation Directives' <[www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU\(2016\)536346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU(2016)536346_EN.pdf)> accessed 6 July 2021.

³² Criminal Code <www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf> accessed 16 August 2021.

or homosexual orientation or civil status.³³ Section 7 of the Act provides that it shall be unlawful to discriminate in offering or permitting access to goods or services, in concluding, implementing or terminating agreements on the subject, and in providing career orientation and advice or information regarding the choice of educational establishment or career if such acts of discrimination are committed:

- (a) in the course of carrying on a business or exercising a profession;
- (b) by the public service;
- (c) by institutions which are active in the field of housing, social services, health care, cultural affairs or education or
- (d) by private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly.

Section 7(a) of the Act further provides that it shall be unlawful to discriminate on the ground of race in social protection, including social security and social advantages.³⁴ By this provision, the Law clearly provides for the equal treatment of persons regardless of their disability or chronic illness, and this is in line with the second generation of Human right on economic social and cultural right as it is provided for in the International Covenant on Economic, Social and Cultural Rights of 1966.³⁵

4.2 Patient Right Care Sector Act³⁶

This law provides that everyone who lives in the Netherlands is entitled to care. This right is enshrined in the Exceptional Medical Expenses Act (AWBZ) and a host of other legislation and is implemented through the broad basic health insurance provided for under the healthcare insurance Act. It provides that all forms of care - preventive care, general medical care (including acute care) and long-term care-must be available and accessible to all. Patients must also be able to rely on continuity of care. Insurers have a duty of care, which means that, in general, right to care is sufficiently guaranteed. The aim of the Act is to give patients the right to good care, and what form it should take.

4.3 The Constitution of the Kingdom of the Netherlands 1998

Article 1 of the constitution provides ‘that all persons in the Netherlands shall be treated equally in equal circumstances, discrimination on the grounds of religion, belief, political opinion, race or any other grounds whatsoever shall not be permitted’. The purport of this provision is to protect the minority, those considered to be the vulnerable in the society. Protecting the minority from the

³³ Equal Treatment (Disability and Chronic Illness) Act

³⁴ Ibid.

³⁵ Equal Treatment on Grounds of Disability or Chronic Illness Act 2003

³⁶ Dutch Patient Right Act.

majority is the whole essence of a working democratic system of government it is this reason that a law was separately enacted for the Equality Treatment (Disability and Chronic) Act,³⁷ to protect the mental health illness and other health challenges that could leave a person in a disadvantaged position.

4.4 Criminal Code Act of Netherlands

Section 13 of the Act provides that a convicted offender sentenced to imprisonment may be admitted to a custodial institution for the treatment of persons detained under an entrustment order, if he is eligible for such admission by reason of mental disease or defect. If a convicted offender has been sentenced to imprisonment in combination with detention under an entrustment order with compulsory treatment, a review of whether the convicted offender should be placed in a custodial institution for the treatment of persons detained under an entrustment order shall be conducted regularly.

Chapter 2 of the Act provides for a psychiatric hospital and detention under an entrusted order. Section 37 of the Act provides that the court may order the admission of a person, who cannot be held responsible for committing a criminal offence by reason of mental disease or defect, to a psychiatric hospital for a term of one year, but only if he poses a danger to himself, to others, or to the general safety of persons or property. This order may only be issued after a reasoned, dated and signed opinion issued by no fewer than two behavioural experts of different disciplines - one being a psychiatrist - who have examined the person in question, has been submitted to it. Such opinion shall be given jointly by the behavioural experts or by each of them separately. Where the date of this opinion precedes the commencement of the trial by more than one year, the court may only rely upon it with the consent of the Public Prosecution Service and of the defendant.³⁸

4.5 The 1992 Psychiatric Hospitals (Compulsory Admissions) Act³⁹ 1992

This Act applies to persons with mental disorder from 12 years and above. If such a person does not agree with the admission to or treatment in a psychiatric institution the Thematic Legal Study on Mental Health and Fundamental Rights provisions and procedures of the Act applies. In case of children below the age of 12 the general rule is that the parents or guardians have the authority to decide about care and treatment (including the admission to a psychiatric hospital). However, if the parents of a child below the age of 12 disagree with one another, the provisions of the present Dutch Act apply as well.

³⁷ Ibid.

³⁸ Criminal Code of Netherlands.

³⁹ Thematic Legal Studies on Mental Health and Fundamental Rights <<https://fra.europa.eu/sites/default/files/frauploads/2157-mental-health-study-2009-NL.pdf>> accessed 16 August 2021.

The 1992 Psychiatric Hospitals (Compulsory Admissions) Act may also apply to persons with addictive behaviour (if the addiction is related to a mental disorder). Offenders with mental disorders are dealt with in the criminal justice system, on the basis of specific legislation (criminal law). In most cases this will result in the placement of the offender in an institution within the criminal justice system. In a number of situations offenders with mental disorders may be transferred to an institution that is governed by the provisions of the Psychiatric Hospitals (Compulsory Admissions) Act. Provisions regarding persons under guardianship can be found in the Dutch Civil Code.⁴⁰ However, under Dutch law a guardian does not have the power to order the involuntary placement or treatment of the person under guardianship. If such a person requires involuntary placement and/or involuntary treatment the criteria and procedures of the Psychiatric Hospitals (Compulsory Admissions) Act have to be met.⁴¹ The objectives of the Act are as follows:

- (a) To clarify and strengthen the rights of persons with a mental disorder (including intellectual disabilities and dementia); and
- (b) To protect individuals and society from dangerous acts performed by persons with a mental disorder). In actual practice other objectives play a role as well (rehabilitation, restoring self-determination etc).

The Act further regulates involuntary placement and involuntary treatment of persons with a mental disorder, and this may only be carried out after the fulfilment of some criteria laid down in the Act and in the absence of less intrusive measures. The criteria for involuntary placement is strict on the assessment of a psychiatric disorder requiring involuntary placement, the maximum duration of involuntary placement and the legal procedures to be followed⁴². In addition, the law distinguishes between two types of compulsory admission. The first type is the common procedure, whereby a judge determines whether legal conditions have been met. The second type involves emergencies, whereby compulsory admission is decided by the mayor or a member of the municipal council in the town or city in which the emergency takes place. This decision is based on a written medical report by a physician or psychiatrist who is not the therapist of the patient in question. Within a few days, a judge then decides whether the admission is to be continued.

Also, in the fields of employment, education and social security, other distinctions are made by the law. For example, the Act on Social Employment is applicable onto individuals with physical, intellectual or mental restrictions. The

⁴⁰ Dutch Civil Code (Civil Code of the Netherlands).

⁴¹ Compulsory Admission and Involuntary Treatment of Mentally Ill Patients-Legislation and Practice in EU-member States.

⁴² Ibid.

Act on employment and income⁴³ depending on labour capacities differentiates between individuals who are completely and lastingly unfit to work and individuals who are partially labour disabled. In the field of education, four types ('clusters') of special education are distinguished, including cluster 3 type education aimed at pupils with intellectual and / or physical restrictions and cluster 4 type education targeted at children with educational difficulties and pupils with long-term mental illnesses.⁴⁴ All these laws and related by-laws define mental disorders and intellectual disabilities in terms of functional and social impairments. According to social security laws, disabilities can be measured and expressed in terms of a percentage, with only people who are more than 35 per cent 'unfit to work' entitled to a social benefit.

4.6 The Exceptional Medical Expenses Act

The Exceptional Medical Expenses Act (AWBZ) helps to provide opportunities for the achievement of the health system goals and to increase efficiency. This provided finances for the major part of mental health care until 2008⁴⁵. Until 2008, the Act financed the major part of mental healthcare. In 2008 the financing structure was fundamentally reformed. The first 365 days of mental health treatment became part of basic health insurance and are thus financed under the Health Insurance Act (Zvw).⁴⁶ The funding of preventive mental healthcare was transferred to the Social Support Act (Wmo), which means that the responsibility for organizing this care was shifted to municipalities. Since 2014 the first three years of (inpatient) mental treatment is financed through the Health Insurance Act.⁴⁷

4.7 Youth Assertive Community Treatment (Youth Act) / Intensive Rehabilitative Mental Health Services (IRMHS)

The Youth Act provides for an intensive, comprehensive and non-residential rehabilitative mental health service. These services are delivered using a multidisciplinary team approach and are available 24 hours a day, 7 days per week, Youth ACT/IRMHS teams work intensively with youth having severe mental health or co-occurring mental health and substance use issues to assist them with remaining in their community while reducing the need for residential or inpatient placements. Teams also work with youth discharging from these

⁴³Netherlands Employment and Labour Laws Regulation 2021 <<https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/netherlands>> accessed 16 August 2021.

⁴⁴ Special Needs Education <www.mext.go.jp/en/policy/education/elsec/title02/detail02/1373858.htm> accessed 16 August 2021.

⁴⁵ Health System in Transition, Netherlands (18) 2 2016 <<https://www.apps.who.int/iris/rest/bitstreams/1280609/retrieve&ved>> accessed 16 August 2021.

⁴⁶ Ibid.

⁴⁷ Ibid.

placements to ensure a smooth transition back to their home, family and community. Services are delivered in an age-appropriate and culturally sensitive manner designed to meet the specific needs of each client.⁴⁸

5. Issues and Challenges of Mental Health Laws in Nigeria and the Netherlands

The progress of mental health in the Netherlands is very commendable, as it very organized with appropriate Laws put in place to promote the cause, and by so doing, has continued to evolve on the bright side. Nigeria on the other hand, is developing slowly after that of the Netherlands, as there is a wide divide needing urgent attention. On the other hand, the Legal attitude to mental health in Nigeria is facing a very considerable challenge with awareness, policies and the need to repeal draconian laws regulating the cause, as well as issues regarding funding and implementation of the provisions of the laws already in existence.

The defect in the provisions of the Lunacy Act is innumerable. Apart from not meeting the international requirements for a good policy, it does not recognize human rights, including: equality and non-discrimination, the right to privacy, liberty, individual autonomy, physical integrity, right to information/participation, freedom of movement etc. The law also violates the right of persons from enjoying the highest attainable standard of physical and mental health, which is a fundamental right guaranteed under the Constitution. Additionally, the policy must be able to address and recognize the 25 principles outlined in the protection of persons with mental illness and the improvement of mental health care adopted by the United Nations in 1991.⁴⁹ The Act further confines the mentally ill to a non-therapeutic, overcrowded, unsanitary and dilapidated facility.⁵⁰

The current Mental Health Bill,⁵¹ containing better provisions for the regulation of mental health activities, and which should have been a replacement of the Lunacy Act, is yet to be assented to, and as such, its relevance, is yet to be verified. By leaving this bill in abeyance, the Lunacy Act continues to serve as the primary legislation regulating the mental health space.

⁴⁸ Youth Assertive Community (Youth ACT)/Intensive Rehabilitative Mental Health Services (IRMHS) <www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS16_181612> accessed 12 October 2021.

⁴⁹ United Nations <www.who.int/mental_health/policy/en/UN_Resolution_on_protection_of_persons_with_mental_illness.pdf> accessed 16 August 2021.

⁵⁰ The current Mental Health Bill, containing better provisions for the regulation of mental health activities, and which should have been a replacement of the Lunacy Act, is yet to be assented to, and as such, its relevance, is yet to be verified. By leaving this bill in abeyance, the Lunacy Act continues to serve as the primary legislation regulating the mental health space.

⁵¹ National Policy for Mental Health Services Delivery (n 26).

Despite how robust the legal attitude to mental health is in the Netherlands, there are still areas worthy of improvement, and this goes to show the complexity in tackling mental health challenges. The areas needing improvements are discussed below.

5.1 Lack of Diligent Monitoring

The 1992 Psychiatric Hospitals (Compulsory Admissions) Act only to a limited extent stipulates adequate aftercare following involuntary placement. The Act provides that if a person is granted leave or is discharged, the institution has to contact the health care providers who cared for the person before the involuntary placement was effectuated. More specific requirements regarding aftercare are not mentioned in the Act, and because of this, aftercare is not guaranteed, and it is difficult to call individual health and social services to account for their performance. Dutch law does not explicitly include an aftercare arrangement that meets the 'Care Programme Approach', as is the framework for discharge planning and aftercare in the United Kingdom. This approach involves assessing the patient's healthcare and social care needs, developing a care plan agreed by all stakeholders, identifying a key worker or case manager, and monitoring the delivery of the care plan in view of the patient's progress. Effective support comes down to the intensive cooperation of health and social services and the creative handling of essential rules and services.

5.2 Involuntary Placement without Treatment

The 1992 Psychiatric Hospitals (Compulsory Admissions) Act does not see involuntary placement without treatment as a goal in itself. The assumption is that involuntary placement will result in treatment (on a voluntary basis or, under certain circumstances, as an involuntary measure). However, due to the distinction between involuntary placement and involuntary treatment that is incorporated in the Dutch Act, situations of involuntary placement without treatment may occur.

5. Conclusion

In the past, people with mental health issues were treated as underclass, or even worse, when in fact as history shows, the line between sanity and insanity, genius and madness is such a fine line. From the foregoing, it is clear that the Netherlands have a robust legal attitude to mental health as compared to Nigeria, which goes to show their advancement in creating more room for treatment and employability options for persons with mental health disability. It is necessary for Nigeria to take lessons from their counterpart state in effecting a greater development and impact in the mental well-being of its citizenry, as the promotion of mental health, prevention and the treatment of mental disorders are fundamental to safeguarding and enhancing the quality of life, well-being and productivity of individuals, families, workers, communities, and in increasing the strength and resilience of society as a whole. In mobilizing the strategy to ensure a more positive impact on mental health, this would require not just a practical

approach to things, but a continuous step to be taken in caring for persons with mental health disorders. Mental health illness is a complex problem globally, and as such, simple suggestions or solutions cannot be used to solve them. Hence, the theoretical and practical approach will be employed for a greater achievement of the cause, as it goes beyond the theoretical framework but more on the practical approach with more focus on its continuity.

There is a need for the National Assembly to enact a robust mental health law in Nigeria in accordance with WHO guidelines, such that will recognize the human rights of patients once admitted to the mental health facilities, and just like Nigeria is committed to recognizing national/international treaties and charters on human rights, the proposed law must reflect compliance with the standards set by these treaties, in order to guarantee the highest standard of both mental and physical health for the targeted population. There is the need for the creation of a mental health court which will be in form of a specialized court docket for certain defendants with mental illness that substitute a problem-solving model in place of traditional court processing. Participants will be identified through mental health screening and assessments and voluntarily participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals.

There is a need to provide adequate budgetary allocation for mental health policies and service providers in Nigeria as well as insurance facilities to subsidize mental health care in the country, just like it is done in the Netherlands. There is also the need for stricter implementation and enforcement of policies that tackles quackery in the psychiatry and psychology profession for a better care in the Netherlands and Nigeria. Also, replicating the Friendship Bench Programme as is done in Zimbabwe, New York, Zanzibar (in Tanzania) & Malawi (a community development project which helps in bridging the gap between people in society through having group intervention) in local communities in Nigeria and Netherlands, in order to serve as an option to residents of communities lacking access to care, and by so doing, bridge the mental health treatment gap and enhance mental well-being.

ROLES OF THE UNITED NATIONS AND INTERNATIONAL LEGAL INSTRUMENTS IN THE PROTECTION OF WOMEN'S RIGHTS

Omozue Moses Ogorugba*

Abstract

Discrimination and violence against women have become widespread and multi-faceted. Discrimination against women and girls are observable in many spheres of life including social, cultural, economic, health, education, in representation in public life and in determination of nationality. Women and girls suffer violence than their male counterparts at home as well as during armed conflicts, internal or international. In keeping with preamble of the Charter of the United Nations (UN) 1945 to 'reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women...' the organisation has over the years put in place measures to tackle the issues of discrimination and violence against women in order to protect the rights of women. Notable among such measures is the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the establishment of a committee of experts to monitor the implementation of the Convention in the members States. The aim of this article is to discuss the role of the UN in the elimination of discrimination and violence against women. It will also appraise relevant international instruments designed to protect the rights of women globally and at regional levels. The study adopts the doctrinal research method by with legal instruments and case law as the primary sources of data, and textbooks, journal articles and the Internet as the secondary sources of data.

Keywords: Discrimination against women, Violence against women, Rights of Women, United Nations, Convention on the Elimination of All Forms of Discrimination against Women

1. Introduction

Discrimination and violence against women impinge on the human rights of women. Systematic discrimination against women is noticeable in the treatment of women and girls in social, economic and family circles.¹ Women are often discriminated against in a manner that is incompatible with international instruments and constitutional provisions. Unfortunately, such practices are condoned as normal in patriarchal societies such as Nigeria. These undermine and promote the violation of women's rights. Certain harmful traditional practices that amount to gender-based violence such as female genital

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¹ JN Ezeilo, 'Women, Law and Human Rights: Global and National Perspectives (Abuja: Acena Publishers, 2011) xii.

mutilation, early and forced marriages, widowhood practices, denial of inheritance and property rights of women and girls are still prevalent.²

Historically, it has been acknowledged that while the struggle for the protection of women at country levels dates back to the 17th century, the history of global women's rights movement is intrinsically tied to the development of modern human rights which in itself took root from the formation of the United Nations (UN).³ However, prior to the formation of the UN, agitations for equal rights between men and women had manifested in the struggle for enfranchisement⁴ and the recognition of women's legal personality.⁵ The preamble to the UN Charter states that one of its purposes is, 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations at large ...'⁶ The General Assembly of the UN has passed several resolutions for the protection of vulnerable human beings including women. In the protection of women, it adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 18 December 1979.⁷ CEDAW has played a vital role in the protection of women through its committee. This article discusses the role of the UN in the protection of women particularly through CEDAW and other international legal instruments protecting the rights of women. It is divided into five main sections. Section one, which is this introduction, is followed by the second which briefly discusses the concept of women's rights as a derivative of human rights. This section identifies some of the rights that are peculiar to women and can be classified as 'women's rights'. The third section deals with the role of the UN in protecting women through the protection of their rights. This part of the paper highlights the key provisions of CEDAW and the work of the CEDAW committee in the protection of women. The fourth and penultimate section identifies and briefly discusses regional frameworks that protect women's rights. The fifth and last section is the conclusion which also contains the recommendations of the article.

2. The Concepts of Human Rights and Women's Right

A fundamental starting point in discussing protection of women is the question whether there are rights that are peculiar to women distinct from the generally recognised human rights? Meanwhile, there is no unanimity as to the precise meaning and scope of the term 'human rights'. Human rights have been described as the rights that inhere in human beings on account of their

² Ibid 2.

³ Ibid 20.

⁴ The right to vote and be voted for.

⁵ The struggle for the recognition of women as *femme sole* resulted in the enactment of legislation such as the English Married Women's Property Act of 1881.

⁶ Charter of the United Nations 1945, Preamble, para 2.

⁷ UNGA Res 34/180 of 18 December 1979 (1249 UNTS 13), entered into force on 3 September 1981.

humanity.⁸ It has also been asserted to consist of demands or claims that individuals or groups make on one another, their communities or States which are recognised as essential to human nature. These demands or claims consist of certain moral principles that set out certain standards of human behaviour that are regularly protected under national and international law to which a person is entitled simply because he or she is a human being⁹ and thus differ from appeals to benevolence and charity. It is something that pertains to all men at all times of which no one may be deprived without a great affront to justice.¹⁰

Human rights may be said to derive from moral and natural rights. They are the moral principles that set out certain standards of human behaviour, and are regularly protected as legal rights in national and international law, as inalienable rights to which a person is inherently entitled simply because he or she is a human being.¹¹ Human rights derive from the dignity of the human person and are directed towards providing a minimum standard of decent living worthy of a human being. In recognition of the importance of human rights and to ensure their global applicability, the UN has put in place a number of standard-setting instruments in the form of covenants, conventions, declarations, guidelines, principles and protocols which prescribe standards to secure, maintain and enforce such rights. Notable among these include the Universal Declaration of Human Rights (UDHR), 1948¹²; the International Covenant on Civil and Political Rights (ICCPR),¹³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴ both of 1966. Collectively, these are known as the International Bill of Rights. A number of regional instruments have also been put in place to foster human rights. Prominent among these are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; the American Convention of Human Rights, 1970 and the African Charter of Human and Peoples Right, 1981 (ACHPR).

Human rights have been classified in a variety of ways. They may be classified into personal rights, political and moral rights, procedural rights,

⁸ J Donnelly *Universal Human Rights: In Theory and Practice* (2003) 7. See also H O Agarwal *International Law and Human Rights* (2010) 731 and A Fagan 'Human Rights' *The Internet Encyclopaedia of Philosophy* <<http://www.iep.utm.edu/h/humrts.htm>> accessed 18 February 2022.

⁹ M Sepúlveda and others, *Human Rights Reference Handbook*, (3rd rev ed, Cuidad Colon, Costa Rica: University of Peace, 2004) 3.

¹⁰ HO.Agarwal, *International Law and Human Rights* (Allahabad: Central Law Publishing, 2010) 731.

¹¹ Sepúlveda (n 9) 3.

¹² UNGA Res 217 A(III) (adopted 10 December 1948).

¹³ GA Res 2200A (XXI) 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967) (adopted on 16 December 1966 and entered into force on 3 January 1976).

¹⁴ GA Res 2200A (XXI), 993 UNTS 3/[1976] ATS 5/6 ILM 360 (1967) (adopted 16 December 1966, entered into force 23 March 1976).

proprietary rights and equality rights. Personal rights include the rights to life, to dignity of human person, personal liberty and freedom of movement. Political and moral rights include the rights to freedom of expression, conscience and religion. Proprietary rights include rights to property and privacy. Procedural or due process rights include the rights to fair hearing and equality rights include the right to freedom from discrimination.¹⁵ Jurisprudential justification for human rights is anchored on three generally acceptable principles, namely equality, justice and solidarity.¹⁶ Equality or equal treatment of all recognises that each rational, competent person is a free agent, autonomous and self-directing in the pursuit of his/her good. The idea is that regardless of socio-economic and other socially constructed distinctions, each individual deserves equal treatment and respect for the dignity of his or her person. The importance of equality to human rights is indelibly etched in virtually all human rights instruments.¹⁷ Equality is closely related to justice. Equality guarantees of human rights instruments aim to achieve justice. According to Rawls, justice presupposes that ‘each person has an equal right to a fully adequate scheme of equal basic rights and liberties...’¹⁸ Terms that have been used to explicate justice include ‘fair’, ‘equitable’ and ‘according each person what is due or owed to that person’.¹⁹

This justice and equality perceptions which underlies human rights formulations have resulted in the construction of the universality of human rights. However, most feminist scholars and activities favour cultural relativism

¹⁵ CM Peter, *Human Rights in Africa - A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights* (New York: Greenwood Press: 1990) 53.

¹⁶ Some commentators break these principles into four: (a) equality and non-discrimination (b) participation (c) transparency and access to information and (d) accountability. See M Sepúlveda *Note of the UN Independent Expert on the Question of Human Rights and Extreme Poverty* (2011) 49 cited in W van Ginneken ‘Social Protection and the Millennium Development Goals: Towards a Human Rights-based Approach’ International Conference: ‘Social Protection for Social Justice’ Institute of Development Studies, UK 13–15 April 2011 <<https://www.ids.ac.uk/files/dmfile/VanGinneken2011HumanrightsbasedapproachtoMDGsCSPconferencedraft.pdf>> accessed 16 April 2022.

¹⁷ For instance, aside from using the first paragraph of the UDHR to proclaim equal and inalienable rights of all human beings as the foundation of human rights, the international community accentuated the indispensability of equality to human wellbeing by employing the word ‘equal’ or ‘equality’ at least fifteen other places in the instrument. Similarly, the ICCPR and the ICESCR use the term ‘equal’ or ‘equality’ twelve and nine times respectively, and to the same effect.

¹⁸ J Rawls ‘Justice as Fairness: Political not Metaphysical’ (1985) 14 (3) *Philosophy and Public Affairs* 227.

¹⁹ TL Beauchamp and J Childress *Principles of Biomedical Ethics* (5 edn New York: Oxford University Press, 2001) 226.

in the construction of human rights.²⁰ The universality versus relativism discourse on human rights is hinged on individual versus collective rights. To the universalists ‘fundamental rights and freedoms are universal, that is, belong to each and every human being, no matter what he or she is like.’²¹ However, cultural relativists posit that human rights are culture specific, and notions of human rights based on Western conceptions may not be acceptable in other cultures, such as Africa, because as cultures are different so are their metaphysical basis different.²² Whilst the universalist principle of human rights appears to favour equal rights for both men and women, it seems that gender differences have not been taken into account. Thus, Bunch asserts that the dominant definitions of human rights have tended to exclude much of women's experiences.²³ In order to address these experiences of women, certain rights that are peculiar to women have been identified as species of human rights.

The National Human Rights Commission (NHRC) states that ‘women’s rights are human rights’ and ‘are fundamental human rights that were enshrined by the UN for every human being on the planet.’²⁴ These rights include the right to live free from violence, slavery, discrimination, to be educated, to own property, to political participation, health, dignity and to earn fair and equal wage. As NHRC observes, women are entitled to all these rights; yet almost everywhere around the world, women and girls are still denied of these rights simply because of their gender.²⁵ According to the Commission, the underlying factors responsible for women’s rights infringement is inherent discrimination between male and female genders which results in women not enjoying equality with men in the society.²⁶ This inequality is evidence in unequal access of women and girls to education, harmful traditional practices, inadequate access to economic resources, unequal access to political participation, sex and gender based violence (SGBV) - various forms of violence experienced specifically by women and girls, amongst others. Consequently, many international, regional and national human rights framework contain provisions for promotion and protection of women’s rights. Key principles in the instruments include non-

²⁰ See for example: C Bunch, ‘Transforming Human Rights from a Feminist Perspective’ in J Peters and A Wolper (eds) *Women’s Rights, Human Rights – International Feminist Perspectives* (New York: Routledge, 1975) 13.

²¹ R Hanski and M Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (2nd rev edn (Turku: Åbo Akademi University Institute for Human Rights, 1999) 5.

²² See RA Wilson, *Human Rights, Culture and Context – Anthropological Perspectives* (London: Pluto Press, 1997) 4.

²³ Bunch (n 20).

²⁴ National Human Rights Commission ‘The Rights of Women and Gender Related Matters’ <<https://www.nigeriarights.gov.ng/focus-areas/women-and-gender-matters.html>> accessed 16 April 2022.

²⁵ Ibid.

²⁶ Ibid.

discrimination, equality of rights, individual autonomy and non-violence. The next two sections discuss some of these frameworks/instruments.

3. The UN and Protection of Women's Rights

3.1 The International Bill of Rights

The International Bill of Rights comprises of UDHR,²⁷ ICCPR²⁸ and ICESCR.²⁹ These instruments and their accompanying protocols³⁰ form the tripod on which fundamental rights stand globally. Many of the provisions of these instruments possess the important characters of generality, consistency, long duration and a sense of obligation on States, which confers on them the status of customary international law, binding on all States and not only members of the United Nations.³¹ The UDHR provides that all human beings are born free and equal in dignity and rights,³² and contains an authoritative listing of human rights, including various provisions affirming gender equality and non-discrimination. According to article 1:

Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR attempts to secure the protection of civil and political rights, recognizes the inherent dignity of each individual and undertakes to promote conditions within States to allow the enjoyment of civil and political rights. Member States to the Covenant are obligated to protect and preserve basic human rights and to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy for their violation.

²⁷ Note 13.

²⁸ Note 14.

²⁹ Note 15.

³⁰ These are the optional protocols to the ICCPR and the ICESCR which were adopted in 1966 and 2008, respectively.

³¹ Customary international law refers to 'conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international law' P Alston and HJ Steiner *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2nd edn New York: Oxford University Press, 2000) 28. The character of the State practice that can develop into a customary rule of international law include concordant practice by a number of states relating to a particular situation, continuation of that practice over a considerable period of time, a conception that the practice is required by or consistent with international law, and general acquiescence in that practice by other States; see art 38(1) of the Statute of the International Court of Justice (ICJ) and M Hudson *Working Paper on Article 24 of the Statute of the ICJ* UN Doc A/CN.4/16 (1950) 5.

³² *Ibid* art 1.

The core themes of ICCPR are contained in articles 2 and 3 and are essentially based on the notion of non-discrimination. Article 2 ensures that rights recognized in the ICCPR will be respected and be available to everyone within the territory of States parties to the Covenant while article 3 ensures the equal right of both men and women to the enjoyment of all civil and political rights set out therein, which include rights to freedom from torture,³³ liberty and security of the person,³⁴ movement, equality before the courts and tribunals and recognition as a person before the law;³⁵ and political participation.³⁶ ICESCR provides the legal framework for the protection and preservation of most basic economic, social and cultural rights. These include rights relating to work in just and favourable conditions;³⁷ social and family protection including marriage only by consent;³⁸ adequate standard of living, highest attainable standards of physical and mental health;³⁹ education;⁴⁰ and the enjoyment of the benefits of cultural freedom and scientific progress.⁴¹ Most of the rights contained in the ICESCR are relevant in tackling discrimination and violence against women and girls (VAWG), given that the provisions are laced with the requirement of equal treatment equal to men and women.

3.2 Convention on the Elimination of all forms of Discrimination against Women

A milestone in the attempt to establish universal standards on rights of women was reached with the UN Declaration on the Elimination of All Forms of Discrimination against Women, 1967.⁴² This paved the way for the subsequent adoption of CEDAW, which is one of the most widely ratified human rights treaties under the UN system.⁴³ CEDAW re-asserts many of the fundamental rights provisions of the International Bill of Rights with emphasis on the rights of women. Article one (1) provides for some rights and kicked against sex discrimination in the following words:

...any discrimination, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment

³³ ICCPR art 7.

³⁴ Ibid art 9.

³⁵ Ibid arts 12, 14 and 16.

³⁶ Ibid art 18.

³⁷ ICESCR arts 6 – 8.

³⁸ Ibid arts 9 and 10.

³⁹ Ibid arts 11 and 12.

⁴⁰ Ibid arts 13 and 14.

⁴¹ Ibid art 15.

⁴² UN General Res 2263 (XXII) of 7 November 1967.

⁴³ As at the end of 2021 CEDAW has 189 State parties, 2 signatories and only six States with no action; see UN Office of the Human Rights Commissioner ‘Status and Ratification Interactive Board - Convention on the Elimination of All Forms of Discrimination against Women’ <<https://indicators.ohchr.org/>> accessed 9 March 2022.

or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field.

According to the preamble to the Convention, State parties should acknowledge the fact that extensive discrimination against women continue to exist. The preamble also acknowledges the detrimental effect that discrimination has on the development of nations, thereby linking gender equality with development.⁴⁴

Among the international human rights treaties, CEDAW takes an important place in bringing the female gender into the focus of human rights concerns. Its spirit is rooted in the goals of the United Nations which is to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women. The treaty spells out the meaning of equality and how it can be achieved. In so doing, CEDAW establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights. In the preamble to CEDAW, the State parties acknowledge the fact that extensive discrimination⁴⁵ against women continues to exist, and that the society is fond of denying women participation in political and economic activities.

CEDAW is a landmark treaty and the most important normative instrument that aims to achieve equal rights for women everywhere in the world. The Nigerian government became a State party to this important Convention when it ratified it in 1985 without reservations, signed the Optional Protocol in 2000 and ratified it in 2004. CEDAW is an international standard-setting document that establishes the universality of the principles of equality between men and women and makes provision for measures to be taken by States parties to ensure equality of rights for women throughout the world. It provides for the adoption at the national level, of legislation prohibiting discrimination against women.⁴⁶ The framework of the obligations under CEDAW is constructed on three main principles: the obligation to respect (equality in laws and policies); the obligation to protect (non-discrimination – direct and indirect) and the obligation fulfil (to uphold equality and eliminate gender discrimination in the entire sphere of the social, political and economic life).⁴⁷ The rights listed in CEDAW cover many aspects of women's lives, and relate to participation in

⁴⁴J Rehman., *International Human Rights Law* (2nd edn England: Pearson Education Limited, 2010) 520.

⁴⁵ What constitutes 'discrimination' in the Convention was clearly defined; see CEDAW art 1.

⁴⁶ The National Coalition on Affirmative Action for Women 'About Us' <<http://aacoalition.org/about>> accessed 4 April 2021.

⁴⁷ UN Sustainable Development Goals Knowledge Platform 'Committee on the Elimination of Discrimination against Women (CEDAW)' <<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=108&menu=3170>> accessed 26 March 2022.

political, social and cultural life,⁴⁸ health,⁴⁹ education,⁵⁰ employment,⁵¹ housing,⁵² marriage,⁵³ family relations⁵⁴ and equality before the law.⁵⁵ What follows is a discussion of the implementation of CEDAW at the international level and in Nigeria.

3.2.1 *Committee on the Elimination of Discrimination against Women*

Article 17 of CEDAW establishes the Committee on the Elimination of Discrimination against Women (the Committee), a body of independent experts that monitors implementation of the Convention. The Committee consists of 23 experts on women's rights from around the world. State parties to the treaty are obliged to submit regular reports on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention. During its sessions the Committee considers the report of each State party and addresses its concerns and recommendations to the State party in the form of concluding observations. Furthermore, under the Optional Protocol CEDAW,⁵⁶ the Committee is mandated to receive communications from individuals or groups of individuals within the jurisdiction of a State party, claiming to be victims of a violation of any of the rights in the Convention by that State party. On the receipt of such a communication, the Committee initiate inquiries into situations of grave or systematic violations of women's rights.⁵⁷ The Committee also formulates general recommendations and suggestions based on the examination of reports and information received from the States parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.⁵⁸

Historically CEDAW Committee secretariat, unlike other treaty-based committees, was not provided by the office of the High Commissioner of Human Rights. However, as of 1 January 2009 all responsibility for servicing CEDAW has been shifted to the office of the High Commissioner for Human

⁴⁸ CEDAW arts 3, 5, 7, 8 and 13.

⁴⁹ Ibid arts 12 and 14.

⁵⁰ Ibid art 10.

⁵¹ Ibid art 11.

⁵² Ibid art 14(h).

⁵³ Ibid art 16.

⁵⁴ Ibid art 16.

⁵⁵ Ibid art 2

⁵⁶ Adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, entered into force, 22 December 2000.

⁵⁷ Optional Protocol to CEDAW, arts 1 and 2. These procedures are optional and are only available where the State concerned has accepted them by ratifying the Optional Protocol.

⁵⁸ CEDAW art 21.

Rights.⁵⁹ Like the Human Rights Committee and the Economic, Social, and Cultural Rights Committee, expenses of the CEDAW Committee are borne from the UN budget. Prior to 1994 the CEDAW Committee used to meet in New York and Vienna although New York sessions were much more publicized. Since its 13th session in 1994, the committee's sessions have mostly been held in New York. However, as noted above, in January 2008 the secretariat of CEDAW moved to Geneva, which has allowed a greater number of sessions to be held in Geneva.

CEDAW's overall structure and composition resembles the Human Rights Committee, although the membership of the committee is predominantly female. The committee also has the largest membership of any of the UN treaties. The members of CEDAW Committee are drawn from a range of professions. Members are nominated by States but serve in their personal capacity and not as government representatives. Until recently the Committee has not had a judicial or quasi-judicial function. Its sole task previously was reviewing the state reports, but this has changed significantly since the Optional Protocol came into force. The committee's main task was one of implementing the Convention, an exercise, thus far, conducted within the framework of reporting procedures.⁶⁰ The Optional Protocol to the convention authorising communications from individuals or groups of individuals, as well as an enquiry procedure was adopted by the UN General Assembly on 6 October 1999 and came into force on 22 December 2000.⁶¹ The present reporting procedure as provided in the Convention has proved less than satisfactory. Reports are often delayed, out-dated and inadequate, with most state parties placing emphasis upon the legislative mechanisms relating to gender equality.

The report is the State party's first opportunity to present to the committee the extent to which its laws and practices comply with the convention which it has ratified. The report should:

- (a) establish the constitutional legal and administrative framework for the implementation of the convention;
- (b) explain the legal and practical measures adopted to give effect to the provisions of the convention;
- (c) demonstrate the progress made in ensuring enjoyment of the provisions of the convention by the people within the state party and subject to its jurisdiction.⁶²

⁵⁹J Rehman., *International Human Rights Law* (2nd edn., England: Pearson Education Limited, 2010) 537.

⁶⁰ CEDAW, art 29.

⁶¹ GA Res 54/4.

⁶² Rehman (n 59) 538 – 539. -

3.2.2 Social and Cultural Patterns to Eliminate Practices Based on Ideas of Inferiority

The Office of the UN High Commissioner for Human Rights, commonly known as the Office of the High Commissioner for Human Rights (OHCHR) or the UN Human Rights Office, is a department of the Secretariat of the United Nations that works to promote and protect the human rights that are guaranteed under international law. The UN also uses this office to eliminate practice based on ideas of inferiority of women, because societal patterns have frequently led to ideas of inferiority of women. One of the principal objectives of CEDAW is to change perceptions and traditional (usually negative) image of women in many cultures and traditions, and in this regard article 5(a) represents a significant commitment in the following words:

To modify the social and cultural patterns of conduct of men and women...in the elimination of the prejudice and other customary practice which are based on the ideas of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

CEDAW committee in its general recommendation observes that some traditions are representing stereotyped roles to perpetuate practice of violence or coercion, forced marriages and female circumcision.⁶³ Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in sub-ordinate roles and reduced the low level of political participation, education and to their work opportunities. These attitudes also contribute to propagation of pornography, the depiction and other commercial exploitation of women as sexual objects, rather than as individuals.⁶⁴

Pursuant to articles 4 and 5 of UNDHR which state that no one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. article 6 of CEDAW considers the important issue of female sexual slavery and the suppression of trafficking in women. In condemning such activities, it requires State parties to take all appropriate steps to end trafficking in women and exploitation and prostitution of women.

⁶³ UNDOC HRI/Gen/1/Rev.

⁶⁴ Ibid para 12.

3.2.3 Women Representation in Public Life and Issue of Nationality

In many countries, women have had inadequate opportunities in social participation, especially in striving for political rights and power in the government and different institutions.⁶⁵ This historical tendency still persists, although women are increasingly being elected to be heads of state and government.⁶⁶ Women may face several challenges that affect their ability to participate in political life and become political leaders. Several countries are exploring measures that may increase women's participation in government at all levels, from the local to the national. The number of women leaders around the world has grown, but they still represent a small group. At the executive level of government, women become prime ministers more often than they become presidents. Part of the differences in these roads to power is that prime ministers are elected by political party members themselves while presidents are elected by the public. As of October 2019, the global participation rate of women in national-level parliaments was 24.5%.⁶⁷ In 2013, women accounted for eight per cent of all national leaders and two per cent of all presidential posts. Furthermore, 75% of all female prime ministers and presidents have taken office in the past two decades. Since 1960 to 2015, 108 women have become national leaders in 70 countries, with more being prime ministers than presidents.

Individual female executives usually have high levels of education and may have close relationships with politically prominent or upper-class families. The general status of women in a country does not predict if a woman will reach an executive position since, paradoxically, female executives have routinely ascended to power in countries where women's social standing are acknowledged.⁶⁸ Women have long struggled in more developed countries to become president or prime minister. Israel elected its first female prime minister in 1969 but has not done so again. The United States of America, on the other hand, has had no female president. Meanwhile, the proportion of women in national parliaments around the world is growing, but they are still underrepresented. As of 1 April 2019, the global average of women in National Assemblies is 24.3%. At the same time, large differences exist between countries; for example, Sri Lanka has quite low female participation rates in parliament compared with Rwanda, Cuba, and Bolivia, where female

⁶⁵ RO Bamidele 'Gender Equality and the United Nations: Implementation of CEDAW in Nigeria and South Africa' Master of Arts Thesis in International Relations, Eastern Mediterranean University, Faculty of Business and Economics, Dept of International Relations (2013) 51 – 77 <<http://i-rep.emu.edu.tr:8080/xmlui/handle/11129/1345>> accessed 23 April 2021.

⁶⁶Ibid.

⁶⁷ J Farida 'Introduction' *Shattered, Cracked, or Family Intact? Women and the Executive Glass Ceiling Worldwide* (Oxford: Oxford University Press 2016) 1-2, 55.

⁶⁸Ibid.

representation rates are the highest. Three of the top ten countries in 2019 were in Latin America (Bolivia, Cuba, and Mexico), and the Americas have seen the greatest aggregate change over the past 20 years.⁶⁹

CEDAW deals with the elimination of discrimination against women in the political and public life of states.⁷⁰ It attempts to ensure that women have a right to vote and have a right to be elected to office with participatory rights in policy formulation at all the governmental levels. It also attempts to ensure that women are able to participate in the activities of non-governmental organisations. Women are not legally banned from standing for election or being appointed to public offices in most countries. CEDAW further provides that State parties are under an obligation to take all appropriate measures to ensure that women have the opportunity to represent their government at all international levels.⁷¹ On the issue of nationality women have equal rights in acquiring, changing and retaining nationality. State parties are required to ensure that 'neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.'⁷²

3.2.4 Women Rights to Education, Employment and Health

Women frequently suffer from inequality of opportunities in education, vocational and professional training. CEDAW attempts to eradicate such discrimination and inequality. The governments of the State parties to the Convention are required to adopt appropriate legislative and other measures to end discrimination against women.⁷³ Girls and women have a right to education, just as boys and men do. Girls and women should have access to career guidance and professional training at all levels; to studies and schools; to examinations, teaching staff, school buildings, and equipment; and opportunities to get scholarships and grants, the same as boys and men. Girls and women have the right to take part in sports and physical education, and to get specific information to ensure the health and well-being of families. Governments should make sure girls do not drop out of school. They should also help girls and women who have left school early to return and complete their education.⁷⁴

Article 11 deals with elimination of discrimination at the workplace and in the field of employment. It recognizes the right to work as an inalienable right of all human beings and women have a right to work just like men. They should be able to join a profession of their choice. Women must have the same chances to find work, get equal pay, promotions and training and have access to healthy

⁶⁹ Ibid.

⁷⁰ CEDAW art 7.

⁷¹ Ibid art 8.

⁷² Ibid art 9.

⁷³ Ibid art 18.

⁷⁴ Ibid art 10.

and safe working conditions. Women should not be discriminated against because they are married, pregnant, just had a child or are looking after children. Women should get the same assistance from the government for retirement, unemployment, sickness, and old age.

World Health Organisation (WHO), an organ of the UN , promotes and supports traditional practices which enhance health; ,for example, breast-feeding, and discourages those which are harmful, particularly to the health of women and girls. Among the latter, female genital mutilation which presents the most dramatic risk of ill health, affecting some 75 million women and girls in Africa alone. The organization also discourages nutritional taboos which prevent pregnant and lactating women from eating essential foods. WHO works closely with all concerned national authorities, and particularly with non-governmental organizations, on these issues. In 1993, the forty-sixth World Health Assembly adopted a resolution on maternal and child health and family planning.⁷⁵ Among other things, the resolution expressed concern about the continuing inequities affecting women in general and the persistence of harmful traditional practices such as child marriages, and dietary limitations during pregnancy. It urged member States to continue to monitor and evaluate the effectiveness of their efforts to achieve the goal of health for all, in particular in eliminating traditional practices affecting the health of women, children and adolescents. In 1994, the Forty-Seventh World Health Assembly adopted resolution dealing specifically with harmful traditional practices,⁷⁶ in which it urged all member States to:

- (i) assess the extent to which harmful traditional practices affecting the health of women and children constitute a social and public health problem in any local community or subgroup;
- (ii) establish national policies and programmes that will effectively, and with legal instruments, abolish female genital mutilation, childbearing before biological and social maturity, and other harmful practices affecting the health of women and children; and
- (iii) collaborate with national non-governmental groups active in this field, draw upon their experience and expertise and, where such groups do not exist, encourage their establishment.

In the same resolution, the Assembly requested the Director-General of WHO to strengthen technical support to member States in implementing the above measures; and to continue global and regional collaboration with non-governmental organizations, United Nations bodies, and other agencies and organizations concerned in order to establish national, regional and global strategies for the abolition of harmful traditional practices.

⁷⁵ WHA 46.18.

⁷⁶ WHA 47.10.

3.2.5 Social and Economic Rights of Women

When the State fails to fulfil economic, social, and cultural rights, the burden is felt disproportionately on women. The lack of adequate housing, healthcare, work, and education also greatly increases women's vulnerability to violence, exploitation, and abuse. Economic, social, and cultural rights, therefore, are central to ensuring dignity and equality for women and must be a part of advocacy strategies to realize women's human rights. However, as women are highly diverse, experiences of inequality and discrimination can only be truly remedied through contextualized policies, practices, and remedies (that is, a substantive equality approach) aimed at realizing women's economic, social and cultural rights. According to UN, women are more likely than men to have low-paid, low-status and vulnerable jobs, with limited or no social protection or basic rights. Globally, women's wages are 17% lower than those of men. The right to work entitles female workers to have the opportunity to earn their living by the work. It is noted that worldwide, women make up 70% of the 1.2 billion people living in poverty.⁷⁷

Article 13 of CEDAW represents important provisions related to economic and social rights. It emphasizes equality of rights, particularly the right to family benefits, the right to bank loans, mortgages, other forms of financial and recreational activities. It states that girls and women have the same rights as boys and men in all areas of economic and social life, like getting family benefits, getting bank loans, and taking part in sports and cultural life. Governments must do something about the problems of girls and women who live in rural areas and help them look after and contribute to their families and communities. Girls and women in rural areas must be supported to take part in and benefit from rural development, health care, loans, education, and proper living conditions, just like boys and men do. Women and girls in rural areas have a right to set up their own groups and associations.⁷⁸ Women often suffer from inequalities in obtaining benefits, loans and credit from governmental agencies, banks and building societies.

Article 14 of CEDAW makes specific positions relating to rural women whose works are often not acknowledged. The article is a detailed expression of the rights belonging to women in rural area and provides as follows:

- (a) States parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take all appropriate measures to ensure the

⁷⁷ Relifweb, 'UNICEF Says Education for Women and Girls a Lifeline to Development,' 4 May 2011 <<https://reliefweb.int/report/burkina-faso/unicef-says-education-women-and-girls-lifeline-development>> accessed 23 April 2021.

⁷⁸ CEDAW art 14.

application of the provisions of the present convention to women in rural areas.

- (b) States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that they participate in and benefit from rural development and in particular, shall ensure to such women the right to;
- (i) participate in the elaboration and implementation of developing planning at all levels;
 - (ii) have access to adequate health care facilities, including information, counselling, and services in family planning;
 - (iii) benefit directly from social security programmes;
 - (iv) obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter-alia, the benefit of all community and extension services, in order to increase their technical proficiency;
 - (v) organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
 - (vi) participate in all community activities;
 - (vii) have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; and
 - (viii) enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity, and water supply, transport, and communication.

The provisions of the article 14 of CEDAW aim, among other things, to prevent gender discrimination in the payment of social securities and similar benefits. In *Broeks v Netherlands*,⁷⁹ Ms Broeks appealed to the Human Rights Committee under the first optional protocol claiming violations of article 26 of ICCPR and article 9 as well as articles 2 and 3 of ICESCR. Ms Broeks had been dismissed by her employer because of illness. At first, she received payments as unemployment benefits, but the Dutch government discontinued these since she was not the ‘breadwinner’ in her household as was required by the Netherlands Unemployment Benefits Act. The committee found violations of article 26 of ICCPR, because the statute was discriminatory in its treatment of women. Similarly, the Human Rights Committee has found that gender discrimination existed where a woman was not allowed to claim before domestic courts in relation to matters arising from matrimonial property.⁸⁰ The offending legislation in Peru had provided that when a woman is married only the husband is entitled to represent matrimonial property before courts, a provision which violated the terms of article 26 of ICCPR.

⁷⁹ (1970) UN Doc Supp No 40 (A/42/40) at 139.

⁸⁰ *Graciela Alo del Avelland v Peru, communication* (1988) UN Doc Supp No 40 (A/44/40) at 196.

3.3 Domestic Application of CEDAW in Nigeria

Provisions on the domestication of treaties in Nigeria are enshrined in section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) as follows:

- (1) 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.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub-section (2) of this section shall not be presented to the President for assent and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The implementation of treaties affecting matters in the exclusive legislative list rests with the federal government. This means that only the National Assembly is empowered to domesticate treaties on matters on the exclusive list. In other words, a treaty affecting a matter in the exclusive legislative list will come into force in Nigeria with an enactment of the National Assembly. If the matter fell within the concurrent or residual list, the treaty also requires the approval of the majority of the State Houses of Assembly. As CEDAW is a treaty dealing with the rights of women, it falls within the category of treaties, which must attract ratification by a majority of all the Houses of Assembly in the Federation if it must become applicable throughout Nigeria.

At the state level, the branches of the National Coalition on Affirmative Action (NCAA) in the states, which are being coordinated by the Civil Resource Development and Documentation Centre (CIRDDOC) is working towards the domestication of CEDAW by at least 23 State Houses of Assembly, to satisfy the provisions of section 12 of the Constitution. The National Assembly is yet to enact legislation to domesticate CEDAW in Nigeria.⁸¹

3.4 Rights of Women during Armed Conflict

From the contemporary legal perspective war atrocities have to be seen as mass violations of human rights. They affect all members of the society, regardless of their gender, age, skin colour, nationality or ethnic origin. Women, however, were and still are particularly vulnerable to all forms of such violations, in particular - becoming victims of various forms of violence. Women and girls are the frequent target of violence and sexual humiliation in times of distress, civil

⁸¹ Ruth Oluyemi Bamidele 'Gender Equality and the United Nations: Implementation of CEDAW in Nigeria and South Africa' 51 -77 <http://www.aacoalition.org/domestic_cedaw.htm> accessed 4 May 2021.

war or internal and international armed conflicts.⁸² The rape of women during armed conflict is an unfortunate, though regular occurrence; recent conflicts such as those in the former Yugoslavia and Rwanda graphically reflects the target rape of women from the opposing religious or ethnic group as a war tactic, as the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the Trial of Jean-Paul Akayesu, it was found that Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau's communal premises, as well as elsewhere in the commune of Taba. The Chamber notes that much of the sexual violence took place in front of large numbers of people, and that all of it was against Tutsi women.⁸³

The evolution of the protection and guarantee of the rights of women in armed conflicts became clearly noticeable after World War II. Initially, the legal position of women was defined through the prism of the general acts of international humanitarian law. Later on, international legal framework developed and, in course of time the need for special legal protection of women and their rights in the armed conflicts became very evident. Some of the international legal instruments that protect the rights of women during armed conflicts are as follows are discussed in the following paragraphs.

3.4.1 The Geneva Conventions 1949

Establishment of Geneva Conventions has been seen as a great step forward for protection of women in situations of armed conflict. Article 12 of Geneva Convention I⁸⁴ creates the rule of equal treatment of women and men. At the same time however, it indicates that women should be treated with 'all consideration due to their sex'.⁸⁵ Geneva Convention III⁸⁶ relating to the treatment of prisoners of war, provides for equality of treatment for women and men and ensures treatment of women 'with all the regard due to their sex'⁸⁷. Correspondingly Geneva Convention IV⁸⁸ provides that women shall be especially protected against any attack on their honour, in particular against

⁸² Human Rights Watch, 'Seeking Justice, The Prosecution of Sexual Violence in the Congo War' www.hrw.org/en/reports/2005/03/06/seeking-justice-o <last visited 15 March 2009>

⁸³ *Prosecution v Jean Paul Akayesu* Judgment decision 2 September 1998, Trial Chamber, Case No. (ICTR- 96-4-T)

⁸⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949.

⁸⁵ *Ibid* art 12.

⁸⁶ Convention on the Treatment of Prisoners of War 1949.

⁸⁷ *Ibid* arts 14, 88 and 97.

⁸⁸ Convention on the Protection of Civilian Persons in Time of War 1949.

rape, enforced prostitution, or any form of indecent assault.⁸⁹ It also contains specific provisions relating to pregnant women and maternity.⁹⁰

The Geneva Conventions constituted a major shift in the legal position of women in warfare. Yet it has been observed that the protection of women's right provided in the Conventions is 'mostly based on the notions and ideal of respect for women, honour and family rights and women are seen in the treaties primarily as mothers and caregivers,'⁹¹ which is indicative that acts of coercion against women and rape in particular, are considered by those treaties as harm to women's 'honour' in its social meaning, rather than women's dignity in the sense of essential feature of a human being.⁹²

3.4.2 Other Relevant Statutes

Article 8 (2) of the Statute of the International Criminal Court (Rome Statute)⁹³ further highlights specific impact of armed conflict on women, by recognizing that committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined under article 7, 2 (f), enforced sterilization, or any other form of sexual violence constituting a grave breach of the Geneva Conventions amount to war crimes.

The Statute of International Criminal Tribunal for Yugoslavia (ICTY)⁹⁴ empowering the Tribunal to prosecute persons for committing crimes against humanity directly indicates to rape, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".⁹⁵ Correspondingly, Statute International Criminal Tribunal for Rwanda (ICTR)⁹⁶ while vesting the tribunal with power to prosecute crimes against humanity also refers to rapes. However, in order to accuse any person of those charges, the actions must constitute 'widespread or systematic attack

⁸⁹ Ibid art 27.

⁹⁰ Ibid arts 14, 16, 23, 27, 38, 50 and 76). See N Buchowska 'Violated or Protected. Women's Rights in Armed Conflicts After the Second World War' (2016) 2(2) *International Comparative Jurisprudence* 72 – 80.

⁹¹ A Barrow 'UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law' (2010) 92(877) *IRRC* 221–234.

⁹² KH Moodrick-Even and A Hagay-Frey 'Fall, Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust' (2013) 35 *Women's Rights. Law Report*, 43–66.

⁹³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

⁹⁴ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993 <<https://www.refworld.org/docid/3dda28414.html>> accessed 20 April 2022.

⁹⁵ Ibid art 5 (g).

⁹⁶ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, <<https://www.refworld.org/docid/3ae6b3952c.html>> accessed 20 April 2022.

against any civilian population on national, political, ethnic, racial or religious grounds'.⁹⁷

3.4.3 Specialised Regulations

In order to conduct a broader analysis of position and protection of women during armed conflicts, the acts adopted under the auspices of the UN, the Council of Europe and the European Union will be considered. As far as the UN legal framework is concerned it has to be underlined, that CEDAW neither has any direct reference to the violence against women nor to the women's rights during the wartime. Also it has no provisions suspending its applicability during war or armed conflict. Additionally, the CEDAW Committee has defined violence against women as a form of discrimination against women and one of the major breaches of women's rights.⁹⁸ Thus, the Committee has mentioned the situation of women in the armed conflicts, and the issues of violence against women in particular, in its Reports submitted on an exceptional basis and in its general recommendation⁹⁹ on women in conflict prevention, conflict and post-conflict situations. Since late 1960s the UN has drawn its attention specifically to the situation of women in armed conflict in its declarations, resolutions and action plans. In 1968, the International Conference on Human Rights in Teheran initiated discussion on the protection of women and children in emergency and armed conflicts. The Commission on the Status of Women has followed that with its own discussion during sessions held in 1970, 1972 and 1974. The result of those actions was the UN General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted in 1974.¹⁰⁰ Also the final document of the United Nations Fourth World Conference on Women held in Beijing in November 1995, that is, Platform for Action (1995) has referred to the issue of women in armed conflicts as one of the twelve crucial points of interest of the UN member States.

The ground-breaking Resolution 1325¹⁰¹ has strongly underlined the need to reduce the use of gender-based violence in armed conflicts, explicitly requiring Member States to take all necessary action in this regard and urging them to stop impunity and to prosecute those who are responsible. This Resolution also obliged Secretary General to start the reporting procedure to the SC on the agenda, which resulted in 22 reports by now, with last report of 17 September 2015. It is very important that SC of UN has directly expressed the view that acts of sexual and gender-based violence are known to be part of the strategic objectives and ideology of certain terrorist groups, used as a tactic of

⁹⁷ Ibid art 3.

⁹⁸ CEDAW Committee General Recommendation No 19.

⁹⁹ Ibid No 30.

¹⁰⁰ UNGA A/RES/3318(XXIX), 14 December 1974.

¹⁰¹ Security Council Resolution on Women and Peace and Security, 2000.

terrorism.¹⁰² One of the importance of the instruments as discussed in the preceding paragraphs is that State-parties are obliged to follow the Convention, Statutes and resolution during armed conflict, State of emergency, within its jurisdiction, both in its own territory and in occupied territories.

4. Other International Instruments Governing Rights of Women

Attempts to combat discrimination against women and to establish de jure and de facto equality have a substantial history. The norm of equality and non-discrimination, especially gender-based equality and non-discrimination represents the core of the modern human rights regime. The following paragraphs discuss some of other international legal instruments that have been put in place to combat discrimination against women. Aside the Universal Treaties governing rights of women, there are regional treaties and these are;

4.1 European Commission on Human Rights Treaty

The European Convention on Human Rights (ECHR)¹⁰³ also provides for gender equality by virtue of article 1 of. Under ECHR State parties undertake to 'secure to everyone' the rights contained in the convention. According to article 14 'the enjoyment of the rights and freedoms shall be secured without discrimination on any ground such as sex....'

Protocol 12 of the treaty extends beyond the rights provided in the convention to any right set forth by law. . Article 1 of Protocol 12 provides as follows:

...the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin association with a national minority, property, birth or other status.

This extension is clearly to the benefit of disadvantaged groups, such as women who have suffered from various discriminatory norms and practices which are not covered by the rights set forth in ECHR itself.

4.2 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

The Inter-American Convention, on the Prevention, Punishment and Eradication of Violence against Women (*Convention of Belém do Pará*)¹⁰⁴ seeks to prohibit

¹⁰²Resolution 2331 (2016) adopted by the Security Council at its 7847th meeting, on 20 December 2016.

¹⁰³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 20 April 2022.

¹⁰⁴ Organisation of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994 <<https://www.refworld.org/docid/3ae6b38b1c.html>> accessed 20 April 2022.

violence against women and pervades every sector of society regardless of class, race, or ethnic group, income, cultural, level of education, age or religion and strives at its every foundation. It prohibits physical, sexual, and psychological violence against women, which explicitly includes violence in the home.¹⁰⁵ The convention provides a number of rights including the right to life, liberty integrity, fair trial, association, religion, legal protection and freedom from torture.¹⁰⁶ It contains an undertaking on the part of States which includes doing more than merely investigating, prosecuting and punishing violence against women. Thus, there is an undertaking to modify social and cultural patterns of conduct of men and women and customs based on the inferiority of women and stereotyping of roles.¹⁰⁷

4.3 The African Union (AU) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

The AU Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol)¹⁰⁸ was adopted at the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003, and came into force on 26 November 2005. Article 2 (2) of the protocol States that:

State parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotype roles for women and men.

Unlike the Women's Convention, the Maputo Protocol contains provision dealing specifically with the rights to life, addition to other rights of women.¹⁰⁹ Article 4 of the Protocol mandates State parties to the Protocol to: enact and enforce laws to prohibit all forms of violence against women including unwanted forced sex whether the violence takes place in public or private:

- (a) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- (b) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.

¹⁰⁵ *Convention* of Belém do Pará art 2.

¹⁰⁶ *Ibid* art 4.

¹⁰⁷ *Ibid* art 8.

¹⁰⁸ African Union, *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa*, 11 July 2003 <<https://www.refworld.org/docid/3f4b139d4.html>> accessed 20 April 2022.

¹⁰⁹ Maputo Protocol art 4.

- (c) actively promote peaceful education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women;
- (d) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
- (e) establish mechanisms and accessible service for effective information, rehabilitation and reparation for victims of violence against women;
- (f) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
- (g) prohibit all medical or scientific experiments on women, without their informed consent;
- (h) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
- (i) ensure that, in those countries where the death penalty still exists, not to carryout death sentences on pregnant or nursing women; and
- (j) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and those women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

4.4 South Asian Association for Regional Co-operation (SAARC)

Nations of the South Asia under the umbrella of SAARC¹¹⁰ had worked together to promote and protect the rights of women and girls. In recognition of the need to ameliorate the condition of women in general and in these countries, the heads of State or governments of SAARC have ratified various international conventions and protocols including CEDAW.¹¹¹ To meet the challenge against discrimination against the girl child, members of the South Asian Association for Regional Cooperation (SAARC) collectively observed 1990 as the Year of the Girl Child and 1991–2000 as **the SAARC Decade of the Girl Child**.¹¹² ,

5. Conclusion

The United Nations during the new millennium established the United Nations Human Rights Council in 2006, various mechanisms were set up to publicise, promote and protect human rights across the globe by the United Nations. These exercises have highlighted human rights awareness with significant impact. The contemporary broad prescription against sex-based discrimination has its origin in the United Nations (UN) Charter and various ancillary expressions and commitments, dealing with problems which affect women adversely. CEDAW

¹¹⁰ SAARC comprises of eight countries of South Asia, Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka.

¹¹¹ SAARC and UNIFEM, *Gender Initiatives in SAARC: A Primer* (2007) <<https://www3.nd.edu/~ggoertz/rei/reidevon.dtBase2/Files.noindex/pdf/5/Gender%20Initiatives%20in%20SAARC%20-%20A%20Primer.pdf>> accessed 20 April 2022.

¹¹² Ibid.

was adopted by UN General Assembly in 1979 and is often called a bill of human rights for women. In 1979, Nigeria signed the convention and in 1985 ratified it without reservations.

Other special regulations such as the UN General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted in 1974,¹¹³ United Nations Fourth World Conference on Women¹¹⁴ and so forth also protect the rights of women during armed conflict. It is noted that for the above instruments to be applicable in various states depends on the policy of the State concerned, for example in Nigeria there is need for domestication by enactment of a legislation in accordance with the provision of section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). From the foregoing, notwithstanding the ratification of international legal instruments for the protection of women by the Nigerian government, such instruments can only become applicable in the country where such laws or instruments have been enacted into law by the National Assembly. There is therefore, an urgent need for the National Assembly to enact legislation to domesticate CEDAW. This is the first recommendation of this article.

The second recommendation of this paper is that abolition of certain cultural norms and practices that stereotype women. To attain substantive gender equality and ensure that women in Nigeria enjoy the benefits of the protection provided by the normative international legal instruments there is need to address cultural norms and practices that stereotype women and girls, which will aid in abolishing stigma and violence. Thirdly, there is need to redress women's socioeconomic disadvantage, which inhibits their full participation in political and social activities. If these recommendations are implemented, much of the constraints that limit women's enjoyment of their rights as provided under international and regional human rights framework will be eliminated.

¹¹³ Note 100 above.

¹¹⁴ Held in Beijing, China in November 1995.

COMPARATIVE OVERVIEW OF TAX AMNESTY POLICY IMPLEMENTATION IN NIGERIA

Newman U Richards*

Abstract

Nigeria between 2016 and 2019 implemented several tax amnesty programmes successively. Tax amnesty is the release from the consequence of non-compliance with a tax obligation. The repetition of tax amnesty schemes within a short period indicates that there are lapses in tax administration in Nigeria. This paper examines the role of Tax amnesty in catalysing domestic resource mobilisation and voluntary compliance to tax obligations in Nigeria; drawing from the lessons presented by the experiences of Ghana, South Africa, Mauritius, Kenya, Ireland, Indonesia and the United Kingdom. The doctrinal research methodology is adopted in this research. The paper will contend that for a tax amnesty to succeed there is need for an effective tax administrative system that has the capacity to enforce tax laws and sanctions. It recommends that a sectorial tax amnesty is preferable for Nigeria.

Keywords: Tax, Tax Amnesty, Tax Evasion, Tax Enforcement, Nigeria

1. Introduction

In recent times, there is an increasing manipulation of taxation as an economic management and resource mobilisation tool across the world. However; the impact differs from one continent to the other depending on the functionality of the tax system. Nigeria like many other countries in Africa is yet to have a functional tax system and the level of non-compliance in the payment of taxes is relatively high. According to the Federal Inland Revenue Service only about 14 million people out of the about 70 million economically active Nigerians pay taxes, of this number 96% of them have their taxes deducted at source under the 'Pay As You Earn' (PAYE) system, while only 4% comply under direct assessment, which means only about 20% of economically active Nigerians pay taxes.¹ The situation is not different with corporate taxes; available data suggest that tax evasion is equally prevalent at the corporate level as many companies falsify their book of accounts to show low revenues and high expenses to evade tax.² Hence, taxation is yet to have considerable impact on the Gross Domestic Product (GDP). This is evident from the fact that Nigeria has one of the lowest

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¹ Newman U Richards, 'Tax Amnesty in Nigeria: An Examination of the Voluntary Assets and Income Declaration Scheme (VAIDS)' (2017) 1(1) 1 *OAU Journal of Public Law* 324.

² Ibid.

tax to GDP ratio in Africa which is currently put at about 6%.³ This is in sharp contrast to the state of affairs in Europe and some other countries where the tax to GDP ratio is considerably high. For instance, the tax to GDP ratio of the United Kingdom is 33.2%, Germany 37.6%, France 45.3%, Sweden 44.1%, while that of the United States is 26.0%, Canada 31.7%, and Korea 26.3%.⁴ These statistics show that many developed economies rely heavily on tax revenue to fund their budget; the same cannot be said of Nigeria. Taxation for many years was not a major contributor to the revenue profile of Nigeria due to the over reliance on revenue from natural resource and the lack of tax culture. It is argued that the increasing cases of non-compliance are symptomatic of an ineffective tax administrative system and bad governance over the years. In other words, non-compliance is higher in economies where the tax authorities lack the capacity to effectively discharge the core mandate of tax administration, which is collection of taxes and enforcement of sanctions for non-compliance. Non-compliance to tax obligations is also more prevalent in economies that are characterised by bad leadership and mal-administration. This is so as often times the apathy to pay tax is a silent protest and a reflection of the lack of confidence in the government to meet the expectations of its citizens.

In recent times, there is a renewed commitment to expand the tax net, increase tax revenues and mobilise more funds to address the infrastructure deficit across Nigeria. The conventional approaches of enforcing tax compliance which involve investigation, tax audit, prosecution of tax defaulters to recover tax due, accrued penalties and interest has not been effectively deployed to compel voluntary compliance. This is compounded by the dawdling judicial system in Nigeria and corruption. Thus, the effective and viable short term alternative is the tax amnesty strategy which has the potentials to expand the tax net and increase the revenue base of any country within a short time. Achieving these objectives is dependent on a number of factors including the structure of the amnesty programme and the willingness to enforce sanctions on those who fail to participate. In many cases, the gains of an amnesty scheme, start manifesting at the end of the scheme and is dependent on the capacity of the tax authorities to effectively enforce tax laws without giving any indication of another amnesty within a short time. This paper examines the implementation of tax amnesty schemes in Nigeria, drawing from the lessons the experience of Ghana, South Africa, Mauritius, Kenya, Ireland, Indonesia and the United Kingdom present in the implementation of tax amnesty schemes.

³ OECD, 'Revenue Statistics in Africa 2017' <<http://www.oecd.org/tax/tax-policy/revenue-statistics-africa-2017-infographic.pdf>> accessed 6 September 2021.

⁴ Ibid.

2. Conceptual Framework

An amnesty is ‘an act of erasing from legal memory some aspect of criminal conduct by an offender.’⁵ It implies an absolution from a wrongful act or the consequence of a wrongful act. Tax amnesty on the other hand is the release from the consequence of non-compliance with tax obligation. A tax amnesty provides a time bound window of opportunity for tax payers to pay a defined amount in exchange for forgiveness.⁶ It is ‘...a limited time opportunity for a specified group of tax payers to pay a defined amount, in exchange for forgiveness of a tax liability relating to a previous tax period or periods without fear of criminal prosecutions.’⁷ Similarly, it has been defined as ‘a waiver or reduction and sometimes removal of penalties in back taxes to encourage defaulting taxpayers to pay what they owe within a specified window.’⁸ It has also been described as ‘a time-bound opportunity for defaulters to pay a defined amount relating to a previously unpaid tax liability (which may include interest and penalties) without the fear of criminal prosecution.’⁹ Most of these definitions emphasis the payment of an amount within a specified period in exchange for pardon from the consequences of previous tax default. In practice a tax amnesty scheme does not in all cases mandate the payment of any specified amount; in some cases it may be targeted at generating data on tax payers and there may be waiver of all principal taxes, penalties and interest due, to attract participants. Accordingly, tax amnesty is a scheme that allows tax defaulters to voluntarily declare their assets and income, negotiate their tax liabilities with the tax authorities within a specified time, on the expectation that the tax authorities will either waive or reduce outstanding tax liabilities, penalties, interest, or suspend the prosecution of tax defaulters, tax audit and investigation.¹⁰ In other words, Tax amnesty is a strategic fiscal policy measure

⁵ Jonathan Law and Elizabeth A Martin (eds) *Oxford Dictionary of Law* (7th edn Oxford: Oxford University Press, 2009), 32.

⁶ Meyasi Dissanayake, Sachitha Madushani and Kithmini Weerakkody, ‘Tax Amnesties: The Case of Sticks and Carrots’, 1. KDU Library, E-repository <<http://ir.kdu.ac.lk/handle/345/1676>> accessed 20 February 2020.

⁷ Olufemi Abifarin, SA Bello and Isah E Joseph, ‘Tax Amnesty in Some Commonwealth Countries and America: A Lesson for Nigeria’ in Josephine AA Agbonika, *Topical Issues on Nigerian Tax Laws and Related Areas*, (Ibadan: Ababa Press Ltd, 2015) 101.

⁸ Deloitte ‘Amnesty for Tax Defaulters’ <<https://www2.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/amnesty-for-tax-defaulters.html>> accessed 6 September 2021.

⁹ Folajimi Olamide Akinla, ‘VAIDS Imperatives and the Role of stake holders’ A paper presented at the Sensitisation Workshop on VAIDS organized by the Federal Ministry of Finance in Conjunction with Price Water Cooper House (PWC) (28 September 2017) 13.

¹⁰ Richards (n1) 326.

to catalyse voluntary compliance in the payment of taxes within a specific time which in most cases will not be more than a year.¹¹

Taxation is statutory thus; tax amnesty schemes must have some legislative support to guarantee its effectiveness. In practice, tax amnesty schemes are introduced either by specific laws, subsidiary legislations or executive policy instruments/orders. It is attractive because of its potentials to deliver short term and long term gains. Some of the benefits are; it could lead to a considerable increase in tax revenue and widen the tax net within a short time. In addition, it provides revenue authorities with important statistics and data on tax payers and increases the level of information and awareness on tax matters. Furthermore, it reduces the cost of enforcement of tax laws and invariably the cost of tax administration. This is because, while investigations, audit and prosecution of tax offenders could involve some huge cost, tax amnesty on the other hand replaces the possibility of prison sentences with financial concessions.¹² It is contended that fiscal compromise in the enforcement of tax laws will yield more economically viable outcomes than punitive sanctions. Arrangements like tax amnesty are therefore preferable because the main intent for tax sanctions is not to punish offenders but to induce compliance to tax laws. Tax amnesty could also trigger the repatriation of capital abroad without using any of the conventional tax enforcement mechanisms.¹³

Notwithstanding these advantages, there are concerns on the use of tax amnesty schemes. It has been argued that since it seeks to give reliefs or benefits to defaulters, it invariably rewards law breakers who have cheated the government considering that tax evasion is an offence and therefore it is unfair to compliant tax payers.¹⁴ Furthermore, it has been contended that incentivising tax defaulters could discourage and lower the morale of law abiding tax payers which could in the long run reduce the level of tax compliance.¹⁵ However, the Indonesian Constitutional Court which is the apex court in Indonesia rejected the contention that the Indonesian amnesty law was unfair and discriminated against obedient tax payers as it gives special privileges to tax evaders.¹⁶ It is

¹¹ Ibid.

¹² Haula Rosdiana and Titi M Putranti 'Tax Amnesty Policy Discourse in Perspective of Politic of Taxation' *Proceedings of the International Conference on Social and Political Issues 2016* [2018] *Knowledge and Social Transformation* 225.

¹³ JAA Agbonika, 'Tax Amnesty for Delinquent Taxpayers: A Cliché in Nigeria' (2015) 3(3) *Global Journal of Politics and Law Research*, 105-120.

¹⁴ See the objections to the Indonesian Tax Amnesty Scheme by several civil society organizations in Haula Rosdiana and TiTi M Putranti 'Tax Amnesty Policy Discourse in Perspective of Politic of Taxation' (n12), 257-260.

¹⁵ Dissanayake and others (n 6) 3

¹⁶ Grace D Amianti 'Court Verdict clears hurdles for Tax Amnesty Law' *The Jakarta Post*, (26 October, 2017) <<http://www.thejakartapost.com/news/2016/12/14/court-verdict-clears-hurdles-for-tax-amnesty-law.html>> accessed 1 August 2021.

contended that, the fact that a tax amnesty scheme is unfair to obedient tax payers cannot be wished away considering that it seeks to give incentives to tax defaulters without a concomitant direct or special benefit to obedient tax payers for being compliant. It is therefore, necessary for an amnesty scheme to have specific provisions like tax waivers or tax rebates to compliant tax payers to sustain and reinforce the positive attitude of compliant tax payers within the amnesty period.

In spite of these challenges, tax amnesty is a commendable strategic fiscal policy measure that could instigate tax defaulters to regularise their tax status within a short time. The objective of a tax amnesty programme includes reduction of administrative cost, increase of tax revenue, stimulation of voluntary compliance, development of a more comprehensive and accurate tax data base, acceleration of domestic liquidity and investment within a short time.¹⁷ However, whether a tax amnesty scheme achieves its objectives or not depends on several intrinsic factors within a tax system. Studies show that oftentimes the critical objectives of a tax amnesty programme which are increase in tax revenue and stimulation of voluntary compliance within a short time are not achieved in many cases.¹⁸ This is because a tax amnesty programme could produce contrary and unintended results due to a number of factors such as; an ineffective tax administrative system, lack of enforcement of sanctions after previous amnesty schemes, negative reactions of obedient tax payers and the complacency of the participants after the scheme.¹⁹ In other instances, the need to increase tax revenue could be sacrificed on the altar of escalation of voluntary compliance and expansion of the tax net. This is because most tax amnesty schemes grants full or partial waivers for principal tax due, penalties and interest. Furthermore, an amnesty scheme rather than stimulating compliance could lead to reduced compliance over the years if not properly structured. For instance, if obedient tax payers perceived the scheme as unfair it will induce deliberately default in their tax obligations as they expect the enjoyment of some privileges in the guise of an amnesty for being delinquent instead of sanctions in future. Thus, in some places the level of compliance rather than increasing fell drastically after an amnesty programme.²⁰

Notwithstanding the advantages of tax amnesty scheme, countries like Nigeria who have introduced tax amnesty programmes repeatedly²¹ without

¹⁷ Ahad Munir 'Good Governance on Tax Amnesty' International Conference on Law, Governance and Globalisation' (2017) *131 Advances in Social Science, Education and Humanities Research* 29. See also, Muhammad Alishahdani Ibrahim and others, 'Tax Policy in Indonesian Energy Sectors: An Overview of Tax Amnesty Implementation' (2018) (8) 4 *International Journal of Energy Economics and Policy* 235.

¹⁸ Ibid.

¹⁹ Dissanayake and others (n 6) 5.

²⁰ Alishahdani and others (n 17) 235.

²¹ Dissanayake and others (n 6) 2.

significant results should reconsider their strategy. It is contended that the frequent use of tax amnesty scheme may not be an effective fiscal policy and resource mobilisation plan and may invariably be a strong indicator that there is failure of tax administration in the tax system. This is more so as a key performance index for tax administration is the level of tax payers' compliance and revenue generated. It is further contended that the consistent introduction of tax amnesty schemes could discourage effective participation in subsequent schemes as tax defaulters may not be inclined to participate in anticipation of future amnesty scheme with higher incentives. Also, compliant tax payers may become complacent and deliberately default in expectation of an amnesty instead of sanctions. In the long run, rather than stimulating voluntary compliance and increasing tax revenue, it may end up increasing the number of tax defaulters. It is for these reasons that a tax amnesty scheme should not be introduced too often. Another reason a tax amnesty scheme may not meet its intended goals is, failure of tax administration to enforce sanctions for non-participation after the scheme which in most cases are prosecution of tax offenders to recover taxes, penalties and interest due or invocation of the provisions of the law on tax audit and investigation. This in itself exposes the incapacity of the tax administrators to enforce tax laws and further strengthens the non-compliance posture of tax defaulters.

It is contended that tax amnesties alone cannot increase tax compliance; it is a regularisation device that lacks the capacity to address the core challenges of a tax system. The introduction of a tax amnesty scheme repeatedly suggests that the tax system is confronted with the challenge of low compliance and ineffective tax administration; since tax amnesty schemes are introduced most times where there is a high prevalence of tax default in the tax system. Therefore, for a tax amnesty programme to succeed, it should be preceded with necessary reforms to address the challenges in the tax system that are inhibiting effective tax administration and discouraging compliance. The success of a tax amnesty programme is largely dependent on the presence of an effective tax administrative system with the capacity to enforce compliance to tax laws. This must be complemented with good governance by political leaders which are necessary to develop and sustain tax payers' confidence in the tax system. An effective tax administrative system must demonstrate the capacity to enforce tax laws and impose appropriate sanctions on tax defaulters. Tax defaulters will be more inclined to regularise their tax status when it is clear, the tax authorities can compel their compliance through the various enforcement mechanisms at their disposal. This makes it imperative for tax authorities at the end of an amnesty programme to immediately proceed with investigation, audit and prosecution of tax defaulters who refuse to participate in the scheme. This is more so as the waivers given as incentives in an amnesty programme must be followed with vigorous enforcement of tax laws after the amnesty programme.²²

²² Ibid.

If this is not done, the amnesty may fail to increase the number of voluntary compliance as the pardoned tax payers may go back to their old ways and may be joined by some compliant tax payers since they may never be punished for breaking the law. In the next part of this paper, Nigeria's experiment with tax amnesty will be considered.

3. Tax amnesty in Nigeria

Nigeria has found tax amnesty schemes an attractive fiscal policy strategy and thus between 2016 and 2019 it has introduced 3 tax amnesty schemes. Extant Nigerian tax laws clearly anticipate the implementation of tax amnesty schemes which could be by remission of taxes, remission of penalties and interest and/or compounding of tax offences. For instance, the President, based on sections 89 and 23(2) of the Companies Income Tax Act²³ (CITA), has powers to remit or exempt wholly or in part any tax payable by a company on any ground that appears sufficient to him as just and equitable. In the same vein, the Governor of a State on the recommendation of the Commissioner of Finance and the relevant tax authority can remit wholly or in part, personal income tax, if he is satisfied that it is just and equitable to do so.²⁴ Furthermore, tax authorities²⁵ have powers to remit either wholly or in part penalties and interest on unpaid taxes,²⁶ and to compound tax offences by accepting sums not more than the maximum fine prescribed for the offence.²⁷

The first attempt to introduce tax amnesty in Nigeria was by public notice issued by the Federal Inland Revenue Service (FIRS) in October 2016, which gave 45 days windows for tax defaulters to pay outstanding tax liabilities for the years 2013-2015.²⁸ Under this scheme, defaulting tax payers are to declare their tax indebtedness, accompanied with evidence of part payment of not less than 25% or full payment of undisputed tax liabilities and a schedule of a payment plan for the balance acceptable to the FIRS within the 45 days window, while

²³ (As Amended) 2011, Cap C21, Laws of the Federation of Nigeria, (LFN) 2004.

²⁴ See section 80 Personal Income Tax Act (as amended) 2011, (PITA) Cap P8, LFN, 2004. Note that in Nigeria personal (individual) income tax is administered by states except for the Federal Capital Territory.

²⁵ The Federal Inland Revenue Service.

²⁶ See section 85 (3) CITA; section 79 PITA; section 32 (3) Federal Inland Revenue Service (Establishment) Act, 2007. (FIRS(E) Act).

²⁷ Section 48 (1) FIRS(E) Act.

²⁸ See Taiwo Oyedele, 'FIRS Declares Tax Amnesty' (*PWC Nigeria*, 5 October 2016), <http://pwc-nigeria.typepad.com/tax_matters_nigeria/2016/10/firs-declares-tax-amnesty.html> accessed 18 July

2021; Umar Yusuf Usman, 'Acting President Launches Voids' *Gauge April-June 2017*, A quarterly publication of the Federal Inland Revenue Service 12.

the FIRS will waive penalties and interest for all participants.²⁹ The waivers covered all federal taxes including personal income tax collectable by the FIRS, interest and penalties for late registration, late filing of returns and late payment.

The scheme was extended for six months and it provided an opportunity for corporate organisations in default of payment of taxes to regularise their tax status within the stipulated time.³⁰ The scheme generated about 27 billion Naira in deposit and about 2700 companies participated.³¹

3.1 Voluntary Assets and Income Declaration Scheme (VAIDS)

Shortly after the end of the first tax amnesty programme, VAIDS was introduced on the 29 June 2017 by a Presidential executive order.³² The scheme provided a 12 months' opportunity for tax defaulters to declare their income and assets from sources within and outside Nigeria relating to the preceding six years of assessment and pay their outstanding tax obligation within the specified period.³³ The scheme afforded all tax defaulters (corporate and individuals) including those who earn income and own assets but are yet to register with the relevant tax authorities, or have not been filing returns an opportunity to voluntarily regularise their tax status.³⁴

Under the scheme tax payers who make full and complete declarations and are willing to pay all outstanding taxes are immune from prosecution, tax audits and they are also entitled to waiver of interest and penalty.³⁵ The consequence of not participating in the scheme includes: liability to pay in full the principal sum due, penalties and interest and tax defaulters could face prosecution for tax evasion and comprehensive audits.³⁶ Although, the objective of the VAIDS scheme was to mobilise over 1 billion dollars (over 360 billion Naira) in tax revenue, increase the tax to GDP ratio to 20% by 2020

²⁹Deloitte , 'Clarifications of FIRS Waiver of Penalty and Interest' (*Deloitte Tax Alert*) <<https://www2.deloitte.com/ng/en/pages/tax/articles/clarification-of-firs-waiver-of-penalty-and-interest.html>> accessed 18 July 2021.

³⁰ PWC, 'Nigeria: Federal Inland Revenue Service Declares Tax Amnesty' (*PWC Global Mobility Service*, 21 (October 2016)) <<https://www.pwc.com/gx/en/services/people-organisation/global-employee-mobility/global-mobility-insights/nigeria--federal-inland-revenue-service-declares-tax-amnesty.html>> accessed 7 August 2021..

³¹ Akinla (n 9) 15.

³² Executive Order No 004, 2017 <<http://pwc-nigeria.typepad.com/files/voids-executive-order.pdf>> accessed 18 July 2021.

³³ Ibid, paras 2 and 3. It was initially nine months but was extended for three months. See 'President Buhari Extends VAIDS Deadline to June 30' <<https://voids.gov.ng>> accessed 12 September 2021.

³⁴ Paras 4 and 5.

³⁵ Paras 3 and 6.

³⁶ Para 8.

and attract about 4 million new taxpayers to the tax net;³⁷ at the end of the exercise, only about 10 Million Dollars was realised,³⁸ and it had no significant impact on the tax to GDP ratio in Nigeria. The objectives of VAIDS are laudable but unfortunately, the outcome of the exercise appears too distant from the intended objectives.³⁹

3.2 Voluntary offshore Assets Regularization Scheme in Switzerland

The most recent attempt at tax amnesty policy implementation in Nigeria is the Voluntary Offshore Assets Regularization Scheme (VOARS). VOARS was introduced few months after the end of VAIDS via an executive order issued by the president on 8 October 2018 which authorised the Attorney General of the Federation and Minister of Justice to set up a Voluntary Offshore Assets Regularization Scheme in Switzerland (VOARS).⁴⁰ The scheme provides a 12 months window (8 October 2018 – 7 October 2019) for affected tax payers who are in default to declare their offshore assets and income from sources outside Nigeria relating to the preceding 30 years (1978-2018)⁴¹ through the Voluntary Offshore Assets Regularisation Facility set up by the Nigerian Government in Switzerland (VOAFS).⁴² The scheme applies to all entities and their intermediaries who have undeclared offshore assets⁴³ and/or earn incomes on offshore assets but are yet to declare such incomes or are in default or have registered but have not been filing returns or have been under declaring their income and assets but need to make additional disclosures or have been under paying or under remitting taxes due.⁴⁴ To participate in the scheme, the tax payer pays a one-time levy of 35% of their offshore assets to the Federal Government of Nigeria in lieu of all outstanding taxes, penalties and interest,⁴⁵ establish a Swiss nexus for their offshore assets held anywhere in the world,⁴⁶ voluntarily elect to access the facility in Switzerland by paying a 2% facility

³⁷ Ifeanyi Onuba, 'FG Targets Four Million New Tax Payers through VAIDS' Punch, accessed on 14 July 2021 <<https://punchng.com>> accessed 4 September, 2018.

³⁸ Ndubuisi Francis, 'Proceeds from VAIDS Hit N30 Billion' *Thisday Live* <<https://www.thisdaylive.com>> accessed 14 July 2021.

³⁹ Richards (n 1) 338.

⁴⁰ Presidential Executive Order No 008 of 2018, Federal Republic of Nigeria Official Gazette, Lagos, 8 October, 2018, para 1. The choice of locating the facility in Switzerland may have been informed by the fact that Nigeria has in the past traced a lot of looted funds to Switzerland and it is generally believed that there are a lot of funds hidden in Switzerland by some Nigerians.

⁴¹ *Ibid*, para 2.

⁴² Para 5(c).

⁴³ The assets include liquid assets, stocks and bonds held in portfolio, insurance policies, property assets.

⁴⁴ See para 4.

⁴⁵ Para 3(a) and 5(e).

⁴⁶ Para 3(c).

access fees⁴⁷ and consent that assessment of future taxes will be carried out by the relevant tax authority on income earned on residual offshore assets.⁴⁸ In return, the declarant is entitled to a permanent waiver from prosecution, tax audit, penalties and interest in relation to the offshore assets and he is free to invest the regularised assets in Nigeria.⁴⁹ Failure to participate in the scheme will expose the tax payer to investigation, prosecution and liability to pay in full, principal tax due including interest and penalty.⁵⁰

It appears that the conceptualization of VOARS did not consider the provisions of extant tax laws, particularly the Personal Income Tax Act, Company income Tax Act and Double Taxation Agreements. Although, it provided that the executive order shall be subject to extant tax laws,⁵¹ it was initiated on the assumption that once you are a Nigerian or a Nigerian Company, your offshore assets is automatically taxable in Nigeria. The assets and income of a Nigerian resident outside Nigeria is generally not subject to tax in Nigeria except it is brought into or received in Nigeria.⁵² Similarly, the income of a Nigerian Company earned outside Nigeria must have been brought into or received in Nigeria for it to be taxable⁵³ and this is subject to double taxation agreements which could allow the income earned abroad to be taxed only in the source country. Thus, they are not automatically subject to the scheme as they can choose to retain such funds and income abroad. Similarly, dividend, interest, rent or royalty, derived by companies outside Nigeria are exempted from tax if such incomes are repatriated back to Nigeria through an approved official channels.⁵⁴ It has therefore been argued that the only foreign incomes subject to tax in Nigeria are the non-exempt incomes and those incomes brought into Nigeria through unauthorised channels thus, it is far reaching for VOARS to create tax obligations where there is none.⁵⁵ Considering the preceding, it is argued that the assets and income that can be captured under the scheme are those subject to tax in Nigeria since the executive order is subject to the provisions of extant tax laws. Furthermore, there are concerns on the basis of imposing the 35% asset levy and the 2% facility levy as it is above the threshold for personal income tax which is maximally 19%⁵⁶ and

⁴⁷ Para 3(b).

⁴⁸ Para 5(f).

⁴⁹ Para 6.

⁵⁰ Para 8.

⁵¹ Para 12.

⁵² PITA, s 13.

⁵³ CITA s 9(1) and 23(1) j.

⁵⁴ Ibid s 23(1)k.

⁵⁵ See Wole Obayomi, 'KPMG Executive Order 008 on VOARS' <<https://home.kpmg/ng/en/home/insights/2018/10/Executive-Order-008-on-Voluntary-Offshore-Assets-Regularization-Scheme.html>> accessed 14 July 2021

⁵⁶ See the 6th schedule to PITA.

companies' income tax which is 30%.⁵⁷ Also, the 30 years duration for the scheme appears unrealistic and is inconsistent with the limitation period of six years for tax obligations under most Nigerian tax laws.⁵⁸ For these reasons it is doubtful if the VOARS scheme would achieve any significant impact in increasing compliance and generating more tax revenue as expected. In fact, there is hardly any information on whether it has had any participant and it is opined that the scheme is an example of how not to run a tax amnesty scheme. It may have been introduced as part of mechanisms to repatriate funds allegedly looted over the years by corrupt public officials. However, for the Scheme to achieve its intended objectives it must be restructured to elicit the participation of its intended participants.

Furthermore, the repeated use of tax amnesty schemes in Nigeria since 2016 is worrisome and the idea of having an amnesty scheme like VOARS which is to cover a 30 years period appears to be unprecedented considering the lessons presented by the experiences of some countries who had implemented such schemes in the past. The introduction of tax amnesty schemes successively in the last few years without properly evaluating the gains and losses of previous amnesty schemes suggest that policy makers in Nigeria may be working on the assumption that tax amnesty schemes are the panacea to the multiplicity of challenges inherent in the Nigerian Tax System such as poor tax administrative system, lack of capacity to enforce tax laws and sanctions on tax defaulters, lack of voluntary compliance and low tax revenue profile. To continue on this premise and assumption will be counterproductive as tax amnesty schemes are not designed to deliver such objectives. At best tax amnesty schemes are short term measures to provide an avenue for tax defaulters to regularise their tax status which could expand the tax net and may lead to increase in tax revenue in the short run. However, the long term gains of an amnesty programme are dependent on the effectiveness of tax administration system. This is more so as if the tax administrators are inefficient in discharging their responsibilities, participants of the scheme may likely not pay taxes in future. Furthermore, future amnesty schemes may fail as the usual threat of sanctions for non-participation in most amnesty schemes will not compel future participation if there is no record of the enforcement of sanctions against those that refuse to participate under previous amnesty Schemes. This itself reinforces non-compliance as the tax defaulter knows that either the tax authority lacks the capacity to locate them and enforce sanctions on them or it lacks the will to effectively discharge its responsibilities. Before Nigeria introduces further tax amnesty schemes, it is imperative to evaluate the lessons the experiences of other countries present, especially from countries that have effectively deployed tax amnesty schemes as a fiscal policy strategy. In the next part of this paper,

⁵⁷ See CITA s 40.

⁵⁸ See Section 332 of the Companies and Allied Matters Act (CAMA), Cap C13 LFN 2004.

tax amnesty in some countries will be discussed and thereafter the lessons they present to Nigeria will be evaluated.

4. Tax amnesty in other countries

Nigeria is not the only country that has adopted tax amnesty as a tool to stimulate voluntary compliance in the payment of taxes. Several countries in Africa, Europe, Asia and other parts of the world had at various times experimented with the idea of tax amnesty with varying results. A brief discussion of tax amnesty in some of these countries is necessary at this point.

4.1 Kenya

Kenya successfully implemented a unique Tax Amnesty programme targeted at encouraging the repatriation of foreign earned income and assets. Pursuant to the Kenya Finance Act, 2016, the Government announced a tax amnesty for repatriation of assets and income owned by Kenyans' residents abroad.⁵⁹ The procedure for application for the amnesty is under the provisions of section 37B of the Tax Procedure Act, 2015. The scheme grants tax amnesty on income earned by Kenyan residents abroad that are subject to tax in Kenya, if they were earned on or before December 2016. The Tax Procedure Act, 2015 was amended in April 2017 to restrict the amnesty to only tax payers who completely disclose their foreign income and assets and transferred the funds to Kenyan not later than 30 June 2018. However, where tax payers declare such income but are unable to transfer the funds immediately, they have a 5 years window to transfer such funds but they will be liable to a 10% penalty.⁶⁰ To benefit from the amnesty scheme, the income earned abroad must be repatriated to Kenya.

The Kenya Tax Amnesty scheme was targeted at Kenyans who owned foreign assets or have earned foreign income taxable in Kenya. Its major objective was to stimulate the repatriation of funds to Kenya. To achieve this, tax payers who disclosed and repatriate their funds are entitled to 100% waiver of the principal tax due, penalties and interest. Also, the Tax Procedure Act prohibits the Kenyan Revenue Authority from asking any question relating to the source of income and with a promise that any information provided will be held in confidence and will not be shared with any other Government agency or

⁵⁹ TaxKenya, 'Kenyan Tax Amnesty in Respect of Foreign Assets and Income' (2016) <<https://www.taxkenya.com/kenya-tax-amnesty-in-respect-of-foreign-assets-and-income/>> accessed 12 September 2021.

⁶⁰ 'Tax Amnesty on Foreign Earned Income' <www.ikm.co.ke> accessed 5 September 2018; KPMG, 'Kenya: Voluntary Disclosure by Taxpayers' <<https://home.kpmg.com>> accessed 12 September 2021.

anti-graft agencies.⁶¹ The scheme was relatively successful as about \$8.3billion was repatriated back to Kenya between 2016 and 2019.⁶²

4.2 South Africa

South Africa has also experimented with Tax Amnesty Schemes. The South Africa Tax Administration Act, 2011, provided for the South Africa Permanent Voluntary Disclosure Programme with effect from 1 October 2012. This scheme encourages voluntary declaration of assets on a continuous basis. In 2016 a Special Voluntary Disclosure Programme (SVDP) was introduced to run from 1 October 2016 to 31 August 2017. The scheme provided a window for individuals and companies who in the past did not disclose tax on offshore assets and income, to voluntarily disclose this information and pay tax due, to avoid the imposition of administrative penalties.⁶³ South Africa has a higher tax payment compliance rate than Nigeria, this is clear from its tax to GDP ratio which is 28.4%.⁶⁴ Its tax amnesty schemes seems to be more targeted at encouraging voluntary compliance and creating a window for delinquent tax payers to regularise their status rather than increasing tax revenue within a short time.

4.3 Ghana

The Ghana Tax Amnesty Act, 2017 (Act 955) was enacted to provide a limited time opportunity for tax payers who have defaulted in any of the following ways: failure to register with the Ghana Revenue Authority, failure to file tax returns as and when due, non-payment of taxes as and when due and making false disclosure to discharge their tax obligations voluntarily in exchange for waiver of interest and penalties and relief from prosecution.⁶⁵ The tax amnesty scheme was aimed at facilitating the regularisation of the tax affairs of tax defaulters, updating the Ghana Revenue Authority data base, improving the tax compliance culture and to expand the tax net.⁶⁶ The tax amnesty scheme which ended on 30 September 2018,⁶⁷ provided an opportunity for all registered tax payers who have not submitted all returns or amended returns containing a full disclosure of all previously undisclosed liabilities up to 2017 to pay up all assessed and outstanding taxes and in turn, the revenue authority will waive all

⁶¹ Ibid.

⁶² See 'Kenyan Tax Man Caught Sleeping on the Job as \$8.03 Billion of Repatriated Money Disappears Without a Trace' <<https://www.pulselivr.co.ke/bi/finance>> accessed 15 June 2021.

⁶³ 'Voluntary Disclosure Programme (VDP)' (South Africa Revenue Service (SARS)) <<http://www.sars.gov.za/Legal/VDP/Pages/default.aspx>> accessed 15 June 2021.

⁶⁴ OECD, 'Revenue Statistics in Africa 2019-South Africa' <www.oecd.org> accessed on 16 June 2021.

⁶⁵ S 1 Guidelines on the Tax Amnesty 2017 (Act 955) <www.gra.gov.gh> accessed 15 October 2021.

⁶⁶ Ibid s 2.

⁶⁷ Ibid, s 3.

penalties and interest for failure to file tax returns and pay tax as and when due.⁶⁸ Also, an unregistered person who is liable to pay tax in 2014, 2015 and 2016, who registers on or before 30 September, 2018 and submit all outstanding tax returns with full disclosure of all previously undisclosed incomes shall have their taxes, penalties and interest waived by the tax authority.⁶⁹ This is a radical and progressive provision which is in line with the objectives of the Ghana Tax amnesty programmes, to improve tax compliance culture.

4.4 Mauritius

Mauritius has at various times introduced various amnesty schemes, the most recent of which is a tax amnesty for small and medium scale enterprises (SMEs). The scheme which was extended to 31 January 2020 by the Mauritian Finance Act 2019 provides a window for SME's to voluntarily disclose their incomes for 2017-2018 and in exchange all penalties and interest will be waived.⁷⁰ Furthermore, Mauritius implemented various tax amnesty schemes in 2012 as part of its tax reform programmes. For instance, it introduced the Tax Arrears Settlement Scheme (TASS) which provided an opportunity for individuals and companies to settle their outstanding principal tax liability and upon compliance all penalties and interest will be waived.⁷¹ Similar waivers were also granted to persons who voluntarily disclose, undeclared or under declared income or VAT before 31 March 2012 under the Voluntary Disclosure of Income/Under Declared VAT Arrangement scheme which is complementary to the Voluntary Registration Incentive Scheme.⁷² Also, the Expeditious Dispute Resolution of Tax Scheme, allowed tax payers who were unable to apply for a review of assessments issued prior to 1 January 2011, due to their inability to make compulsory down payment of 30% of the total assessment and non-production of full records or inability to apply to the tax authorities for a review of such assessment.⁷³

4.5 Ireland

Ireland is one of the countries in Europe that has effectively implemented tax amnesty schemes as a fiscal policy measure to boost her revenue over the years. It is reported that between 1988 and 2001, the Irish tax amnesty schemes

⁶⁸ Ibid s 5(a).

⁶⁹ Ibid s 5(b).

⁷⁰ Mauritius Tax Agency extends deadline on Tax Amnesty program for SMEs under the 2019 Finance Act' <<https://news.bloombergtax.com/dailytaxreport>> accessed on 15 June 2021.

⁷¹ Mauritius Revenue Authority, *E-News Letter* (February 2012) <<http://www.mra.mu/index.php/component/content/article/310-february-2012>> accessed 15 June 2021.

⁷² Ibid.

⁷³ Ibid.

generated over 1 billion pounds.⁷⁴ The 1988 Irish tax amnesty scheme; was introduced at a time when the country was facing financial difficulties as a short term measure to catalyse increase in tax revenue. The scheme, provided tax defaulters opportunity to pay outstanding taxes and the penalties and interest will be waived. At the end of the scheme over 500million pounds was realized from this first amnesty scheme.⁷⁵ Also, in 1993, Ireland introduced an amnesty scheme which was the fifth in six years that raked in over 260 million pounds. The scheme provided a waiver of interest or penalty and 85% of tax due to all tax payers who disclosed previously undisclosed income and paid 15% of the total tax due.⁷⁶ Under this scheme, it is a criminal offence to under disclose or to refuse to participate in the amnesty scheme.⁷⁷ Furthermore, Ireland introduced other amnesty schemes after the 1993 amnesty scheme, the most recent being the Voluntary Offshore Income Declaration scheme announced on budget day 2016 and ran till 1 May 2017.⁷⁸ The scheme presented an opportunity for tax payers with offshore assets and businesses with revenue subject to Irish tax to voluntary declare such assets and regularise their tax status and enjoy reduced penalties.⁷⁹ Failure to participate in the scheme exposes the target tax payers to higher penalties, investigations and prosecution.⁸⁰

4.6 United Kingdom (UK)

In March 2013 the United Kingdom announced an amnesty for tax payers; which ended in 30 September 2016.⁸¹ The scheme gave opportunity to taxpayers to make a disclosure of any unpaid tax to Her Majesty's Revenue and Customs (HMRC). The amnesty covered all UK taxes between 6 April and 31 December 2013. The scheme encouraged tax defaulters to voluntary disclose their tax liabilities and in exchange enjoy the following benefits: limitation of tax liabilities to 6 April 1999 instead of the statutory 20 years, remission of penalties and interest, immunity from forensic review and prosecution by the tax authority, provided they make full and complete disclosure. Also, the plumber tax safe plan was introduced on 31 May 2011. The plan which was

⁷⁴ Irish Times '£1bn Collected in Amnesties over 13 Years', <<https://www.irishtimes.com>> accessed 15 June 2021.

⁷⁵Ibid.

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸ Moran McNamara 'Undeclared Offshore Income "Tax Amnesty" Deadline 1 May 2017' (9 January 2017) <<http://moranmcnamara.ie/tax-offences/undeclared-offshore-income-tax-amnesty-deadline-1-may-2017/>> accessed on 15 June 2021.

⁷⁹Helen Burggraf 'Irish Tax Amnesty Yields just €205,000', *International Investment* (17 March 2017) <www.internationalinvestment.net/products/irish-tax-amnesty-yields-just-e205000-times/> accessed 18 August 2021.

⁸⁰ McNamara (n 78).

⁸¹ Bob Jackson and TuiIti 'UK Amnesty for UK Tax Payers' *Ogier* (19 December 2013) <<https://www.lexology.com/library/detail.aspx?g=b77f469c-dab3-4f34-8602-1ddb73a0183a>> accessed on 18 July 2021.

targeted at plumbers, gas fitters, heating engineers and people involved in similar trades allowed its intended participants to disclose undeclared income in return for reduced penalty.⁸² The plumber safe plan is similar tax amnesty scheme earlier introduced by HMRC for those in the medical profession in 2011.⁸³

4.7 Italy

In December 2014 the Italian Voluntary Disclosure Law was passed by the parliament. The law provided a window for Italian residents to disclose undisclosed assets held abroad and pay taxes due and in turn they will enjoy reduced penalties and protection from prosecution.⁸⁴ The scheme recorded some significant impact as about 130,000 residents participated and over 60 billion Euros in previously undeclared offshore funds were declared.⁸⁵ On 1 January 2017 the Italian Government re-introduced and extended the amnesty scheme to cover both offshore assets and domestic assets.⁸⁶ Also, in 2018, a new amnesty scheme targeted at providing opportunity for tax payers to reconcile their tax status with the revenue authority was introduced by Law Decree No. 119. The scheme tag 'Tax Peace' automatically waived all tax debts below 1, 000 Euros incurred between 2000 and 2010.⁸⁷

4.8 Indonesia

Indonesia has effectively deployed tax amnesty schemes as a fiscal policy strategy over the years. In 2016 a tax amnesty scheme which covered the period 18 July 2016 to 31 March 2017 was introduced. The special scheme waives the taxpayer's principal tax debt, penalties and criminal liabilities, on the redemptive payment of between 2% to 10% depending on when the tax declarations are made.⁸⁸ It is believed to be one of the most successful tax

⁸² HMRC Opens Further Tax Amnesty <<http://www.mazars.co.uk/Home/News/Latest-news/Tax-News/HMRC-opens-further-tax-amnesty>> accessed on 18 July 2021.

⁸³ Ibid.

⁸⁴ EY, 'Italian Parliament Passes New Voluntary Disclosure Law of Undisclosed Assets held Abroad by Italian Residents' *Global Tax Alert* (12 December 2014) <http://www.ey.com/Publication/vwLUAssets/Italian_Parliament_passes_new_voluntary_disclosure_law_of_undisclosed_assets_held_abroad_by_Italian_residents.pdf> . accessed 18 July 2021.

⁸⁵ Step 'Italy Reopens Tax Amnesty for Domestic as well as Offshore Assets' (9 January 2017) <<http://www.step.org/news/italy-reopens-tax-amnesty-domestic-well-offshore-assets>> accessed 21 August 2021.

⁸⁶ Ibid.

⁸⁷ B McKenzie, 'Italy-Launch of Tax Amnesty Program – Preliminary Outline' <<https://www.bakermckenzie.com/en/insight/publications/2018>> accessed 27 September 2021.

⁸⁸ Gary Robinson, '347,000 Sign up and Declared via Indonesia Tax Amnesty' *International Investment* (7 Oct 2016),

amnesty schemes with over 745,000 participants and attracted more than 330 billion US dollars in tax revenue; which is beyond the expectation of the government.⁸⁹

4.9 India

India has implemented several tax amnesty schemes after the Voluntary Disclosure Scheme 1951.⁹⁰ In 2016, the Indian government introduced the Income Disclosure Scheme which provided an opportunity for tax defaulters to disclose undisclosed income or income, or asset and clear up their past tax transgressions by paying redemptive charge of 45% (including surcharge and penalty) of the undisclosed income between 1 June 2016 and 30 September 2016 (4 months).⁹¹ The scheme which covers all undisclosed assets in India provides immunity for participants from investigation, penalties and prosecution for tax evasion.⁹² Also, on 29 November 2016, the Income Tax Act was amended to allow depositors of unaccounted funds to pay 50% tax, in return they will be immune from prosecution for violation of tax laws. The scheme which is code named '*Pradhan Mantri Garib Kalyan Yojana*' (*PMGKY*), was the third voluntary disclosure scheme launched between 2014 and 2016.⁹³

5. Lessons for Nigeria

Tax amnesty has been effectively utilised as a tax evasion mitigation mechanism in several countries across the world; Nigeria can draw some lessons presented from the experience of some of these countries in the implementation of tax amnesty programmes. Indonesia and Ireland appears to have deployed arguably the most effective tax amnesty schemes. Their experiences suggest a tax amnesty schemes may need to waive all or a substantial part of principal tax liability for it to motivate participation. For

<<http://www.internationalinvestment.net/products/tax/347000-sign-us263bn-declared-via-indonesia-tax-amnesty/>> accessed 27 Sept 2021.

⁸⁹ Gayatri Suroyo and Hidayat Setiaji, 'Indonesia Tax Amnesty Nets 330 Billion' (*Reuters*, 20 March 2017) <<https://www.reuters.com/article/us-indonesia-economy-tax/indonesia-tax-amnesty-nets-330-billion-now-for-reform-idUSKBN16S0AS>> accessed 13 August 2018; M Djafar Saidi, 'Tax Amnesty as Policy in the Field of Taxation' *Journal of Law, Policy and Globalisation* <<http://www.iiste.org/Journals/index.php/JLPG/article/view/38033>> accessed 27 Sept 2021.

⁹⁰ SS Khan 'Tax Amnesties in India' *Tax India International* (12 March 2012) <<https://taxindiainternational.com/columnDesc.php?qwer43fcxzt=NzU>> accessed 27 Sept 2021.

⁹¹ 'Tax Amnesty Scheme in India' <<https://www.bdo.co.uk/getmedia/ca80b259-dba1-4bda-b73a-2304ffc788b9/Tax-Amnesty-in-India2016.%20pdf.aspx>> accessed 27 Sept 2021.

⁹² *Ibid.*

⁹³ 'India Launches Another Tax Amnesty Scheme' <<https://www.eiu.com>> accessed 27 Sept 2021.

instance, the Indonesian tax amnesty scheme introduced in 2016 eliminated the taxpayer's principal tax debt, penalties and criminal liabilities, if the taxpayer's makes a redemption payment of between 2% to 10% depending on when the tax declarations are made.⁹⁴ This is technically a remission of about 90% of the total tax liability of delinquent tax payers. Similarly, the 1993 Irish amnesty scheme allowed tax defaulters to pay just 15% of the total tax while accrued interest and penalty for previously undisclosed income are waived.⁹⁵ Nigeria generally has a very high incidence of tax evasion which is largely due to the inability of the tax authorities to generate reliable data on prospective tax payers and their income. Hence, the experience of Indonesia and Ireland suggest that Nigeria needs a tax amnesty scheme that places emphasis on bringing more people to the tax net, data generation and formulating policies that makes it easy for tax authorities to access financial details of individuals and companies. Thus the tax amnesty scheme should focus more on long term revenue generation objectives rather than short term goals.

Another important lesson for Nigeria is from the structure of the UK's plumber tax safe plan and the Mauritius Voluntary Registration Incentive Scheme. Their experience suggest that, rather than have a general amnesty programme like VAIDS, it is better to have segmented or sectorial amnesty programme targeted at different categories of tax defaulters. Nigeria must consider a sectorial approach to the implementation of tax amnesty schemes in future. A sectorial tax amnesty strategy helps to address the peculiar needs and challenges of a particular sector and it is likely to succeed because the incentives for the amnesty will be targeted at the specific interest of the sector. For instance, the Mauritius scheme was well thought out and adopted a holistic approach to reform its tax system by introducing several schemes about the same time to address different categories of tax defaulters. This is complemented by the recent introduction of a special tax amnesty scheme for SMEs.⁹⁶ This approach treats each case based on their peculiar facts and circumstances and has the potentials to stimulate more participants based on group dynamism. Another significant difference between the Nigerian tax amnesty schemes and the Mauritius experience is that while Nigeria placed more emphasis on corporate taxes, the Mauritius Scheme had a broader approach to cover different types of taxes and different circumstances of tax default including a special arrangement for VAT defaulters.

The Mauritius experience presents a good precedent for Nigeria, because the various Nigerian amnesty schemes did not make provision to address the challenges of taxing the informal sector; it focused more on taxing large companies. It is difficult to enforce tax compliance in the informal sector

⁹⁴ Gary Robinson (n 88).

⁹⁵ Irish Times (n 74).

⁹⁶ Mauritius Tax Agency extends deadline on Tax Amnesty program for SMEs under the 2019 Finance Act (n 70)

because they are largely unorganised and there are little or no data about their existence, operations and financial records. Nigeria has a large informal sector, and this has had a debilitating effect in the implementation of fiscal policies. Going forward, in implementing special amnesty scheme for the informal sector in Nigeria, some forms of carrot and stick approach must be adopted to catalyse and incentivise the informal sector to register for tax purposes by paying a token registration fee. For instance, all residents could be invited to register for tax purposes and upon registration all outstanding taxes, penalties and interest will be waived and this will be evidenced by issuing all participants a tax clearance certificate. This approach was adopted by Ghana's in taxing the informal sector; as its amnesty programme allowed persons who were previously not registered for tax purposes and are liable to pay taxes to register and submit all outstanding tax returns with full disclosure of all previously undisclosed incomes and in return they shall have their taxes, penalties and interest waived by the tax authority.⁹⁷ One advantage of this approach is that, it stimulates several tax defaulters especially those who have never paid taxes to come and register. This will improve the tax culture and help to develop credible data base on tax payers and in the long run lead to consistent increase in tax revenue. This is more so as amnesty schemes that emphasises data generation above revenue generation will in the long run lead to increase in tax revenue and a more effective tax system. It is opined that amnesty programmes should not always be targeted at short term revenue generation; sometimes it is more effective when it deemphasizes short term revenue generation and focuses more on bringing more people into the tax net, which in the long run will yield higher revenue.

Furthermore, Nigeria in a bid to join the global trend of stimulating the repatriation of incomes and assets abroad introduced VOARS which provides for the voluntary declaration of hidden assets and income by people who have assets and incomes abroad. However, it appears that VOARS was not properly structured to deliver its objectives. It is a known fact that many Nigerians prefer to keep their incomes and assets abroad. A number of factors may have informed this posture and they include fluctuation of the naira which has led to devaluation of the Naira over the years, inconsistency of government policies, insecurity, among others. It is also believed that most of the looted funds are stashed in bank accounts abroad and this believe is fortified by the several repatriations from different countries of funds allegedly looted by the Late Nigerian Military, Head of State. General Sani Abacha.⁹⁸

In the quest to implement a successful voluntary disclosure scheme, the experience of Kenya is commendable as it presents useful lessons for Nigeria on how to stimulate the repatriation of funds abroad. The Kenya model unlike

⁹⁷ Guidelines on the Tax Amnesty 2017 (Act 955) (n 65), s 5(b).

⁹⁸ The Guardian Nigeria, 'US to monitor usage of returned Abacha loots Nigeria', <<https://m.guardian.ng>> accessed 20 February 2020.

Nigerians VOARS emphasised voluntary disclosure and repatriation of income back to Kenya above the short term tax revenue enhancement goals. Accordingly, all those who voluntarily and fully declared and repatriated the funds were entitled to 100% waiver of the principal tax due, penalties and interest.⁹⁹ Nigeria should adopt this approach as it will encourage people with hidden assets and funds abroad to repatriate those funds back to Nigeria without fear of being harassed or losing a large chunk of their funds to tax. In the long run the Government will benefit from the multiplier effect of the repatriated funds on the economy. This is more so as the repatriated funds will be invested in Nigeria, catalyse economic growth, create more jobs and guarantee more consistent future taxes.

6. Conclusion

Tax Amnesty schemes have relatively been successful in some parts of Europe, Asia and even Africa; but for Nigeria the reverse is the case. Apart from the first amnesty scheme introduced in Nigeria in 2016 which was partially successful, other amnesty schemes such as VAIDS and VOARS failed to achieve the intended objectives. VAIDS provided for waiver of penalties and interest and VOARS a 35% redemptive payment for disclosure of foreign income and assets; however, it appears these incentives were inadequate to catalyse repatriation of foreign assets. In contrast, the Kenya foreign assets and income disclosure and repatriation programme was not targeted at raising tax revenue for government in the short term, rather it was targeted at getting those funds repatriated back to Kenya because of the positive effect it will have on the economy. Thus, complete waiver from taxes, penalties and interest due was granted to those who repatriated their funds back to Kenya.

The successive introduction of tax amnesty schemes in Nigeria between 2016 and 2019 suggest policy makers may have been swayed by the partial success of the 2016 amnesty programme. This is evident from the fact that at the end of the first amnesty programme in 2017, VAIDS was immediately introduced to run from 2017-2018 and at the end of it; even with noticeable signs that the scheme technically failed, VOARS was introduced. Nigeria policy makers appears to be oblivious of the fact that repeated amnesty schemes introduced almost consecutively suggest there is poor tax administration and that several economic and political factors are not in place.

Tax Amnesty has not been able to achieve its objectives in Nigeria for a number of reasons. Firstly, it is always targeted at short term increase in tax revenue without considering the factors that are militating against the voluntary compliance in the payment of taxes in Nigeria. Secondly, Nigeria is a cash economy and has a relatively poor data management strategy. The implication of this is that, it is difficult to access data or records of tax payers, their assets and income. These in many cases frustrate the effort of tax authorities to enforce

⁹⁹ 'Tax Amnesty on Foreign Earned Income' (n60).

compliance. Thirdly, after an amnesty scheme, there must be structures to enforce tax laws. This is because, future amnesty schemes may fail if non-participants in previous amnesty schemes were not sanctioned as prescribed by the scheme. Also, failure to enforce sanctions on defaulters who failed to participate encourages participants to go back to their old ways and discourages future participation. Therefore, before further amnesties are introduced, there is need to demonstrate a will to enforce tax laws. Furthermore, before Nigeria introduces another tax amnesty scheme, it is important to evaluate the factors that may have influenced the success of amnesty schemes in some of the countries discussed above. The success in the implementation of tax amnesty programme in parts of Europe like Ireland, UK, Italy and are largely due to the existence of an effective tax administration structure before the introduction of the amnesty programme. This is evident from the fact that there have been efforts by the tax authorities to ensure tax compliance over the years and the tax authorities have demonstrated the capacity to enforce sanctions for non-compliance and they had on several occasions successfully prosecuted tax evaders.¹⁰⁰ This is in addition to the fact that there is an automated financial and economic system that makes it easy for tax authorities to track and monitor tax compliance.

Nigeria needs to do a lot of background check for it to run a successful amnesty system. First, tax authorities must demonstrate the capacity to enforce compliance and prosecute tax defaulters. Also, there is need to reform the financial system. In this direction, there is an urgent need to reduce cash liquidity in circulation and enforce a cashless policy where all major transaction can only be done through e-payment systems. In a similar vein, there is need to encourage voluntary self-assessment and payment of taxes using the carrot and stick approach. The carrot it is suggested could be a 2% waiver for all those who voluntarily declare their income and pay their taxes as and when due, while the stick is to enforce sanctions inclusive of penalties, interest and prosecution of tax defaulters. This should be complemented with a comprehensive tax reform programme. After putting these structures in place a sectorial tax amnesty strategy could be adopted to target different sectors of the economy and to pursue specific objectives. However, it should not be declared with the sole intention of increasing tax revenue but to expand the tax net by providing an opportunity for people to regularise their tax status within a short time. In this direction, a more radical amnesty scheme with very attractive benefits like complete waiver or partial waiver of principal taxes due in addition to 100% waiver of interest and penalties and immunity from prosecution, investigation and audit is recommended.

¹⁰⁰ See Lexis Nexis 'Tax Evasion Offences – Overview' <<https://www.lexisnexis.com>> accessed 16 June 2021.

STRENGTHENING THE LEGAL FRAMEWORK FOR PERSONAL DATA PROTECTION IN NIGERIA

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Abstract

Advancement in Information Communication Technology (ICT) has brought to the fore the need for the protection of individuals' personal data. In today's digital age, the personal data of individuals are routinely collected and stored in databases of both private and public establishments. Such personally identifiable information can easily be analyzed with fascinating accuracy, rapidly transmitted, and put to unimaginable uses. This situation has placed the regulation of personal data collection and uses on the front burner in many nations. The weak or total absence of regulation of personal data poses serious challenges to the security of lives and property of individuals and can constitute a serious disincentive for the adoption of beneficial technology. Employing the doctrinal methodology, this article examines the legal framework for personal data protection in Nigeria with the aim of assessing the adequacy or otherwise of relevant extant regulations in protecting the personal data of Nigerians and other people doing business in Nigeria. Looking at the state of the law in some developed and developing countries, the paper notes that the current state of regulation in Nigeria is still a far cry from what obtains in most countries of the global North and some sister African countries. It, therefore, concludes that there is a compelling need for a stronger regulatory framework for data privacy in Nigeria.

Keywords: Right to Privacy, Personal Data Protection, Rights of Data Subject, Personal Data Protection Regulation, Nigeria Data Protection Regulation 2019

1. Introduction

Digitisation and information communication technology have simplified the collection, storage and dissemination of information.¹ Buying and selling of goods and services, banking and other financial transactions are increasingly being conducted online. Nigeria has joined the rest of world to embrace the multifarious uses of digital and telecommunications technology, with the attendant benefits which include lower costs, speed and convenience and the associated challenge of the security of individual's personal data.² With modern computing technology, data can be collected and analysed with fascinating

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¹ M Nuruddeen, 'An Appraisal of the Legal Requirements of Electronic Commerce Transactions in Nigeria' (2011)3(1) *Bayero University Journal of Public Law*164–183, 165.

² DJ Ibegbulem and FO Ukwueze, 'Deconstructing Nigeria's Data Protection Regime from Consumer Protection Perspective' (2021) 13(1) *The Law, State and Telecommunications Review* 94 – 118, 96.

accuracy and transmitted or distributed to long and dispersed areas with lightning speed. Without a robust legal framework for personal data protection, enormous amounts of personally identifiable information (PII) can be collected, stored, processed and transmitted without the knowledge or consent of the data subjects.³ If personal data get into wrong hands, they can be put to uses that can be injurious to the data subjects. Furthermore, absence of legal protection of personal data raises serious challenges to security of lives and property of individuals, and can discourage individuals from engaging in online transactions out of fear of their PII being misused.⁴ This article examines the legal framework for personal data protection in Nigeria with a view to assessing its adequacy in protecting the personal data of Nigerians and other people in the country. It adopts the doctrinal method and analyses relevant Nigerian statutes that protect personal data of individuals. It is divided into five sections of which this introduction is the first. The second section highlights the importance of privacy of personal data and the need for their protection. The third section identifies the relevant laws on personal data protection in Nigeria prior to the issuance of the Nigeria Data Protection Regulation 2019 (NDPR), and analyses them to show the level of protection of personal data they provide. The penultimate section discusses NDPR analysing its key provisions to determine their adequacy to provide the much needed protection of personal data in Nigeria. The last section is the conclusion which also contains the key recommendations of the article.

2. Significance of Personal Data Protection Laws

Personal data refer to information relating to an identified or identifiable natural person.⁵ A data subject therefore is a natural person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.⁶ Personal data ranges from a name, address, a photo, a phone number, an email address, bank details, medical information, to other unique identifier such as, Internet Protocol (IP) address, Media Access Control (MAC) address, International Mobile Equipment Identity (IMEI) number, International Mobile Subscriber Identity (IMSI) number, Integrated Circuit Card Identifier (ICCID) or Subscriber Identity Module (SIM) and so on.⁷

³ Ibid.

⁴ Joseph M Jones and Leo R Vijayasaratgy, 'Internet Consumer Catalog Shopping: Findings from an Exploratory Study and Directions for Future Research' (1998) 8(4) *Internet Research*, 322

⁵ Nigeria Data Protection Regulation 2019 (NDPR) r 1.3 (xix).

⁶ Ibid r 1.3 (xiv)

⁷ Ibid r 1.3 (xxi).

Technology has radically changed the ways and manners of doing many things. Buying and selling of goods and services online (e-commerce), is steadily gaining popularity. Banking and other financial operations are increasingly being conducted online and many organisations now collect payments through digital platforms.⁸ Many educational institutions operate e-learning programmes, conduct examinations and publish results online. Digital transactions often involve the transfer of money and the exposure of customers' personal information and data over telecommunication networks and trading platforms. Sometimes, such information gets exposed beyond the expected point, thereby rendering them susceptible to the activities of hackers and fraudsters.

Data protection laws have evolved to protect individuals against misuse, misappropriation or unlawful disclosure of their PII by regulating all activities relating to personal data which collectively is referred to as the processing of personal data. Processing of personal data covers all operations performed on personal data such as the collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.⁹ The type of information and data that require protection are wide and varied personal information such as gender, health status, personal relationships, addresses, telephone numbers, internet activities, banking transactions, medical records, etc.¹⁰

Without legal regulation of personal data, the privacy of individuals as well as the security of their lives and property will remain precarious and susceptible to activities of rogues and mischief makers. Thus, data protection regulations are used to secure individuals' rights to privacy.

3. Data Protection Laws in Nigeria

3.1 Right to Privacy under the Constitution

Flowing from the 'right to privacy' enshrined in numerous international human rights instruments,¹¹ the Nigerian Constitution guarantees and protects the citizens' right to privacy of their homes, correspondence, telephone

⁸ Ibid.

⁹ NDPR r 1.3 (r).

¹⁰ Aaron Olaniyi Salau, 'Data Protection in an Emerging Digital Economy: The Case of Nigerian Communications Commission - Regulation without Predictability?' 7th International Conference on Information Law and Ethics, 22-23 February 2016 <<https://icil.gr/download.phpfen=years/2016/downloads/speakers/0083-salau-abstract-en-v1.pdf>> accessed 15 December 2019.

¹¹ Such as the Universal Declaration of Human Rights, art 12; International Covenant on Civil and Political Rights, art 17; American Convention on Human Rights, art 11; and European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8.

conversations and telegraphic communications.¹² However, there is a consensus of opinion that although this constitutional provision envisages protection of citizens' personal information, it does not constitute sufficient legal instrument for individuals to enforce their right to control the access to, retention and the use of their personal information.¹³ The Constitution does not define 'privacy' and its conceptualisation of the term appears too narrow; thus it has been rightly argued that the ambit of the constitutional right to privacy does not address the complex issues relating to collection, storage, processing, control and use of individuals' personal information and other online contents.¹⁴

3.2 Cybercrimes (Prohibition, Prevention, etc) Act 2015 (Cybercrimes Act)

The Cybercrimes Act which gives effect to the Economic Community of West African States (ECOWAS) Directive on Fighting Cyber Crime¹⁵ deals specifically with cyber security. The stated objectives of the Act include promote cyber security and the protection of computer systems and networks, electronic communications, intellectual property and privacy rights.¹⁶

The Act provides that the President may on the advice of the National Security Adviser by order designate certain computer systems or networks as Critical National Information Infrastructure (CNII) which should comprise computer systems or networks that are vital to the nation, such that their incapacity or interference would have a debilitating impact on the nation's security, economy, public health and safety.¹⁷ The Presidential Order on CNII may prescribe minimum standards, guidelines, rules or procedure relating to, among other things, the protection and general management of critical information infrastructure; access to, transfer and control of data in any critical infrastructure; the storage or archiving of data or information designated as CNII; and any other matter required for the adequate protection, management and control of data and other resources in any CNII.¹⁸

The Act creates and prescribes the punishment for a number of offences that relate to privacy and e-commerce. These include unlawful access to a computer system or network for fraudulent purpose or to obtain data that are

¹² Constitution of the Federal Republic of Nigeria 1999 (as amended) (hereinafter, the 1999 Constitution) s 37.

¹³ LA Abdulrauf 'New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension between Traditional and Modern Conceptions' (2016) 7 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 113.

¹⁴ See Udo Udoma and Bello-Osagie, 'Data Privacy Protection in Nigeria' <<https://www.uubo.org/media/1337/data-privacy-protection-in-nigeria.pdf>> accessed 23 October 2019.

¹⁵ Directive C/DIR. 1/08/11 – Directive on Fighting of Cyber Crime within ECOWAS done at Abuja on 19 August 2011.

¹⁶ Cybercrimes Act s 1.

¹⁷ Cybercrimes Act s 3 (1).

¹⁸ Cybercrimes Act, s 3(2).

vital to national security; tampering with CNII; wilful interception of electronic messages, e-mails and electronic money transfer; wilful misdirection of electronic messages; unlawful interception of computer data; identity theft and impersonation; cyber-stalling and cyber-squatting; manipulation of Automated Teller Machine/Point of Sale (ATM/POS) terminals; phishing, spamming and spreading of computer virus, and other computer related fraud and offences.¹⁹ Section 38 of the Act imposes a duty on communications service providers in relation to records retention and protection of personal data. A service provider is mandated to keep all traffic data and subscriber information as may be prescribed by the authority responsible for the regulation of communication services in the country, for a period of two years.²⁰ Service providers shall at the request of the authority or any law enforcement agency, preserve, hold, retain or release any traffic data, subscribers' information, non-content and content data. Any data retained, processed or retrieved by the service provider at the request of any law enforcement agency shall not be utilised except for legitimate purposes as provided in the Act, any other legislation, regulation or by an order of a court of competent jurisdiction.²¹ Anyone exercising any function in this regard is enjoined to have due regard to the individual's right to privacy under the Constitution and to take appropriate measures to safeguard the confidentiality of the data retained, processed or retrieved for the purpose of law enforcement.²²

The Act imposes heavy penalties for the various offences ranging from terms of imprisonment of two years to life imprisonment with options of fines ranging from ₦1 million to ₦7million and in some cases both imprisonment and fine. It makes provisions for victim compensation in addition to any penalty prescribed, as it mandates that the court 'shall' order a person convicted of an offence under the Act to make restitution to the victim of the false pretence or fraud by directing the person, where the property involved is money, to pay to the victim an amount equivalent to the loss sustained by the victim and in any other case, to return the property or pay an amount equal to the value of the property where the return of the property is impossible or impracticable. An order of restitution under the Act 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.²³

Even though the Cybercrimes Act contains certain provisions relating to personal data protection, for all intents and purposes, it does comprehensively regulate the various aspects privacy of data subjects' personal information in e-commerce environment. For example, it seeks to prevent unlawful interference

¹⁹ Ibid, ss 5 - 36.

²⁰ Ibid s 38(1).

²¹ Ibid s 38(4).

²² Ibid s 38(5).

²³ Ibid, s 49 (1) and (2).

with computer data but does not contain provisions on how personal data of individuals can be lawfully collected, stored processed and used by individuals and organisations that engage in online transactions with the data subject. To that extent, it does not provide full protection for PII of data subjects on computer networks.

3.3 Official Secrets Act 1962

The Official Secret Act (OSA)²⁴ aims to secure public safety by protecting official government information, prohibiting entry into or photographing or making sketches of defence establishments, restricting photography during a state of emergency and controlling mail forwarding agencies.²⁵ Section 1 of the Act prohibits unauthorised access to, reproduction, retention or transmission of any classified matter²⁶ on behalf of the government. For purposes of controlling mail forwarding agencies, section 4 of the Act empowers the Minister responsible for security and public safety to make regulations for controlling the manner in which any person conducts any organisation for receiving letters, telegrams, packages or other matter for delivery or forwarding to any other person, and providing for the furnishing of information and keeping of records by persons having or ceasing to have the conduct of such an organisation. Failure to comply with regulations so made constitutes an offence under the Act. Penalties for offences under the Act range from terms of imprisonment of up to 14 years or fines between ₦100 – ₦200 or both fine and imprisonment.²⁷

It is obvious that the thrust of OSA is the protection of government records and related matters and not the protection of personal information of individuals. It can only provide protection for personal information where such information is part of a public record.

3.4 Freedom of Information Act 2011

This statute was enacted to provide for access to public records and information, protect public records and information to the extent consistent with the public interest as well as to protect personal privacy of individuals.²⁸ The Freedom of Information Act (FOIA) mandates every public institution to record and keep information about all its activities, operations and businesses in a manner that facilitates public access to such information.²⁹ It establishes the right of any person to access or request information, whether or not contained in any written

²⁴ No 29 of 1962, Cap O3, LFN 2004.

²⁵ Official Secret Act (OSA) ss 1 – 4.

²⁶ Classified matter means ‘any information or thing which, under any system of security classification, from time to time, in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria’. See OSA, s 9.

²⁷ OSA s 7.

²⁸ See the long title to the Freedom of Information Act (FOIA).

²⁹ FOIA, s 2.

form, which is in the custody or possession of any public official, agency or institution. An applicant for such information does not need to demonstrate any specific interest in the information sought. Any person entitled to the right to information can institute proceedings in court to compel any public institution to comply with the provisions of the Act.³⁰

In spite of the wide latitude which FOIA affords for public access to records and information held by public institutions, the Act provides for circumstances where a public institution can deny an application for such information.³¹ One of such circumstance is where the information sought is personal³² and its disclosure would constitute an invasion of personal privacy. In such a situation, a public institution must deny an application for such information and can only disclose such information if the individual to whom it relates consents to the disclosure; or the information is already publicly available or where the disclosure would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates.³³

The provisions of FOIA do not cover proper custody of personal information retained by public institutions. More worrisome is the fact that the Act does not make any provision for redress for an individual whose personal information is disclosed in circumstances where such information ought not to be disclosed. On the contrary, section 27 of FIOA provides immunity against the public institution in such circumstances as well as immunity against criminal or civil action against the recipient of such information for further publishing of the information.

3.5 Child Rights Act 2003

In furtherance of the constitutional provision, the Child Rights Act 2013 (CRA) reasserts the right to privacy as it relates to children for his/her privacy, family life, home, correspondence, telephone conversation and telegraphic communications.³⁴ This right of the child is however made subject to the rights of parents and legal guardians to exercise reasonable supervision and control over the conduct of their children and wards.³⁵ To ensure that the right of the child to privacy is respected at all stages of child justice administration in order to avoid harm being caused to the child by undue publicity which may lead to labelling, CRA prohibits the publication of any information that may lead to the

³⁰Ibid, s 1.

³¹ Ibid s 19.

³² Personal information is 'any official information held about an identifiable person, but does not include information that bears on the public duties of public employees and officials'. See FOIA, s 31.

³³FOIA, ss 12 and 14.

³⁴ CRA, s 8 (1) and (2).

³⁵ Ibid, s 8 (3)

identification of a child offender. It further stipulates that records of a child offender shall be kept strictly confidential and closed to third parties and made accessible only to persons directly concerned with the disposition of the case or other duly authorised persons.³⁶

Evidently, CRA attempts to protect information of children and does not extend to adults. It does not make provisions for how personal data of children can be lawfully collected, stored processed, used or transmitted.

3.6 Sector Specific Regulatory Statutes

A number of statutes that regulate certain sectors of the Nigerian economy contain provisions that protect the privacy of individuals in relation that the particular sectors which they govern. These include the National Health Act 2014 (NHA), the Nigerian Identity Management Commission Act (NIMC) Act 2007³⁷ the Statistics Act 2007,³⁸ the Consumer Protection Framework (CPF) of the Central Bank of Nigeria (CBN) and various regulations of the Nigerian Communications Commission (NCC). Section 26 of NHA imposes a duty of confidentiality on medical information of individuals including information relating to the individual's health status, treatment or stay in a health establishment and no person may disclose such information unless the individual (patient) consents to the disclosure in writing or any law requires the disclosure or the non-disclosure represents a serious threat to public health, as witnessed during the Ebola outbreak of 2014. In the case of a minor or other person who is unable to give consent, the disclosure can only be made at the request of the parent, guardian or legal representative of such a person. Section 29 imposes a duty on persons in charge of health establishments that are in possession of a user's health records to set up control measures to prevent unauthorised access to those records and to the storage facility in which they are kept. Failure to observe this duty is an offence punishable on conviction by a term of imprisonment not exceeding two years or a fine of ₦250,000.00.

The Statistics Act has provisions which protect the privacy and confidentiality of private information. Section 26(2) of the Act provides that data collected for statistical purposes shall be treated as confidential and prohibits data producers from disclosing information that is of individual nature obtained in the course of their work. Also section 26 of the NIMC Act provides that no person or body corporate shall have access to the data or information contained in the database with respect to a registered individual entry except with the authorisation of the Commission.³⁹The Commission can authorise such

³⁶ Ibid, 205.

³⁷ No 23 2007.

³⁸ No 9 2007.

³⁹ The National Identity Management Commission (NIMC) established by the Act to maintain a national database, registration of individuals and issuance of national identification cards; NIMC Act, s 5.

access only if an application for the information is made with the authority of that individual or the individual consents to the provision of that information, unless the provision of the information is in the interest of national security, necessary for purposes connected with the prevention or detection of crime or for any other purposes as may be specified by the Commission in a regulation when strictly necessary in public interest.

Paragraph 2.6 of CPF directs that appropriate measures should be established to guarantee protection of data subjects' assets and privacy. Every financial institution should at all times protect data subjects' financial and personal information and should not disclose such information to third parties without the consent of the data subject whose information is sought to be disclose except where such disclosure is required by law or ordered by statute. All personal information of customers (including those with closed accounts) shall be kept in confidence by financial institutions. As a duty of care, financial institutions are obliged to safeguard the privacy of their customers' data.

The above statutes and guidelines to some extent protect privacy but they lack provisions granting individuals' positive control over access to, usage and disclosure of their information by the various entities. An area where Nigerian consumer or data subject had substantial legal right to the control of collection access and usage of his or her personal information is in the telecommunications industry. Nigeria's telecommunications sector regulator, the Nigerian Communications Commission (NCC) in furtherance of its responsibility under the Nigerian Communications Act 2003 (NCA) has made and published several regulations and guidelines for the sector. Relevant for this discourse are the Consumer Code of Practice Regulation 2007 (CCPR)⁴⁰ and the Registration of Telephone Subscriber Regulation 2011 (RTSR).⁴¹CCPR stipulates the minimum standard and set of practices for the provision of services to consumers by licensees (telecommunications service providers). Part VI of the General Consumer Code of Practice (GCCP) annexed as a schedule to CCPR sets out the responsibility of a licensee in the protection of individual customer's information. Paragraph 35 (1) of the Code provides that a licensee may collect and maintain information on individual consumers reasonably required for its business purposes. However, the collection and maintenance of information on individual consumers shall, among other things, be fairly and lawfully collected and processed; processed for limited and identified purposes; relevant and not excessive; accurate; and protected against improper or accidental disclosure. Also, licensees are required to meet generally accepted fair information principles including notice, consumer or data subject choices on collection, use and disclosure of their personal information, their access to collected

⁴⁰SI No 32 of 2007.

⁴¹SI No 35 of 2011.

information to ensure accuracy, security measures to protect such information and redress mechanisms to remedy any failure to observe the measures.⁴²

RTSR complements the GCCP and makes elaborate provisions for data protection, confidentiality and release of subscribers' personal information. Regulation 9(1) of RTSR provides for the right of any subscriber whose personal information is stored in the Central Database⁴³ or a licensee's database to view the said information and to request updates and amendments thereto. A subscriber's information contained in the Central Database shall be held on a strictly confidential basis and no person or entity shall be allowed access to such information and no licensee shall release personal information of a subscriber to any third party (including security agencies) without obtaining the prior written consent of the subscriber except in accordance with the provisions of NCA, regulations and any guidelines or instrument issued from time to time. Even in such permitted circumstances, the data can only be released in a format determined by NCC.⁴⁴ RTSR prohibits and criminalises dealing with subscriber information in any manner inconsistent with its provisions, including retaining, duplicating, utilising a subscriber's information in any business, commercial or other transactions.⁴⁵

While it can positively be asserted that NCC's CCPR and RTSR afford adequate protection to data subjects' personal information, they are of sectoral applications and their scope of application is restricted to the telecommunications industry alone.

3.7 Common Law Tort of Privacy

Commentators do not agree on the utility of tort of privacy in the protection of personal information in Nigeria. Nwauche asserts that a comprehensive protection of information privacy can be achieved through the tort of privacy which not only protects intrusion into individuals' privacy space but also information disclosure.⁴⁶ While noting that, strictly speaking, there is no cause of action for information privacy at common law,⁴⁷ he opines that the tort of breach of confidence protects information privacy, and is important in the development of a constitutional right to privacy. It has even been argued that some principles of information privacy may be gleaned from various tort actions, such as trespass, defamation, nuisance and passing-off. On the other

⁴² General Consumer Code of Practice 2007 para 35(2).

⁴³ 'Central Database' means subscriber information database, containing the biometric and other registration information of all telecommunications service subscribers in the country, which the Commission is required to establish and maintain; RTSR r 4(1).

⁴⁴ RTSR r 10.

⁴⁵ RTSR r 9(3).

⁴⁶ ES Nwauche, 'The Right to Privacy in Nigeria' (2007) 1 *Review of Nigerian Law and Practice* 63, 84.

⁴⁷ *Wainwright v Home Office* [2003] 3 WLR 1137.

hand, Abdulrauf⁴⁸ asserts that, unlike the later development in the English common law which permitted tort actions for breach of privacy, the law applicable in Nigeria does not recognise breach of privacy as an independent tort; rather what is applicable in Nigeria is an equitable action for breach of confidence which is limited in protecting privacy as it involves violation of trust in a relationship. Since there may not be any relationship of trust requiring confidence between individuals and entities that can collect, retain and use their personal information and thereby violate their right to privacy, the tort action for breach of trust cannot provide adequate protection for information privacy.⁴⁹

A clear distinction can be drawn between privacy of space and privacy of information. While tort actions such as trespass, nuisance, defamation, passing-off and deceit can protect the invasion of privacy of space and false information concerning a person, they are not directed at protection of personal information particularly where such information is true. The equitable action of breach of confidence is anchored on relationship of trust between the two parties and cannot stand in the absence of such a relationship which need not exist for there to be violation of contemporary information privacy. It has been rightly noted that one way to conceptualise the development of English law on privacy is that it is 'a creative...fusion of a 'right-based' conception of privacy, reflecting the influence of the European Convention on Human Rights with the traditional incremental approach of the English common law.'⁵⁰ Thus, privacy of information cannot be conceptualised under the English common law of tort as received in Nigeria⁵¹ and tort actions could not provide the needed protection for information privacy; hence the need for legislation in the area.

4. Nigeria Data Protection Regulation 2019

This is the first general regulation on data protection in Nigeria. The Nigerian Information Technology Development Agency (NITDA) (the Regulation) in the exercise of its statutory mandate to create a framework for planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of information technology practices in Nigeria by developing standards, guidelines and regulations for that purpose,⁵² issued the Nigeria Data Protection Regulation (NDPR/the Regulation) in January 2019.

⁴⁸ Abdulrauf (n 9) 121.

⁴⁹ Ibid.

⁵⁰ David Lindsay and Sam Ricketson, 'Copyright, Privacy and Digital Rights Management' in AT Kenyon and M Richardson, (eds) *New Dimensions in Privacy Law: International and Comparative Perspectives*, (New York, Cambridge University Press, 2006) 121, 137.

⁵¹ See Interpretation Act Cap I 23 LFN 2004 s 32(2).

⁵² Nigerian Information Technology Development Agency Act No 28 of 2007 s 6.

4.1 Objectives, Scope and Application

The stated objectives of the Regulation are to safeguard the rights of natural persons to data privacy; foster safe conduct of transactions involving the exchange of personal data; prevent manipulation of personal data; and ensure that Nigerian businesses remain competitive in international trade, through the safeguards afforded by a just and equitable legal regulatory framework on data protection and which regulatory framework is in tune with global best practices.⁵³

NDPR applies to the processing of personal data notwithstanding the means by which the data processing is being conducted, and to all natural persons resident in the country as well as Nigerians residing outside the country.⁵⁴ A data subject under NDPR is an identified or identifiable natural person – one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.⁵⁵ Extending the scope of the application of the Regulation to the protection of personal data of Nigerian citizens residing outside Nigeria is laudable, but it raises the question of its enforceability outside Nigeria. Its enforceability on Nigerian citizens abroad will depend on collaboration with regulatory and law enforcement authorities in other countries.⁵⁶

4.2 Governing Principles of Data Processing

NDPR sets down principles of data processing covering fair and lawful processing, purpose specification, accuracy, consent, security and accountability, comparable to those found in the data protection statutes of other jurisdictions.⁵⁷ Regulation 2.1(1) provides that personal data are to be:

- (a) collected and processed in accordance with specific, legitimate and lawful purpose consented to by the data subject; provided that:
 - i. a further processing may be done only for archiving purposes in the public interest, scientific, historical or statistical research purposes; and
 - ii. any persons or entity carrying out or purporting to carry out data processing shall not transfer any personal data to any person.
- (b) adequate, accurate and without prejudice to the dignity of human person;
- (c) stored only for the period within which it is reasonably needed; and

⁵³NDPR, r 1.0.

⁵⁴Ibid r 1.2.

⁵⁵ Ibid r 1.3 (xiv)

⁵⁶ The Regulation, para 2.11(a) and 4.3(a).

⁵⁷ See for example, GDPR, art 5; UKDPA s 34(1), elaborated on in ss 35 - 40; POPIA, chap 3; Singapore's Personal Data Protection Act (PDPA), No 26 of 2012 pts IV – VI; and US Federal Trade Commission's Information Practice Principles (FIPPs).

- (d) secured against all foreseeable hazards and breaches such as theft, cyber-attack, viral attack, dissemination, manipulations or any kind, damage by rain, fire or exposure to other natural elements.

Processing of data is lawful if at least one of the follows applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the data controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official public mandate vested in the controller.⁵⁸

Processing of personal data in all forms of commercial and other transactions in which data subjects daily engage in, qualifies as lawful purpose under the Regulation. Thus, personal data of a data subject collected while window shopping on the Internet will satisfy the requirement of lawful purpose since such a visit to the website of a business is necessary preliminary to entering into the contract. NDPR prohibits improper motives in processing of personal data; thus, consent for data processing shall not be sought, given or accepted in any circumstance that may directly or indirectly engender propagation of atrocities, hate, child rights violation, criminal acts and anti-social conducts.⁵⁹ Although this provision is necessary to prevent the negative acts in question, the requisite motive can only be determined when any of the acts which are sought to be prevented has taken place except where there has been a manifest conduct towards its commission.

Under regulation 2.3, personal data shall not be obtained except the specific purpose of the collection is made known to the data subject. The data controller is under obligation to ensure that the consent of a data subject is obtained without fraud, coercion or undue influence. A data subject shall have the option to object to the processing of personal data relating to him which the data controller intends to process for the purposes of marketing and should be expressly offered the mechanism to object to any form of data processing free of charge.⁶⁰ A pertinent question here is whether it is only when the data controller intends to process data for marketing purposes that the data subject's right to object arises. If so, how would the data subject be aware of the intention to

⁵⁸ Ibid r 2.2

⁵⁹ Ibid r 2.4 (a)

⁶⁰ Ibid r 2.8.

process his or her personal data for the said purpose so as to raise the necessary objection?

Data processors and controllers are accountable to NITDA or a reputable regulatory authority for data protection.⁶¹ Contracts between data controllers and third parties for processing of personal data must be in writing and it is the responsibility of the data controller to ensure adherence to the regulation.⁶² Accordingly they are required to take reasonable measures to ensure that the other party to the data processing contract does not have a record of violating data processing principles set out in the regulation. This presupposes that there should be publicly available records of violations data processing principles to enable data controllers verify the credibility of entities they intend to engage for processing of personal data. Without such records, it will be difficult to hold them liable for not taking reasonable measures as required to ensure that such persons do not have records of violation of data processing principles. The Regulation does not make provision for the establishment of such a database.

Anyone involved in data processing or the control of data shall develop security measures to protect same; such measures include but are not limited to, protecting systems from hackers, setting up firewalls, storing data securely with access to specific authorised individuals, employing data encryption technologies, developing organisational policy for handling personal data (and other sensitive or confidential data), protection of emailing systems and continuous capacity building for staff.⁶³ The prescribed security measures for the protection of personal data appear to be adequate as they cover all conceivable hazards and breach. However, unlike the legislation of other countries, NDPR does not require responsible parties to regularly confirm the effective implementation of the safeguards and update such safeguards in response to new risks or deficiencies in previously implemented safeguards.⁶⁴ Such a provision is necessary to ensure that responsible parties are under obligation to regularly upgrade their security measures in view of the rapidity with information technology evolves.

4.3 Rights of Data Subjects

NDPR confers a number of rights on the data subject. These include rights to:

- (a) information relating to data processing;⁶⁵
- (b) have personal data deleted;⁶⁶
- (c) restrict processing of personal data;⁶⁷

⁶¹ NDPR, r 2.4 (b)

⁶² Ibid r 2.7.

⁶³ Ibid, r 2.6

⁶⁴ GDPR art 24(1); POPIA s 19(2)(d) and GDPA s 28(2)(d).

⁶⁵ NDPR r 3.1(1).

⁶⁶ Ibid, r 3.1(9).

- (d) be notified of rectification, erasure or restriction of personal data;⁶⁸
- (e) and receive and transmit personal data.⁶⁹

Data controller are mandated to provide the data subject any information relating to processing of data in a concise, transparent, intelligible and easily accessible form, using clear and plain language. A data subject has the right to request the controller to delete personal data or to impose on the data controller restriction in processing his or her personal data under certain circumstance. The data controller shall communicate any rectification or erasure of personal data or restriction to each recipient to whom the personal data have been disclosed unless this proves impossible or involves disproportionate effort. In that case, if the data subject requests, the controller shall inform him or her about those recipients.⁷⁰ A data subject has the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format. A data subject also has the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where the processing is based on consent or contract, and the processing is carried out by automated means.⁷¹ Similarly, in the exercise of right to data portability, a data subject has the right to have his or her personal data transmitted directly from one controller to another, where this is technically feasible; provided that this right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.⁷²

The security measures and information requirement under NDPR falls short of what obtains in other jurisdictions where responsible parties are required, as soon as it is reasonably possible, to notify not only the regulatory authorities but also the affected data subject(s), where there are reasonable grounds to believe that the personal data of a data subject has been accessed or acquired by any unauthorised person, providing sufficient information to allow the data subject to take protective measures against the potential consequences of the compromise.⁷³ The absence of a mandatory requirement of prompt notice to the regulator and data subjects may result in total non-disclosure or delay in disclosure of data compromise, which will consequently impede protective mitigation measures by the data subject. Furthermore, NDPR does not prescribe any mitigating measures that can be adopted on the occurrence of

⁶⁷ Ibid, r 3.1(13).

⁶⁸ Ibid, r 3.1(13).

⁶⁹ Ibid, r 3.1(14).

⁷⁰ Ibid, r 3.1(13)

⁷¹ Ibid, r 3.1(14)

⁷² Ibid, r 3.1(15)

⁷³ GDPR art 34; UKDPA ss 67 and 68; POPIA s 22 and GDPR s 31

personal data breach. This omission is not peculiar to it but is noticeable in even seemingly extensive data protection laws including the GDPR. Although a cardinal aim of data protection laws is the prevention of such breaches, there is need to include in such laws remedial steps to be taken in the event of a breach, since even the most extensive and efficiently enforced data protection laws cannot be fool proof, in light of continuous technological advancement and increasing sophistication of cyber criminals.

4.4 Penalty for Default

NDPR imposes liability on any person who breaches the data privacy rights of any data subject. In addition to any other criminal liability, it imposes fines as follows:

- (a) in the case of a data controller dealing with more than 10,000 data subjects, payment of the fine of 2% of annual gross revenue of the preceding year or payment of the sum of ₦10 million.
- (b) in the case of a data controller dealing with less than 10,000 data subjects, payment of the fine of 1% of the annual gross revenue of the preceding year or payment of the sum of ₦2 million whichever is greater.⁷⁴

Any breach of the regulation shall be construed as a breach of the provisions of the NITDA Act 2007.⁷⁵ Under the Act, any person or corporate body who contravenes or fails to comply with the provisions of the Act commits an offence.⁷⁶ Where an offence is committed by a body corporate or firm or other association of individuals, ~~every~~ the chief executive officer or the body corporate or any officer acting or purporting to act in that capacity ~~or~~ on behalf commits an offence, unless he proves that the act or omission constituting the offence took place without his knowledge, consent or connivance.⁷⁷ Anybody, corporate or individual who commits an offence under the Act where no specific penalty is provided, is liable on conviction to a fine of ₦200,000.00 or imprisonment for a year or to both such fine and imprisonment, for a first offence and a fine of ₦500,000.00 or to imprisonment for a term of three years or to both such fine and imprisonment, for a second and subsequent offence.⁷⁸

4.5 Enforcement and Redress Mechanisms

Within three months after the date of issuance of NDPR, all public and private organisation in Nigeria that control data of natural persons were to make available to the general public their respective data protection policies.⁷⁹ Every data controller was required to designate a data protection officer for the

⁷⁴ NDPR r 2.10

⁷⁵ Ibid r 4.2(6). The import of this also may be that the penalty provisions of sections of the NITDA Act apply to the contravention of NDPR.

⁷⁶ NITDA Act s 17(1).

⁷⁷ Ibid s 17(3).

⁷⁸ Ibid s. 18(1).

⁷⁹ NDPR r 4.1(1)

purpose of ensuring adherence to the regulation, relevant data privacy instruments and data protection directives of the controller. However, a data controller may outsource data protection to a verifiably competent firm or person.⁸⁰ Every data controller or processor shall ensure continuous capacity building for her data protection officers and the generality of her personnel involved in any form of data processing.⁸¹ The three months grace period given to relevant data controllers to comply with the provisions of the Regulation is evidently too short to enable them set up the required data protection mechanisms. Under the GDPR a transitional grace period of two years was recommended for compliance⁸² while POPIA stipulates a grace period ~~was~~ of one year which may be extended to an additional period of up to three months.⁸³ Three months only, as provided in NDPR, for a country that did not have a prior regulation that required the kind of skill and technical capacity envisaged under the Regulation, is to say the least, a herculean task. This period eventually proved to be too short as it was only on 11 July 2019 (six months after its issuance in January 2019) that NITDA released a draft framework for its implementation, known as the Draft Implementation Framework⁸⁴ On 18 May 2020, the Agency issued the Guidelines for the Management of Personal Data by Public Institutions in Nigeria 2020 for the implementation of the Regulation within public institutions in Nigeria.⁸⁵ It was not until November 2020 that NITDA published NDPR Implementation Framework,⁸⁶ a guide to assist data controllers and data administrators/processors understand the controls and measures they need to introduce into their operations in order to comply with the NDPR.

NITDA is mandated to register and license Data Protection Compliance Organisations (DPCOs) who shall on behalf of the Agency and subject regulations and directives of the Agency, monitor, audit, conduct training and data protection compliance consulting to all data controllers.⁸⁷ Where a data

⁸⁰ Ibid r 4.1(2)

⁸¹ Ibid r 4.1(3).

⁸² GDPR Preamble para 171.

⁸³ POPIA s 114(1) and (2).

⁸⁴ See NITDA, *Nigeria Data Protection Regulation 2019: Draft Implementation Framework*, <https://nitda.gov.ng/wp-content/uploads/2019/01/Nigeria%20Data%20Protection%20Regulation.pdf> accessed 5 November 2020.

⁸⁵ NITDA, *Guidelines for the Management of Personal Data by Public Institutions in Nigeria, 2020*, <https://nitda.gov.ng/wp-content/uploads/2020/11/GuidelinesForImplementationOfNDPRInPublicInstitutionsFinal11.pdf> accessed 15 June 2021.

⁸⁶ NITDA, *NDPR 2019: Implementation Framework, 2020* <https://nitda.gov.ng/wp-content/uploads/2021/01/NDPR-Implementation-Framework.pdf> accessed 15 June 2021.

⁸⁷ NDPR r 4.1(4)

controller processes the personal data of more than 1000 data subjects in a period of six months, a soft copy of the summary of the audit shall be submitted to the Agency while on annual basis, a data controller who processes the personal data of more than 2000 data subjects in a period of 12 months shall, not later than the 15 of March of the following year, submit a summary of its data protection audit to the Agency.⁸⁸ The mass media and the civil society have the right to uphold accountability and foster the objectives of the regulation.⁸⁹ Without prejudice to the right of a data subject to seek redress in a court of competent jurisdiction, NITDA is mandated to set up an Administrative Redress Panel (ARP) to handle complaints of breach of the regulation and recommend appropriate remedies.⁹⁰ In October 2019, NITDA inaugurated an ARP which is comprised of industry professionals and representatives of relevant government agencies that will provide an alternative dispute resolution mechanism to address grievances in a non-litigious manner.⁹¹

5. Conclusion

NDPR is currently the most comprehensive legislation on personal data protection Nigeria. Although not as comprehensive as the GDPR or the personal data protection laws of some African countries notably, South Africa and Ghana, it provides a pedestal on which the country can progressively fashion a robust data privacy regulation. In spite of the shortcomings in its provisions, some which have been highlighted above, there appears to be a consensus of opinion that it is a step in the right direction⁹² and a welcome development⁹³ and should be implemented to logical conclusion, as it provides some measure of protection for personal data that hitherto did not exist.

One major shortcoming of NDPR is that it is a subsidiary legislation. Although a subsidiary legislation has the force of law as the enabling statute, because it does not pass through the rigorous law making process of the legislature, its provisions may not be very robust. A full Act establishing an independent regulator specifically charged with the responsibility for the regulation of personal data in the fashion of UKGDP, GDPA and POPIA is

⁸⁸ Ibid r 4.1 (6) and (7).

⁸⁹ Ibid r 4.1(8).

⁹⁰ Ibid r 4.2.

⁹¹ One Trust Data Guidance 'Nigeria: NITDA Issues Statement on Data Protection' <<https://www.dataguidance.com/news/nigeria-nitda-issues-statement-data-protection>> accessed 12 April 2022.

⁹² Oyeyemi Aderibigbe, 'An outlook on the Nigerian Data Protection Regulation 2019' *Businessday* (11 April 2019) <<https://businessday.ng/legal-business/article/an-outlook-on-the-nigerian-data-protection-regulation-2019/>> accessed 5 November 2019.

⁹³ See also D Oturu 'An Overview of Big Data and Data Protection in Nigeria' (19 April 2019) <<https://www.aelex.com/wp-content/uploads/2019/05/An-overview-of-Big-Data-and-data-protection-in-Nigeria-1-compressed.pdf>> accessed 2 Nov 2019.

preferable. There is a Bill⁹⁴ presenting pending before the Senate of the National Assembly, having earlier been passed by the House of Representatives, which seeking to enact an Act to establish a Data Protection Commission for the protection of personal data and to regulate the processing personal information and related matters. The National Assembly is urged to expedite action on the passage of the Bill and to use it to establish a robust legal framework for personal data protection and lay to rest the lurking argument on the legitimacy of NDPR and the worrisome foot-dragging by NITDA in its implementation.

In the meantime, there is an urgent need for NITDA to step up the implementation of the NDPR. Complaints from data subject are important to trigger off administrative and other enforcement mechanisms in a regulation such as NDPR. Public awareness is vital in ensuring effective enforcement of a protective regulation such as NDPR. If individuals whose rights are protected by a regulation are not aware of the steps to take to enforce the rights granted them under the regulation, such rights become a mirage. To ensure effective enforcement of NDPR there is a need for NITDA to put in place an efficient public enlightenment programme to educate Nigerians on their rights and the redress mechanisms under the NDPR.

⁹⁴ SB 1 2019.

APPRAISAL OF THE CONCEPT OF MATRIMONIAL PROPERTY UNDER NIGERIAN LAW

Chinelo Immaculata Jane Ugwu *

Abstract

Family and matrimonial contracts are often oral, unwritten and made without fear of breach. Consequently, spouses contribute both financially and non-financial towards the success of the marriage and acquisition of their matrimonial home. Often, the shared intentions of the spouses is usually to create a comfortable home for the family and each make indirect, invisible and unquantifiable sacrifices towards the success of the marriage. The State High Court is conferred with unlimited discretion in respect of matrimonial property and in exercising this discretion it often insists that a party must show evidence of substantial and direct financial contributions to the acquisition of matrimonial property before joint ownership of matrimonial property is inferred. Basically the library based research, is adopted in this article both the primary and secondary sources of law are cited. The findings of this article are: (1) Where there is a document of title in favour of one party to the marriage, that property is lost as a matrimonial property. (2) Where a party is insisting that the property in issue is jointly owned, that party is responsible for producing evidence to the effect that both parties contributed adequately to the acquisition of the said property, whether financially or otherwise. (3) Oral evidence, even, about the parties' private arrangements cannot be allowed to contradict the content of document of title. This article recommends for a statutory definition of matrimonial property that will ingrain the socio-cultural norms and values regarding marital relations as a communal and partnership arrangement.

Keywords: Property, Matrimonial property, Marital asset, Statutory marriage, Customary marriage readjustment

1. Introduction

The word 'property' refers collectively to the rights in valued resources such as land, chattels, or an intangible. It is a 'bundle of rights' and includes the right to possess and use, the right to exclude and the right to transfer.¹ Therefore property in law connotes both incorporeal (non- physical such as leases, mortgagees, share, insurance etcetera) and corporeal (physical property). On the other hand matrimonial property or marital property refers to property that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution.² The Court in *Anieto v Anieto*³ explained marital

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¹ BA Garner, *Black's Law Dictionary* (10th edn 2014) 1410.

² Ibid 1410.

³ (2019) LPELR-47223 (CA).

property, when it stated, that, ‘it is however essential that the property should have been purchased in the course of the marriage or where the property was purchased before the marriage was completed after and in the course of the marriage, as in the case of a property purchased on mortgage’. Therefore, marital property can be seen as a property that its full ownership was acquired in the course of marriage by any of the spouses.

Marital property is one of the matters over which angry divorcing spouses disagree. This is made prominent by the passage of various laws and judicial decisions permitting women to acquire property⁴. The law generally permits the parties to manage their relationship to their property during marriage, but upon breakdown, it always sought for a way to strike a balance between the parties and marital property in issue. The Matrimonial Causes Act 1970 (MCA)⁵ and Married Woman Property Act 1882 (MWPA)⁶, give court discretion to achieve equity and fairness in marital property action. The courts are enjoined to be equitable in benefiting all the parties involved and are bestowed with a wide discretion in doing so. This equity jurisdiction covers all properties of the parties whether jointly or separately acquired. While this equity jurisdiction of the court is well defined, the problem that they have faced over time is how to exercise this jurisdiction. Generally the courts approach is to exclude from their equity jurisdiction property over which formal title is shown.⁷

This approach makes the equity jurisdiction of the court in matrimonial property problematic. Perhaps the problem stems from the absence of a specific marriage centred definition of matrimonial property in the statute. The consequence is that the courts restrict their jurisdiction by focusing on finding where the title lies (usually in the man) and exclude property which title is located from their equity jurisdiction. This is often disadvantageous to the women who are usually non-title land user. This position ignores the socio-cultural underpinning, orientation and environment of marriage patriarchy in Nigeria and generally disables women in relation to property rights.⁸ The consequence is that equity, which is the objective of the jurisdiction, fails, and women are further deprived of property rights. This article recommends for a statutory definition of matrimonial property over which court can exercise jurisdiction. Such definition should remove discretion from the court regarding specification of property that it can readjust, recognize and include the legal, social and cultural significance of marriage as its core basis and promotes

⁴ *Onyibor Anekwe & Anor v Mrs Maria Nweke* (2014) LPELR-22697(SC); *Nzekwu v Nzekwu* (1989) 3 SCNJ 167.

⁵ Cap M7 Laws of the Federation (LFN) 2004.

⁶ The Married Women Property Act 1882, applicable to Nigeria as a Statute of General Application.

⁷ Micheal Attah, ‘Divorcing Marriage from Marital Assets: Why Equity Fail in Property Readjustment Actions in Nigeria’ (2018) 62 (3) *Journal of African Law* 427– 446.

⁸ *Ibid.*

communal property ideal during the subsistence of the marriage. This would prevent the court from using their discretion to restrict their equity jurisdiction.

2. The Concept of Matrimonial Property under the Customary Law

This article is concerned with statutory marriage. However, for purposes of clarity, it is necessary to discuss Customary Law position on marital property. Customary and Islamic Marriages⁹ share property after divorce according to customs and Islamic teachings that are not contrary to the Constitution of Nigeria. Such customs must not be repugnant to natural justice, equity and good conscience. Generally, most customs vest properties after divorce on the husbands and not the wives, even where the wives contributed to the property. This practice is against the hallowed principles of fairness and equality as enshrined by the constitution.

Under the customary law, both the man and the woman can acquire property either before or during the marriage. The woman is not barred from holding or acquiring property. Also when the man acquires a property, he has sole interest or right over the property. When a marriage under the customary law is been dissolved, the woman has no right to claim for settlement of property even if she contributes to the acquisition of such property. She cannot through a court order compel her husband to share property with her.¹⁰ However, the above position of the customary law position on marital property cannot stand the test of time, considering the recent developments in law. The Supreme Court in analysing “whether any culture that disinherits a daughter from her father’s estate or wife from her husband’s property should be punitively and decisively dealt with held as follows:

I hasten to add at this point that the custom and practices of Awka people which the appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century society setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious discrimination are over. Any culture that disinherits a daughter from her father’s estate or wife from her husband’s property by reason of God institute gender differential should be punitively and decisively dealt with. The

⁹ Islamic Marriages refers to marriages conducted under the Islamic law. Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain, more permanent and more universal than the English common law” Per Wali JSC in *Alkamawa v Bello & Anor* (1998) LPELR-424 (SC). For this reason, this article will limit its discussion to customary marriages.

¹⁰ Resolution Law Firm, ‘Sharing Property After divorce in Nigeria’ (2020) <<https://www.resolutionlawng.com/sharing-of-property-after-divorce-in-nigeria>> accessed 17Nov 2021.

punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she had no male child, is indeed very barbaric, worrying and flesh skinning. It is indeed much more disturbing especially where the counsel representing such perpetrating clients, though learned, appears comfortable in identifying, endorsing and also approving of such a demeaning custom. In similar circumstances as the case under consideration, this court in *Nzekwu v Nzekwu* (1989) 3 SCNJ page 167 held amongst others and ruled “that the plaintiff had the right of possession of her late husband’s property and no member of her husband’s family has the right to dispose of it or otherwise whilst one is still alive”.¹¹

3. Statutory Provisions on Matrimonial Property

The relevant laws on matrimonial property are MCA and the MWPA. In divorce situation section 72 (1) MCA provides that the court may by order require the parties to the marriage, or either of them to make, for the benefit of all or any of the children of the marriage such a settlement of property to which the parties are, or either of them entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case. S. 72(2) MCA provides that the court may make such orders with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post –nuptial settlements on the parties to the marriage or either of them. Section 17 MWPA provides that in any question between husband and wife as to title or possession of property either party may apply to a judge and the judge may make such order with respect to the property in dispute as he thinks fit or may direct any inquiry touching on the matters in question to be made in such manner as he shall think fit. The MWPA applies to couples married under the Act that are not divorced or divorcing.

From the above provisions the range of the courts discretion under section 72 of MCA appears unlimited. Section 72(1) MCA grants discretion to courts to settle property of divorced couples in a manner that is ‘just and equitable in the circumstances of the cases.’ It is only limited by the requirement for the court to be just and equitable in exercising its jurisdiction in line with needs of spouses and their children. It could apply in situation where the marriage is void¹², this is in line with section 69 MCA which provides that void marriage can ignite the courts equitable jurisdiction. The section 72 (1) (2) of the MCA provisions covers both property jointly and separately owned by the parties and the ones acquired during and before the marriage. The above section applies regardless of where title lies and ownership of property is not in issue. It does not exclude any type or category of property from the court’s jurisdiction, both corporeal

¹¹ Per Ogunbiyi JSC in *Onyibor Anekwe & Anor v Mrs Maria Nweke* (2014) LPELR-22697(SC) (36-37, paras A-B)

¹² *Oghoyone v Oghoyone* (2010) LPELR-4689(CA).

and incorporeal property acquired during marriage is covered as matrimonial property.

Therefore, the court has unlimited powers in determining the fate of all properties of spouses where there is divorce. It does not focus on ownership of property, since undoubtedly ownership rests on the marriage union and their participants. Rather it focuses on the management (sharing and settlement) of the property the benefits of the spouses and their children, to ensure post marriage wealth redistribution and adjustment.¹³

The effect of the above provisions is that all properties belonging to the parties are to be regarded as matrimonial property and court may decide to readjust. The purpose of readjustment is to be fair to both parties. Also, the courts discretion will be fettered where it focuses its equity jurisdiction on making findings as to who between the parties has title to a particular property so as to declare exclusive ownership on that party. The exercise of such jurisdiction would run counter to the basis of its equity jurisdiction.¹⁴ This is because it has the consequence of reducing the range of property that the court can readjust. More so, it can prevent the other party and children of the marriage (if there is any) from benefiting from the matrimonial property.

4. The Approach of the Nigerian Courts in Exercising Jurisdiction over Matrimonial Property

By agreement, couple may settle their property through a pre-marriage agreement (pre-nuptial contract) or a post-marriage agreement (post-nuptial contract). Above all, all agreements towards the sharing of marital property must be presented to a State High Court for the judge to verify it and ensure that it is 'just and equitable in the circumstances of the cases' in line with the provisions of the MCA. Only the State High Courts and High Court of the Federal Capital Territory, Abuja, can entertain and resolves cases of divorce and settlement of marital property in statutory marriages.

The courts in Nigeria usually proceed to locate title using evidence-based tools, worsened by the adversarial technicalities of pleadings and proof. Whoever has legal title for which there is documentary evidence retains separate ownership, and such property is excluded from the courts equity jurisdiction as a matrimonial property. Generally, the parties may have only one piece of land or house that has served as their matrimonial home. And the parties might have pooled resources to acquire the land or erect the house. To the woman most times, proving ownership of such property is often a herculean task, considering the cultural principles underpinning marital relations in Nigeria. The courts

¹³ Onyedikachi Umah, 'Who Takes Over the Property after Divorce?' (2021) <<https://learnnigerianlaws.com/who-takes-over-the-property-after-divorce/>> accessed last on 17 Nov 2021.

¹⁴ Attah (n 7).

adopt the strict property rights approach in ordering for redistribution, regardless of economic analysis of the worth of a housewife, this often leaves the financially weaker spouse (usually the wife) at an economically disadvantaged position.¹⁵ Therefore, the courts approach often defeats the equity objective of the jurisdiction.

Accordingly, in *Oghoyone v Oghoyone*¹⁶ the Court of Appeal held that property separately owned by the parties during the marriage are not matrimonial property, while the ones jointly owned are retained as matrimonial property. The ones jointly owned can be sold by order of court and its proceed shared between the parties in accordance with section 17 of the Married Women's Property Act which confers on the judge power to make orders in respect of property in dispute as he thinks fit such an order must be fair, just and equitable. Consequently, Owoade JCA in *Essien v Essien*¹⁷ held that a direct financial contribution to the purchase price of the matrimonial home or to the repayment of the mortgage instalments in respect thereof, was sacrosanct before joint interest could be inferred.

Also, in *Adaku Amadi v Edward Nwosu*¹⁸ the appellant husband sold the house which served as their matrimonial home and moved to a different city. The respondent refused to vacate the house. The Respondent purchaser sued for declaration of title, injunction and damages for trespass. The Appellant could not produce evidence to support her claim that she has interest in the property. Affirming the ownership of the husband as the owner of the matrimonial home Kutigi JSC (as he then was) said that '...when she came to testify in court, she ought to have explained the quality and quantity of her contribution, she also ought to have given particulars of the contribution which would have enabled the court to decide whether or not she owned the property with PWI (her husband)'. And on this basis, the court held that the house in question is not jointly owned. Therefore, where a spouse claims joint ownership of property, he must be able to quantify his contribution. He must give detailed particulars and support them where necessary with receipts of what he bought towards the building of the property.

Similarly, in affirming the above position, Tukur JCA (as he then was) in *Odedola v Odelola & Ors*¹⁹ said:

¹⁵ CJ Efe and OE Eberechi, 'Property Rights of Nigerian Women at Divorce: A Case for a Redistribution Order' (2020)

<<https://journals.assaf.org.za/index.php/per/article/view/5306>> accessed 17 Nov 2021.

¹⁶ *Oghoyone v Oghoyone* (2010) LPELR-4689 (CA) per Rhodes –Vivour JCA, para B.

¹⁷ (2008)LPELR-4049(CA); *Gissing v Gissing* (1970) 2 ALL ER 780; *Rimmer v Rimmer* (1952) 2 ALL ER 803 at 869.

¹⁸ (1992) LPELR-442 (SC); (1992) 6 SCNJ 59.

¹⁹ (2016) LPELR -42222(CA) 12 paras A-E.

...in her effort to establish a joint ownership of the property the Appellant tendered Exhibits B and L I have examined the exhibits relied on by the Appellant which are invoices bearing her name showing evidence of some repairs effected on the property. But as rightly pointed out by the learned trial judge these exhibits by themselves cannot translate into making the Appellant a joint owner of the property which is in the sole name of the 1st Respondent. For the Appellant to succeed, she must adduce evidence to show what direct financial contribution she made to warrant co-ownership of the property. The law is trite that a direct financial contribution to the purchase price of the matrimonial home or to the repayment of the mortgage instalments in respect of the property is necessary before joint interest could be inferred.

In *Onabolu v Onabolu*²⁰ the wife/petitioner claimed among other, against her husband that their joint matrimonial property be shared equally. The court having examined all the pieces of evidence given by the wife/petitioner and husband/respondent on the issue of joint ownership of the property found that evidence of the husband positively established that he bought the land over which the property was built. The Court of Appeal held to the effect that: ‘it is settled law that a person who claim joint owner of a property must be able to quantify his contribution. He must give detailed particulars and support them where necessary with receipts of what he bought towards the building of the property.’

Therefore, it follows that substantial and ascertainable contribution in the acquisition of matrimonial property is the qualification for distribution of marital property upon divorce in Nigeria. This position is anti –marital and does not take into cognizance the reality that the cultural marital norms and values foster common ownership of property and a strong female deference to men.²¹ In Nigeria, generally a woman does not receive land from her natal family. Even when a woman receives some grant, her right is usually usufruct.²² Where it is titular, distance usually prevents her from claiming it and exercising control over it as her responsibilities to husbands family prevails. This applies regardless of the modern developments in law granting proprietary rights to women.

Also it is socio cultural awkward for a married woman to acquire separate landed property. Even where she provides the entire income, with few exceptions, she is content to have land and other costly item purchased in her husband’s name. And for some cultural and religious reasons, the wife will not usually have monopoly of documentary evidence to show the internal family arrangement and negotiations regarding how property was purchased or income

²⁰ (2005) 2 SMC 135.

²¹ Attah (n 7).

²² Per Nnamani JSC in *Nzekwu v Nzekwu* (1989) LPELR-2139(SC); *Aniekwe v Nweke* (2014) 9NWLR (Pt 1412) 393 – customary law allows women (widow)possessory in the family estate for life.

was generated or spent. And the law is that oral evidence cannot be allowed to be given to add, vary contract that parties have reduced into writing.²³ Consequently her use of land is generally non-titular, informal and secondary as a married woman.

This approach is simply, garbage in, garbage out system. In this a husband or wife receives only what he/she proves to have directly contributed financially or non-financially towards the property of the marriage.²⁴ And whatever contribution that cannot be proven is lost and marital property lost too. It is title finding oppressive and highly conservative. It does not consider the indirect, invisible and often unquantifiable contributions of spouses towards marital properties.²⁵

It is on its own, a contradiction of the principle of family contract, where contracts are often oral, unwritten, made in beds and kiss, without fear of breach of contract. It is discriminatory, male – biased and divisive. It treats marital property and contributions to it in isolation to all other marriage sacrifices and contributions and also expects every family agreement to be documented. It is an unfair approach designed to oppress women and wives, and has a strong origin in the customary laws in Nigeria, where wives are mere helpers and properties of their husbands. This approach is a sympathizer to repugnant customary systems, where ‘wives are mere properties and as properties, cannot own properties’. It puts the onus on wives to show documentary proofs of their contributions to the ownership of marital property. Even where there are obvious proof that wives earned more and even took care of other family affairs and cost.²⁶ However, of recent, the court appears to be departing from the above approach of title finding in marital property to considering the direct and indirect, visible and invisible, quantifiable and unquantifiable contributions of spouses towards acquiring their marital properties. Therefore, marital properties are considered to be jointly owned by both spouses, since both contributed in diverse ways towards the marriage itself and not towards specific items and properties. This recent approach by the courts is liberal, open minded and unbiased towards any spouse or sex, by treating all spouses equally and fairly. The court relies on the principle of equity to determine the rights of spouses to a property and not on proof of financial /non-financial contributions to the property. This is a property redistribution model. Under this, every ex-spouse is compensated from the wealth of their union. The sense here is that while a

²³ Per Rhodes-Vivour, *JCA Oghoyone v oghoyone* (2010) LPELR-4689, CA (pp 19-20, paras. F-A).

²⁴ *Anieto v Anieto* (2019) LPELR-47223 (CA).

²⁵ Other cases where this approach was enforced includes: *Akinboni v Akinboni* (2002)5 NWLR (Pt 761)564; *Egunjobi v Egunjobi* (1976)2FNLR 78; *Nwanya v Nwanya* (1987) 3 NWLR (Pt 62) 697; *Sodipe v Sodipe* (1990) 5WRN 98.

²⁶ *Odelola v Odelola* (2016) LPELR CA (p 13 paras A-E); *Essien v Essien* (n 17); *Onwuchekwa v Onwuchekwa* (1995) 5 NWLR (Pt 194) 739.

spouse (mostly a wife) makes food, babysits and focuses on house chores, she indirectly contributes to the purchase of any marital property by her spouse. With this approach, the cases of Jeff Bezos and Bill Gates (where their wives got chunks of the investment of their husbands, without having any direct contributions to such) would have also been same in Nigeria. This approach is equitable and reflective of Nigerian families.²⁷

In the face of marital realities, wives often play non-financial roles towards property acquisitions and such must not be left out in the sharing of marital properties. In some cases, the wives earn salaries and own large investments, after all they are human beings. Where because of undeniable closeness to children, wives orally agree to focus their wealth on education and advancement of the children, while husbands focus theirs on marital properties, it is injustice for any court to deny that the wives are co-owners of the marital properties.²⁸

In *Anieto v Anieto*²⁹ the Court of Appeal held inter alia ‘...it is correct that the contribution of a party does not necessarily have to be in nature of cash outlay for the purchase of the property. It can be by way of moral and/financial contribution to the business of a husband by a wife’. Accordingly it held that:

Though the respondent might not have contributed financially or in the nature of cash outlay towards the purchase of the land and subsequent development thereof, there is uncontroverted evidence that she actively contributed towards the success of the business of the appellant, which ultimately fetched the money with which the land was developed. In the circumstances, it will be unjust and inequitable for the court, being of law and equity, to allow that to happen. The learned trial judge was therefore right when he ordered that the property in question be sold and the proceeds of sale be equally shared between the appellant and the respondent.

Thus, if a fulltime wife manages the husband’s affairs while the husband goes ahead and excel in his career, in event of divorce, equity will not allow such a woman to go empty handed. In *Kafi v Kafi*³⁰ the husband contended that the wife was not a joint purchaser or developer of the property with him. The court in rejecting the argument held that there was evidence that the wife actively managed the husbands business, she actively participated in the supervision and construction of the husband’s property and the wife provided the necessary support for the husbands business. The pendulum of justice swung in favour of the wife. In *Muller v Muller*³¹ a man claimed a joint ownership of a marital property. The court held that ‘as husband and wife there is nothing wrong in buying property in the name of one of the parties. Such still remains marital

²⁷ Umah (n 13).

²⁸ Ibid.

²⁹ (2019) LPELR-47223 (CA).

³⁰ (1986) 3 NWLR (Pt27) 175.

³¹ *Muller v Muller* (2005) LPELR-12687 (CA); (2006) 6 NWLR (Pt 977) 627.

property which belongs to the parties'. Again, in *Okere v Akaluka*³² the court held that sometimes the indirect contributions of the wife to the marital property cannot be quantified in monetary terms which would entitle her to a share in the property. This accords with modern reality particularly, where the parties were husband and wife of Christian and statutory marriage.

Similarly in the English case of *Rimmer v Rimmer*,³³ both the husband and wife were wage earners. They bought a house in the name of the husband as the matrimonial home. The wife provided the deposit for the house. The rest of the purchase money was borrowed on the security of a mortgage from a building society in the name of the husband. The remainder was repaid by the wife out of her money at a time her husband was on war service. The wife provided all the furniture for the home out of her own resources. When subsequently, the husband left the wife and the house was sold, the proceeds were shared equally between them on a summons under section 17 of MWPA. Therefore, as Rhodes Vivour JCA succinctly puts it, with respect to matrimonial property 'it would be unconscionable for any party to claim exclusive ownership. Bearing in mind the changing social and economic realities, a judge is to ascertain the parties shared intentions, actual, inferred with respect to the property in the light of their conduct. In that light I am satisfied that when the going was good the parties made contributions to ensure that they had good living accommodation. When the going turns bad it is only right and equitable that each side recoups its contribution and call it a day.'³⁴

The court in exercising its discretion in matrimonial property usually considers the circumstances of the case including the fortune of the parties and their responsibility. As such the court has a wide discretionary power to share properties as just and equitable and is enjoined to act judiciously. The children produced by the marriage are also member of the family. The court will consider sharing of property for the benefit of any child below 21 years of age except in special circumstances where it is justifiable to settle the property for his or her interest at the age of above 21 years.³⁵ Awotoye, JCA in *Mgbeahuruike v Mgbeahuruike*³⁶ held that the court in determining a question of settlement of matrimonial property under section 72 MCA is expected to consider (1) whether or not the property in question was acquired in the course of marriage? (2) What is the contribution of each party to the cost of the acquisition? (3) What is just fair, and equitable to do in the circumstance in settling the property?³⁷ In *Ibeabuchi v Ibeabuchi*³⁸ the question that arises is

³² (2014) LPELR-24287 (CA) 1, 60-61.

³³ *Rimmer* (n 17).

³⁴ Per Rhodes Vivour JCA in *Oghoyone v Oghoyone* 20-22, paras B-B.

³⁵ MCA s 72(3).

³⁶ (2017)LPELR-42434(CA) (10-11, paras E-D).

³⁷ *Coker v Coker* (1964) LLR 188; *Amadi v Nwosu* (1992) 6 SCNJ 59; *Egunjobi v Egunjobi* (1974) 4 ECSR.552; *Hayes v Hayes* (2000) 3 NWLR (Pt 648) 276 at 293.

whether the lower court exercised its discretion judiciously and judicially when it awarded the property of the Appellant at No 48, Sarki Yaki Road, Sabon Gari, Kano to the Respondent. The court held that the most firmly established guidelines that courts are enjoined to take into consideration in determining a question of settlement of property is whether or not the property in question or some other property was acquired by the parties or by one of the parties during the course of the marriage, and if so, what was the contribution of each party to the cost of acquisition. It is correct that the contribution of a party does not necessarily have to be in the nature of a cash outlay for the purchase or development of the property. It can be by way of moral and / or financial contribution to the business of a husband by a wife where the property is purchased from the profits of the business. It is however essential that the property should have been purchased in the course of the marriage or where the property was purchased before marriage, that the payment for the property was completed after and in the course of the marriage, as in the case of a property purchased on mortgage.

Furthermore, there is a presumption of advancement, where a husband buys a property in the name of his wife. In such circumstances, the law would presume an intention to gift the property to the wife or the husband as the case may be. This presumption is rebuttable by proving that no gift was intended. This extends to where a husband acquires title to land with his sole funds but inserts his wife's name as a co-owner. In such cases, the wife will acquire an equal interest in the property. The husband may prove that his wife contributed nothing financially but the court would presume that the wife's half share is advancement or a gift to her. However, there is no presumption of advancement where a woman buys property in the name of her husband. In *Julugbo & Anor v Ainu & Anor*³⁹ the court held that when a wife buys a property and conveys it in the name of her husband, there is no presumption of advancement in favour of her husband, he holds it in trust for his wife. However, if the husband purchases a property in the wife's name, it is prima facie a gift to her.⁴⁰ The above law aims at stopping male chauvinism and treacherous attitude overtime and to save the loyal wives who bought properties in their husband's names only to be told that the documents speak for themselves. Thus, the husband merely holds the property in trust for the wife. Also, it is the primary duty of the husband to provide for the home and not the other way round.

³⁸ Per Habeeb Adewale Olumuyiwa in *Ibeabuchi v Ibeabuchi* (2016) LPELR – 41268(CA) 30-31 paras A-D.

³⁹ (2016) LPELR-40352(CA) Per Justice Amina JCA 27-29 paras A-D; *Silver v Silver* (1958) 1All E.R 523.

5. Findings

The position of the Nigerian courts with respect to matrimonial property is that where there is a document of title in favour of one party to the marriage, that property is excluded from being matrimonial property. A party that insists that a property in issue is jointly owned is responsible for producing evidence to the effect that both parties contributed adequately to acquire the property, whether financially or otherwise. Oral evidence, even, about the parties' private arrangements, cannot be allowed to contradict the content of document of title.

Accordingly, these judicial decisions have blurred the perceived ideal matrimonial property. When a party is striving to show joint ownership, it is simply asking that the property be shared using a formula. A core objective of that sharing jurisdiction is to benefit parties and their children. However, parties do not generally think in terms of separate or joint ownership in marriage. They see properties acquired during marriage from a communal perspective. Also properties and business success of parties to a marriage would usually be achieved by their joint efforts, which may not necessarily be quantifiable in monetary terms.

6. Recommendations and Conclusion

There is need for a statutory definition of matrimonial property by reference to legal, social and cultural marriage in Nigeria Context. The result will be that all property acquired by the parties or any of them during the subsistence of marriage should be regarded as matrimonial property. This position was adopted by the court in *Muller v Muller* and *Rimmer v Rimmer*.

There is need for a statutory definition of matrimonial property that will ingrain the socio-cultural norms and values regarding marital relations as a communal and partnership arrangement. This could maintain the shared intentions of the parties during the subsistence of the aborted marriage and would prevent the court from using their discretion to restrict their equity jurisdiction to determining titular ownership. The effect is that all properties belonging to the parties are to be regarded as matrimonial property and are shared on just and equitable basis for the benefits of the children of the marriage and the parties.

APPRAISAL OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR SUSTAINABLE ENVIRONMENTAL MANAGEMENT IN NIGERIA

Felicia A Anyogu* and Empire Hechime Nyekwere**

Abstract

The legal and institutional framework for sustainable environmental management (SEM) in Nigeria consists of the laws and statutory institutions (agencies) regulating the environment. There are several laws and institutions which seek to protect and sustainably manage the Nigerian environment from degradation, especially, through the activities of the oil and gas companies operating in the country. Oil and gas exploration, extraction, and production in Nigeria, especially, in the Niger Delta region of the country, have caused severe environmental degradation in the region, owing to the legacy of decades of oil spills and gas flaring. Despite the laws and institutions intended to protect and sustainably manage the Nigerian environment, the nation's environment keeps deteriorating at an alarming rate. The aim of this paper is to appraise the laws and institutions expected to sustainably protect and manage the environment of Nigeria. The paper adopted the doctrinal research methodology and generated its data through local statutes, case laws, policy documents, textbooks, journal articles, seminar papers, manuscripts, newspaper reports, monographs, some unpublished works, and internet websites. The paper carefully examined the principal laws in Nigeria dealing with environmental protection and management with a view to reviewing their provisions and the method of environmental protection and management through these laws. Also, the paper examined the principal statutory institutions or agencies regulating the Nigerian environment with a view to achieving national environmental sustainability. The paper found that the laws enacted to protect the Nigerian environment are generally weak on the account of some flaws contained therein. The paper also found that the statutory institutions established to enforce environmental laws are ineffective in their enforcement mandate.

Keywords: Sustainable development, oil pollution, ecosystem degradation, agencies, regulation

1. Introduction

Nigeria, particularly, its Niger Delta region, represents a closely woven, long-standing relationship between people and the environment. Nigeria's Niger Delta region is the largest wetland in Africa and among the third largest in the world.¹ About 2,370sq/km of Nigeria's Niger Delta consists of rivers, creeks, estuaries and stagnant swamps cover approximately 8600sq/km, the Delta mangrove swamp

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¹S C Izah, 'Ecosystem of the Niger Delta region of Nigeria: Potentials and Threats' (2018) 2 (4) *Biodiversity International Journal* 339; CNP Okonkwo, L Kumar and S Taylor, 'The Niger Delta wetland ecosystem: What threatens it and why should we protect it?' (2015) 9 (5) *African Journal of Environmental Science and Technology* 452.

spans about 1900sq/km as the largest mangrove swamp in Africa.² Nigeria's environment, among others, harbours a tropical rainforest ecosystems comprising of diverse species of flora and fauna, aquatic and terrestrial species, and a coastal area of mangrove vegetation traversed by many rivers, tributaries and creeks.³ Nigeria is blessed with abundant natural resources, including large oil and gas deposits, extensive forests, good agricultural land, and water resources supportive of numerous species of terrestrial and water-living organisms.⁴

Since pre-colonial days, oil and gas has played a crucial role in the Nigerian economy. However, the exploitation of oil and gas has hampered the nation's potential for environmental sustainability as one fundamental problem that faces Nigeria today is the degradation of its environment.⁵ The Nation's future is being threatened by environmental degradation and deteriorating economic conditions which are not being addressed by present policies and actions.⁶ Land resource degradation, renewable resource depletion and oil and gas pollution are now the irreversible consequences of prolonged dependence on oil and gas exploitation by the nation.⁷ The rich biodiversity of Nigeria, especially, its Niger Delta region, is under threat from unsustainable oil and gas mining activities. Nigeria has lost a large portion of its protected areas in the last five decades as a result of these pressures.⁸

²UC Anochie and OM Onyinye, 'Evaluation of Some Oil Companies in the Niger Delta Region of Nigeria: An Environmental Impact Approach' (2015) 3 (2) *International Journal of Environment and Pollution Research* 16; LF Awosika, 'Impacts of Global Climate Change and Sea Level Rise on Coastal Resources and Energy Development in Nigeria' in JC Umolu (ed), *Global Climate Change: Impact on Energy Development* (Damtech Nigeria Limited 1995).

³See NC Ugochukwu, *Sustainable Environmental Management in the Niger Delta Region of Nigeria: Effects of Hydrocarbon Pollution on Local Economy* (Unpublished PhD Thesis, Faculty of Environmental Sciences and Process Engineering, Brandenburg University of Technology Cottbus, 2008) 29; E Hutchful, 'Oil Companies and Environmental Pollution in Nigeria' in A Claude (ed), *Political Economy of Nigeria* (Longman Press 1985) 114; See World Bank, *Defining an Environmental Development Strategy for the Niger Delta, Nigeria* (1st edn, World Bank, 1995) 24.

⁴See HY Okhumode, 'Addressing Environmental Health Problems in Ogoni land through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4 (2) *Environments* 28.

⁵Ugochukwu (n 3); See AO Atubi, 'Effects of Oil Spillage on Human Health in Producing Communities of Delta State, Nigeria' (2015) 4 (8) *European Journal of Business and Social Sciences* 15.

⁶See Ugochukwu, *ibid* 27.

⁷*Ibid* 28; UJ Ibok, 'Gas Flaring and Venting Associated with Petroleum Exploration and Production in the Nigeria's Niger Delta' (2013) 1 *American Journal of Environmental Protection* 70.

⁸See IUCN Niger-Delta Panel, 'Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta: Main Report including Recommendations for the Future' A Report by the Independent IUCN-Niger Delta Panel (IUCN-NDP) to the Shell Petroleum Development Company of Nigeria (SPDC) (Gland, Switzerland: IUCN

The environment of Nigeria has been deteriorating at an alarming rate due to unsustainable oil and gas exploitation. A number of oil pollution impact assessment studies suggest that the high levels of pollution from oil and gas operations in Nigeria, particularly, in the Niger Delta region of the country, has severely impacted habitats, livelihoods and people.⁹ Decades of a near complete lack of attention to environmental concerns have turned Nigeria, especially, its Niger Delta region, into one of the world's most endangered ecosystems; an epicentre of human rights abuses and environmental injustice.¹⁰ Thus, an urgent need exists to implement mechanism to protect the life and health of the region's inhabitants and its environmental systems from further deterioration.¹¹

This paper which aims to appraise the legal and institutional framework for SEM in Nigeria is divided into five parts. Part one is the introduction, part two discuss the legal framework for SEM in Nigeria, while part three examined the institutional framework for SEM in Nigeria. Part four x-rayed the challenges to the legal enforcement of environmental laws in Nigeria, while the paper concludes with recommendations in part five.

2. Legal Framework for Sustainable Environmental Management in Nigeria

This section examines some select laws enacted to protect and sustainably manage the Nigerian environment, especially, the Niger Delta region, against environmental pollution and degradation, especially from the activities of the oil and gas operations. They include the Constitution of the Federal Republic of Nigeria 1999; the Harmful Waste (Special Criminal Provisions, etc) Act; the Petroleum Industry Act; the Petroleum Act; the Oil in Navigable Waters Act; the Oil Pipelines Act and the Environmental Impact Assessment Act. The relevant provisions of these laws are discussed in some detail in the following paragraphs.

2.1 Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999)

One of the objectives of Part II of the CFRN 1999 (Fundamental Objectives and Directive Principles of State Policy) is to ensure a safe and improved environment for the citizenry. Section 20 clearly obligates the state to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. By this provision, activities, including those aimed at achieving an economically vibrant state, must be carried out in a manner that achieves the purpose set out in section 20 of the CFRN 1999. This position is further strengthened by the provision

2013) (IUCN Niger-Delta Panel Report); See UNDP Niger Delta Human Development Report 2006 (United Nations Development Programme, Abuja: Nigeria, 2006) 185.

⁹ Ibid; See UNEP, *An Environmental Assessment of Ogoni land* (United Nations Environment Programme 2011); O OEmoyan and IA Akpoborie and EE Akporhonor, 'The Oil and Gas Industry and the Niger Delta: Implications for the Environment' (2008) 12 (3) *Journal of Applied Sciences and Environmental Management* 29.

¹⁰ Ugochukwu (n 3) 28; See EC Odogwu, 'Impact of Environmental Regulations on the Petroleum Industry: Economic and Social Considerations' in A Claude (ed), *Political Economy of Nigeria* (London and Lagos: Longman Press 1885); A Babatunde, 'The Impact of Oil Exploitation on the Socio-Economic Life of the Ilaje-Ugbo People of Ondo State, Nigeria' (2010) 12 (5) *Journal of Sustainable Development in Africa* 7.

¹¹ Atubi (n 5).

of section 17(2)(d) which forbids the exploitation of human or natural resources in any form whatsoever for reasons, other than for the good of the community.¹²

While section 20 of the CFRN 1999 at first sight appears to give some hope for the environment by providing that ‘the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria,’ it has in most cases been interpreted as a non-justiciable right on the ground that it falls under Fundamental Objective and Directive Principles of State Policy (FODPSP) as contained in Chapter II of the CFRN 1999. Rights under FODPSP are believed to be non-justiciable,¹³ and therefore, lacks judicial enforcement in Nigeria since by virtue of section 6(6)(c) of the CFRN 1999: The judicial powers vested in accordance with the foregoing provisions of this section – shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.¹⁴ Unfortunately, as envisaged by section 6(6)(c), there is no other provision for the protection of the environment in the CFRN 1999.¹⁵

The interpretation of section 20 of the CFRN 1999 as a non-justiciable right by the Nigerian courts, for several years, rendered those seeking to judicially enforce their environmental rights incapable of doing so.¹⁶ The attitude of the Nigerian courts is well illustrated in *NNPC v Fawehinmi*,¹⁷ where the Nigerian Supreme Court held that the provisions of Chapter II of the Constitution are wholly unenforceable under any guise whatsoever and remain mere governmental aspirations. Also, in *AG Ondo State v AG Federation*,¹⁸ the Supreme Court stated that the provision of section 6(6)(c) of the Constitution makes rights under the FODPSP non-justiciable except as otherwise provided in the Constitution. Further, in *Archbishop Olunmi Okogie (Trustees of Roman Catholic Schools) and Ors v The Attorney General of Lagos State*,¹⁹ the Court of Appeal held that section 6(6)(c) of the Constitution makes rights outlined under FODPSP as contained in

¹²F O Ugbaja, *Regulation of Environmental Pollution in the Nigerian Oil and Gas Industry: The Need for an Alternative Approach* (Unpublished Master's Thesis, Faculty of Law, University of Calgary, Alberta, Canada 2016) 53.

¹³RO Ugbe and ME Umo, ‘Enforcement Provisions of Major Environmental Law Regimes in Nigeria’ (2015) *5University of Ibadan Law Journal* 233; F Olarewaju, ‘Reappraising the Nigerian Constitution for Environmental Management’ (2002) 1 (1) *AAU Law Journal* 44.

¹⁴CFRN 1999, s 6(6)(c).

¹⁵See TT Onifade, *Legal and Institutional Framework for Promoting Environmental Sustainability in Nigeria through Renewable Energy: Possible Lessons from Brazil, China and India* (Master's Thesis, Faculty of Law, University of Ibadan, Nigeria 2014) 47.

¹⁶Ibid.

¹⁷*NNPC v Fawehinmi* [1998] 7 NWLR (Pt 559).

¹⁸*AG Ondo State v AG Federation* [2002] 9 NWLR (Pt 772).

¹⁹*Archbishop Olunmi Okogie & Ors v Attorney General of Lagos State* [1981] 2 NCLR 337 350.

Chapter II of the CFRN 1999 non justiciable.²⁰ However, the growing trend in the jurisprudence of human rights, especially, through the African Charter on Human and Peoples Rights (ACHPRs), have rendered the notion of non-justiciability of section 20 of the CFRN 1999 untrue. In *Jonah Gbemre v SPDC*,²¹ the Federal High Court held that gas flaring violated the right of the plaintiff to enjoy a healthy environment as provided by Article 24 of the African Charter and the constitutional guaranteed right to life and dignity of persons provided for in sections 33 and 34 of the CFRN 1999. The Court which ordered SPDC to stop gas flaring in the plaintiff's community affirmed that the constitutionally guaranteed rights to life and dignity of persons inevitably includes the rights to a clean, poison-free and healthy environment and that the actions of the defendants in continuing gas flaring was a violation of the rights.²² It is however, noteworthy, that the decision of the court is yet to be enforced as gas flaring has continued in Nigeria till date.

Also, in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v Nigeria*,²³ the African Commission on Human Rights held that the Federal Government of Nigeria (FGN) and its multinational oil partners operating in the Niger Delta region had violated the environmental rights of the Ogonis, as provided for in Article 24 of the ACHPRs, in the process of oil exploration and production activities. The Commission took cognisance of the fact that the Federal Republic of Nigeria had incorporated the African Charter into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including the environmental rights violations alleged by the plaintiff.²⁴ This case and the case of *Jonah Gbemre v SPDC* is a clear manifestation of how the provisions of the ACHPRs can help to protect the right to a clean and healthy environment in Nigeria.²⁵

2.2 Harmful Waste (Special Criminal Provisions, Etc) Act²⁶

This Act was the first enactment directed at protecting the Nigerian environment. The Harmful Waste (Special Criminal Provisions, etc) Act 1988 No 42 was enacted as a consequence of the illegal dumping of toxic wastes in Koko Port, Bendel State (now Delta State) in 1988 to provide the legal framework for the effective control of the disposal of toxic and hazardous waste into any environment within the

²⁰ See generally, E OEkhator, 'Improving Access to Environmental Justice under the African Charter on Human and Peoples Rights: The Roles of NGOs in Nigeria' (2014) 22 (1) *African Journal of International and Comparative Law* 71.

²¹ *Gbemre v Shell* [2005] FHC/B/C/153/05.

²² T Rhuks, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) (3) *NUJS Law Review* 436.

²³ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v Nigeria*, Communication No 155/96.

²⁴ Rhuks (n 22) 434.

²⁵ E Emejuru, MA Ebikake-Nwanyanwu and C Ajie, 'Right to a Healthy Environment in Nigeria and other Jurisdictions: A Legal Assessment' (2020) 8 (3) *Global Journal of Politics and Law Research* 11; AB Abdulkadir, 'The Right to a Healthful Environment in Nigeria: Review of Alternative Pathways to Environmental Justice in Nigeria' (2014) 3 (1) *Afe Babalola University Journal of Sustainable Development, Law, and Policy* 125.

²⁶ Harmful Waste (Special Criminal Provisions, etc) Act Cap H1 LFN 2004.

confines of Nigeria.²⁷ The act prohibits and declares unlawful the carrying, depositing and dumping of harmful waste on any land, terminal waters and matters relating thereto. Section 1(1) of the Act prohibits all activities relating to purchase, sale, importation, transit, transportation, deposit and storage of harmful waste. The Act makes it a general offence for anyone to deal with harmful waste.²⁸ Section 2 of the Act provides that any person who, without lawful authority, carries, deposits, dumps or causes to be carried, deposited or dumped, or is in possession for the purpose of carrying, depositing or dumping, any harmful waste on any land or in any territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways shall be guilty of a crime.

The Act in section 6 provides penalties for any person found guilty of violating the provisions of sections 1 to 5 of the Act. Section 1-5 of the Act talks about crimes against the environment. It is because of the importance of leaving in an environment that is not polluted that the Act provided for stiff penalties for any person that violates the law. In the light of this, Section 6 provides that, ‘Any person found guilty of a crime under sections 1 to 5 of this Act shall on conviction be sentenced to imprisonment for life and in addition (a) any carrier, including aircraft, vehicle, container and any other thing whatsoever used in the transportation or importation of the harmful waste; and (b) any land on which the harmful waste was deposited or dumped, shall be forfeited to and vest in the Federal Government without any further assurance other than this Act’.²⁹

Section 7 of the Act provides punishment for environmental crime committed by corporate body. It provides that ‘Where a crime under this Act has been committed by a body Corporate and it is proved that it was committed with the consent or connivance of or is attributable to any neglect on the part of- (a) A director, manager, secretary or other similar officer of the body Corporate; or (b) Any other person purporting to act in the capacity of a director, manager, secretary or other similar officer, he as well as the body corporate shall be guilty of the crime and shall be liable to be proceeded against and punished accordingly’.³⁰

The summary of the provisions of both sections 6 and 7 of the Harmful Waste Act is that anyone found contravening the provisions of the Act will on conviction be sentenced to imprisonment for life, forfeit to the Federal Government of Nigeria any carrier used in the transportation or importation of the harmful waste deposited or dumped by corporate bodies, including any director, manager, secretary or any

²⁷N Echefu and E Akpofure, ‘Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework’ *Law, Policy and Institutional Arrangements* (UNEP EIA Training Resource Manual- Case Studies from Developing Countries, Case Study 7) 63 <<https://www.iaia.org/pdf/case-studies/EIANigeria.pdf>> accessed 12 August 2021; See GS Ogbodo, ‘Environmental Protection in Nigeria: Two Decades After the Koko Incident’ (2009) 15 (1) *Annual Survey of International & Comparative Law* 2.

²⁸C Mordi and others, Corporate Social Responsibility and the Legal Regulation in Nigeria’ (2012) 64 (1) *Economic Insights – Trends and Challenges* 3.

²⁹Harmful Waste Act (n 34), s 6(a)(b).

³⁰Ibid s 7(a)(b).

other similar officer of such corporate bodies, will be held liable, if found guilty of contravening the provisions of the Act

The provisions of the Act can be applied to oil pollution (a major cause of environmental degradation in Nigeria, especially, in the Niger Delta region) which falls within the definition of ‘harmful waste’ in the Act. In other words, for proper understanding of the protection of environment by the Act, reference to the interpretation of section 15 of the Act is imperative. ‘Harmful waste’ according to section 15 of the Act³¹ means anything injurious, poisonous, toxic, or noxious substance. The activities of oil and gas companies will certainly come within the ambit of this provision. It therefore means that any oil company that pollutes the environment will be caught by the provisions of the Act. In summary, if the provision of the Act is religiously complied with, the environment will be safe, healthy, and clean particularly for the residence of the oil producing areas because environmental degradation by oil companies will be at its minimal.³²

2.3 Petroleum Industry Act (PIA)

The PIA contains provisions that seek to protect the Nigerian environment, especially the Niger Delta region of the country. The PIA provides for a mechanism to tackle oil spillage and gas flaring induced environmental pollution and degradation in Nigeria.³³ Section 102 of the PIA 2021 provides that a licensee or lessee who engages in upstream or midstream petroleum operations is required to within one year or six months of the effective date or after the grant of the applicable license or lease, submit for approval an environmental management plan in respect of projects which require environmental impact assessment to the Commission or Authority as the case may be.³⁴ The plan shall be approved where it complies with relevant Environmental Acts and the applicant has the capacity or has provided for the capacity to rehabilitate and manage negative impacts on the environment.³⁵

The PIA 2021 also made provisions for financial contribution for remediation of environmental damage. Section 103 of the PIA 2021 provides that as a condition for the grant of a license or lease and prior to the approval of the environmental management plan, the licensee or lessee is required to pay a prescribed financial contribution to an environmental remediation fund for the rehabilitation or management of negative environmental impacts of the petroleum operation. The

³¹Ibid s 15.

³²A Ibrahim, *Assessment of the Legal and Institutional Framework for the Prevention of Environmental Degradation by Oil and Gas Companies in Nigeria* (PhD Thesis, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria 2014) 98.

³³SN Dambatta, ‘Effects of the Petroleum Industry Act’ *The Cable* (Lagos, 25 November 2021).

³⁴PIA Act 2021, s 102 (1) (a)&(b).

³⁵Ibid, s 102(3) (a)&(b); Resolution Law Firm, ‘Nigeria: Overview of the new Petroleum Industry Act 2021’ (21 September 2021) <<https://www.mondaq.com/nigeria/oil-gas-electricity/1113104/overview-of-the-new-petroleum-industry-act-2021>> accessed 24 January 2022.

financial contribution will take into account the size of the operations and the level of environmental risk that may exist.³⁶

Further, the PIA addresses the issue of gas flaring by prohibiting the flaring or venting of natural gas. Section 105 of the PIA provides that a licensee or lessee shall pay a penalty prescribed pursuant to the Flare Gas (Prevention of Waste & Pollution) Regulations.³⁷ Also, section 104(1) of the PIA provides that a licensee, lessee or marginal field operator that flares or vents gas, except in the case of an emergency, pursuant to an exemption granted by the Commission, or as an acceptable safety practice under established regulations, commits an offence under this Act and is liable to a fine as prescribed by the Commission in regulations under this act.³⁸

To better protect the Nigerian environment from the adverse effects of gas flaring and encourage gas utilization in the country,³⁹ section 52 of the PIA establishes a Midstream and Downstream Gas Infrastructure Fund (MDGIF), which shall be financed primarily from the 0.5% levy on the wholesale price of petroleum and natural gas sold. The Fund is expected to be deployed as equity investments of Government-owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations to increase domestic gas utilization (consumption of Natural Gas in Nigeria) and encourage investments in gas projects, while also eliminating gas flaring.⁴⁰ Furthermore, based on the PIA, gas flaring penalties arising from midstream operations will also be credited to the MDGIF for environmental remediation and relief of the affected host communities of the settlor on which the fine is levied.⁴¹ Also, section 108 of the PIA requires a licensee or lessee producing natural gas to prepare and submit a natural gas flare elimination and monetization plan to the Nigerian Upstream Regulatory Commission (NURC). However, the PIA 2021 outlines the conditions in which gas may be flared in Nigeria. Section 107 of the PIA 2021 provides that the Commission or the Authority may grant a permit to a licensee or lessee to allow the

³⁶PIA Act 2021, s 103(1) and (2).

³⁷PIA 2021, s. 105; S Bhadare, 'Nigeria Petroleum Industry Act brings positive change' *African Law and Business News Analysis* (London, 2 September 2021).

³⁸PIA 2021, s. 104(1)(a),(b)&(c).

³⁹'Petroleum Industry Act – A New Era for the Nigerian Oil and Gas Upstream Industry' *Vanguard Newspaper*, (Lagos, 22 September 2021); Highlights of the Petroleum Industry Act, 2021 <<https://www.manifieldsolicitors.com/2021/09/16/highlights-of-the-petroleum-industry-act-2021/>> accessed 8 April 2021.

⁴⁰Petroleum Industry Act – A New Era for the Nigerian Oil and Gas Upstream Industry *ibid*; Highlights of the Petroleum Industry Act, 2021 *ibid*; S N Dambatta; Analysis of Petroleum Industry Act 2021 in Nigeria (Bomes Resources Consulting, 30 September 2021) <<https://www.bomesresourcesconsulting.com/review-petroleum-industry-act-2021-nigeria.html>> accessed 8 April 2022.

⁴¹O Maiye and T Kolade, Nigeria: Petroleum Industry Act 2021: Opportunities for Key Industry Players (24 August 2021) <<https://www.mondaq.com/nigeria/oil-gas-electricity/1104754/petroleum-industry-act-2021-opportunities-for-key-industry-players>> accessed 8 April 2022; Petroleum Industry Act – A New Era for the Nigerian Oil and Gas Upstream Industry (n 39); Highlights of the Petroleum Industry Act, 2021 (n 39).

flaring or venting of natural gas for a specified period- (a) where it is required for facility start-up; or (b) for strategic operational reasons, including testing.⁴²

2.4 Petroleum Act⁴³

The Petroleum Act is one of the laws not repealed by section 310 of the PIA. By virtue of the saving provisions of section 311 of the PIA 2021, the Petroleum Act shall continue to be in effect until the termination or expiration of all oil prospecting licenses and oil mining leases granted under the Petroleum Act that is subsisting at the effective date of the PIA 2021.⁴⁴ The Petroleum Act and the regulations made thereunder contain provisions that seek to protect and sustainably manage the Niger Delta environment. Section 9(1) of the Act⁴⁵ provides that the minister may make regulations for the prevention of pollution of water courses and the atmosphere.

The Petroleum (Drilling and Production) Regulation 1969⁴⁶ which was issued pursuant to the Petroleum Act in its Regulation 25 seeks to ensure that oil operators do not pollute the environment in the course of drilling and production by providing that a holder of an oil exploration and or oil prospecting licenses shall, ‘Adopt all practicable precautions including the provision of up-to-date equipment approved by the Chief Petroleum Engineer (Department of Petroleum Research) to prevent the pollution of inland waters, rivers, water courses, the territorial water of Nigeria or the high seas by oil mild or other fluid or substances which might contaminate the water, banks or shore line or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred will take prompt steps to control and, if possible, end it’.

Under Regulation 37 oil operators are enjoined to carry out their operations in a proper and workmanlike manner and to take reasonable steps to among others, prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuarine or harbour, and cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.⁴⁷

2.5 Oil in Navigable Waters Act (ONWA)⁴⁸

The ONWA 1968 prohibits the discharge of oil or any mixture containing oil into the sea and territorial or navigable inland waters of Nigeria.⁴⁹ Section 1(1) of the Act provides that ‘If any oil to which this section applies is discharged from a Nigerian ship into a part of the sea which, in relation to that ship, is a prohibited sea

⁴²PIA 2021, s 107(a) and (b).

⁴³Petroleum Act, Cap P10 LFN 2004.

⁴⁴ PIA 2021, s 311(2)(c) and (9)(a).

⁴⁵Ibid, s 9(1)(b)(iii).

⁴⁶Petroleum (Drilling and Production) Regulation, Regulation 25; M T Abdulmumini, *An Assessment of Liabilities of Oil Producing Companies for Oil Spillage in Nigeria* (Masters Thesis, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria 2013) 45.

⁴⁷Petroleum (Drilling and Production) Regulation, Regulation 37(d)&(e).

⁴⁸Oil in Navigable Waters Act, 1968, Cap O6 LFN 2004 (hereinafter, ONWA).

⁴⁹See Abdulmumini (n 46) 45.

area, or if any mixture containing not less 100 parts of Oil to which this section applies is discharged from such a ship into such a part of the sea, the owner or master of the ship shall, subject to the provisions of this Act, be guilty of an offence under this section'.⁵⁰

Section 3 of the Act provides that (1) if any oil or mixture containing oil is discharged into waters to which this section applies from any vessel, or from any place on land, or from any apparatus used for transferring oil from or to any vessel (whether to or from a place on land or to or from another vessel), then subject to the provisions of this Act- (a) if the discharge is from a vessel, the owner or master of the vessel; or (b) if the discharge is from a place on land, the occupier of that place; or (c) if the discharge is from apparatus used for transferring oil from or to a vessel, the person in charge of the apparatus, is guilty of an offence under this section.⁵¹ Sub section 2 provides that this section applies to the whole of the sea within the seaward limits of the territorial waters of Nigeria; and all other waters (including inland waters) which are within those limits and are navigable by sea-going ships.⁵²

The Act imposes obligation on ship owners to install anti-pollution equipment for the purpose of preventing water pollution. Section 5(1) of the Act further provides that for the purpose of preventing or reducing discharges of oil and mixtures containing oil into the sea, the minister may make regulations requiring Nigerian ships to be fitted with such equipment and to comply with such other requirements, as may be prescribed.⁵³

The primary purpose of the provisions of sections 1(1), 3 and 5(1) is to prevent the sea (water environment) from oil pollution by discouraging oil operators and owners or masters of ship from discharging oil from their ships into the sea in the course of transporting oil or oil related product by ship. Compliance with the provision of the Act will certainly prevent pollution of the sea by ships which will result in a clean, safe, and healthy environment.⁵⁴

Section 6 of the Act prescribes penalties for violations of the provisions of sections 1, 3 and 5⁵⁵ by providing that: A person guilty of an offence under sections 1, 3, or 5 of this Act shall, on conviction by a High Court or a superior court or on summary conviction by any court of inferior jurisdiction, be liable to a fine: provided that an offence shall not by virtue of this section be punishable on summary conviction by a court having jurisdiction inferior to that of a High Court by a fine exceeding N2,000.⁵⁶

⁵⁰ONWA (n 47) s 1(1).

⁵¹Ibid s 3(1)(a-c).

⁵²Ibid s 3(2)(a-b).

⁵³Ibid s 5(1).

⁵⁴Abdulmumini (n 44).

⁵⁵Oil in Navigable Waters Act (n 47), ss. 1, 3, 5 and 6.

⁵⁶Ibid s 6.

2.6 Oil Pipelines Act (OPA)⁵⁷

The OPA, enacted in 1956, contains model provisions that, where effectively used, could protect the Nigerian environment from the impacts of oil and gas developments.⁵⁸ The OPA and the regulations made pursuant to it, govern the grant of permits and licenses for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for ancillary purposes. The OPA seeks to regulate the transportation of oil and gas through pipelines in order to effectively protect the environment from oil spills and pollution arising therefrom.⁵⁹ Section 17(4) of the OPA provides that ‘Every license shall be subject to the provisions contained in this Act as in force at the date of its grant and to such regulations concerning public safety, the avoidance of interference with works of public utility in, over and under the land included in the license and the prevention of pollution of such land or any waters as may from time to time be in force.’⁶⁰

Regulation 8(b) of the Oil and Gas Pipeline Regulations (OGPRs) of 1995 provides that where the pipeline crosses or passes within 100 metres of a watercourse, the operator shall assure the Department that adequate contingency plans have been made for protecting the environment. Additionally, Regulations 9(a)(ii), (b)(ii) and (iii) of the OGPRs of 1995 provides that a licensee shall establish a written emergency plan for implementing in the event of systems failure, accidents or other emergencies which shall include procedures for prompt and expedient remedial action for the protection of property and the environment and the control of accidental discharge from the pipeline.⁶¹ To further protect the environment from damage resulting from oil pipelines operations, Part four of the OPA provides for the payment of compensation to a person whose land was adversely affected by pipeline operations or who suffered damage due to a permit holder’s neglect or due to pipeline breakage or leakage.⁶²

2.7 Environmental Impact Assessment (EIA) Act⁶³

The EIA Act was enacted in 1992 as the core legislation that governs environmental impact assessment in respect of proposed projects in Nigeria. It is particularly directed at regulating the industrialization process with due regard to the environment. By the provisions of the Act, no industrial plan/development/activity of both public and private sector of the economy can be executed without prior consideration of the environmental consequences of such a

⁵⁷Oil Pipelines Act Cap O7 LFN 2004.

⁵⁸F O Ugbaja (n 16) 67; See O Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria’s Oil Producing Communities* (Intersentia Publishing, United Kingdom 2014) 137.

⁵⁹FO Ugbaja ibid 67.

⁶⁰Oil Pipelines Act (n 57) ss 17(4) and 33(c).

⁶¹Oil and Gas Pipeline Regulations of 1995, Regulations 9(a)(ii), (b)(ii)&(iii).

⁶²Oil Pipelines Act (n 57), ss. 11(5) &20(2); See O Ayotunde, *Legal and Institutional Framework for Multi-Stakeholder Participation in Oil and Gas Management in Nigeria: Perspectives on the Multi-Stakeholder Dialogue Approach* (Master’s Thesis, University of Saskatchewan, Saskatoon, Canada 2016) 61.

⁶³Environmental Impact Assessment (EIA) Act, 1992, Cap E12 LFN 2004 (hereinafter, EIA Act).

proposed action, in the form of an environmental impact assessment. In other words, the EIA Act made environmental impact assessment mandatory for both public and private sectors for all development projects.⁶⁴ Section 2(2) of the EIA Act requires that where the extent, nature or location of a proposed project or activity is such that is likely to significantly affect the environment, its environmental impact assessment should be carried out before undertaking such projects.⁶⁵

If in the opinion of the Federal Ministry of Environment (FME), the project is likely to cause significant adverse environmental effects that cannot be mitigated and cannot be justified in the circumstances, it may refuse to grant a permit required to embark on the project in whole or in part.⁶⁶ An equally significant provision of the EIA Act is its requirement for the consultations of persons where the proposed projects are likely to have a substantial impact on the environment of surrounding villages and towns.⁶⁷ However, under the EIA Act, an impact assessment is not required for a proposed project in the following circumstances: where the President of Nigeria or the Federal Environmental Protection Council is of the view that the environmental impacts of the project may likely be minimal, the project is to be undertaken during national emergency period for which the government has taken temporary steps, and the Federal Ministry of Environment is of the view that such a project is in the interest of public health or safety.⁶⁸

Considering the laws discussed in this section, it may be safe to state that there are laws intended to sustainably manage and protect the Nigerian environment, including the Niger Delta region of the country, against oil and gas companies induced environmental pollution and degradation. However, the enforcement of these environmental laws has been a major challenge. Hence, the continued pollution and degradation of the Nigerian environment, especially, that of the Niger Delta region of the country.

3. Institutional Framework for Sustainable Environmental Management in Nigeria

This section looks at some select institutions (agencies) for sustainable environmental management in Nigeria. Key statutory institutions that currently regulate and manage the Nigerian environment include National Environmental Standards Regulation Enforcement Agency, National Oil Spill Detection and Response Agency, The Nigerian Upstream Regulatory Commission, Niger Delta Development Commission, and the Ministry of Niger Delta Affairs.

⁶⁴Ibid s 2(1); N Echefu & E Akpofure (n 27).

⁶⁵EIA Act (n 63) s. 2(2); See AA Ibrahim and others, 'Environmental impact Assessment in Nigeria - A Review' (2020) 8 (3) *World Journal of Advanced Research and Review* 332.

⁶⁶EIA Act, s 40(1)AND (b).

⁶⁷Ibid s 1(c).

⁶⁸EIA Act, s 15(1)(a) – (c). See generally, CC Ekeolisa, *Framework for Obligations Regarding Environmental and Human Rights Protection in Nigeria's Bilateral Investment Treaties* (Master's Thesis, College of Law, University of Saskatchewan, Canada) 7.

3.1 National Environmental Standards Regulation Enforcement Agency (NESREA)

NESREA was established in 2007 by the *NESREA Act*⁶⁹ as the lead environmental agency charged with the mandate of protecting the Nigerian environment and ensuring compliance with enacted environmental laws.⁷⁰ Section 2 of the NESREA Act saddles NESREA with the responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, polices and guidelines.⁷¹ Thus, section 2 empowers the NESREA to act for the environmental good of the country by ensuring a sustainable environment for Nigerians through the enforcement of existing environmental laws as well as regulations made pursuant to the *NESREA Act 2007*.⁷²

Section 7 of the NESREA Act provides for the functions of NESREA. These functions include enforcing compliance with laws, guidelines, policies and standards on environmental matters; coordinating and liaising with stakeholders, within and outside Nigeria, on matters of environmental standards, regulations and enforcement; enforcing compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force; enforcing compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement; enforcing compliance with guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources; enforcing compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages thereof.⁷³

Further, by the provisions of section 7(g)(h)(j)(k), NESREA is saddled with the functions of enforcing compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector; enforcing through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans, and other water bodies other than in the oil and gas sector; enforcing environment control measures through registration, licensing and permitting system other than in the oil and gas sector; conducting environmental audit and establishing data bank on regulatory and enforcement mechanisms of

⁶⁹National Environmental Standards Regulation Enforcement Agency (NESREA) Act 2007.

⁷⁰Ibid s 1(1); Ugbaja (n 12) 56; See MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) *Law, Environment and Development Journal* 120.

⁷¹NESREA Act (n 69) s 2; See Ladan, Ibid.

⁷²See Ugbaja (n 12) 56.

⁷³NESREA Act (n 69) s 7(a)(b)(c)(d)(e)(f).

environmental standards other than in the oil and gas sector; and creating public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations other than in the oil and gas sector.⁷⁴

To ensure compliance with the provisions of the NESREA Act and to enable the Agency to perform its functions diligently, section 8 of the Act made some enforcement powers available to the Agency and her officials. This includes the power to compel and conduct public investigations on pollution and the degradation of natural resources, except investigations on oil spillage; power to submit for the approval of the Minister, proposals for the evolution and review of existing guidelines, regulations and standards on environment other than in the oil and gas sector;⁷⁵ power to develop environmental monitoring networks, compile and synthesize environmental data from all sections other than in the oil and gas sector; at international levels, undertake, coordinate, utilize and promote the expansion of research experiments, surveys and studies by public or private agencies, institutions and organizations concerning causes, effects, extent, prevention, reduction and elimination of pollution and such other matters related to environmental protection and natural resources conservation other than in the oil and gas sector as the Agency may, from time to time, determine; power to enter into agreement and contracts with public or private organizations and individuals to develop, utilize, coordinate and share environmental monitoring programmes, research effects, and basic data on chemical, physical and biological effects of various activities on the environment and other environmental related activities other than in the oil and gas sector;⁷⁶ power to do such other things, other than in the oil and gas sector, as are necessary for the efficient performance of the functions of the Agency.⁷⁷

Section 29 which also stipulates that the agency ‘shall, in the face of pollution, co-operate with other government agencies for the removal of any pollution’ excludes the removal of oil and gas related pollution.⁷⁸ Another rather startling provision of the *NESREA Act* is in section 30 which expressly prohibits officials of the NESREA from enforcing any environmental regulations in the oil and gas sector.⁷⁹ It is rather interesting that Nigeria's principal environmental agency is under the provisions of section 29 of the NESREA Act prohibited from supervising or participating in the clean-up of any pollution resulting from oil and gas industry activities and from enforcing any environmental regulations in the oil and gas sector.

⁷⁴Ibid s 7(g)(h)(i)(j)(k)(l).

⁷⁵Ibid s 8(g)(k).

⁷⁶Ibid s 8(k)(l)(m)(n).

⁷⁷Ibid s 8(o)(p)(s).

⁷⁸Ibid s 29.

⁷⁹Ibid s 30(1)(a); See L Stevens, ‘The Illusion of Sustainable Development: How Nigeria's Environmental Laws are Failing the Niger Delta’ (2011-2012) 36 *Vermont Law Review* 397; Ugbaja (n 12) 59.

3.2 National Oil Spill Detection and Response Agency (NOSDRA)

NOSDRA was established by the NOSDRA Act⁸⁰ in 2006 as the lead agency with responsibility for preparedness, detection and response for all matters relating to oil spills management in Nigeria.⁸¹ The NOSDRA Act provides for certain objectives of the Agency ranging from monitoring and regulating oil spill; development, coordination and implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria,⁸² ensuring a safe, timely, effective and appropriate response to major or disastrous oil pollution; identify high-risk areas as well as priority areas for protection and clean up; establish the mechanism to monitor and assist or where expedient direct the response to save lives, protect threatened environment, and clean up to the best practical extent of the impacted site.⁸³

Inasmuch as the functions of NOSDRA are partially embedded in the range of its objectives as detailed above, the NOSDRA Act for the avoidance of doubt, went on to specify the functions of NOSDRA in section 6 by providing that the Agency shall be responsible for surveillance and ensure compliance with all existing environmental legislation in the petroleum sector including those relating to prevention, detection and general management of oil spills, oily wastes and gas flare; enforce compliance with the provisions of international agreements, protocols, conventions and treaties relating to oil and gas and oil spill response management and such other related agreements as may from time to time come into force; receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria; co-ordinate the implementation of the NOSCP as may be formulated, from time to time, by the Federal Government; co-ordinate the implementation of the NOSCP for the removal of hazardous and noxious substances as may be issued by the Federal Government pursuant to the NOSDRA Act.⁸⁴ In addition, section 7 of the NOSDRA Act provides for the special functions of NOSDRA.⁸⁵

Further, the NOSDRA Act empowers the agency to impose penalties upon an oil spiller for failure to report an oil spill incident within 24 hours and for failure to clean up polluted site to a reasonable extent. Section 6(2) of the Act specifically provides that an oil spiller is by this Act to report an oil spill to the Agency in writing, by fax or electronic mail not later than 24 hours after the occurrence of an oil spill in default of which the failure to report shall attract penalty in the sum of N2,000,000 for each day of failure to report the occurrence. Section 6(3) of the Act further provides that the failure to clean up the impacted site, to all practical extent including action plan for remediation within two weeks of the occurrence of the spill in accordance with the polluter pays principle shall constitute an offence and on conviction the oil spiller shall be liable to a fine not exceeding N5,000,000 or to

⁸⁰National Oil Spill Detection and Response Agency (Establishment) Act (NOSDRA Act), Cap N157 LFN 2006.

⁸¹Ibid ss. 1 and 19(2).

⁸²Ibid s 5.

⁸³Ibid s 5(a-c); See also s. 5(e-l) for other objectives of NOSDRA.

⁸⁴Ibid s 6(1)(a-e).

⁸⁵Ibid s 7(a-f).

imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.⁸⁶

3.3 Nigerian Upstream Regulatory Commission (NURC)⁸⁷

NURC, which repealed the Department of Petroleum Resources (DPR) and statutorily empowered to perform the functions of the defunct DPR,⁸⁸ is an agency of the Federal government established on the 18th of October 2021, following the passage and implementation of the Petroleum Industry Act (PIA).⁸⁹ The NURC has the mandate of environmental protection and management in compliance with the provisions of the PIA 2021. The NURC has among others, the objectives of promoting healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally acceptable and sustainable manner;⁹⁰ ensuring strict implementation of environmental policies, laws and regulations for upstream petroleum operations; and⁹¹ enforcing health safety and environmental regulations in the oil and gas industry and ensuring that those operations conform to national and international best oil field standards and practices.⁹²

By the provision of section 102 of the PIA, the NURC is empowered to approve an environmental management plan (EMP) in respect of projects which require environmental impact assessment, only where such EMP complies with relevant Environmental Acts and the applicant has the capacity or has provided for the capacity to rehabilitate and manage negative impacts on the environment.⁹³ Also, section 103 of the PIA 2021 empowers the NURC to only grant a license or lease and approve the EMP of a licensee or lessee who has paid a prescribed financial contribution to an environmental remediation fund for the rehabilitation or management of negative environmental impacts of the petroleum operation.⁹⁴ It is hoped that the NURC will sufficiently discharge its statutory function of environmental protection and management by ensuring that petroleum industry operators do not continue to pollute the environment in the course of their operations. Recently, the Chief Executive Officer of the NURC, Gbenga Komolafe,

⁸⁶Ibid s 6(2) and (3).

⁸⁷Established by section 4 of the PIA 2021.

⁸⁸See O Udegbonam, 'Nigeria Scraps DPR, PPPRA, PEF as New Oil Agencies Take Off' *Premium Times* (19 October 2021); K Jeremiah, 'Finally, Government Scraps DPR, PPPRA, PEF for New Agencies' *The Guardian Newspaper* (Nigeria, 19 October 2021); E Addeh, 'Upstream Commission, Midstream/Downstream Authority Formally Begin Operations' *THISDAY Newspaper* (Nigeria, 19 October 2021).

⁸⁹PIA 2021, s 4(1).

⁹⁰Ibid s 6(d).

⁹¹Ibid s 9(i).

⁹²See Nigerian Upstream Regulatory Commission (NURC), 'Functions of NURC -What We Do' (NURC, 2021) <<https://www.nuprc.gov.ng/functions-of-nuprc/>> accessed 24 January 2022.

⁹³PIA, s 102(3)(a) and (b); Resolution Law Firm, 'Nigeria: Overview of the new Petroleum Industry Act 2021' (21 September 2021) <<https://www.mondaq.com/nigeria/oil-gas-electricity/1113104/overview-of-the-new-petroleum-industry-act-2021>> accessed 24 January 2021.

⁹⁴PIA 2021, s 103(1) and (2).

assured on the Agency's commitment to tackle oil spills in Nigerian communities in fulfilment of its regulatory mandate.⁹⁵ However, since the NURC was only set up on the 18th of October 2021, only time will tell how well the NURC will fare in discharging its mandate of environmental protection and management in compliance with the provisions of the PIA 2021.

3.4 Niger Delta Development Commission (NDDC)

NDDC is a Federal Government Agency established in 2000 by the NDDC Act⁹⁶ with powers to implement policies for the development of the Niger Delta region and protection of the region from environmental degradation among others.⁹⁷ The establishment of the NDDC is largely a response to the demands of the Niger Delta region that had for several years, confronted the Nigerian Government and multinational oil companies (MOCs) on the issue of extensive environmental pollution and degradation from oil activities of the MOCs that have operated in the region since the late 1950s.

Section 7(1) of the NDDC Act provides for the functions and powers of the Commission including its environmental functions. Section 7(1)(h) of the NDDC Act specifically provides that the NDDC shall tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise the Federal Government and the Member States on the prevention and control of oil spillages, gas flaring and environmental pollution.⁹⁸ Further, section 7(1)(i) of the NDDC Act provides that the NDDC shall liaise with the various oil mineral and gas prospecting and producing companies on all matters of pollution prevention and control.⁹⁹

From the provisions of section 7(1)(h) & (i) of the NDDC Act, it is obvious that the NDDC operates under the mandate of improving environmental conditions in the Niger Delta region.¹⁰⁰ However, the Commission, like others referred to above, is not living up to expectation in terms of discharging its responsibilities. The commission is characterized by greed and corruption. It is more into who gets what than ensuring that the core objectives of the commission i.e., tackling ecological problems which arise from the exploration of oil minerals in the Niger Delta area is achieved. Oil spill and gas flaring which are the major mediums of environmental degradation in the region are still on the increase.¹⁰¹ Recently, the

⁹⁵H Edeh, 'Upstream Regulatory Commission to explore provisions of PIA in tackling oil spills, says CEO' (International Centre for Investigative Reporting (ICIR), December 6, 2021) <<https://www.icirnigeria.org/upstream-regulatory-commission-to-explore-provisions-of-pia-in-tackling-oil-spills-says-ceo/>> accessed 20 February 2022.

⁹⁶Niger-Delta Development Commission (Establishment, Etc) Act Cap N86 LFN 2004 (hereinafter, NDDC Act).

⁹⁷See NDDC Act, s 1; See Ayotunde (n 62) 88.

⁹⁸NDDC Act, s 7 (1)(h).

⁹⁹Ibid s 7 (1)(i).

¹⁰⁰See Ibrahim (n 40) 136,139; See PC Nwilo and OT Badejo, 'Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas' 8 <<https://www.fig.net>>chapters>chapter_8> accessed 30 July 2018.

¹⁰¹Ibrahim (n 32).

Minister of Niger Delta Affairs-Senator Godswill Akpabio was credited to have alleged that the majority of the NDDC projects were awarded to the National Assembly members.¹⁰² Because of the high level of corruption, the Commission is notorious for cases of abandoned projects meant to prevent environmental degradation and contribute to the sustainability of the Niger Delta environment.¹⁰³

3.5 Ministry of Niger Delta Affairs (MNDAs)

MNDAs was established by the Nigerian government in 2008, basically as an interventionist ministry to enhance, promote and coordinate government's efforts to tackle the challenges of infrastructural development, environmental protection and youth employment in the Niger Delta Region of the country.¹⁰⁴ To fulfil its environmental protection function, the MNDAs established an Environmental Management (EM) Department with the mandate to develop appropriate and effective strategies for restoring, conserving and protecting the environment of the Niger Delta Region.¹⁰⁵ However, it is asserted that the Ministry was created as a measure of placating the restive youths of the Niger Delta region. That it serves a political purpose of peace at that time but has now become a counterproductive measure. The existence of two bodies, that is, NDDC and MNDAs result in overlap in the discharge of their responsibilities. It is in the light of this, that many Nigerians argued that the creation of the MNDAs is superfluous, given the fact that the NDDC is sufficiently empowered by law to address the issues in the region.¹⁰⁶ The allegation of non-performance and duplication of ministry seems to be the major criticisms of MNDAs. The region has not change for good since the creation of the ministry as it is arguably alleged that the MNDAs has not made any concrete effort to tackle the problem of environmental pollution and degradation in the region.¹⁰⁷

4. Challenges to the Legal Enforcement of Environmental Laws in Nigeria

It is hardly arguable that environmental policies and legislation no matter how beautifully conceived towards the protection of the Nigerian environment will at best be an exercise in futility and of little significance unless and until they are

¹⁰²D Elumoye and A Akinwale, 'Akpabio Fires Back, Lists Senators, House Members Awarded NDDC Contracts' *THISDAY Newspaper* (Lagos, 27 July 2020); AM Jimoh and J Osahon, 'Akpabio's Letter Exposes Senators, Reps in NDDC Contract Scams' *The Guardian Newspaper* (Lagos, 27 July 2020); L Nwabughio, 'NDDC Contracts Beneficiaries: Akpabio Finally Names Senators, Reps' *Vanguard Newspaper* (Lagos, 27 July 2020).

¹⁰³Ibrahim (n 32) 14.

¹⁰⁴C Ochay, 'Buhari's Determination for a New Niger Delta Sacrosanct-Akpabio' *Vanguard Newspaper* (Lagos, 25 June 2021); 'Nigeria: Why We Created Niger Delta Ministry, By Yar'Adua' *THISDAY* (Lagos, 12 September 2008) <<https://allafrica.com/stories/200809120002.html>> accessed 12 August 2021.

¹⁰⁵ Ministry of Niger Delta Affairs, Environmental Management <<https://www.nigerdelta.gov.ng/index.php/departments-units/environmental-management>> accessed 10 March 2020.

¹⁰⁶ Ibrahim (n 32) 136.

¹⁰⁷Ibid.

accompanied by effective means of enforcement and compliance. This section identifies and discusses the challenges to the legal enforcement of environmental laws in Nigeria

4.1 Inadequate Penalties or Punishments for Violators of Environmental Laws

The penalties or punishments prescribed by the laws for offenders or violators of environmental laws are in most cases, low and inadequate and thus, not deterrent enough to compel compliance with environmental laws. For example, sections 1, 3 and 5 of the ONWA prohibit discharge of oil into the waters of Nigeria and mandates ships to install anti-pollution equipment for the purpose of preventing water pollution.¹⁰⁸ If the above provisions are violated, the violator (ship owner or master) will be liable and guilty of an offence and will pay a fine of N2,000 for such violation.¹⁰⁹ The authors regards the punishment of a fine of N2,000 too small and grossly inadequate to serve the purpose of this law as it is not likely going to serve as an effective tool for deterrence to polluters of the environment, especially, the oil and gas companies operating in the Niger Delta region.¹¹⁰

Also, there is no provision in the NOSDRA Act that specifically imposes fines for an oil spill incident; only failure to report an incident and to clean up and remediate the impacted (polluted) site within two weeks of the occurrence of the spill is punishable.¹¹¹ This provision is particularly concerning, as an oil spiller who would have assumed an obligation to report an oil spill incident may prefer to pay the fine of two million naira rather than engage in the clean-up process. This situation then removes deterrence and fosters an environment where the law is observed more in its breach than in compliance. Besides, the violators are usually multinational companies that are extremely rich and can afford to pay the fine with ease.¹¹²

4.2 Exemptions in Environmental Laws that Impedes Enforcement of its Provisions

There are exceptions in some environmental laws that impede the enforcement of their provisions by environmental enforcement agencies. For example, under the EIA Act, an impact assessment is not required for a proposed project where the President of Nigeria or the Federal Environmental Protection Council is of the view that the environmental impacts of the project may likely be minimal, the project is to be undertaken during national emergency period for which the government has taken temporary steps; and the Federal Ministry of Environment is of the view that such a project is in the interest of public health or safety.¹¹³ These exceptions are

¹⁰⁸See ONWA, ss. 1, 3 & 5.

¹⁰⁹Ibid s 6.

¹¹⁰Ibrahim (n 32) 93-94.

¹¹¹See NOSDRA Act, s 6(2)&(3).

¹¹² Ugbaja (n 12) 61.

¹¹³See EIA Act, s 15(1)(a-c).

mostly responsible for non-compliance with the provisions of the EIA Act.¹¹⁴ The last exception that allows non-compliance with the environmental impact assessment requirement appears to counteract the entire objective of the EIA Act. This is because the only way to determine whether a project is safe or healthy for the public is by assessing its potential impacts on the environment.¹¹⁵

Also, the PIA which prohibits the flaring or venting of natural gas and imposed penalties on violators, equally allows the flaring or venting of natural gas for a specified period under certain conditions, such as where it is required for facility start-up; or (b) for strategic operational reasons, including testing.¹¹⁶ These exceptions in the PIA which allows gas flaring may defeat the original intention of the PIA to put a stop to gas flaring in Nigeria.

4.3 Lack of Awareness of the Existence of Environmental Rights in Nigeria

Ignorance of the existence of the right to a healthy environment based on the notion of non-justiciability of section 20 of the CFRN 1999 has for several years hindered the enforcement of environmental laws. This lack of awareness of the existence of environmental rights was further promoted by the interpretation of section 20 as a non-justiciable right as evidenced in the cases of *NNPC v Fawehinmi*,¹¹⁷ *A.G. Ondo State v A.G. Federation*,¹¹⁸ and *Archbishop Olubunmi Okogie (Trustees of Roman Catholic Schools) and Ors v The Attorney General of Lagos State*,¹¹⁹ where the Nigerian Court held that the provisions of Chapter II of the 1999 Constitution, including environmental rights provisions of section 20, are non-justiciable and therefore, unenforceable in Nigeria.

Most Nigerian are not yet aware that the growing trend in the jurisprudence of human rights, especially, through the African Charter on Human and Peoples Rights (ACHPRs), have rendered the notion of non-justiciability of section 20 of the CFRN 1999 untrue, as illustrated in the cases of *Jonah Gbemre v SPDC*,¹²⁰ and *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v Nigeria*,¹²¹ where both the Nigerian court and the African Commission on Human Rights held that Nigerians have a right to a healthy environment.

4.4 Placing more Value on Economic Benefits over Environmental Protection

In the seemingly steady struggle between environmental protection and economic development, economic considerations still influence government's decisions in

¹¹⁴ CC Ekeolisa (n 68); See E Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (University of Toronto Press 2009) 59.

¹¹⁵Ekeolisa (n 68) 38.

¹¹⁶See PIA 2021, s 107(a) and (b).

¹¹⁷*NNPC v Fawehinmi* (n 17).

¹¹⁸*AG Ondo State v AG Federation* (n 18).

¹¹⁹*Okogie & Ors* (n 19).

¹²⁰*Gbemre* (n 21).

¹²¹ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP)* (n 23).

environmental protection issues in Nigeria.¹²² This is well illustrated by the fact that the NESREA Act, the most comprehensive piece of legislation ever enacted for the sustainable management of the environment in Nigeria,¹²³ clearly exempted itself from providing protection to the environment against pollution arising from oil and gas companies in Nigeria. Sections 7, 8, 29 and 30 of the NESREA Act expressly exclude the Agency from entertaining issues of environmental pollution arising from the activities of oil and gas companies, which arguably accounts for more than 90 per cent of environmental pollution and degradation in Nigeria.¹²⁴

4.5 Lack of Political Will on the Part of Government to Enforce Environmental Laws

A major challenge in the enforcement of environmental laws in Nigeria seems to be a lack of political will on the part of government to enforce the provisions of the laws. For example, in the case of *Jonah Gbemre v SPDC*, the court gave a judgment that SPDC should stop gas flaring since 2005, but the Nigerian government has since displayed the lack of political will to enforce this judgment through its environmental institutions (agencies).

5. Conclusion

It is obvious that several environmental laws and statutory regulatory institutions have been put in place by successive governments in Nigeria to protect and sustainably manage the Nigerian environment against environmental pollution especially arising from the oil and gas sector. Yet, the Nigerian environment, particularly, the Niger Delta Region of the country, is presently today, a typical global example of a negatively degraded environment through unsustainable oil exploration and exploitation. There are basically, two reasons for the degraded state of the Nigerian environment, particularly, the Niger Delta region of the country. Firstly, there are some flaws in the laws designed to protect the nation's environment, which includes, inadequate penalties or punishments for violators of environmental laws, exemptions in environmental laws that impedes enforcement of its provisions, and lack of awareness of the existence of environmental rights in Nigeria. Secondly, there are factors making the environmental regulatory agencies ineffective in enforcing the laws, which includes placing more value on economic benefits over environmental protection and lack of political will on the part of government to enforce environmental laws. It is in the light of the above that the authors recommend the following in order to achieve the protection and sustainability of the Nigerian environment:

- (i) The laws examined should be reviewed and amended in line with the observations made therein for effectiveness.

¹²² See generally, J Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston Univ Intl LJ* 291.

¹²³ Ugbaja (n 12) 56.

¹²⁴ *Ibid.*

- (ii) Stiffer penalties and punishments should be enshrined in the laws enacted for environmental protection.
- (iii) Government should create awareness, educate, and enlighten the citizens on the existence of environmental rights and the need to judicially enforce same.
- (iv) Government should strike a balance between economic development and environmental protection.
- (v) Government should exert strong political will to enforce environmental laws.

STRENGTHENING THE RULE OF LAW AND GOOD GOVERNANCE AMID COVID-19 PANDEMIC IN THE GLOBAL SOUTH

John Funsho Olorunfemi* & Chidiebere Geoffrey Udeokechukwu**

Abstract

Disproportionate curtailment measures against the COVID-19 pandemic alongside compulsory vaccination (in the midst of rumours and conspiracy theories) have contributed to vaccination hesitancy, data and surveillance monitoring without due regard to civil and political rights. The absence of due regard to these rights by governments, undermine the observance of rule of law and good governance. Consequently, there have been sweeping implications on public order and security, disruption of electoral process and the right to dignity through torture and unlawful use of force. Socio-economic rights violations, relaxation of public procurement mechanisms, lack of capacity to deliver essential services, disinformation, perversion of justice, and gender-based violence have also overwhelmed the entire global health care system. The paper assesses curtailment measures against COVID-19 pandemic and its impact on rule of law and good governance in the Global South towards a better COVID-19 stimulus and recovery packages. It adopts doctrinal research method by relying on relevant statutes, international instruments, judicial decisions and literature. It finds that the discriminatory, inequitable curtailment measures and insufficient governmental social protections and economic supports, constitute “multiplier threat” that produces structural violence against vulnerable, marginalised communities and foreign nationals. The pandemic has created scientific uncertainty that necessitates global solidarity and scientific precautionary measures through digital and telemedicine leading to important health management. The paper calls for international democracy support for electoral reforms and United Nations oversight mechanisms for rule of law and good governance to promote transparency and accountability in the management of COVID-19 pandemic.

Keywords: COVID-19; curtailment measures; good governance; rule of law

1. Introduction

The Covid-19 pandemic exacerbated structural inequalities and human rights violations worldwide. The catalyst for this exacerbation is presumably the nature of response to the crisis by the governments, especially in the global south. It is easy to imagine that a faithful application of the tenets of the rule of law and good governance would have and can still mitigate the harsh impacts of the pandemic; therefore, the importance of the rule of law in addressing Covid-19 challenges cannot be overemphasised.

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Human rights are at the frontline in the fight against Covid-19.¹ Hence, focusing on the needs of people, and the institutions and norms regulating relations between States and individuals, the rule of law enables and facilitates good governance and is a precondition for security, justice, and equality.² The rule of law safeguards human rights standards and an independent judiciary in order to prevent the arbitrary and abusive exercise of power. It protects legitimate justice processes and results, including through fair laws and policies, effective, accessible, and accountable institutions and by ensuring people and groups are empowered to realize their rights.³ While the relevance of the rule of law (in theory) cannot be downplayed, reality presents a far cry from what should be obtained.

With the dawning of this new reality as presented by the Covid-19 pandemic, the relevance of the rule of law, (especially as states respond to the crisis) is unavoidably germane; multiple times over. The jurisprudence behind this reasoning is this: that in a state of emergency (like that of the Covid-19 crisis), respect for the tenets of the rule of law will positively optimise a regime's reaction accordingly. Respect for the rule of law in times like this, means that human needs are at the forefront of any government's effort to curtail the deadly effects of the virus.

The statistics of casualties has been staggering and really frightening since the outbreak of the Coronavirus pandemic; cumulating to deaths of more than 6 million people as at 11 April 2022.⁴ This has raised concerns that led governments to take urgent and aggressive action to stop the spread of the virus.⁵ The effects of the pandemic have not only overwhelmed the health care systems but other areas of the global economy⁶ have been drastically strained

¹ See generally: United Nations, 'COVID-19 and Human Rights We are all in this together' (Report on Human Rights and Covid-19, 2020) <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf> accessed 23 October 2021.

² IDLO, 'Rule of Law and Covid-19: Policy Brief', (2020) <https://www.idlo.int/sites/default/files/pdfs/publications/idlo-rule_of_law_and_covid19-policy_brief-final.pdf> accessed 23 October 2021.

³ Ibid.

⁴ As at 11 April 2022, 6,179,104 deaths had been reported to the World Health Organisation (WHO). 'WHO Corona Virus (Covid-19) Dashboard' *World Health Organisation* <<https://covid19.who.int/>> accessed 11 April 2022. According to the John Hopkins Corona Virus Resource Centre, there have been 6,142,999 deaths as of 11 April 2022. Johns Hopkins University and Medicine 'Corona Virus Resource Centre' <<https://coronavirus.jhu.edu/>> accessed 11 April 2022 .

⁵ Human Rights Watch, 'Human Rights Dimensions of Covid-19 Response' (19 March 2020) <<https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>> accessed 3 October 2021.

⁶ The economic damage wrought by the outbreak of the Covid-19 pandemic unfortunately represents arguably, the worst economic shock the world has experienced

including the legal system, domestic mechanisms of governance and other aspects of life. As a consequence, the world faces varying degrees of challenges occasioned by the outbreak of this virus which once was novel, but now, is enjoying phases of resurgence and mutations.⁷

In the global south,⁸ these challenges have been manifested as disproportionate curtailment measures against Covid-19 which have contributed

in decades. According to the World Bank, (as of June 2020) the pandemic and resulting efforts to contain it, caused a drastic plunge in the demand for oil; and also a crash in oil prices. The World Bank 'The Global Economic Outlook during the Covid-19 Pandemic: A Changed World' (8 June 2020) <<https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world>> accessed 1 October 2021.

⁷ The Delta variant of coronavirus continues to rampantly spread and dominate across the world and fresh worries have cropped up with the emergence of a variant which has come to be known as the 'Mu' variant, which, according to some medical experts, is worrying. While it has been branded as a 'Variant of Interest' by the WHO, latest reports have noted that the variant is making its presence felt internationally, and has spread to over 49 US states and 40 different countries worldwide. See 'Coronavirus: Is The 'Mu' Variant Deadlier Than Delta? Decoding All Known COVID-19 Mutations Circulating Right Now' (September 9, 2021) *Times of India* <https://m.timesofindia.com/life-style/health-fitness/health-news/coronavirus-is-the-mu-variant-deadlier-than-delta-decoding-all-known-covid-19-mutations-circulating-right-now/amp_etphotostory/86063698.cms> accessed 30 September 2021. On 26 November, the WHO designated the newly identified coronavirus variant, B.1.1.529, named Omicron as a variant of concern which was reportedly discovered in South Africa, Botswana, Hong Kong and Belgium which has led reports of new travel bans by United States and United Kingdom especially against travellers from South Africa, Botswana, Zimbabwe, Namibia, Lesotho, Eswatini, Mozambique and Malawi. David McKenzie and others, "Omicron, a new Covid-19 variant with high number of mutations, sparks travel bans and worries scientists" *CNN*, 27 November 2021, <<https://edition.cnn.com/2021/11/26/africa/new-covid-variant-discovered-south-africa-b11529-intl/index.html>> accessed 27 November 2021. The data shown here were accurate as at the time of publication. Since Covid-19 data changes rapidly, it is recommended that resource sites like WHO, John Hopkins University and Medicine be regularly visited for updates on Covid-19 data.

⁸ The Global South has traditionally been used to refer to underdeveloped or economically disadvantaged nations by intergovernmental development organizations, specifically the Non-Aligned Movement members. These countries are those who tend to have unstable democracy, are in the process of industrializing, and frequently face colonization by Global North countries (especially by European countries). The second definition uses the Global South to address populations that are negatively affected by capitalist globalization. 'Global South Countries 2021', *World Population Review* <<https://worldpopulationreview.com/country-rankings/global-south-countries>> accessed 1 October 2021. Even though the impact of the pandemic has been felt globally and all countries have been guided in their responses by the directives of the WHO, the jurisdictional scope of this paper is limited to the global south which is experiencing

to vaccination hesitancy, data and surveillance monitoring without due regard to economic, civil and political rights. Yet most countries have neglected these obligations posed by the challenges in their respective responses to the pandemic. This neglect has been manifested through failures to establish effective testing, contact tracing, social distancing, isolation, and quarantine policies. This clearly undermines observance of the rule of law and good governance with sweeping implications on public order, security and the right to dignity through torture and unlawful use of force. These discriminatory and inequitable curtailment measures, alongside insufficient government social protections, and economic support constitute a multiplier threat that produces structural violence⁹ against vulnerable, marginalised communities and foreign nationals. Several attempts have been made in literature on the assessment of the challenges posed by the Covid-19 Pandemic on every aspect of life. Tom Bernes and others examine the challenges of the Covid-19 Pandemic on the Global health and expose the inefficiency of relevant international institutions such as the G20, the European Union and the WHO to address the issues arising from the Pandemic. It is therefore suggested that international cooperation is considered in a world that will continue to be deeply interconnected¹⁰

In a collection of essays¹¹, some experts examine beyond the COVID-19 crisis and the potential challenges and opportunities in the post-COVID-19 world designed to offer new perspectives on the post-pandemic future. The experts find that International cooperation could mean increased solidarity and therefore, there is a foremost need for debt write downs to enable countries (of the global south) to grow out of the crisis.

Thomson and Eric explain the nature of the COVID-19 and curtailment measures against the pandemic and find that there are unmistakable regressions

more biting effects of the pandemic. However, references have been made to the experiences of some countries in the global north from comparative perspectives.

⁹ Structural violence can assume patterns of differences within large-scale social structures, differences of power, wealth, privilege, education and health that are unjust and unequal. Violence in this context thrives in a society where institutions and policies are designed in a way that creates barriers or inequitable access to a range of goods and services for some people but not others. See United Nations Children Fund, '*Structural Violence against Children in South Asia*', UNICEF, Kathmandu, 2018, 2.

¹⁰ Tom Bernes, 'Challenges of Global Governance Amid the COVID-19 Pandemic' https://cdn.cfr.org/sites/default/files/report_pdf/challenges-of-global-governance-amid-the-covid-19-pandemic.pdf Accessed 16 April 2022.

¹¹ The Global Risks Advisory Board of the World Economic Forum's Global Risks Initiative, *Challenges and Opportunities Post COVID 19*, https://www3.weforum.org/docs/WEF_Challenges_and_Opportunities_Post_COVID_19.pdf 11. Accessed 16 April 2022.

into authoritarianism in governmental efforts to contain the virus.¹² A report by the *Human Rights Watch* notes the obligations of Governments across jurisdictions to take effective steps for the prevention, treatment and control of the COVID-19 Pandemic. The report recommends that emergency declarations should not be used as a cover for repressive action or to quash dissent under the guise of protecting health¹³.

An OECD Report examines from Socio-economic and health fronts the probable effects of the COVID-19 pandemic on Effective implementation of the African Continental Free Trade Area (AfCFTA) and the African Union's productive transformation agenda which can strengthen regional value chains and reduce vulnerability to external shocks, advance the digital transition, and build economic resilience against future crises. On the health front, greater capacities to test, protect, treat and cure are essential.¹⁴

After discussing the challenges, opportunities, socio-political dynamics the impact on constitutionalism and rule of law as a result of the COVID-19 crisis in North African Countries, some experts recommends some measures that can be taken to mitigate the negative effect of the covid-19 pandemic on well-being of North African people.¹⁵

Although the foregoing works have made beneficial contributions by addressing future recovery plans, later developments arising after the first wave of the pandemic and the new variants, the important discovery of the covid-19 vaccines and the development on the use of information technology among others could not be captured by the aforementioned attempts as elaborately discussed in this paper.

This paper fills the gap by also considering the developments after the first wave of the pandemic by analysing the application of relevant national laws, international instruments and judicial decisions within the Global South. It assesses curtailment measures against the COVID-19 pandemic and its impact

¹² Stephen Thomson and Eric C Ip, COVID-19 emergency measures and the impending authoritarian pandemic, *Journal of Law and the Biosciences*, 7 (1) January-June 2020, lsaa064, <https://doi.org/10.1093/jlb/lsaa064>.

¹³ *Human Rights Watch*, 'Human Rights Dimensions of Covid-19 Response' (n 5)

¹⁴ OECD, 'COVID-19 and Africa: Socio-economic implications and policy responses' 7 May 2020 <<https://www.oecd.org/coronavirus/policy-responses/covid-19-and-africa-socio-economic-implications-and-policy-responses-96e1b282/>> accessed 27 November 2021.

¹⁵ J De Mesquita and A Kapilashrami, and B. Meier, 'The Impact of the COVID-19 Pandemic on Constitutionalism and the Rule of Law in North African Countries' 30 June 2020. <<https://www.idea.int/sites/default/files/publications/the-impact-of-the-covid-19-pandemic-on-constitutionalism-and-the-rule-of-law-in-north-african-countries-en.pdf>> accessed 27 November 2021.

on rule of law and good governance in the Global South towards a better COVID-19 stimulus and recovery packages.

To accomplish this task, The paper proceeds from introductory remarks under Section 1 to examines the responses of various countries to the COVID-19 pandemic and gives situation reports on cases of excessive use of force, discriminatory and inequitable measures across the jurisdictions under section 2. Section 3 reviews the effects of the curtailment measures on rule of law and good governance, While Section 4 discusses the application of the Siracusa Principle on limitations to derogations permitted to manage public health emergencies, while Section 5 contains the concluding remarks and proffers suggestions that can strengthen the rule of law and good governance amid COVID-19 pandemic.

2. Responses to the Covid-19 Pandemic in the Global South

The Covid-19 pandemic has confronted governments with a challenge of mammoth proportions. Various governments have always played interventionist roles in responding to public health emergencies. The points in favour of government response to mitigate the harshness of Covid-19 pandemic include employment of tax relief measures,¹⁶ release of disaster relief funds inform of wages through Unemployment Insurance Fund (UIF),¹⁷ relaxation of emergency procurement procedures¹⁸ and provision of funding to small businesses.¹⁹ However most of these measures have been severely criticised as discriminatory socio-economic relief or palliatives especially against foreign nationals and the less privileged. This is because most of the measures which are expected to be targeted at the vulnerable groups in the allocation of resources used criteria such as race, gender, disability and rural status to prioritise the socio-economic needs of vulnerable groups.²⁰ Other measures, some of which allegedly offend respect

¹⁶ Somboon Weerawutiwong, 'Legal and tax relief measures on COVID_19 pandemic' PWC, 2021 <<https://www.pwc.com/th/en/tax/legal-and-tax-relief-measures-on-covid-19-pandemic.html>> accessed 27 November 2021.

¹⁷ SARS, 'Unemployment Insurance Fund' *South African Revenue Service* 12 October, 2021 <<https://www.sars.gov.za/types-of-tax/unemployment-insurance-fund>> accessed 27 November 2021.

¹⁸ Kerry Kopke, 'Streamlining public procurement processes during COVID-19: Balancing efficiency and accountability' *COVID-19 Africa Public Finance Response Monitor* (2020) <<https://www.cabri-sbo.org/uploads/files/Documents/Streamlining-public-procurement-processes-during-COVID-19-Balancing-efficiency-and-accountability.pdf>> accessed 27 November 2021.

¹⁹ SBA, 'COVID-19 Economic Injury Disaster Loan' *US. Small Business Administration*, 2021 <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl>> accessed November 27, 2021

²⁰ Justice Alfred Mavezenge (ed), *COVID-19 Pandemic and Socio-Economic Rights*, (Juta and Company Ltd, 2020), <<https://www.kas.de/documents/275350/0/ESR+and+COVID+19+Book.pdf/0db2503c->

for human rights, the tenets of democracy and good governance have also been taken in various parts of Africa and across the globe.²¹ Certain governments have been accused of using the COVID-19 pandemic as a pretext to consolidate political power undemocratically or impose undue restrictions on the exercise of civil and political rights.²² Legislation has reportedly been enacted in Hungary allowing the Prime Minister to rule indefinitely and the employment of unorthodox surveillance in Israel.²³ In this section, the response measures of some countries have been highlighted. The countries include Nigeria, Angola, Kenya, Egypt, Cambodia, South Africa and Jordan. The listed jurisdictions have been selected on the basis of being countries of the global south. As noted, the global south traditionally refers to underdeveloped or economically disadvantaged nations. These countries are those who suffer unstable democracy, are in the process of industrializing, and frequently face colonization by Global North countries (especially by European countries). The situations in China and Thailand have been considered not only because the origin of the pandemic can be traced to China but the discussion has been taken from comparative perspectives.

2.1 Excessive Use of Force

Several security agencies were empowered to enforce the lockdown throughout the States of the federation.²⁴ In Nigeria, insecurity and alleged excessive use of force by security agents comprise the major factors that militate against the safety of the indigenes.²⁵ And predictably, there were spates of killings reportedly perpetrated by security agents in the guise of enforcing lockdown compliance.²⁶

e0d8-472b-6c43-7f12f3794237?version=1.0&t=1611901569173> accessed 14 September 2021.

²¹Herbert smith freehills ‘Covid-19: Initial Responses of Certain African Countries (Africa)’, Thomas Herman and others (eds), 22 May 2020. <<https://www.herbertsmithfreehills.com/latest-thinking/covid-19-initial-responses-of-certain-african-countries-africa>> accessed 7 August 2021.

²²CRS, ‘Global Democracy and Human Rights Impacts of COVID-19: In Brief,’ *Congressional Research Service*, 26 June 2020 <<https://sgp.fas.org/crs/row/R46430.pdf>> accessed 14 September 2021.

²³Yoni Ish-Hurwitz, ‘COVID-19 is revealing gaps in our human rights’ 27 April, 2020. <https://apolitical.co/en/solution_article/covid-19-is-revealing-gaps-in-our-human-rights> accessed 20 September 2021.

²⁴*Freehills n 21*.

²⁵Favour C Uroko, Chinyere T Nwaoga, ‘Human Rights Abuses in Local Government Areas in Nigeria during the Coronavirus Disease 2019 Pandemic: Faith-based Organisations as Agents of Transformation’ (2021) 2 (a) *Journal of Local Government Research and Innovation*, 25, DOI: <<https://doi.org/10.4102/jolgr.v2i0.25>> accessed 17 October 2021.

²⁶On the 2nd of April 2021, a 28 year old man was killed by the army in Warri for violating the lock down mandate. 14 days later in Aba, a tricycle commuter reaped the

According to the National Human Rights Commission (NHRC), security services killed about 30 people and unlawfully extorted, detained, tortured, or mistreated dozens more over the first five weeks of lockdown enforcement.²⁷ A civil society organisation²⁸ expressed particular concern over the decision by state authorities in Rivers State to demolish two hotels because they allegedly continued to operate despite the governor's executive order prohibiting hotel operations during the lockdown.²⁹ Reacting to the demolitions, (socio-economic rights and accountability project) SERAP accused the governor of using COVID-19 to perpetrate human rights violations, branding his actions as an 'executive rascality'.

Authorities in Angola struggled to contain the spread of the pandemic despite declaring a partial lockdown in late March 2020. But many Angolans, especially street traders, broke the lockdown rules to earn some money.

same fate. Bereaved families were left to grieve without recompense or redress while security personnel continued unabated, their spate of human rights violations. See Uroko and Nwaoga (n 18) 2. The Lekki tollgate massacre is an unforgivable despotic response by the government to the agitations of the Nigerian youths against police brutality which grew worse during the lockdown. In the days that preceded the 'Black Tuesday' (10 October 2021), a nationwide protest against the excesses of the disbanded Special Anti-Robbery Squad (SARS) had attained global recognition; thanks to the hashtag end SARS tweet (#endSars) that trended on Twitter for days. On the 20 October 2020, the Nigerian Army allegedly fired live ammunition on unarmed young protesters at Lekki tollgate. See 'Black Tuesday at Lekki Toll-gate', (23 October 2020) *Vanguard* <<https://www.vanguardngr.com/2020/10/black-tuesday-at-lekki-toll-gate/>> accessed 20 October 2021; Stephanie Busari, Nimar Elbagir, Gianluca Mezzofiore and Katie Polglase, 'How a Bloody Night of Bullets and Brutality Quashed a Young Protest Movement', (19 November 2020) *CNN* <<https://edition.cnn.com/2020/11/18/africa/lagos-nigeria-lekki-toll-gate-feature-intl/index.html>> accessed 20 October 2021; 'End SARS Protests: People 'Shot Dead' in Lagos, Nigeria' (21 October 2020) *BBC* <<https://www.bbc.com/news/world-africa-54624611>> accessed 20 October 2021.

²⁷ 'National Human Rights Commission Press Release on COVID-19 Enforcement So Far Report on Incidents of Violation of Human Rights', (April 15, 2020) *NHRC* <<https://www.nigeriarights.gov.ng/nhrc-media/press-release/100-national-human-rights-commission-press-release-on-covid-19-enforcement-so-far-report-on-incidents-of-violation-of-human-rights.html>> accessed 15 October 2021; Stephen Thomson and CIP Eric, 'COVID-19 Emergency Measures and the Impending Authoritarian Pandemic', (2020) 7(1) *Journal of Law and the BioSciences*, 1-33, 5 <<https://doi.org/10.1093/jlb/ljaa064>> accessed 20 October 2021.

²⁸ The Socio-Economic Right and Accountability Project (SERAP).

²⁹ Kayode Oyero, 'SERAP threatens to sue Wike over hotels' demolition', (10 May 2020) *The Punch*, <<https://punchng.com/serap-threatens-to-sue-wike-over-hotels-demolition/>> accessed 18 October 2021.

Government forces reacted with excessive use of force, which in some cases, sadly resulted in the killings of innocent unarmed civilians.³⁰

In September 2020, a medical doctor died in police custody after being detained for not wearing a face mask inside his car. Also in Angola at the oil rich enclave of Cabinda, authorities had cracked down on peaceful protesters and activists. They had continued forced evictions and demolitions without the necessary procedural guarantee or the provision of alternative adequate housing even during the lockdown.³¹

In Kenya, in response to the Covid-19 pandemic, the president on the 27th of March 2020 invoked the Public Order Act to impose restrictions, including a three-month nationwide curfew between 7pm and 5am. Three days later, 13-year-old Yassin Moyo was shot dead by a police officer in Eastlands in Nairobi while he was playing on his balcony after the 7pm curfew. On 27th of March 2020, a police officer beat journalist Peter Wainaina with a baton while he filmed a police assault on commuters, as they rushed them to board a ferry ahead of the curfew. In the month that followed, Michael Njau, a social justice activist, his cousin and a taxi driver disappeared while travelling from Thika to Nairobi. Two days later, police discovered their abandoned car. There was no evidence to implicate the police, but Michael Njau's colleagues said he had received threats for his work on police killings. The whereabouts of the men remained unknown even at the end of 2020. Police intimidated, harassed and attacked journalists and bloggers as a means to silence them. On 29 March 2020, three journalists were arrested for allegedly violating the Covid-19 curfew, despite their legal exemption from curfew restrictions. Several bloggers and journalists were arrested and charged under the Computer Misuse and Cybercrimes Act for publishing what the government deemed to be misleading information about COVID-19.³²

There were unfortunate reports of police misconduct in South Africa between 25 March and 5 May 2020, brought before the Independent Police Investigative Directorate (IPID). These complaints totalled 828 and sadly, they included 16 deaths in police custody; 32 deaths caused by police action; eight

³⁰ 'World Report 2021: Angola: Events of 2020' (2021) *Human Rights Watch* <<https://www.hrw.org/world-report/2021/country-chapters/angola>> accessed 18 October 2021.

³¹ Shivani Chaudhry and others, 'Forced Evictions in India in 2020: A Grave Human Rights Crisis During the Pandemic', September 2021 <https://www.hlrn.org.in/documents/Forced_Evictions_2020.pdf/> accessed 25 September 2021.

³² Collaboration on International ICT Policy for East and Southern Africa (CIPESA), 'How the Covid-19 Fight Has Hurt Digital Rights in East Africa', January 2021 <https://cipesa.org/?wpfb_dl=427/> accessed 20 September 2021.

incidents of rape by police officers; 25 accounts of torture in custody; and 589 assaults.³³

The Egyptian government arrested workers who expressed safety concerns or criticised the administration's handling of the pandemic and detained them pending investigations on charges related to terrorism and spread of false news.³⁴ Sometime in February 2020, the Egyptian Health Ministry sent doctors and medical teams to a quarantine facility without informing them that their transfer was part of the COVID-19 response or of the risks entailed. The medical team had revealed that they were 'tricked' into the assignment.³⁵

At the start of 2020, there were protest movements in Algeria, Lebanon and Iraq. These campaigns continued until the outbreak forced a suspension of the protests. However, peaceful protesters were beaten, arrested and, at times, prosecuted for participating in protests.³⁶

A wave of unprecedented authoritarian governance swept through China in the periods that followed the outbreak of the virus. Instances of high profile and disproportionate curtailment measures by governments in the global south include the periods when China's government initially withheld basic information about the virus from the public, under-reported cases of infection, downplayed the severity of the infection, and dismissed the likelihood of transmission between humans. Also, people were detained for spreading information about the epidemic on social media and media reporting was significantly curtailed. There was lockdown of tens of millions of people in Wuhan and other locations, which was further buttressed by an uncompromising use of quick response code technology, facial recognition cameras, drones, and other means, to closely monitor the whereabouts of citizens.³⁷ Many residents in cities under quarantine expressed difficulties in obtaining medical care and other life necessities. These difficulties caused a man with kidney disease to jump to his death from his apartment balcony after he could not get access to health facilities for dialysis.³⁸ Authorities had also reportedly employed various

³³ Amnesty International, 'South Africa 2020' <<https://www.amnesty.org/en/location/africa/southern-africa/south-africa/report-south-africa/>> accessed 2 October 2021.

³⁴ Amnesty International, 'Human Rights in Middle East and North Africa - Review in 2020', <<https://www.amnesty.org/en/location/middle-east-and-north-africa/report-middle-east-and-north-africa/>> accessed 16 October 2021.

³⁵ Human Right Watch, 'Human Rights Dimensions of Covid-19 Response', (n 5).

³⁶ Amnesty International, 'France: Thousands of Protesters Wrongly Punished under Draconian Laws in Pre and Post COVID-19 Crackdown', 29 September 2020 <<https://www.amnesty.org/en/latest/news/2020/09/france-thousands-of-protesters-wrongly-punished-under-draconian-laws-in-pre-and-post-covid19-crackdown/>> accessed 23 October 2021.

³⁷ Thompson and Eric (n 27) 5.

³⁸ Human Right Watch, 'Human Rights Dimensions of Covid-19 Response' (n 5).

intrusive containment measures comprising barricading shut, the doors of suspected infected families with metal poles. The authorities did little to combat discrimination against people from Wuhan or Hubei province who travelled elsewhere in China.³⁹ In January 2020, Li Wenliang, a doctor at a hospital in Wuhan where infected patients were being treated, was summoned by police for 'spreading false rumours' after he warned of the new virus in an online chat room. He died in early February from the virus.⁴⁰

In Cambodia, concerns were expressed because of how aggressively the government pursued those who spoke out freely about the virus. Cambodian authorities reportedly made a series of arrests on charges of spreading 'fake news' related to Covid-19.⁴¹

Further, in Thailand, medical personnel were alleged to have been threatened with disciplinary action – including termination of employment contracts and revocation of their licenses – for speaking out about the severe shortage of essential supplies in hospitals across the country.⁴²

2.2 Poor Distribution of Palliatives

Palliatives donated by companies via corporate citizenship schemes were hoarded by some government officials. The distribution of the few that were released led to overcrowding, which became counterproductive to the main reason for imposing the lockdown.

2.3 Relevant Legislative Efforts

Femi Gbajabiamiala, the speaker of the Federal House of Representatives in Nigeria, sponsored the 'Control of Infectious Disease Bill, 2020', which was set to replace the extant Quarantine Act⁴³. The proposed bill sought a penalty of between ₦200,000 (Two Hundred Thousand Naira) and ₦5,000,000 (Five million Naira) plus jail terms for violators of Covid-19 curtailment directives as opposed to the ₦500 fine from the previous Quarantine Act. A similar Public Health Emergency Bill, 2020 is also pending before the Nigerian Senate. The measures in the bill were seen as means to further contain the coronavirus

³⁹Ibid.

⁴⁰Stephanie Hegarty, 'The Chinese doctor who tried to warn others about coronavirus' 6 February 2020 <<https://www.bbc.com/news/world-asia-china-51364382>> Accessed 23 October 2021.

⁴¹Michael A Weber Maria A. Blackwood, Tomás F Husted, Thomas Lum and Derek E Mix, 'Democracy and Human Rights Impacts of COVID 19: In Brief' (2020) Congressional Research Service prepared for members and committees of Congress, <<https://crsreports.congress.gov/product/details?prodcode=R46430>> accessed 27 November 2021.

⁴²Human Right Watch, 'Thailand-Covid 19 Clamp down on Free Speech', 25 March 2020 <<https://www.hrw.org/news/2020/03/25/thailand-covid-19-clampdown-free-speech/>> accessed 15 September 2021

⁴³Cap Q 2, Laws of the Federation of Nigeria (LFN).

pandemic in a country of nearly 200 million. However, the Civil Society Legislative Advocacy Centre (CISLAC), and 39 other non-profit organisations operating in Nigeria including Amnesty International decried the bill, noting that it violated key principles of unambiguous legislative drafting, leaving a significant amount of discretion on the implementing authorities and limiting the rights of citizens and relevant institutions. Many Nigerians thought that the bills was draconian in nature and was also plagiarised from the Singapore Infectious Diseases Act 1977.⁴⁴

In Jordan, authorities issued decrees or legislation citing a state of emergency that criminalised legitimate expression about the pandemic. These were promptly implemented, with prosecutions for ‘spreading false news’ or ‘obstructing’ government decisions.⁴⁵

In April 2020, the Cambodia parliament unanimously passed a state of emergency law, which allows the king to declare a state of emergency in situations of war, pandemics, and 'national chaos'. This gives the government the prerogative to place bans or limits on movement and gatherings, the new emergency law also authorises the government to restrict the dissemination and broadcast of information, engagement in digital surveillance, and imposition of penalties on violators of the law.⁴⁶

2.4 Disregard to the Rights of Foreigners

The lockdown witnessed the authorities’ failure in South Africa to abide by their constitutional and international legal obligations towards refugees, asylum-seekers and undocumented migrants. The government’s COVID-19 aid programmes and social relief arrangements were made only for people with national identity documents. Only *spaza* shops owned by nationals were allowed to operate during the period when lockdown was most strictly enforced.⁴⁷

⁴⁴ Ruth Olurounbi, 'Coronavirus: Nigeria's Proposed COVID-19 Law Tears the Country Apart' (15 May 2020) <<https://www.google.com/amp/s/www.theafricareport.com/27969/coronavirus-nigerias-proposed-covid-19-law-tears-the-country-apart/amp/>> accessed 18 October 2021.

⁴⁵ Amnesty International, 'Human Rights in Middle East and North Africa - Review in 2020' (n 34).

⁴⁶ Reuters Staff, 'Cambodia adopts law to allow for emergency powers to tackle coronavirus' 9 APRIL 2020 <https://www.reuters.com/article/us-health-coronavirus-cambodia-idUSKCN21S0IW/> accessed 15 September 2021

⁴⁷ Ferdinand C. Mukumbang and others, 'Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa', 20 August 2020 <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-020-01259-4/> Accessed 10 September 2021

2.5 COVID-19 Vaccinations

In spite of the alleged side effect of COVID-19 vaccines⁴⁸ which has led to vaccination hesitancy,⁴⁹ covid-19 vaccination appears to enjoy global support as governments across jurisdictions have made Covid-19 vaccination mandatory. In Nigeria, as of 27 March 2022, a total of 31, 391, 732 doses of the vaccine have been administered.⁵⁰ The Federal Government and some state governments have made COVID-19 vaccination compulsory for Nigerians at the risk of prohibition from all public places and gatherings.⁵¹ This directive has been attacked by Trade Unions including Nigerian Medical Association (NMA) and The Joint Health Sector Unions (JOHESU), just as the federal High Court sitting in Port Harcourt had granted an ex parte injunction restraining the Edo State Government from implementing its decision to sanction persons that

⁴⁸Celeste McGovern 'Nobel Prize Winner: Mass COVID Vaccination an 'Unacceptable Mistake' 19 May 2021, *Life Site*, <<https://www.lifesitenews.com/news/nobel-prize-winner-mass-covid-vaccination-an-unacceptable-mistake-that-is-creating-the-variants>> accessed 19 November 2021.

⁴⁹Olusoji S Olatunji and others, "'Infodemic' in a Pandemic: COVID-19 Conspiracy Theories in an African Country' (2020) 3(4) *Social Health and Behaviour* 152-157, <<https://www.shbonweb.com/article.asp?issn=2589-9767;year=2020;volume=3;issue=4;spage=152;epage=157;aulast=Olatunji>> accessed 19 November 2021; David Robert Grimes, 'Medical Disinformation and the Unviable Nature of COVID-19 Conspiracy Theories' (2021)16 (3) *PLoS ONE* e0245900. <doi:10.1371/journal.pone.0245900, <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0245900>> accessed 19 November 2021.

⁵⁰WHO 'WHO Corona Virus (Covid-19) Dashboard' <<https://covid19.who.int/region/afro/country/ng>> accessed 13 April 2022.

⁵¹Chukwuma Muanya and others 'FG Moves to Make COVID-19 Vaccination Mandatory for Civil Servants' *The Guardian*, 03 September 2021 <<https://guardian.ng/news/fg-moves-to-make-covid-19-vaccination-mandatory-for-civil-servants/>> accessed 24 November 2021; Omeiza Ajayi, 'COVID-19: FG to Bar Unvaccinated Workers from Work by Dec 1' *Vanguard* (31 October 2021) <<https://www.vanguardngr.com/2021/10/breaking-covid-19-fg-to-bar-unvaccinated-workers-from-work-by-dec-1/>> accessed 24 November 2021; Osahon Osahon, 'COVID-19 Vaccination: Civil Servants Barred From Edo Secretariat' *Niger Delta Today* 15 September 2021, < <https://www.nigerdeltatoday.com/covid-19-vaccination-civil-servants-barred-from-edo-secretariat/>> accessed 24 November 2021; FEMI AJASA, 'EXCLUSIVE: Ravaged by Covid-19, GTBank imposes mandatory vaccination for staffers, threatens to slash salaries by 50%' <<https://thenewsguru.com/nigeria-news/exclusive-ravaged-by-covid-19-gtbank-imposes-mandatory-vaccination-for-staffers-threatens-to-slash-salaries-by-50/>> accessed 24 November 2021.

have not taken COVID-19 vaccination.⁵² In the same vein, other countries such as Italy, Greece, France, Germany, United States, China, and Austria, among others, have made digital vaccine certificates a mandatory requirement for access to workplaces and public gatherings as well as imposed various sanctions against those who have not been vaccinated.⁵³ In contrast, on a more liberal note, Singapore has directed that unvaccinated people should henceforth bear their own medical expenses except those who are exempted as a persuasive move to encourage massive taking of the COVID-19 vaccines.⁵⁴

⁵² Compulsory vaccination: NMA, JOHESU kick as FG threatens sanction <https://punchng.com/compulsory-vaccination-nma-johesu-kick-as-fg-threatens-sanction/>; *Charles Osaretin v. Governor of Edo State* (2021) FHC/PH/FHR/266/2021. <<https://www.thisdaylive.com/index.php/2021/09/01/court-stops-obaseki-from-enforcing-compulsory-covid-19-vaccine-directive/>> accessed 16 November 2021.

⁵³ Jonathan Franklin and Sylvia Poggioli, 'Italy Is Making COVID-19 Health Passes Mandatory For All Workers' 17 September 2021, <<https://www.npr.org/sections/coronavirus-live-updates/2021/09/17/1038240183/italy-vaccine-health-pass-for-employees>> accessed 17 November 2021; Chico Harlan and Stefano Pitrelli, 'Italy begins enforcing one of the world's strictest workplace vaccine mandates, risking blowback', <https://www.washingtonpost.com/world/europe/italy-vaccination-mandate-workers/2021/10/15/d1b045e2-2d99-11ec-b17d-985c186de338_story.html> accessed 17 November 2021; ROME — Italy pushed into new territory for a Western democracy on Friday, enforcing a stringent workplace vaccination rule that was dramatically reshaping society even as the morning shift began. Everywhere from offices to factories, workers faced a new requirement for entering and earning a paycheck: They had to first flash the QR code of a government-issued health pass. https://www.washingtonpost.com/world/europe/italy-vaccination-mandate-workers/2021/10/15/d1b045e2-2d99-11ec-b17d-985c186de338_story.html> accessed 17 November 2021. 'Chinese authorities say unvaccinated parents can't send children to school' *BBC News*, 16 July 2021 <https://www.bbc.com/news/world-asia-china-57859356>> accessed 19 November 2021; 'Vaccinate or resign, Zimbabwe tells government workers' *African News* <<https://www.africanews.com/2021/09/08/vaccinate-or-resign-zimbabwe-tells-government-workers/>> accessed 19 November 2021.; 'President Joe Biden said he'd order all executive branch employees, federal contractors and millions of health-care workers to be vaccinated against the coronavirus, and that his administration would issue rules requiring large private employers to mandate shots or testing' <<https://www.bloomberg.com/news/articles/2021-09-09/biden-to-sign-order-requiring-vaccines-for-federal-workers>> accessed 19 November 2021.; Ros Krasny and Jonathan Tirone 'Austria Orders Lockdown for Unvaccinated as COVID Cases Climb' <<https://www.bloomberg.com/news/articles/2021-11-14/austria-prepares-to-lock-down-unvaccinated-as-covid-cases-spike>> accessed 19 November 2021.

⁵⁴ Jason Dasey and staff "Unvaccinated patients in Singapore will have to pay their own medical bills from next month as the island nation tries to come to grips with a worrying COVID-19 caseload" <<https://www.abc.net.au/news/2021-11-09/singapore-to-bill-unvaccinated-covid-19-patients/100606366>> accessed 19 November 2021.

Apparent from the preceding paragraphs in this section is the truth that regimes in the global south largely responded to the crisis of the pandemic in manners that showed little or no respect for human rights. It is obvious that a government's disregard for human rights is a primal attribute of non-adherence to tenets of the rule of law and good governance. This section goes far beyond this motive to underscore the organic and global importance of human rights; especially in the global south. Once more, in political climates where rule of law and good governance thrive, it boils down to how the ruling regime regards human rights. Unfortunately, more is desired from regimes in the global south, in this respect.

3. Impact of Covid-19 on the Rule of Law and Good Governance

The previous section is a catalogue of case studies detailing the authoritarian response of regimes to the crisis of the pandemic which constituted a multiplier threat that produce structural violence against vulnerable marginalised communities and foreign nationals. In essence, as far as the global south is in issue, structural violence was a direct consequence of the response of the government to Covid-19 in the global south; or better still, it would be more appropriate to surmise that the problem of structural violence was exacerbated by the response of regimes in the global south, to the crisis of the pandemic.

According to Lutz Oette, Covid-19 sheds light on systemic institutional defects and the bitter realities of uneasy lives, usually manifested in weak public health architecture and overpopulated prisons which are fertile grounds for infections. The securitisation of the pandemic reviews these structural issues which mostly affected the vulnerable, poorest and disenfranchised.⁵⁵ Nigeria suffered a serious economic downturn aggravated by the lockdown phases without corresponding adequate relief measures. And what was the resultant effect? Hunger, of course! Some people were forced by the necessity of hunger to damn the lockdown mandate. This resulted in iniquitous repercussions in ensuring rights to adequate food, education, housing, standards of living, and physical and mental health.⁵⁶ These seeming disobedient citizens were mostly those ranked at the lowest rungs of society's ladder.

In South East Asia, the virus exposed the weak social protection for urban poor, especially migrant workers, while for many African people working in the

⁵⁵ Eliana Cusato, 'Beyond War Talk: Laying Bare the Structural Violence of the Pandemic' (3 May 2020) *Blog of the European Journal of International Law* <<https://www.ejiltalk.org/beyond-war-talk-laying-bare-the-structural-violence-of-the-pandemic/>> accessed 22 October 2021.

⁵⁶ De Mesquita, and others (2021) 'Strengthening Human Rights in Global Health Law: Lessons from the COVID-19 Response' *Journal of Law, Medicine & Ethics*, 49(2), 328-331. <doi:10.1017/jme.2021.47>

informal sector social distancing is a luxury that can hardly be afforded.⁵⁷ Covid-19 exposed the ineptitude of regimes towards the welfare of the citizenry. All the sovereignties discussed in the previous section were quick to employ despotic tactics in curtailment attempts. Consequently, there were spates of utter disregard for the rule of law and good governance which ideally essentialize derogable and non-derogable rights.⁵⁸

The responses have produced unprecedented pressure on democratic systems globally and have disproportionate impact on the most vulnerable and marginalized populations.⁵⁹ Other effects of the impact of Covid-19 pandemic on rule of law and good governance include restrictions on rights and consolidation of power by autocrats and provision of reliable and accessible information, among others.

The Covid-19 pandemic undermines the rights to health and life, human rights that underlie public health, and international assistance and cooperation. Covid-19 challenged the foundations of human rights in global health governance. The failure to guarantee determinants of health on the basis of equality and non-discrimination has shaped the unequal distribution of infections and deaths in the Covid-19 pandemic, placing increased burdens on vulnerable and marginalized communities. Such health measures have inequitably affected (and at times selectively targeted) marginalised and vulnerable groups, with violations of civil and political rights resulting in discrimination, incarceration, violence, and exploitation.⁶⁰ However, many high-income states have failed to comply with their trans-boundary obligations, enacting nationalist measures that restrict the international flow of essential goods.⁶¹ This neglect of global health governance in confronting a global health

⁵⁷Addisu Lashitew, 'Social Distancing Unlikely to Hold up in Africa without a Safety Net for Micro-entrepreneurs' 9 April 2020 <https://www.brookings.edu/blog/africa-in-focus/2020/04/09/social-distancing-unlikely-to-hold-up-in-africa-without-a-safety-net-for-microentrepreneurs/> Accessed 16 January 2022.

⁵⁸See International Covenant on Civil and Political Rights, (ICCPR) G.A. Res. 2200 A (XXI), U.N. GAOR, 21st session, Supp. No. 16, U.N. Document A/6316 (1966). Art 4.

⁵⁹USAID, 'Covid-19: Democracy, Human Rights, and Governance Issues and Potential USAID Responses' *USAID's Centre of Excellence on Democracy, Human Rights, and Governance*, April 2020, <https://www.usaid.gov/sites/default/files/documents/1866/COVID_USAID-DRG-Issues-and-Potential-Responses.pdf> accessed 27 November 2021.

⁶⁰Efrat Shadmi and others 'Health equity and COVID-19: global perspectives' *International Journal for Equity in Health*, (2020) 19:104 <<https://equityhealthj.biomedcentral.com/track/pdf/10.1186/s12939-020-01218-z.pdf>> accessed 27 November 2021.

⁶¹UN Committee on Economic and Social and Cultural Rights, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights', 17 April 2020 <<http://digitallibrary.un.org/record/3856957>> accessed 27 April 2021.

threat has led to devastating COVID-19 inequities and limited vaccine access, as high-income states have blocked waivers of intellectual property rights and failed to adequately fund and supply the COVAX Initiative.⁶²

The lack of equipment and supplies to test for and protect against COVID-19 will lead countries to re-examine their supply chains for critical health and livelihood related products.⁶³ The COVID-19 pandemic which has challenged the multilateral system and global solidarity on an unprecedented scale can if properly managed promote harmony and synergy between the north and global south with charity organisations in China already distributing masks to European governments, as Europe and the United States have been doing in developing countries for years.⁶⁴

Apart from the impact of Covid-19 on women,⁶⁵ around the world, more than 1.5 billion children are impacted by school closures⁶⁶ most of whom are largely drawn from the developing countries with low technology that would have supported e-learning during the lockdown. Sexual and gender-based violence (SGBV), incidences of political violence and protest, social unrest and violence by state forces, social cohesion, armed actors and peace processes, criminal violence and organised crime usually prevalent during a pandemic like Covid-19 are widely considered as threats to instability and social cohesion.⁶⁷ This is because the hoodlums and terrorist groups usually have a field day due

⁶²LO Gostin and SA. Karim, and BM Meier, 'Facilitating Access to a COVID-19 Vaccine through Global Health Law,' *Journal of Law, Medicine & Ethics* 48, no. 3 (2020): 622–626, <<https://doi.org/10.1177/1073110520958892>> accessed 27 April 2021.

⁶³OECD, 'COVID-19 and Africa: Socio-economic implications and policy responses' 7 May 2020 <<https://www.oecd.org/coronavirus/policy-responses/covid-19-and-africa-socio-economic-implications-and-policy-responses-96e1b282/>> accessed 27 November 2021.

⁶⁴Michael Igoe and Vince Chadwick, 'After the pandemic: How will COVID-19 transform global health and development?' *Devex* 3 April 2020 <<https://www.devex.com/news/after-the-pandemic-how-will-covid-19-transform-global-health-and-development-96936>> accessed 13 September 2021

⁶⁵UN Women, 'COVID-19 and its economic toll on women: The story behind the numbers' 16 September 2020 <<https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>> accessed 13 September 2020.

⁶⁶James Elder, 'More than 1.5 billion children are out of school around the world, due to COVID-19' UNICEF 04 June 2020 <<https://www.unicef.org/esa/stories/vlog-2-more-15-billion-children-are-out-school-around-world-due-covid-19>> accessed 27 November 2021.

⁶⁷H Marquette and S Herbert, 'COVID-19, governance, and conflict: emerging impacts and future evidence needs' March 2021 <https://gsdrc.org/publications/covid-19-governance-and-conflict-emerging-impacts-and-future-evidence-needs/> accessed September 14 2021.

to the absence of law enforcement agents who have been diverted to enforce the curtailment measures.⁶⁸

4. Enforcement of Rule of Law and Good Governance during Covid-19 Era

The previous section holds a detailed catalogue of utter disregard for the rule of law and good governance by states in responding to the crisis of the pandemic. While this paper enjoins states to ensure the protection and enforcement of the rule of law and good governance within their respective sovereignties, it is clear that collaboration within the international community is much needed to actualise the enforcement/application of the rule of law in responding to the Covid-19 pandemic. This necessitates the call for international democracy support for electoral reforms and United Nations (UN) oversight mechanisms for rule of law and good governance to promote transparency and accountability in the management of Covid-19 pandemic that will strengthen Covid-19 response architecture.⁶⁹

Non-state actors have a crucial role to play (both locally and internationally) in ensuring that the rule of law is respected by regimes in the global south. The preamble of the Universal Declaration of Human Rights enjoins every organ of society to promote respect for human rights and freedoms through progressive means in order to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among other peoples of territories under their jurisdictions.⁷⁰ The rule of law primarily encapsulates respect for human rights. Non-state actors can only encourage respect for these human entitlements through lobbying and suits against regimes as well.⁷¹ Also, even in genuine cases of emergency, the European Commission has always maintained that State security and public safety can only be effectively guaranteed in a democracy which fully respects the rule of law.⁷²

⁶⁸J De Mesquita and A. Kapilashrami, and B Meier (n 15).

⁶⁹ R Youngs and E Panchulidze 'Global Democracy & Covid-19: Upgrading International Support' (2020) <<https://www.idea.int/sites/default/files/publications/global-democracy-and-covid-19.pdf>> accessed 27 November 2021.

⁷⁰Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), preamble, in, 'Role of Non State Entities' *Icelandic Human Rights Centre* <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities>> accessed 23 October 2021.

⁷¹Council of Europe, 'Human Rights Activism and the Role of NGOs' <<https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos>> accessed 27 November 2021.

⁷²Council of Europe, 'The impact of COVID-19 on human rights and the rule of law - Our action' <<https://www.coe.int/en/web/human-rights-rule-of-law/covid19>> accessed 27 November 2021.

This is necessary because the moral content of a law can be assessed as a reflection of societal ideals through its commitment to the respect for human rights in order to ascertain whether such measures accord with standard global practice. Based on scientific evidence of the health emergency, the enforcement of restrictions on certain rights which should be time specific can be lawfully justified under the doctrine of necessity and proportionality without compromising the right to human dignity.⁷³

Sometimes, these responses amount to extreme and extraordinary measures that derogate from and limit the fundamental rights of the citizens. But these derogations and limitations may be legal.⁷⁴ In the ICCPR, derogations are allowed in times of public emergencies that threaten the life and official existence of the nation. In the International Covenant on Economic, Social and Cultural Rights,⁷⁵ the right to health requires states to take legal and policy measures to respect, protect, and fulfil determinants of health. There is also a further obligation to prevent, treat, and control infectious diseases; and make health services available, accessible, acceptable, and of good quality.⁷⁶ The right to health is guaranteed under article 12 and it entails governmental control over the spread of communicable diseases through restrictive measures for the protection of public safety. States Parties to the ICCPR Covenant may take measures derogating from their obligations under the treaty. But these derogations must be strictly required by the situation, consistent with other obligations under international law, and non-discriminatory. States parties are prohibited in these instances to derogate from their obligations to respect certain rights which include the rights to life, freedom of thought, conscience and religion, as well as against slavery, torture, and cruel, inhuman, or degrading treatment or punishment etc.⁷⁷ According to the UN Office of the High Commissioner for Human Rights (OHCHR), any restriction must be interpreted strictly and in favour of the right in issue.⁷⁸

⁷³ Yoni Ish-Hurwitz 'COVID-19 is revealing gaps in our human rights' 2020. <https://apolitical.co/en/solution_article/covid-19-is-revealing-gaps-in-our-human-rights> accessed 24 September 2021.

⁷⁴ Thomson and Eric, (n 21) 3.

⁷⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR) 2000 UN Doc E/C.12/2000/1

⁷⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (New York: United Nations, 1966); UN Committee on Economic, Social and Cultural Rights, General Comment 14 on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (art 12 of the International Covenant on Economic, Social and Cultural Rights) (Geneva: United Nations; 2000), UN Doc E/C12/2000/1.

⁷⁷ ICCPR art 4.

⁷⁸ Michael A Weber and others (n 41) 2.

However, a public health emergency like the Covid-19 pandemic is not a license for governments to forgo their obligations to uphold fundamental rights and liberties.⁷⁹ In line with this, and similar to article 12 (2) (c) of the ICESCR, the Siracusa Principles⁸⁰ provide that the ‘severity, duration, and geographic scope’ of any emergency measure that derogates from civil and political rights must be ‘strictly necessary’ to the relevant public health threat, and ‘proportionate to its nature and extent’.⁸¹ By extension, the Principles also mandate that steps taken to counter serious threats to the health of the population ‘must be particularly targeted at preventing diseases or injuries or providing care for the sick and injured’,⁸² and that a proclamation of public emergency and consequent derogations ‘that are not made in good faith are violations of international law.’⁸³ Unfortunately, the Covid-19 outbreak produced derogations that were made in bad faith.

This better approach is for the UN and the WHO to collaborate and fashion out necessary model legislation that specifies human rights to be adopted and rectified by nation states.⁸⁴ As seen in the Covid-19 response, public health emergencies can create scientific uncertainty and demand global solidarity, and it is necessary for global health law to elaborate relevant human rights principles to shape contemporary public health practice.⁸⁵ This agreement provides a pathway for the WHO to support human rights accountability in the Covid-19 response which will be critically important as UN treaty bodies resume review processes and the UN Human Rights Council provides oversight through the universal periodic review.⁸⁶

A South African case which illustrates judicial attitude to cases of brutality and torture under the guise of curtailing the COVID-19 pandemic is *Khosa v Minister of Defence and Military Veterans*⁸⁷ where the deceased Mr Collins Khosa was murdered and two others were injured by security agents. While reiterating that South Africans live in an open and democratic society under the rule of law, the South African High Court presided by Fabricius, J held that the

⁷⁹Thompson and Eric, (n 21) 3.

⁸⁰Endorsed by the UN Commission on Human Rights in 1984.

⁸¹UN Commission on Human Rights. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN 4/1985/4 (28 Sept. 1984), Principle 51.

⁸²Ibid, principle 25.

⁸³Ibid, principle 62.

⁸⁴J De Mesquita and A Kapilashrami, and B Meier (n 15).

⁸⁵BM Meier and H Huffstetler, and R Habibi, ‘Human Rights Must Be Central to the International Health Regulations,’ *Health and Human Rights Journal* (blog), 26 August 2020, <<https://www.hhrjournal.org/2020/08/human-rights-must-be-central-to-the-international-health-regulations/>> accessed 27 April 2021.

⁸⁶J De Mesquita and A Kapilashrami and B Meier (n 15).

⁸⁷21512/2020 [2020] ZAGPPHC 147.

Bill of Rights is a modern and effective tool and it must be used without fear or favour where appropriate within the bounds of the Constitution. The Court further held that security forces are only entitled to use the minimum force that is reasonable to perform an official duty. Adding that the provisions of the South African constitution protect human dignity and freedom, the obligation of this State and all its organs to respect, protect, promote and fulfil the rights in the Bill of Rights.

Surveillance monitoring has been employed to detect, isolate, test, and manage cases, monitor trends in Covid-19 deaths, identify follow-up and quarantine of contacts, among others.⁸⁸ This at times, requires the downloading of certain apps which may entail the purchase of a new smartphone to be able to cope with technological advancement on telemedicine and this could disproportionately affect those with lower socio-economic status and those who are older and who may not have adequate internet access.⁸⁹ In Qatar any defaulter risks up to three years in prison and a fine of QR200,000 (US\$55,000). Digital Surveillance can be linked to the medical records of members of the public in violation of their right to privacy guaranteed under article 12 of the Universal Declaration of Human Rights (UDHR) article 17 of the ICCPR⁹⁰ and article 8 of the European Convention on Human Rights⁹¹ as adumbrated in the European Court of Human Rights case in *Satakunnan v Finland*⁹² where the court considered the right to freedom of expression and right to a private life under articles 10 and 8 of the ECHR respectively. The Court also considered whether the restrictions applied met the “necessary in a democratic society” standard, and whether the domestic courts struck a fair balance between the right to freedom of expression and the right to respect for private life and held that the interference with the applicants’ right to freedom of expression was “necessary in a democratic society” and that the Finnish authorities had acted within their margin of appreciation.

An Israeli High Court has declared illegal the use of digital surveillance during the Covid-19 pandemic, which used national security legal authority for the Ministry of Health to implement the digital tracking of individuals, because such executive orders lack legislative scrutiny that would have been present

⁸⁸World Health Organization, ‘Global Surveillance for COVID-19 Caused by Human Infection with COVID-19 Virus: Interim Guidance’ March 20, 2020, 1. <<https://apps.who.int/iris/bitstream/handle/10665/331506/WHO-2019-nCoV-SurveillanceGuidance-2020.6-eng.pdf?sequence=1&isAllowed=y>> accessed 20 November 2021.

⁸⁹International Telecommunication Union, *Measuring Digital development: Facts and Figures 2019* (Geneva: International Telecommunication Union, 2019).

⁹⁰G A Res 217A (III) (1948) art 12; International Covenant on Civil and Political Rights, G A Res 2200A (XXI) (1966) art 17.

⁹¹European Convention on Human Rights, European Treaty Series No. 5 (1950) art 8.

⁹²931/13 (27 June 2017).

through legislative approval.⁹³The provisions of a new telecommunications law which permits states authority to monitor data for the purposes of contact tracing have been declared unconstitutional in Slovakia.⁹⁴

In holding that there is a clear interference with the right to privacy and the right to the protection of personal data, the court observe that the proportionality of the measures are to be determined by the minimum requirements for the length, method of storage of information and data obtained, their use, third party access to them, procedures to protect data integrity and confidentiality, and their destruction, in such a way that individuals have sufficient safeguards against the risk of their abuse and arbitrariness.

5. Conclusion

This paper assesses the curtailment measures against Covid-19 pandemic and its impacts on rule of law and good governance in the Global South. It reveals that the response of regimes towards addressing issues of the pandemic adopted a largely authoritarian approach, made manifest in discriminatory, inequitable curtailment measures and insufficient governmental social protections and economic supports conspired to constitute 'multiplier threats' that have exacerbated structural violence against vulnerable, marginalised communities and foreign nationals. In addition, the pandemic has created scientific uncertainties that necessitate global solidarity and scientific precautionary measures through digital and telemedicine leading to important health management. This paper catalogues situation reports that detail the despotic response of regimes to the crisis of the pandemic. The paper goes far beyond this motive to underscore the organic and global importance of human rights; especially in the global south.

It is likely that the Coronavirus has come to stay; and therefore, regimes (particularly governments in the global south) should see the need in recognising the importance of the rule of law in addressing the challenges of this global pandemic. A faithful adherence to the tenets of the rule of law will certainly facilitate good governance. And since human rights are at the forefront of the fight against Covid-19, governments cannot afford (in theory) to disregard non-negotiable importance of the rule of law especially in the fight against a global health hazard. This paper draws to a close by advocating for

⁹³N Bandel, 'Israel's Top Court: No Shin Bet Tracking of Coronavirus Patients Without Knesset Oversight,' *Haaretz* (March 19, 2020). <https://www.haaretz.com/israel-news/.premium-israel-s-top-court-no-shin-bet-tracking-of-coronavirus-patients-without-knesset-ove-1.8690253> accessed 20 November 2021.

⁹⁴*Group of 34 deputies of the National Council of the Slovak Republic vs. National Council of the Slovak Republic*. Constitutional Court of the Slovak Republic, PL. ÚS 13/2020-103

<https://www.venice.coe.int/files/EmergencyPowersObservatory/attachments/Slovakia_Decision_CC.doc> accessed 20 November 2021.

international democracy support for electoral reforms and United Nations oversight mechanisms for rule of law and good governance to promote transparency and accountability in the management of the pandemic towards a better Covid-19 stimulus and recovery packages.⁹⁵ This will encourage the local production of drugs and medical equipment.⁹⁶

There is a need for the various governments to enact laws to create the legal framework for effective response to the pandemic.⁹⁷ Apart from developing Covid-19 national action plans and policies, efforts should be geared at enhancing government communications, accountability, and transparency in health and public social services. Since enormous resources are required to curtail Covid-19 pandemic, effective monitoring mechanisms should be established to curb any possible misappropriation of funds and other corrupt related practices.⁹⁸

Reforms for the improvement of access to justice to minimize risks of Covid-19 in prisons and detention centres are necessary for the protection of public safety without compromising the tenets of rule of law and good governance.⁹⁹ Responses to the Covid-19 pandemic must include necessary electoral reforms that will foster strong democratic institutions and electoral processes modified to suit necessary compliance with curtailment

⁹⁵OECD 'Building back better: A sustainable, resilient recovery after COVID-19' 5 June 2020 <<https://www.oecd.org/coronavirus/policy-responses/building-back-better-a-sustainable-resilient-recovery-after-covid-19-52b869f5/>> accessed 27 November 2021; Anthony Nyong, Manish Bapna, Joel Jaeger and Ella Clarke, 'Nigeria Moves Toward a Sustainable COVID-19 Recovery' World Resources Institute, 14 January 2021 <<https://www.wri.org/insights/nigeria-moves-toward-sustainable-covid-19-recovery>> accessed 27 November 2021.

⁹⁶M Igoe and V Chadwick, 'After the pandemic: How will COVID-19 transform global health and development?' *Devex* 13 April 2020 <<https://www.devex.com/news/after-the-pandemic-how-will-covid-19-transform-global-health-and-development-96936>> accessed 27 November 2021.

⁹⁷Charmaine Rodrigues, 'Legal Approaches to Responding to Emergencies: Covid-19 as a Case Study' *Constitutional INSIGHTS* 6 September 2021, <https://www.idea.int/sites/default/files/publications/legal-approaches-to-responding-to-emergencies.pdf> accessed 27 November 2021.

⁹⁸Jorge Florez, 'COVID-19 Transparency and accountability in Africa: our work and reflections to date' *Global Integrity*, 9 September 2021, <<https://www.globalintegrity.org/2021/09/09/covid-19-transparency-and-accountability-in-africa-our-work-and-reflections-to-date/>> accessed 27 November 2021; B Hyland-Wood, J Gardner, J Leask, *et al.* 'Toward effective government communication strategies in the era of COVID-19' *Humanit Soc Sci Commun* 8 30 (2021). <<https://doi.org/10.1057/s41599-020-00701-w>> accessed 27 November 2021.

⁹⁹UNODC, 'Ensuring Access to Justice in the Context of COVID 19' May 2020, <https://www.unodc.org/documents/Advocacy_Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf> accessed 14 September 2021.

measures.¹⁰⁰ Necessary, lawful, and proportionate curtailment measures in exceptional circumstances on a ‘fact-specific’ basis should have regard to due process and procedural justice.¹⁰¹ It is a given to conclude that government responses to Covid-19 pandemic have culminated into the regression of governance to authoritarianism and the best way to redress this wrong is not just by the making of laws through the parliament but by ensuring that there is an independent judiciary to checkmate the excesses of the executive perpetrated under the guise of enforcing the curtailment measures.

¹⁰⁰ R Youngs and E Panchulidze, ‘Global Democracy & Covid-19: Upgrading International Support’ 24 June 2020 <<https://www.idea.int/sites/default/files/publications/global-democracy-and-covid-19.pdf>> accessed 14 September 2021.

¹⁰¹ Thomson and Eric (n 21).

A COMPARATIVE ANALYSIS OF ELECTRICITY REGULATORY FRAMEWORKS IN NIGERIA AND SOUTH AFRICA

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Abstract

Africa is tagged the 'Dark Continent'. As seen by some analysts, the concept of 'dark continent' is a symbolic representation of Africa's underdevelopment on the one hand and its inability to generate enough electricity necessary for economic and human development on the other hand. The need for a decentralized electricity regulatory framework vis-à-vis effective regulatory institutions in improving power generation and supply cannot be overemphasized. Thus, the failure of most Sub-Sahara African (SSA) countries to significantly improve their power sector could be blamed on non grass-root oriented and non-inclusive electricity regulatory models. South Africa runs a decentralized electricity regulatory model which is highly contributory to her relatively high rate of electricity access. The objectives of this work are to attempt a comparative analysis between South African (SA) and Nigeria's regulatory power sector frameworks and to understand the impacts of SA's regulatory frameworks on its power generation with the view to drawing lessons for Nigeria. The major argument of this paper is that SA's decentralized electricity regulatory model is highly contributory to the country's power sector performance as against Nigeria's centralized model with has dwindled its power sector performance. This paper examines the existing regulatory frameworks of both Nigeria and South Africa, their impacts on the various aspects of power sector. The paper also identifies salient lessons for Nigeria from SA experience and makes other recommendations that could improve Nigeria's power sector regulatory regime and overall performance of the sector.

Keywords: Electricity regulatory frameworks, decentralized and centralised regulatory models, comparative analysis, South Africa, Nigeria

1. Introduction

The evolution of electricity in South Africa, boasts of one of the most historic development of the energy sector in the world with a very long history of electricity technical capacity. The country's electricity dates back to 1882 when the first electric lights were installed at the railway station in Cape Town in the Cape Colony; barely two years after Thomas Edison invented the incandescent lamp in 1879. In 1882, the same year that the world's first central power station began operating in New York, the mining city of Kimberly in the Cape installed

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the first electrical streetlights in South Africa, well ahead of London which was still using gaslights.¹

On the other hand, Nigeria electricity generation development started much later than South Africa in 1896, 15years after the commencement of electric power generation in England.² The first power generation station in Nigeria was built in Lagos and had an installed capacity of 20MW. The power generating station was built and managed by the Public Works Department (PWD) and other municipal authorities.

In a bid to unify electrical power development, the colonial government created the Electricity Corporation of Nigeria (ECN) in 1950 and placed the existing utility and units under its control. By 1964, hydropower was a significant contributor to the Nigerian energy mix with the construction of Kainji Dam through the creation of the Niger Dams Authority (NDA) in 1962. By 1966, all 36 state capitals, including the federal capital territory had been on the national grid. Subsequently, ECN and NDA formed a unified body called the National Electric Power Authority (NEPA) in 1972 with the responsibility of power generation, transmission, distribution, among many others.³

NEPA faced numerous challenges which made the government initiate a restructuring process by modifying the electricity and NEPA Act in the late 1990s. However, these reforms were not exhaustive; hence the National Electric Power Policy (NEPP) was enacted in 2001. This policy provided a framework for restructuring NEPA which led to the creation of the Power Holding Company of Nigeria (PHCN); which assumed the assets, liabilities, and employees of NEPA in 2005; through the passing of the Electric Power Sector Reform (ESPR) Act, to serve as a legal framework for the achievement of the reform objectives of the NEPP.⁴

The Electric Power Sector Reform Act (ESPRA)2005 removed the government's monopoly of the power sector, increased private sector participation and inaugurated a regulatory body called the Nigerian Electricity Regulatory Commission (NERC), responsible for establishing grid standards, codes, regulation for electricity. The launch of the Roadmaps for Power Sector

¹R Christie, *Electricity, Industry and Class in South Africa* (State University of New York Press, Albany 1984)

²OI Okoro and E Chikuni, 'Power Sector Reforms in Nigeria: Opportunities and Challenges' (2007) 18 (3) *Journal of Energy in Southern Africa*.

³AO Soyemi and others, 'A Robust Energy Policy Review of Selected African Countries: An Impetus for Energy Sustainability in Nigeria (2021) <<https://iopscience.iop.org/article/10.1088/1742-6596/1734/1/012028/pdf>> accessed 30 November 2021.

⁴Ibid.

Reform in 2010 began the unbundling of the Nigerian power sector and was completed in 2013 and 2014 respectively.⁵

Since the inception of electricity in Nigeria, its power sector continued to trail behind South Africa's but also the pace of development in terms of generation and distribution capabilities continued to maintain an unacceptable low pace.

SA power sector does not only have a superior historic background but also has a more solid generation and distribution capacity. Although Nigeria is the largest economy in sub-Saharan Africa, it has serious growth constraint in its power sector. With its large oil, gas, hydro and solar resources, it still has a low generation potential of 12,522 MW of electric power from existing plants and on most days, only about 4,000 MW gets dispatched which is insufficient for a country of over 195 million people, mostly generated from non-renewable sources.⁶ SA on the other hand has an installed generation capacity of 58,095 MW from both conventional and renewable energy sources for a population of less than 60 million people.⁷ Interestingly, Nigeria's current electrification rate stands at 60% while that of SA is 95%. This article is an attempt to examine electricity regulatory frameworks of both jurisdictions and their impacts on the overall performance of both jurisdictions power sectors.

The Nigerian power sector is wrapped with challenges of over-centralized electricity policy implementation, regulatory uncertainty, gas supply, transmission system constraints, and major power sector planning shortfalls that have kept the sector from reaching commercial viability. SA on the other hand is not absolutely free of problems in its power sector but its decentralized regulatory model and different levels of its government policy and regulatory actions have had grassroots impacts. Again, different levels of governmental authority has taken a number of legislative and regulatory steps towards increasing social inclusion and a 'just transition plan' to renewable energy.⁸

Although, South Africa has not fully liberalized its power sector as ESKOM, a government owned entity still generates about 90% of electricity used in the country. Nigeria on the other hand, in 2005 unbundled its power sector into 18 companies comprising of six generation companies (GENCOs), one transmission company (TCN) and 11 distribution companies (DISCOs) with National Electricity Regulatory Commission (NERC) as regulatory institution and subsequently in 2013 privatised them save for the Transition Company of Nigeria (TCN).

⁵Ibid.

⁶ Power Africa Fact sheets <<https://www.usaid.gov/powerafrica/nigeria>.> accessed 30 November 2021.

⁷ Ibid.

⁸ Ibid.

South African energy sector though rated to be the best in Sub Saharan Africa, in terms of electricity generation, distribution and access seems to have one major shortfall as perceived by the rules of competition law. ESKOM maintains a monopolistic status as a state-owned institution saddled with power generation, transmission and supply. This negates the global trends of liberalization of the power sector and increased private sector participation that should promote competition in the electricity market. However, as a state-owned entity, it has achieved massive results in electricity access compared to Nigeria. There is little or no striking change with the privatization of Nigeria's electricity sector. There appears to be stagnancy with a number of post-privatization issues.

Nigeria, being the most populated country in SSA, its delivery is less than required on electricity. It has a lot to learn from climes whose power sector is working like SA. If Nigeria truly would continue to be the giant of African, then it must salvage its power sector for growth and sustainability.

2. South Africa's Electricity Regulatory Frameworks

2.1 Legal Frameworks

SA's power sector is governed by the following legislations:

2.1.1 The Constitution of South Africa Act 108 of 1996

The South Africa Constitution supports the involvement of various levels of the government in the electricity value chain. The Constitution gives Municipalities the right to administer local government functions which includes electricity and gas reticulation; municipal planning, etc.⁹ The Constitution also permits the Provincial Executive, an intervening power of issuing directives, to the Municipal Council who fails in its constitutional duties to provide electricity and water, and also empowers the Provincial Executive to assume responsibility to discharge that same obligation when the Municipality fails to discharge same.¹⁰ Also, the Constitution gives the national government power to legislate for effective performance of Municipalities obligations in the provision of electricity and water services to the people.¹¹

These provisions allocate duties for electricity provision to the Municipalities and supervisory and monitoring duties on the Provincial Authority, the citizens therefore can sue the Municipalities for non-performance or administratively bring appropriate notices or petitions of non-performance of the Municipalities to the Provincial Authority. Where there is a duty in law, there is also a right. Where there is a duty for one to perform an act in law, there is a right for another to enjoy, same or bring an action in court for violation of this right.

⁹ Constitution of South Africa Act 108 of 1996 s 156(1) and (2).

¹⁰ Ibid 139(1).

¹¹ Ibid 155(7).

2.1.2 *The National Energy Regulator Act, 2004 (NERA)*

It establishes a National Energy Regulator (NERSA) for the regulation of the electricity, piped gas, and petroleum pipeline industries. This Body established by this Act ensures that the regulatory laws are set in motion.

2.1.3 *The Electricity Regulation Act, 2006 (ERA)*

It establishes a national regulatory framework for the electricity supply industry, makes NERSA the custodian and enforcer of the national electricity regulatory framework, provides for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated, and also regulates the reticulation of electricity by municipalities.

2.1.4 *The National Energy Act, 2008*

This Act directs the Department of Minerals and Energy to ensure that diverse energy resources are available, in sustainable quantities and at affordable prices, to the South African economy in support of economic growth and poverty alleviation, while taking into account environmental management requirements.

2.2 Institutional Framework

2.2.1 *National Energy Regulator of South Africa (NERSA)*

NERSA is the primary regulator in the electricity sector and assumes its authority pursuant to the NERA and the ERA. The mission NERSA is to regulate the energy industry in accordance with government laws, policies, standards and international best practices in support of sustainable development.¹²

NERSA's strategic objectives are to: implement relevant energy policy efficiently and effectively; implement relevant energy law efficiently and effectively; implement relevant energy regulations efficiently and effectively; identify, develop and implement relevant energy rules efficiently and effectively; establish the credibility, legitimacy and sustainability of NERSA as an independent and transparent energy regulator; create an effective organisation that delivers on its mandate and purpose; and evaluate the Energy Regulator's effectiveness.¹³

For the purpose of operating a generation facility, NERSA is responsible for issuing electricity generation licences and registrations for such facilities. No person may operate any generation facility without a licence, save for certain exemptions set out in Schedule II of the ERA or determinations made by the Minister of Minerals and Energy. The exemptions mostly relate to the operation

¹² National Electricity Regulator of South Africa <<https://nationalgovernment.co.za/units/view/131/national-energy-regulator-of-south-africa-nersa>> accessed 30 November 2021.

¹³Ibid.

of smaller generation facilities of no more than 1MW and those generation facilities operated for own use or not connected to the grid. The purpose of the exemptions is to exempt various categories of generation facilities and electricity resellers from the requirement to hold a licence under the ERA in defined circumstances and to require such activities to be registered with NERSA.¹⁴

3. Nigeria's Electricity Regulatory Frameworks

3.1 Legal Frameworks

3.1.1 Constitution of the Federal Republic of Nigeria (CFRN) 1999

The Constitution vests law-making powers for electricity generation and transmission across Nigeria on the National Assembly. Significantly, the damming of water sources within Nigeria for hydropower generation and the establishment of renewable energy power plants in Nigeria is chiefly under federal jurisdiction.¹⁵ However, the Houses of Assembly of the states are allowed to make electricity laws that extend to areas within their states not covered by the national grid system or to regulate power stations established by the states in this regard.

3.1.2 The Electricity Power Sector Reform Act (EPSRA) 2005

In 2005, the Nigerian power sector was liberalized by the introduction of the EPSRA. This Act, which is a consequence of the National Electric Power Policy adopted in 2001, provides a new legal and regulatory framework for the sector. The fundamental change it entails is the privatization of the government-owned electricity company and the process towards a completely liberalized market. It makes provisions for the vertical and horizontal unbundling of the electricity company into separate and competitive entities; development of a competitive electricity markets; sets out a legal and regulatory framework for the sector; a framework for rural electrification; a framework for the enforcement of consumer rights and obligations: establishment of performance standards. It resulted in the transfer of the previously public power company, NEPA, into a (temporary) Holding Company, the Power Holding Company of Nigeria (PHCN) - called "Successor Company".¹⁶

¹⁴ Werksmans Attorneys, 'Electricity Regulation in South Africa' (2019) <<https://www.lexology.com/library/detail.aspx?g=d6ac004e-6663-4756-b44c-095e1a3e237e>> accessed 30 November 2021.

¹⁵CFRN 1999 Schedule 2, Part II, Item 14 (a)–(c).

¹⁶'The Nigerian Energy Sector: An Overview with a Special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification' (2nd Edition 2015) 68 <<https://www.giz.de/en/downloads/giz2015-en-nigerian-energy-sector.pdf>> accessed 8 October 2021.

3.1.3 The Environmental Impact Assessment Act (EIA) 1992

The EIA seeks to forestall the negative impacts of activities on the environment and this includes power generation and extraction. As at the time of its enactment, hydrocarbons constituted (and still constitute) a major source of energy for Nigeria and the generation and extraction had negative environmental impacts, hence the enactment of the EIA, which mandates project managers and parties to examine the likely impact of their activities on the environment before undertaking them. Under the current EIA Guidelines 2017, a power generating company or developer will be required to submit its environmental impact assessment to the Federal Ministry of Environment and obtain permission or a licence to proceed with the project.¹⁷

The Act makes it mandatory for environmental impact assessment to be conducted for projects likely to have significant effects on the environment, which also includes power projects. A power developer who intends to carry out power generation operations through the use of renewable energy must register the project with the Federal Ministry of Environment for an environmental impact assessment as Section 2 of the Act provides for the assessment of public or private projects likely to have a significant impact on the environment.¹⁸

3.1.4 The Nigerian Electricity Management Services Agency Act (NEMSA) 2015

The NEMSA seeks to enforce and maintain standards in power distribution. The NEMSA carries out technical inspections and testing for electrical materials. The standards are stipulated by the NERC in collaboration with the Standard Organisation of Nigeria (SON). In the judicial arena, there is minimal enforcement of the plethora of environmental laws in Nigeria as the case laws seeking to promote renewable and clean generation of power have usually been focused on petroleum activities. More so, it is further crippled by technical principles such as cause of action, the doctrine of ripeness and *locus standi*.¹⁹

An ordinary citizen is therefore discouraged from approaching the court to enforce the environmental laws where he or she is not directly and personally affected more than other citizens. Although recent decisions by the Nigerian Supreme Courts seem to reverse the strict reasoning, there is still yet to be an express opening of the court's doors.

In *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*²⁰ the court reiterated the need to switch from the carbon-polluting

¹⁷ Israel Aye and others, 'The Renewable Energy Law Review: Nigeria' 2021. <<https://thelawreviews.co.uk/title/the-renewable-energy-law-review/nigeria>> accessed 12 September 2021.

¹⁸ Ibid.

¹⁹ A Fagbemi, 'Environmental Litigation in Nigeria: The Role of the Judiciary' (2019)10(2) *Nnamdi Azikiwe University Journal of International Law*.

²⁰[2019] 5 NWLR (Pt 1666) 518.

mind-set. Also, in *Amadi & Ors v Essien*,²¹ the court affirmed the enforceability of electricity regulation in Nigeria. Also, in *Barr Mike Kpemi v Benin Electricity Distribution Company PLC*,²² the court enforced the claimant's right to an electricity meter for the supply of electricity to his household.

3.2 Institutional Frameworks

3.2.1 The Nigerian Electricity Regulatory Commission (NERC)

NERC was established in 2005 under the Electricity Power Sector Reform Act.²³ NERC can basically be regarded as the administrative-technical arm of the Federal Ministry of Power. It has been conferred with the authority to grant and revoke electricity distribution licences and permits.²⁴ Its overriding mandate is to ensure that electricity is available to consumers. It has also, in furtherance of its powers, the Nigerian Electricity Regulation 2012, Mini-grid Regulations 2017 and Renewable Energy Feed-in Tariff Regulations 2015, which have been enacted to increase renewable power supply with particular focus on clean electricity generation and distribution.²⁵ NERC is primarily responsible for granting and issuing licenses and approvals for the electric value chain from generation, distribution, transmission, trading, system operations, metering, etc.

3.2.2 The Nigerian Electricity Management Services Agency (NEMSA)

NEMSA seeks to promote efficient distribution of electricity throughout the country although its particular focus is on the technical standards of operating and distribution plants. NEMSA collaborates with the Standards Organisation of Nigeria (SON) to stipulate and enforce standards for electrical materials. This regulatory agency is responsible for enforcing the technical standards in the power sector in collaboration with the SON to ensure that all electrical materials conform with the required standard and quality and also conduct an inspection of all electricity projects in Nigeria.

3.2.3 The Energy Commission of Nigeria (ECN)

The ECN was established under the Energy Commission Act as far back as 1979, although reformed in 1988 and 1989. The ECN generally formulates policies and makes recommendations to the government on energy development and distribution in Nigeria.²⁶ This includes advisory services to the government on energy strategies, preparation and dissemination of information, promotion

²¹(1993) 7 NWLR (Pt 354) 91 at 112.

²²Unreported suit (Suit No AK/94/2019).

²³EPSRA 2005 s 88. NERC was established under the Act as a body corporate with perpetual succession that can sue and be sued in its own corporate name.

²⁴The Nigerian Electricity Regulatory Commission Act ss 7–12.

²⁵Jama Onwubuariri, 'Reviewing the Legal Framework for Renewable Energy Projects in Nigeria'. Also, Michael Dioha, 'Nigeria's Renewable Energy Policy: A Fantasy or Reality?' (2018) *Renew Energy World*.

²⁶The Energy Commission of Nigeria came to being through the enabling Act No. 62 of 1979, as amended by Act No. 32 of 1988 and Act No. 19 of 1989.

of research, development and training, as well as liaising with international energy-related organisations. Energy research, development and training related activities are carried out in the six technical departments and the six energy research centres. Two of the centres, located at Nsukka and Sokoto, are responsible for new and renewable energy research. The centre in Lagos focuses on energy efficiency and conservation, while the centre in Benin City specialises in energy and environment. The two centres in Ilorin and Bauchi are responsible for hydropower research and research in the area of petroleum respectively. ECN was instrumental in launching the Renewable Energy Master Plan (2012).²⁷

3.2.4 The Transmission Company of Nigeria (TCN)

The TCN is the body responsible for the transmission of electricity in Nigeria, in collaboration with other stakeholders and market players. It focuses on the transmission network across the country. The TCN performs three major functions the market operator, system operator, and transmission service provider. TCN manages the electricity transmission network in Nigeria. It is one of the bodies established to issue licenses for the transmission of electricity. It is also responsible for the evacuation of electricity generated by the electricity generating companies and taking it to the distribution companies.

3.2.5 The Nigerian Bulk Electricity Trader (NBET)

NBET is a government owned public liability company. The Bureau of Public Enterprises and the Ministry of Finance are its two shareholders of record with 80% and 20% stakes respectively. NBET was established in 2010 in line with provisions of the Electric Power Sector Reform Act (EPSRA). It is a trading licensee holding a bulk purchase and resale license. Its mandate is to engage in the purchase and resale of electricity and ancillary services from independent power producers and from the successor generation companies. NBET signs PPAs with privatised generation companies, greenfield IPPs and existing state-owned power plants. They resell power via vesting contracts with distribution companies and sign power sales agreements with eligible customers directly. NBET's power purchase agreements (PPAs) with independent power producers are backed by credit enhancement instruments provided by the FGN.²⁸ Technically, NBET acts as a clearing house between Gencos and Discos to guarantee all purchases in the market till the transitional phase is over. NBET uses a legal posture to drive and attract private sector investment through power

²⁷ The Nigerian Energy Sector: An Overview with a Special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification. 2nd Edition, 2015. <<https://www.giz.de/en/downloads/giz2015-en-nigerian-energy-sector.pdf>> Accessed 8 October 2021

²⁸ Ibid 55.

purchase agreement with energy developers.²⁹ The PPA entered into by NBET with Gencos and IPPs provides for:³⁰

- (a) Guaranteed payments for Capacity and Energy;
- (b) Mitigation of Sovereign Risks including SOEs obligations;
- (c) Cost reflective tariff with favourable ROI and FX protection;
- (d) Proper alignment of Force Majeure issues across Value Chain contracts; and
- (e) Downstream off-take through Vesting Contracts with DisCos.

4. Comparative Analysis of South Africa's and Nigeria's Electricity Regulatory Frameworks

SA and Nigeria are the two largest economies in sub-Saharan Africa. While Nigeria has a population of over 200 million people, SA has about 60 million people. Nigeria with its large population generates less than 5,000 megawatts of electricity while SA with a lesser population generates more than 45,000 megawatts of electricity. This translates to SA having more access to electricity than its Nigerian counterpart. In 2015 Nigeria unbundled its power sector but SA still runs a vertically integrated electricity system (although SA is currently in the process of unbundling). It was ordinarily expected that the deregulation and privatization of Nigerian power sector regime should have translated to a more efficient system with an improved electricity access. However, the contrary became the case. On the other hand, SA with a vertically integrated power sector generates more electricity with a higher access rate. The foregoing realities are imperatives that justify a comparative study of electricity regulatory frameworks of both jurisdictions. This is aimed at interrogating the impact of both jurisdictions regulatory frameworks on their respective electricity generation and access capacities.

Unlike the SA constitution, Nigeria's constitution does not assign any actionable duty to the local government authority or any other authority for the provision of electricity. However, the 1999 Constitution places electricity generation, transmission and distribution on the Concurrent Legislative List (see paragraphs 13 and 14 of the Concurrent Legislative List) thereby empowering both Federal and State legislatures arms of the government to make laws on the matter of electricity in Nigeria. This provision does not assign the duty to any level of government to provide electricity to the citizenry. Energy decentralization is the major reason why SA has recorded tremendous result in adequate electricity generation and supply. Even though the provisions of the

²⁹Yemi Oke, *Essays on Nigerian Electricity Law. The Role of a Bulk Electricity Trader* (2016) 22

³⁰L Yesufu, 'NBET Opportunities in the On-grid RE Section in Nigeria' (2016) <<https://www.get-invest.eu/wp-content/uploads/2016/11/NBET-Opportunities-in-the-on-grid-RE-section-in-Nigeria.pdf>> accessed 8 October 2021.

Nigerian constitution give state governments the right to make laws on electricity matter, it still appears to be a provision just meant for the books.

4.1 Impact of the Law on Various Aspects of the Electricity Sectors in the two Countries

4.1.1 Power Sectors Ownership of Electricity Assets

South Africa's power sector which is majorly dominated by ESKOM is largely state-owned utility and vertically integrated Monopoly. However, there are 177 licensed municipalities, and private-owned Independent Power Producers (IPPs).

In SA, Ownership of Power Generation Plants, originally, power generation utilities were both publicly and privately owned in the early stages of power generation, for example, the Mining City of Kimberly in the Cape installed the first electrical streetlights in South Africa. The first commercial central power station was built in 1897 by the Rand Central Electric Works and supplied electricity mainly to the gold mining industry around Johannesburg.³¹In 1906 the Victoria Falls Power Company was established, but its plans to harness hydroelectric power were soon abandoned in favour of cheaper coal-fired generation.

In Nigeria, prior to the enactment of the Electric Power Sector Reform Act (EPSRA), 2005, Federal Government of Nigeria (FGN) through the Ministry of Power was responsible for policy formulation, regulation, operation, and investment in the Nigerian power sector which operated through the National Electric Power Authority (NEPA), a wholly owned State-owned Enterprise (SOE) responsible for power generation, transmission and distribution. Consequently, FGN established the Power Holding Company of Nigeria (PHCN) and subsequently unbundled it into eighteen (18) successor companies.

Public ownership has always characterized Nigeria utilities from the inception of electricity generation. The first power generation station in Nigeria was built in Lagos and had an installed capacity of 20MW. The power generating station was built and managed by the Public Works Department (PWD) and other municipal authorities. Another power generating plant was built between the years 1921-1923 with an installed generating capacity of 14MW. The first electricity utility company, the Nigerian Electricity Supply Company (NESCO), commenced operations in 1929 with the construction of a hydroelectric power station at Kurra Falls, South-East of Jos, Plateau State, Nigeria (FRN, 2001). However, with the unbundling and subsequent privatization in 2013, private ownership of power sector is more than 60%.

³¹A Eberhard, 'The Political Economy of Power Sector Reform in South Africa' (Graduate School of Business University of Cape Town) 216-226.

4.1.2 Power Generation

In South Africa, the early Power stations which were built, generated electricity at varying capacities. Mining City of Kimberly of Cape, 1882; Rand Central Electric Works, 1897; Victoria Falls Power Company, 1906 and other stations built by the miners for their mining industries. Each of these power plants were said to be generating between 40-60MW. As it stands, SA has an installed generation capacity of 58,095 MW with 95% electrification rate.

Nigeria's earliest power station installed in Lagos has an installed capacity of 20MW. Another power generating plant was built between the years 1921-1923 with an installed generating capacity of 14MW. Today, Nigeria has an installed capacity of 12,522 MW of electric power but on most days, only about 4,000 MW gets dispatched.³²

4.1.3 Power Distribution and Supply

Power distribution and supply during apartheid regime in South Africa was limited to certain residential and industrial locations. Given the Apartheid regime, development including the power sector progressed on racial lines and this pattern affected the electricity industry. Consequently, major target of electricity provision was on heavy industry, mining and white households, which comprised about 12% of the total population.³³ As at 1917 many of the mines built their own power stations and some also supplied electricity to neighbouring towns.³⁴ South Africa has 188 licensed distribution companies which includes ESKOM, 174 municipalities with constitutional rights, and 13 private Distributors.

Prior to independence, electricity distribution and supply in Nigeria was managed by the Public Works Department (PWD), was cut across geographical boundaries. While in the case of Lagos municipality, electricity supply by PWD was limited to Lagos Island.

Today, electricity distribution in Nigeria is carried out by 11 companies empowered by NERC licence to purchase electrical power from the generating companies and distribute the power to consumers within their areas of coverage. They include; Kaduna Electricity Distribution Company Plc, Yola Electricity Distribution Company Plc, Enugu Electricity Distribution Company Plc. Abuja Electricity Distribution Company Plc, Ibadan Electricity Distribution Company Plc, Jos Electricity Distribution Company Plc, Eko Electricity Distribution Company Plc, Ikeja Electricity Distribution Company Plc, Port Harcourt

³² Power Africa Fact sheets <<https://www.usaid.gov/powerafrica/nigeria>>accessed 30 November 2021.

³³ O Davidson and SA Mwakasonda, 'Electricity Access for the Poor: A Study of South Africa and Zimbabwe' (2004) 8(4) *Energy for Sustainable Development* 26-40.

³⁴ A Eberhard, 'The Political Economy of Power Sector Reform in South Africa' (Graduate School of Business University of Cape Town) 216-226.

Electricity Distribution Company Plc, Benin Electricity Distribution Company Plc and Kano Electricity Distribution Company Plc.

It is clear that SA has more coverage range and efficiency with electricity distribution even though Nigeria is almost four times its population.

4.1.4 Privatization

South Africa power sector which is still dominated by ESKOM, a vertically integrated monopoly which generates, transmits and distributes electricity. Majority of the power sector stakeholders contend that ESKOM should be unbundled being a state-owned utility sector overdue for unbundling and privatization. There were unsuccessful attempts to reform through 1998 South Africa Energy White Paper; ISMO Bill, 2012; and IRP (2010-2030). More recently, there have been intense moves to completely unbundle ESKOM by the end of 2022.

Nigeria power sector has been privatized and former PHCN unbundled into 18 new companies which are: six GenCos, one TransCo, and eleven DisCos. This has opened door for private participation although the dividends are yet to be realized by electricity users in Nigeria. Even with the unbundling in Nigeria, the low electricity generation and supply have not stopped and this indicates that Nigeria's power sector needs huge bailout.

5. Challenges of Nigeria's Power Sector and Lessons from SA

5.1 The Challenges

With the exception of South Africa, most other sub-Saharan Africa countries have for decades continued to struggle with their power sector development, management, and governance and Nigeria is certainly not an exception. The major problems leading to power sector crisis in Nigeria to include but are not limited to: low power generation, Gas supply problem, high electricity pricing, low Investment in the power sector, corruption, vandalism of energy infrastructure, ineffective regulatory structures and much more.

These factors have greatly hampered the development of Nigeria's power sector and even made reforms in the country appear to be seemingly without expected benefits at least on the short-run.

5.2 Lessons for Nigeria from SA

5.2.1 Improving Access to Electricity through Decentralisation

South African municipalities and provincial authorities have constitutional rights and duties on the matters of electricity provision to the citizens. Definitely, this is part of the strong reasons why South Africa has the age-long history of superior power generation and distribution capabilities more than all other parts of African countries.

It is highly recommended that Nigeria adopts the South African electricity distribution model whereby the municipalities and provincial authorities have constitutional duties in electricity supply to the grass-root.

The South Africa Constitution in section 151(3) and 156(1) and (2) are germane here. Section 151 (3) provides thus:

A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

The Constitution in section 156 (1) and (2) provide thus:

A municipality has executive authority in respect of, and has the right to administer - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) any other matter assigned to it by national or provincial legislation. (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

Nigeria's energy sector is regulated centrally by the NERC. This has created the conditions for corruption to thrive. The result is that the supply of electricity is unstable and cannot support economic development. Decentralised regulation is the solution, but has been prevented by conflicting laws. For instance, the Nigerian Constitution supports decentralised electricity regulation. The Constitution is clear. It allows both federal and state governments to regulate electricity. Electricity appears on what is known as the concurrent legislative list but electricity regulation is still in the hands of the federal government alone. Supplying electricity is a complex business. The sector has many aspects, all complex in themselves: engineering, accounting, tax, financing, laws and regulations, governance, consumer concerns and safety.³⁵

Countries often decentralise authority to simplify the management of the sector. They also decentralise the sources of energy generation, transmission and distribution and the means of funding the sector. But Nigeria has done the reverse. Under the EPSRA, all regulations concerning electricity are made centrally for the 36 states and their 774 local government areas, which is not consistent with the provisions of the constitution.

The central regulator cannot monitor all the players effectively. The result is corruption, poor service delivery and use of substandard equipment. Gas pipelines are sometimes vandalised by frustrated citizens whose local needs are not understood or met.³⁶

³⁵Yemi Oke, 'Conflicting Laws keep Nigeria's Electricity Supply Unreliable' (2017) <<https://theconversation.com/conflicting-laws-keep-nigerias-electricity-supply-unreliable-81393>> accessed 23 September 2021.

³⁶Ibid.

5.2.2 Mass Electrification Programme

Eskom initiated a mass electrification program in South Africa through its reconstruction and development program; access rate targets were propelled by programs such as the integrated national electrification program³⁷ and the free basic electricity³⁸ which were introduced in 2002 and 2004 respectively. Nigeria needs to embark on a lot of electrification programs both in urban and rural areas. Nigeria is making some fair effort but there is a need to be more aggressive with improving electrification rates.

5.3 Other Recommendations

5.3.1 Electricity Policing

The establishment of a special security squad for the purpose of electricity policing in Nigeria is needed. This squad should be drawn from the existing Nigerian police, civil defence, community vigilante groups, and internal security department of the GenCos, TransCo, DisCos, and IPPs. Special training on electricity theft detection, electricity installation and investment protection should be given to them. There should be in each police division throughout the country, a special squad that is trained technologically and legally on meter reading.

In order to enhance this training, there should be a special course designed by joint resource persons drawn from NERC, the Ministry of Power, Universities, and Electricity consultants with requisite knowledge and skill. The curriculum should cover the basic knowledge about electricity courses. The training should also cover syllabus on criminal law and security courses, for the purpose of security of electricity installations, prevention and detection of electricity theft. It is further recommended that the Ministry of Justice should gazette the NERC Electricity Theft and other related Offences Regulations, 2014, to combat electricity theft in Nigeria, to enable the regulator implement same.

5.3.2 Regulatory Model

The adoption of centralized and co-regulation model of electricity regulation in Nigeria's electricity governance is highly recommended. A centralized regulatory model is more inclusive in that it allocates constitutional obligations on governments at various levels and accommodates the needs and inputs of grass root electricity users in electricity governance. A co-regulatory model on the other hand entails a combination of state control and self-regulatory models for effective regulation of the power sector in Nigeria. The implication of this is

³⁷ AO Soyemi et al , 'A Robust Energy Policy Review of Selected African Countries: An Impetus for Energy Sustainability in Nigeria' <<https://iopscience.iop.org/article/10.1088/1742-6596/1734/1/012028/pdf>>accessed 30 November 2021.

³⁸ Department of Energy 2004 FAQ's Free Basic Electricity.

that in Nigeria, the GenCos, DisCos, TransCo, and IPPs should interface to set up standards and best practices which every member should comply with. They should also establish industry monitoring and regulatory framework to access compliance to their own standards, which will compliment government regulator's regulation.

Furthermore, it is recommended that each GenCos should have regulatory unit that will interface with state regulator and the regulatory units of other licensees. This way, all the stakeholders will be working in concerted efforts to conform to standards and best practices.

5.3.3 Compliance, Monitoring and Enforcement

For effective compliance, monitoring and enforcement of regulations, codes and standards, each GenCo, DisCo and IPP should establish internal regulatory department that will be made of lawyers, engineers, economists, and other relevant professionals. Their major duties should be to:

- (i) collaborate with the State Regulator in order to acquaint themselves with the regulators' regulations, codes, and standards;
- (ii) educate the management and staff of their own entity of those regulations, codes, and standards;
- (iii) internally conduct regulation audit of their entity on operational regulations, codes, and standards;
- (iv) ensure compliance to regulation by reporting to the management of the entity of the department that are failing in their compliance and to take appropriate correctional measures;
- (v) submit to the State regulator an audit report every two years and to ensure that adequate changes or amendment undertaken by their entity as may be stipulated by the regulator; and
- (vi) do anything that may incidental and necessary for best practice in the sector.

5.3.4 Promotion of Foreign Direct Investment (FDI)

The Nigerian government should create enough flexibility within the power sector investment climate that would promote FDI. This may require changing of rules where necessary. A competitive legal framework that is broad and investor friendly will no doubt promote competition and attract huge FDI into Nigeria's power sector.

Where there is need for amendment, the legal framework should be amended and where there is need to entirely change the structure and market regulation, the entire electricity legal framework should be reviewed and a new Act enacted to reflect a liberalized power sector. This will lead to the emergence of a new regulatory regime that will influence new market behaviour and a new tariff. To achieve this, there is need for flexibility and interdisciplinary collaboration to evolve a completely new legal regime that will reposition sub-

Saharan Africa power sector and thus make it more competitive and attractive to FDI in the globalized and liberalized power sector market.

5.3.5 Competition Law and Authority

Competition in the electricity sector during the post-privatization period was strictly regulated by the Act.³⁹ Following the declaration by the Minister that a more competitive market is to be initiated, the trading licensee shall not enter into any further contracts for the purchase of electrical power or ancillary services and shall begin the process of novation of its existing rights and obligations to purchase electrical power and ancillary services to other licensees.⁴⁰

Now that Nigeria has enacted its competition law, the Federal Competition and Consumer Protection Act (FCCPA) 2019, it is needful that it swings into prompt action in ensuring that the law produces the desired result in ensuring the promotion of competition and regulating anti-trust market behaviours in the power sector market such as; abuse of dominance, predatory pricing, price discrimination especially given the fact that electricity is an essential good. This is in consonance with Article 45 of the Cotonou Agreement, which Nigeria is signatory to.⁴¹

In buttressing this point, Dingba states that at least there is a consensus on this point, shared even by those who doubt the utility of a competition law system for a developing country.⁴² As Pham notes, ‘an effective competition law, as is now widely recognized, is a concomitant requirement for market-based reforms. Such a law aims at limiting unnecessary interventions or abuses of power in the marketplace by the state or by private sector enterprises that adversely affect economic efficiency and consumer welfare.’ Therefore, if governments like Nigeria’s which over the past decades have committed themselves to market liberalization, through privatizations and deregulation of

³⁹ See generally EPSR Act 2005 s 26.

⁴⁰ *Ibid* s 26 (1)(i)(a).

⁴¹ See the Cotonou Agreement between the EU and ACP countries Art 45. It enjoins the state parties to among others, implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. See also, Simon Roberts, ‘The role of competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons’, paper presented at the Trade and Industrial Policy Strategies Annual Forum, 2003. See also, Damilola Olajide, ‘The Changing Banking Environment in Nigeria: Emerging Public Policy Issues’ Institute of Public Policy Analysis, Nigeria paper <http://ippanigeria.org/page.php?instructions=page&page_id=546&nav_id=87> accessed 29 November 2021.

⁴² N Dingba, ‘The Privatisation of the Refineries, Competition Law, and Economic Competitiveness’ Faculty of Law, University of the West of England, Bristol, UK.

various sectors of the economy, do not have a competition law, they might unwittingly end up creating new dangers. This might remain a fear if Nigeria does not swing into action with its FCCPA 2019.

6. Conclusion

This work has examined SA and Nigeria's power sector regulation making comparisons between the two SSA countries. It has examined the challenges facing the Nigeria power sector and proffered solutions to improving the sector without forgetting to point out salient lessons from SA's power sector. With the understanding that the Nigerian power sector has not recorded tremendous growth rate with its attendant challenges, it is important that the country takes heed to the lessons and recommendations for an exemplary growth of its power sector. One strong lesson and recommendation that Nigeria must embrace to revolutionize its power sector is to ensure that there is a decentralized electricity regulatory model. All tiers of government should be involved in the business of electricity. This model will increase efficiency, allow for more innovation and business adventure, create competition among the players in the industry and lead to better services.

DIAGNOSIS OF ABORTION LAWS IN NIGERIA AND HUMAN RIGHTS TRAJECTORY: LESSONS FROM GREAT BRITAIN AND UNITED STATES OF AMERICA

Innocent Ekezie Nwaogazie*

Abstract

Abortion is the termination of pregnancy before its birth for whatever reason. The present study is concerned with therapeutic abortion which is criminalized in Nigeria been the focus of this study. The Nigerian societal attitude to abortion is one of stereotyped stigmatization notwithstanding the validity of the reasons. The aim of the study is to examine the trajectory between abortion laws and human rights in Nigeria and the lessons Nigeria can learn from Great Britain and United States jurisdictions. The objective is to interrogate the extant abortion laws with a view to locating their inadequacies in the area of both the African and international human rights concerns of sexual and reproductive health of women on abortion rights. Using doctrinal design by reliance on primary and secondary sources analysed through deductive reasoning based on extant statutes and case law, this study interrogated the extant abortion laws in Nigeria in juxtaposition with the British and the United States legal framework on abortion as well as critical examination of the African and international human rights jurisprudences, and found out that the current position of abortion law in Nigeria is not in the same wavelength with both the African and international human rights jurisprudences on sexual and reproductive health rights of females to access safe abortions implicit in the fundamental rights and freedoms of privacy, non-discrimination, right to life, good health and bodily autonomy as it relates to unwanted pregnancies induced by other factors such as rape, incest or severe foetus abnormalities. The study recommended law reform by using the models provided by the British and United States legal framework to allow women access to legal abortion in deserving cases in conformity with African and international human rights treaties.

Keywords: Abortion laws, abortion rights, human rights, law reform, legal abortion

1. Introduction

The issue of abortion is largely located in the medical and health reproductive area of the body of sciences and jurisprudence, and has attracted conversations among philosophers with divergent views. In this study the focus is on Nigeria. The aim of the study is diagnosis of abortion laws in Nigeria and human rights trajectory with lessons drawn from Great Britain and United States jurisdictions. The objective is to interrogate the extant laws that criminalized abortion in Nigeria and identify their inadequacies in the light of international human rights

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jurisprudence and the African human rights treaty (Maputo Protocol) on abortion rights with a view to recommending a legislative reform. Using doctrinal design of data by relying on primary and secondary sources analysed through deductive reasoning based on extant statutes and case law, this study interrogated both the African and international human rights jurisprudence on sexual and reproductive health rights of women and girls to access safe abortions implicit in universal human rights of privacy, right to life, non-discrimination, freedom from torture and bodily autonomy. In order to streamline this conversation, this study examined the two major and leading constitutional democracies of Great Britain and the United States respectively as a case study with comparative references to Cameroon and Moroccan jurisdictions within the African hemisphere to provide the necessary template to guide Nigerian jurisdiction in the proposed law reform.

There seemed to be less controversy in relation to the meaning of abortion. In the medical and health studies, there exist two types of abortion namely, medically-induced abortion and the spontaneous abortion often regarded as miscarriage. The former is deliberate or intentional while the latter is accidental. In this present study, the former is the focus. Thus, abortion situated under medical jurisprudence is the deliberate, intentional and conscious termination of pregnancy through medical procedure (whether by surgery, administration of drugs or other means) for whatever cause by medical personnel.¹ Several scholars and bodies have advanced various definitions of abortion. According to the World Health Organization (WHO), the global health watchdog, abortion is a termination of pregnancy prior to 20 weeks' gestation². This definition of abortion by the global health watchdog (WHO) introduced a gestation period for abortion to be properly situated. Abortion has also been defined as a medical procedure to end a pregnancy either by medicine or surgery to remove the embryo or foetus and placenta from the uterus.³ Medically, abortion is regarded as a loss of pregnancy due to premature exit of the products of conception (foetus, foetal, membranes and placenta) from the uterus due to various reasons.⁴

Statutorily, the Uniform Abortion Act⁵ sponsored by the National Conference of Commissioners on Uniform State Laws which provided a template for legislative framework on abortion in the United States jurisdiction defined abortion as the 'termination of human pregnancy with an intention other

¹<<https://dictionary.law.com>> accessed 12 April 2022.

²World Health Organization, 'Abortion Laws, A Survey of Current Legislation' (World Health Organization, Geneva, 1971).

³ <<https://www.medlineplus.gov>> accessed 5 November 2021
<<https://languages.oup.com>> accessed 5 November 2021.

⁴ <<https://www.medicinenet.com>> accessed 5 November 2021;
<<https://www.britannica.com>> accessed 5 November 2021.

⁵1971 (revised in 1973) of the United States of America.

than to produce a live birth or to remove a dead foetus,⁶ and prescribed a limitation period of its occurrence to be 20 weeks⁷ in line with the global gestation period for abortion by the World Health Organization (WHO). In the Nigerian jurisdiction, notwithstanding the criminalization of abortion, there seemed to be no clear statutory definition of abortion, and recourse would certainly be had to the ordinary and plain definition of abortion by the World Health Organization and other medical sources. This obvious lacuna in the definition of abortion as an offence by the statutes that created it in Nigeria is a constitutional monstrosity as shall later be demonstrated in this study.

Induced abortion, been the focus of this study, is usually propelled by many reasons such as preservation of the life, physical or mental well-being of the mother, accidental pregnancy caused by rape or incest, prevention of the birth of a child with severe deformity or general genetic abnormality and socio-economic factors⁸ which might result in great difficulty in the training and education of the child such as financial or paternity denial of the child by the supposed biological father that ordinarily would result to social stigma especially in some traditional African societies.

Notwithstanding the validity of reasons for therapeutic abortion, the societal attitude to it in Nigeria has been one of scorn, disapproval and sometimes the woman or the girl involved is stigmatized. It is in the light of that unfortunate situation that this present study is imperative especially when juxtaposed with the criminalization of abortion in Nigeria that appears to reflect the social construct in order to disabuse the stereotype attitude of the larger Nigerian society.

Whether abortion rights should be tolerated or liberalized, restricted or proscribed has generated much conversation among theologians, philosophers, medical and health experts and even human rights advocates. This view was judicially acknowledged by the Supreme Court of the United States in the case of *Jane Roe & Ors v Henry Wade*⁹ where the Court observed thus: ‘We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one’s thinking and conclusions about abortion’.¹⁰ The United States Supreme Court in that case equally

⁶Ibid s 1(a).

⁷Ibid s 1(b)(2).

⁸<<https://www.britannica.com>> (n 4).

⁹410 US 113 delivered on 22 January 1973.

¹⁰Ibid 2 coram Justice Blackmun.

recognized the growing influence of ‘population growth, pollution, poverty and racial overtones’¹¹ as some factors that had somewhat complicated the issue of abortion. However, in the global community, each jurisdiction adopts a legal framework that shapes and underpins its attitude to abortion rights. Across jurisdictions in the world, attitude towards abortion rights keep changing with time. Historically, different jurisdictions had different attitude towards abortion. Within the Roman-Greece early civilization, abortion, as a social construct, was normative as it was acceptable as a means to the limitation of family size. The Chinese jurisdiction also adopted abortion around the 20th century as a permissive State policy to check and control population growth. Thus, there was nothing abnormal about abortion and it was not criminalized in those jurisdictions with a liberal attitude.

From historical point of view, three main reasons have been advanced for the restriction placed on abortion. The first was the acclaimed understanding of abortion as a risky adventure that resulted to the death of several women. Thus, anti-abortion laws were intended to protect the public health and well-being of women. Secondly, abortion was regarded as a sin and ethical issue from the angle of social construct and religious sentiment. Hence, anti-abortion law was used to regulate and protect social morality, advanced religious ethics and served as deterrent measure by its criminalization. And thirdly, an unborn child was regarded as possessing human personality within the realm of Christian ethics and social construct capable of being protected from being killed through abortion procedure.¹² Those reasons are still valid today in the jurisdictions that criminalize abortion.

Ironically, while abortion remained criminalized in the earliest centuries before its reformation in several jurisdictions, there were indeed traces of clandestine, unsafe and unhygienic abortions with attendant health-related consequences that included several deaths in some cases. Thus, the underlying philosophy in the criminalization of abortion was, and still remains, the State’s legitimate interest to protect and secure public health as it affects especially the life of women and the unborn child, which unbridled performance of abortion will frontally attack. The right to life is a universal civil claim that inures to all persons under international human rights law¹³ and recognized at several regional human rights instruments¹⁴ and domestic Constitutions of democratic

¹¹Ibid 3.

¹² Marge Berer, ‘Abortion Laws and Policy Around the World’ <<https://www.ncbi.nlm.nih.gov>> accessed 12 April 2022.

¹³Universal Declaration of Human Rights adopted by General Assembly Resolution 217A (111), 10 December 1948, art 3; International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200A (XX1), 16 Dec 1966, art 6.

¹⁴African Charter on Human and People’s Rights 1981, art iv; European Convention on Human Rights, 1953, art 2; American Convention on Human Rights 1978, art 2.

countries especially Nigeria¹⁵. Thus, a State has an obligation to secure, advance and protect this right to life to the end that it cannot be taken away except on constitutionally permissible grounds. Abortion is not one of those constitutionally permissible grounds as several deaths have been recorded from unsafe abortions.

Unfortunately, the status of an unborn child with respect to human personality issue was not addressed by the framers of the international bill of rights instruments. There is no contextual provision in the international bill of rights that recognizes the right of an unborn child. Thus, a foetus has no international protection under the human rights law. This lacuna seems worrisome and leaves the State Parties the option to adopt a legal framework peculiar to each State Party to protect the unborn child. Nigeria has a legal framework that protects an unborn child and criminalizes any killing of an unborn child as an offence of infanticide with penal sanctions.¹⁶

The State legitimate public health interest to protect human life of both the pregnant woman and the unborn child faces the competing human rights of the pregnant woman who seeks legal abortion to terminate unwanted pregnancy caused by rape or incest, or a pregnancy with irreversible foetal abnormalities or where the life and health of the pregnant woman is in great and grave danger to the end that carrying such a pregnancy to full term will be suicidal. In order to strike a balance between the two competing interests, a need arose to introduce some reform in the anti-abortion law by several jurisdictions to allow limited or legal abortion in exceptional circumstances. The mischief sought to be cured by recent reforms is to expand the scope of permissible grounds for abortion within a specified gestation period and under a regulated procedure. In such circumstance, abortion will be legal. Thus, any abortion done outside the legal framework remains criminalized.

However, around the 19th century, the entrance of Christianity and its teachings introduced a new thinking and attitude towards abortion as a moral wrong and sinful which led to a paradigm shift from cultural approval to disapproval with penal sanctions in many jurisdictions with strong Christianity background. However, around the 21st century and with strong advocacy for human rights concerns, attitude towards abortion rights changed in many European and American jurisdictions from criminalization to regulated decriminalization of abortion in response to human rights concerns.

2. Abortion and the Law in Nigeria

The Nigerian jurisprudence has an intolerant attitude towards abortion, and it is criminalized with penal sanctions. This is prescribed in two criminal laws

¹⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 33.

¹⁶ Criminal Code Act Cap 38 Laws of the Federation of Nigeria (LFN) 2004, s 328; Penal Code (Northern States) Act Cap P3 LFN 2004, ss 235 and 236.

operative in Nigeria at the federal level which have been domesticated by various States. Under the Criminal Code Act (CCA),¹⁷ which is operative in the Southern States the offence of abortion is created thus: ‘Any person who, with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years’.¹⁸ The CCA 2004 further created a novel provision prohibiting self-induced abortion thus: ‘Any woman who, with intent to procure her own miscarriage, whether she is or not with child, unlawfully administers to herself any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used on her, is guilty of a felony, and is liable to imprisonment for seven years’.¹⁹

Curiously and unlike the CCA 2004, the Penal Code Act (Northern States) (PCA)²⁰ operative in the Northern States which proscribed abortion in its provision also took cognizance of health rights of the woman in creating a window where legal abortion could be permissible in rare circumstances. It provided thus:

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.²¹

Thus, under the PCA 2004 domestic jurisdictions in Nigeria, the only authorized legal abortion is when the life of the woman is at risk. Curiously and strangely, this window created for legal abortion under PCA 2004 is absent under the CCA 2004 in the Southern States of Nigeria.

As earlier observed in this present study, there is no statutory definition of abortion in the Nigerian jurisdiction which statutorily is a crime. It is submitted that the absence of statutory definition of abortion in Nigeria which is criminalizes abortion is a clear negation of the provisions of the Constitution²² which provides that:

Subject as otherwise provided by the Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this section, a written law refers

¹⁷CCA (n 16).

¹⁸Ibid s 228.

¹⁹Ibid s 229.

²⁰PCA (n 16).

²¹Ibid s 235.

²²Constitution of the Federal Republic of Nigeria (as amended) 1999.

to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.²³

In effect, any statute or subsidiary legislation creating an offence must not only prescribe the penalty but must also define the offence thereby created. It is submitted that what the two extant anti-abortion laws operative in Nigeria in their separate provisions contextually did were merely to describe what constituted the offence of abortion namely, the illegality of the process, the outcome and the penal consequences. There was no clear statutory definition of the offence of abortion itself. Thus, this lacuna itself has brought the extant anti-abortion laws in Nigeria in direct conflict with the Constitution and ought to suffer the consequences of been rendered void²⁴ for been inconsistent with the grundnorm. It is hoped that the Legislature would address this obvious statutory lacuna in future.

When juxtaposed with each other, an examination of the two federal anti-abortion laws in Nigeria revealed a striking dissimilarity. While the CCA in its contextual provision presented an absolute proscription without regard to the health of the woman or the underlying health challenges of the unborn foetus, the PCA in its contextual anti-abortion provision, recognized a permissible ground for abortion when the life of the woman is at stake. In that situation, abortion could be done to save her life. Curiously, the PCA's legal framework did not consider the inherent deformity or genetic abnormality of the foetus which is implicit in the health and life the law sought to address or pregnancy that resulted from rape or incest.

A fortiori, the PCA 2004 that somewhat provided for permissible legal abortion on the 'woman-life-saving' ground did not provide for any regulatory legal framework by way of subsidiary legislation to provide for the procedure, the gestation period, the type of clinic or hospital to perform abortion, expert advice, qualification and number of medical personnel required to give concurrent opinion on the desirability of the intended abortion and such other procedures to ensure standardization and elimination of quackery. This lacuna could be exploited to introduce a climate of unhealthy and unsafe abortion practices by quacks in unhygienic and unlicensed clinics that may even endanger the lives of the pregnant women the law intended to save. Notwithstanding the differential penal sanctions in the two anti-abortion federal laws and the seemingly restricted permissive legal abortion rights under the PCA 2004, the legal framework on abortion in Nigeria jurisdiction calls for diagnostic legal reform to accord with the African and international human rights law and practice.

²³Ibid s 36(12).

²⁴Ibid s 1(3) which provided thus: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

The criminalization of abortion in Nigerian criminal justice system is a reflection of the colonial legacy from Great Britain which was essentially modelled after the British Offences against the Person Act.²⁵ Curiously, while Britain has adopted legislative reform on her abortion laws to meet with the changing present realities, the Nigerian criminal jurisprudence on abortion remains static, anachronistic and not in tide with the wave of human rights of pregnant women and other health-related issues associated with foetal abnormalities or unwanted pregnancies resulting from rape or incest. Across jurisdictions in the international community, legislative reforms have been introduced on abortion laws to grant restrictive legal abortion in deserving cases by progressive extension of grounds for abortion hitherto limited to where risk to the life of the pregnant woman or permanent injury to her physical or mental health was at stake.

In the present study, the British and United States jurisdictions would be considered as a case study by investigation of the legislative reforms and jurisprudence in those jurisdictions with a view to drawing some lessons for Nigeria to advance some legislative reform on abortion laws in the light of African and international human rights jurisprudence. These two jurisdictions are strong constitutional democracies and share common law and constitutional history with Nigeria and possess rich human rights heritage. Historically, their laws and legal systems especially that of Great Britain, have continued to shape the direction of Nigeria's legal system. References to other jurisdictions would only serve the purpose of emphasizing and highlighting comparatively the current paradigm shift in the attitude towards abortion law reform globally.

3. Law Reform in Selected Jurisdictions

Historically, in the British jurisdiction, the earliest codification of abortion law started with the Lord Ellenborough's Act.²⁶ That piece of legislation was repealed and replaced by the Offences against the Person Act²⁷ and later variously amended.²⁸ With the passage of time, the criminal jurisprudence on abortion in England was extended by legislation²⁹ to cover infanticide of an unborn child who was capable of been born alive. This presupposed that all children in the womb that were over 28 weeks' gestation period were capable of been born alive. That new legislative action received judicial approval in the English case of *C v S*³⁰ where the Court of Appeal (Civil Division) declined to grant an injunction to stop the intended abortion of a foetus between 18- and 21-weeks' gestation period. Later, the English courts expanded the frontiers of

²⁵1861 now repealed in Britain.

²⁶1803, ss 1 and 2.

²⁷1828, s 13.

²⁸Offences against the Person Act 1837, s 6 and again by the Offences Against the Person Act 1861, s 58.

²⁹Infant Life (Preservation) Act 1929.

³⁰(1988) QB 135.

reasons for abortion to include cases where pregnancy resulted from rape which M³¹Naghten described as ‘mental and physical wreck’.³¹

With the new wave of judicial attitude in expansion of the scope of factors to be considered in the trial of abortion cases, legislative reform on abortion became imminent. The English Parliament in 1967 introduced a revolutionary legislation by way of repeal and re-enactment of the Offences against the Person Act³² which new piece of legislation introduced a legal framework on legal abortion. The new law statutorily fixed the gestation period within which any legal abortion could be performed as not exceeding twenty-fourth weeks.³³ The new legislation presented and defined five clear grounds for legal abortion to take place as follows:

1. Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion formed in good faith;³⁴ or
2. That the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated of injury to the physical or mental health of the pregnant woman or any existing children of her family;³⁵ or
3. That the termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman;³⁶ or
4. That the continuation of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated;³⁷ or
5. That there is substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped.³⁸

Thus, the scope for legal abortion in England, Wales and Scotland was expanded beyond the earliest reason for saving the life of the pregnant woman that was at risk. In the English case of *R v British Broadcasting Corporation, Ex-parte Prolife Alliuor*³⁹ the Court observed thus:

There is some evidence that many doctors maintain that the continuance of a pregnancy is always more dangerous to the physical welfare of a woman than

³¹*R v Bourne* (1939) 1 KB 687 (Court of Criminal Appeal).

³²1967.

³³*Ibid* s 1(1)(a).

³⁴*Ibid* s 1(1).

³⁵*Ibid* 1(1)(a).

³⁶*Ibid* s 1(1)(b).

³⁷*Ibid* s 1(1)(c).

³⁸*Ibid* s 1(1)(d).

³⁹(2002) All ER 756.

having an abortion, a state of affairs which is said to allow a situation of de facto abortion on demand to prevail.⁴⁰

However, until 2020, the scope of the Northern Ireland jurisprudence on legal abortion was limited to abortions performed ‘[i]n good faith for the purpose only of preserving the life of the mother’.⁴¹ That enactment that granted restrictive legal abortion solely on the ground where the life of the pregnant woman was at risk received a judicial disapproval in the case of *Northern Ireland Health and Social Services Board v Hand and Ors*⁴² where the Court declared that such provision did not relate only to some life-threatening situation and extended the meaning of life within the context to mean physical and mental health or well-being of the mother and the doctor’s act is lawful where the continuation of the pregnancy would adversely affect the mental or physical health of the mother.

The legislative reform of the Northern Ireland abortion law was further provoked by the pronouncement of the Supreme Court of the United Kingdom in June 2018 in the case of *Northern Ireland Human Rights Commission v Attorney General of Northern Ireland & Anor*⁴³ which sought for a judicial review of the Northern Ireland abortion laws that restricted legal abortion solely for the purpose of saving the life of the mother and did not cover cases where pregnancy resulted from rape, incest and foetal abnormality and whether the current abortion laws were not inconsistent with the articles 3 and 8 of the European Convention on Human Rights (ECHR).⁴⁴

While dismissing the case by declining jurisdiction since there was no victim presented and who was impacted on the impugned abortion laws provisions, the Supreme Court went further and considered the human rights angle of the abortion laws in issue and concluded that: ‘I would have concluded, without real hesitation, that the current Northern Ireland law is incompatible with Article 8⁴⁵ of the Convention insofar as it prohibits abortion in cases of fatal foetal abnormality, rape and incest but not insofar as it prohibits abortion in cases of serious foetal abnormality’⁴⁶. With respect to the excluded grounds such as rape, the United Kingdom Supreme Court further observed that: ‘To require in every instance a girl or woman to carry to term a foetus which was the consequence of exploitative and abusive behaviour and which is utterly abhorrent to her could not, we concluded, be considered as having struck the

⁴⁰Ibid 761 coram Lord Justice Laws.

⁴¹Criminal Justice Act (Northern Ireland) 1945, ss 25 and 26 and Offences against the Person Act 1861, ss 58 – 59.

⁴²(1994) NIJB 1.

⁴³(2018) UKSC 27 delivered on 07 June 2018.

⁴⁴Which came into force on 3 September 1953.

⁴⁵Which provided for the right to respect of private and family life.

⁴⁶See (n 37) para 73-134.

right balance between her rights and those of society'⁴⁷. Thus, judicial activism agitated legislative reform in Northern Ireland that led to the promulgation of an expansive legal framework for abortion.⁴⁸

At the level of the American jurisdiction, family law matters are within the domestic jurisdiction of States. Thus, issues relating to abortion laws are within the legislative competence of various States to legislate. However, the Supreme Court of the United States had, by judicial fiat, changed the jurisprudence on abortion in the United States by the recognition of the rights of women under privacy rights and declared abortion statutes void for violation of the Fourteenth Amendment⁴⁹ in the case of *Jane Roe, et al v Henry Wade*⁵⁰ where the Plaintiff, a single woman brought a class action challenging the constitutionality of the Texas criminal abortion laws⁵¹ which prohibited procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. She contended that she wished to terminate her pregnancy by abortion performed by a competent, licensed physician under safe, clinical condition and that she was unable to get a 'legal abortion' in Texas because her life did not appear threatened by the continuation of the pregnancy, and that she could not afford to travel to another jurisdiction in order to secure a 'legal abortion' under safe conditions. She argued that the Texas statutes were unconstitutionally vague and abridged her right of personal privacy protected by the Fourteenth Amendment. However, the Supreme Court of the United States rejected the absolute and unfettered right of a woman to terminate pregnancy in any way and at any time. It declared thus: 'Though the State cannot override that right, it has legitimate interest in protecting both the pregnant woman's health and the potentiality of human life, each of which grows and reaches a 'compelling' point at various stages of woman's approach to term'.⁵² Hence the Court proceeded to balance a woman's right of privacy with a State's legitimate interest in regulating abortion.

The United States apex court recognized that 'a compelling State interest' is a legitimate justification for regulations limiting fundamental rights of privacy and that the legislature must accordingly draw statutes narrowly to express only legitimate State interests at stake. In balancing the compelling State's interests in the health of a pregnant woman and in the potential life of foetuses for regulation of abortion to be, the Court held thus: 'For the stage prior

⁴⁷Ibid.

⁴⁸Abortion (Northern Ireland) Regulations 2020.

⁴⁹ Fourteenth Amendment 1862, art XIV s 1.

⁵⁰*Roe v Wade* (n 9).

⁵¹Penal Code chap 9 Title 15, arts 119-1196, Texas. The first Texas laws criminalizing abortion was Texas Laws c 49 amended by Texas Penal Code 1857, c 7 arts 531-536 repealed by Texas Rev Stat 1879, c 8 arts 536-541 and Texas Rev Crim Stat 1911, arts 1071-1076.

⁵²*Roe v Wade* (n 9) 147-164.

to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician'.⁵³ With regard to the foetus, the Court located that point at capability of meaningful life outside the mother's womb or viability which occurs at about 24 weeks' of pregnancy at which stage, the State's legitimate interest intervenes. The Court held that for the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe abortion except where necessary, in appropriate medical judgment, for the preservation of the life and health of the mother.⁵⁴

The United States jurisprudence on privacy rights had continued to hibernate within the realm of freedom of personal choice in matters of marriage and family life as one of the liberties protected by the Due Process Clause of the Fourteenth Amendment expressed in several judicial decisions.⁵⁵ The Supreme Court in the latter case of *Eisenstaedt v Baird*⁵⁶ recognized the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child and that right necessarily includes the right of a woman to decide whether or not to terminate a pregnancy, noting further that the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child were of a far greater degree of significance and personal intimacy'.⁵⁷

In a 1992 judgment⁵⁸ of the United States Supreme Court, the decision in *Roe v Wade*⁵⁹ with respect to degree of the State legitimate interest to regulate and proscribe abortion after the first trimester was significantly struck down and a new rule or standard to evaluate abortion laws was introduced which the Court described as 'undue burden' standard, namely a law is void if its purpose or effect was to place substantial obstacles in the path of a woman seeking an abortion before the foetus attains viability' and reiterated that the source of privacy right that underpins woman's right to choose abortion derived from the

⁵³Ibid 163-164.

⁵⁴Ibid 163-165.

⁵⁵*Loving v Virginia*, 388 US 1, 12, 87 S Ct 1817, 1823, 18 L. Ed 2d 1010; *Price v Massachusetts*, 321 US 158, 166, 64 St Ct 438, 442, 88 L. Ed 645; *Skinner v Oklahoma*, 316 US 535, 5411, 62 S Ct 1110, 1113, 86 L Ed 1665.

⁵⁶405 US 438, 453, 92 S Ct 1029, 1038, 31 L. Ed 2d 349 (1972).

⁵⁷Ibid 16.

⁵⁸*Planned Parenthood of Southeastern Pennsylvania v Robert Casey*, 505 US 833, 112 S Ct 2791.

⁵⁹Criminal Justice Act (Northern Ireland) (n 41).

Due Process Clause of the Fourteenth Amendment⁶⁰ to the United States Constitution⁶¹ which placed individual decisions about abortion, family planning, marriage and education within the realm of personal liberty which the Government may not enter'. Thus, the later decision had clipped the right of States to restrict abortion prior to the foetus reaching the viability period.

To address the issue of abortion law in the United States jurisprudence and bring it under uniformity, a legal framework was initiated and sponsored by the National Conference of Commissioners on Uniform State Laws⁶² in 1971 which came up with a legislative⁶³ template for the States to adopt and domesticate. The proposed model abortion law prescribed regulations with respect to legal abortion. It provided that: 'An abortion may be performed in this State only if it is performed'⁶⁴ [b]y a physician licensed to practice medicine (or osteopathy) in this State or by a physician practicing medicine (or osteopathy) in the employ of the Government of the United States or of the State (and the abortion is performed in the physician's office or in a medical clinic), or in a hospital approved by the Department of Health or operated by the United States, this State, or any department, agency or political subdivision of either), or by a female upon herself upon the advice of the physician';⁶⁵ and 'within 20 weeks after the commencement of the pregnancy or after 20 weeks only if the physician has reasonable cause to believe'⁶⁶ that 'there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother'⁶⁷ or 'that the child would be born with grave physical or mental defect'⁶⁸ or 'the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years'.⁶⁹ It criminalized any abortion procedure performed not in consonance with this law as felony with penal sanctions.⁷⁰

It is rather curious that the proposed uniform model piece of legislation to regulate abortion procedure in the United States jurisdiction has not been adopted by the States. Each State continues to formulate their respective regulations on legal abortion. Notwithstanding the position each State may adopt, the jurisprudence laid down by the United States Supreme Court on abortion rights remains the current position.

⁶⁰Fourteenth Amendment (n 49).

⁶¹Constitution of the United States 1787.

⁶²(58 A B A), 380 1971.

⁶³Uniform Abortion Act 1971.

⁶⁴Ibid s 1(b).

⁶⁵Ibid s 1(b)(1).

⁶⁶Ibid s 1(2).

⁶⁷Ibid s 1(2)(i).

⁶⁸Ibid s 1(2)(ii).

⁶⁹Ibid s 1(2)(iii).

⁷⁰Ibid s 2.

Although, the jurisdiction of the Great Britain and the United States formed the case study in the present study as a template for the Nigeria jurisdiction to draw some lessons from, it would appear to be a legitimate and reasonable incursion to pry into some jurisdictions in Africa to demonstrate the progressive emerging trend to reform abortion laws to meet with the present realities. For this purpose, Cameroon and Morocco would be discussed.

In Cameroon, abortion is criminalized⁷¹ However, the legal framework provides for exemptions which permit legal abortion to be performed by a qualified person where it is shown to be necessary to save the life of the mother from serious danger to her health, or where the pregnancy resulted from rape where the facts of the rape were verified by the Public Prosecutor's Office.⁷² Thus, legal abortion is guaranteed in Cameroon under the circumstances as prescribed by law.

In Morocco, a legislative reform⁷³ introduced in 1967 guarantees a restricted legal abortion to safeguard the health of the mother and the procedure for it. Although, the restricted field for legal abortion in Morocco appears narrow, it at least provides a procedural legal framework to perform a legal abortion within the sphere of permissive ground, namely where a physician or surgeon considers abortion as a necessary measure to save the life of the pregnant woman, the medical practitioner is at liberty to perform the abortion with the permission of the spouse. However, the requirement of spousal consent may be dispensed with if the medical practitioner is of the opinion that the life of the woman is in grave and imminent danger, provided the Chief Medical Officer of the Prefecture or Province is notified in writing.⁷⁴

4. Abortion and Human Rights Trajectory

The emerging trend in international human rights law is to extend the rights to privacy, equality, non-discrimination, health and life to abortion. Implicit in the right to life is the right to sexual and reproductive health of a woman and the right to privacy are impacted with what a woman does with her body. Although there are no contextual provisions in the international human rights instruments⁷⁵ that specifically provides for right to abortion, there is, however, a

⁷¹Penal Code 1967, s 339.

⁷²'Abortion Laws: A Survey of Current World Legislation', World Health Organization, Geneva, 1971.

⁷³Crown Decree 1967 which amended the Penal Code, s 453.

⁷⁴Crown Decree (n 73), s 23.

⁷⁵Universal Declaration of Human Rights (UDHR) adopted by the General Assembly Resolution 217A (111),

10 December 1948; International Covenant on Civil and Political Rights (ICCPR) ratified by the United Nations General Assembly Resolution 2200A (XXI) 16 December 1966 and International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the General Assembly Resolution 2200A (XXI) 16 December 1966.

growing body of jurisprudence, treaties and conventions at the level of international law and the African jurisprudence that have added rich scholarship in this area of human rights law.

International jurisprudence advocated by the United Nations Human Rights Committee (UNHRC) have consistently maintained that denying women access to abortion amounts to breach of their rights to good health, right of privacy and even degrading and inhuman treatment.⁷⁶ At several fora, the (UNHRC) had cautioned on the need to ensure that while measures are taken to protect the rights to life and other rights under the Covenant, that restrictions on access to abortion, where they exist, must not ‘jeopardize women’s and girls’ lives or subject them to physical or mental pain or suffering...discriminate against them or arbitrarily interfere their policy’.⁷⁷

On its part, the Committee on Economic, Social and Cultural Rights (CESCR) had stated that as part of the obligation to eliminate discrimination, State Parties should address ‘criminalization of abortion or restrictive abortion laws’.⁷⁸ On the issue of sexual and reproductive rights, the Committee further stated that State Parties ‘have a core obligation to ensure, at the very least, minimum essential levels of satisfaction of the right to sexual and reproductive health which included measures to prevent unsafe abortions’.⁷⁹

The Committee on the Elimination of Discrimination against Women (CEDAW), an international treaty has harped on abortion rights of women and girls and called for decriminalization of abortion. The CEDAW expressed concern about the fact that rural women are more likely to resort to unsafe abortion than women living in urban areas thereby putting their lives at risk.⁸⁰ It kicked against abortion laws as discriminatory. The Committee stated thus: ‘It is discriminatory for a State Party to refuse to legally provide for the performance of certain reproductive health services for women’⁸¹, and that ‘[t]he right of a woman or girl to make autonomous decision about her own body and reproductive functions is at the very core of her fundamental rights to equality and privacy, including intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights’.⁸²

Again, CEDAW sees abortion laws or its restrictions as equivalent to gender-violence, cruelty, and torture. It stated thus:

⁷⁶ *LC v Peru*, CEDAW/C/50/D/22/2009 para 8.15; *Whelan v Ireland*, CCPR/C/119/D/2425/2014 paras 7, 8; *Melletv Ireland*, CCPR/C/116/D/2324/2013 para 7.7; *K L v Peru*, CCPR/C/85/D/1153/2003 para 6.4.

⁷⁷ General Comment 36 para 8.

⁷⁸ General Comment 22 (2016) para 34.

⁷⁹ General Comment 22 para 49.

⁸⁰ General Recommendation 34 (2016) para 38.

⁸¹ General Recommendation 24 (1999) para 11.

⁸² Working Group Report, A/HRC/38/46 (2018) para 35.

Violations of women's sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture and other forms of cruel, inhuman and degrading treatment.⁸³

The CEDAW opines that abortion laws rather than serve as a deterrent, increases more danger of unsafe abortions, health complications and even fatalities. It stated thus: 'Criminal regulation of abortion serves no known deterrent value. When faced with restricted access women often engage in clandestine abortion including self-administering abortifacients, at risk to their life and health in addition to stigmatization impact on women and deprives women of their privacy, self-determination and autonomy of decision, offending women's equal status, constituting discrimination'.⁸⁴

Furthermore, the Committee on the Right of the Child had advocated for legal abortion and called for a review of all laws that criminalized it. It recommended to all States '[t]o decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislations with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions'.⁸⁵

It has been demonstrated that the right to affordable good health-care of women and girls, their privacy which underscores their right to individual autonomy to choose whether to carry to full term an unwanted pregnancy or not especially pregnancy that resulted from rape or incest with its societal stigmatization or pregnancy that manifested foetal great abnormalities, freedom from discrimination which denied them access to adequate medications and equality rights which abortion laws have impacted negatively on human rights. Thus, there is a strong nexus between abortion laws and human rights. Indeed, undue restrictions or absolute ban on abortion impinge on the full enjoyment of fundamental rights and freedoms of women and girls as guaranteed in the international human rights instruments and as provided by State Parties' domestic human right provisions in their respective Constitutions. Indeed, laws that tend to diminish full enjoyment of human rights provisions need to be construed narrowly to safeguard the protected rights.

As earlier observed in this study, one of the antiquity reasons for criminalization of abortion was the protection of the unborn child from been arbitrarily killed. That time-tested reason equally stands today as very germane. Notwithstanding the non-recognition of the right of unborn child as a human personality worthy of international protection in the international bill of rights instruments, domestic laws that criminalize unlawful killing of unborn child

⁸³General Recommendation 35 (2017) para 18.

⁸⁴CEDAW/C/OP 8/GBR/1 (2018) paras 42, 52.

⁸⁵General Comment 20 para 60.

either by abortion or otherwise affords the desired legal protection for the unborn child. The legal protection afforded to an unborn child by domestic law in Nigeria and the human right of a pregnant woman to terminate a pregnancy in deserving cases is the concern of this study. Indeed, both sides of the gulf have legitimate concerns deserving of consideration and conversation. Abortion laws, where they exist, should be liberalized and construed narrowly in the overall interest of the health and reproductive rights of women and girls.

At the level of African jurisprudence, the African Commission on Human and Peoples' Rights (ACHPR) has adopted a treaty position to safeguard the health and reproductive rights of women and girls by calling all States Parties to take all appropriate measures to 'protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.⁸⁶ The Maputo Protocol treaty recognizes the right of women to sexual and reproductive health which includes the right to control their fertility, the right to decide the number of children and their spacing, the right to choose any method of contraception, and the right to have family planning education.⁸⁷ Thus, at the level of African jurisdiction, there is a growing agitation by the African human rights watchdog for legislative reform of abortion laws to respect the health and reproductive rights of women and girls.

5. Summary of Findings, Recommendations and Conclusion

5.1 Summary of Findings

In the present study, the following findings were made:

- (i) The Nigerian jurisdiction criminalized abortion with penal conditions in the two federal laws operative in the country at the federal level. The Criminal Code Act⁸⁸ operates in the Southern States while the Penal Code Act⁸⁹ operates in the Northern States respectively. While the PCA 2004 granted limited and restrictive legal abortion solely to save the life of the mother, the CCA 2004 created a blanket ban on abortion.
- (ii) There is no legal framework that prescribed regulations for legal abortion in the Northern States where the PCA 2004 granted restrictive access to legal abortion.

⁸⁶General Comment No 2 of the Protocol to the African Charter on Human and Peoples' Rights of Women in

Africa (the Maputo Protocol), art 14.1(a), (b) and (f) and art 14.2(a) and (c).

⁸⁷ African Commission on Human and Peoples' Rights General Comment No 2 <<https://www.achpr.org>>

Accessed 15 April 2022.

⁸⁸CCA (n 16).

⁸⁹PCA (n 16).

- (iii) There is no clear-cut statutory definition of abortion in the two Nigeria criminal statutes on abortion, and that lacuna was seen to negate the express provisions of the Nigeria Constitution which specifically provided that no person shall be convicted of any offence unless that offence is defined and the penalty prescribed in a written law. An examination of the Nigeria criminal statutes on abortion merely shows procedural description of abortion, the outcome and the penal consequences.
- (iv) It was further revealed in the study that there is a growing body of jurisprudence in several jurisdictions that introduced legal reforms to abortion laws which have expanded the scope of the grounds of abortion from the original reason to save the life of the pregnant woman to include other factors like pregnancy that resulted from rape, incest, or extreme foetal abnormality.
- (v) The two jurisdictions of the Great Britain and the United States used as a case study to serve as a template for Nigeria in search of legal reform on abortion demonstrated expansive access to legal abortion at the stage of foetus viability and both jurisdictions have a procedural legal framework that afforded women and girls safe legal abortion rights.
- (vi) It was further shown that international human rights jurisprudence and treaty pronouncement sand the African human rights jurisprudence respectively have denounced laws that criminalized abortion or that granted limited access to legal abortion as violation of universal human rights of privacy, life, equality, non-discrimination, and have called on State Parties to take urgent measures to address the human rights concern negatively impacted by abortion laws. There is no recognition and protection of human rights of an unborn child under international human rights law.
- (vii) The menace of criminalization of abortion or restricted abortion solely on the basis where the life of the pregnant woman is at risk have led to increased clandestine unsafe abortions that has culminated in the growing number of mortality rates as a result of unsafe abortions with its fatality and health complications or consequences. Notwithstanding the crime of abortion, women and girls that would want to get rid of unwanted pregnancies would only go underground to perform it, in most cases, with unqualified and unlicensed practitioners under unhealthy conditions.

5.2 Recommendations

In the light of the rich scholarship that garnished this study and findings deduced, the following recommendations were suggested namely:

- a. There is urgent need to review the current abortion laws in Nigeria jurisdiction by legislative reform. In this regard, a new legislative framework should be introduced to provide for regulated access to legal

abortion in deserving cases such as not only when the life or health of the pregnant female is at risk, but to extend to cases of rape, incest, grave and severe foetal abnormality. The new legislation should define the offence of abortion to be in accord with the Constitutional provision.

- b. It is further recommended that a comprehensive prescriptive regulation framework be enacted as a subsidiary legislation to cover such areas as gestation period for unrestrictive safe and access to legal abortion within the first trimester in accordance with the World Health Organization prescription, medical treatment in designated or regulated hospitals and clinics, concurrent medical opinion and advice of at least two medical practitioners, qualification of medical personnel to carry such abortions, post-abortion health-care services to deal with possible complications, consent provision and situations where its waiver may be dispensed with like cases of extreme danger to life of the pregnant woman and such other incidental matters.
- c. It is also recommended that where the pregnancy has entered into ‘viability period’ of the foetus, abortion should be restricted unless certified medical opinion is on the contrary that continuation of the pregnancy and its delivery would pose greater danger to the life of the pregnant female or where there are indications that the foetus was already dead or likely to be born with extreme life threatening ailments like cancer, brain tumour, et cetera to the end that the eventual birth of the child would pose severe and great pains and challenges to the family.
- d. As a template for the proposed law reform, this present study recommends strongly the legal framework in the two jurisdictions of Great Britain with respect to her Offences Against the Persons Act 1967 and the United States with respect to her model Uniform Abortion Act 1971 respectively with such reasonable modifications that would be necessary and expedient to meet with present realities.
- e. There should be a state-sponsored advocacy for legal abortion to make its performance when necessary, a matter of normal medical routine inclusive of aggressive sex education, counselling and adequate provision of medications in designated hospitals or clinics to obliterate the stigmatization syndrome associated with abortion howsoever caused in African developing countries like Nigeria.

5.3 Conclusion

The present study x-rayed the abortion laws in Nigeria and identified their inadequacies to meet with the present realities from the rich scholarship that enriched this study. Nigeria’s extant abortion laws are vague, anachronistic, archaic, reprehensive and an antithesis to the current jurisprudence in African and international human rights law on sexual and reproductive health of women

and girls to access safe abortion. In order to highlight the current dynamics of jurisprudence on the abortion rights of women, two major jurisdictions, namely Great Britain and the United States were used as a case study with references to Cameroonian and Moroccan jurisdictions. Further incursions were made in the African and international human rights jurisprudence for the Nigerian jurisdiction to draw some tutorials from to shape her proposed law reform. It is hoped that the findings and recommendations in the present study would agitate legislative reform in Nigeria and enrich it. This present study advocates for a new legal framework to recognize the sexual and reproductive health rights of women and girls to access legal abortion in deserving cases demonstrated in this study under the African and international human rights framework. Absolute and unfettered access to legal abortion is not feasible but a regulated decriminalization of abortion is recommended for the Nigerian jurisdiction.

EVALUATING THE LEGALITY OF APPLICATION OF RESPONSIBILITY TO PROTECT IN AFRICA: THE LIBYA EXPERIENCE

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Abstract

The international community gathered in 2005 and adopted responsibility to protect in paragraph 138 and 139 of the World Summit Outcome Document. Few years after this adoption, the international community through the UN Security Council applied the concept of responsibility to protect in the 2011 Libyan intervention. The Resolution 1973 was adopted as a result of Gaddafi's manifest intention to exterminate the Libyan population. It authorised the member nations and regional organizations to use all necessary measures to protect civilians in Libya. Thereafter, the coalition of states went to Libya under the pretext of responsibility to protect and protection of civilians, and as a result the Libyan leader was killed. The killing of Gaddafi generated wide controversy as a result of the manner in which the intervening forces implemented Resolution 1973. It was against this background that this research work set to evaluate the application of responsibility to protect in Africa using the Libyan intervention as a text case. In so doing, the study examines the historical development and content of responsibility to protect, which was introduced in 2001 as a result of the Security Council's failure to authorize intervention for humanitarian purposes in Rwanda, Bosnia and Kosovo. The study aims to investigate whether or not the intervention in Libya was in line with responsibility to protect, and in so doing, the study analyses Resolution 1973 to ascertain whether or not the interveners went beyond mandate. The responsibility to protect is central to the discussion of this research work because Resolution 1973 in its preamble reminded the Libyan authorities of their responsibility to protect civilian populations. The study in analysing Resolution 1973, argues that it would be impossible to enforce civilian protection with Gaddafi in power, and even if some scholars posited that the interveners went beyond mandate in Resolution 1973, the interveners saved many lives which would have been killed by Gaddafi.

Keywords: Responsibility to protect, legality, application in Africa, the Libya experience

1. Introduction

The rebellion against Gaddafi's regime started in early 2011, following closely upon revolutionary challenges that were occurring in Tunisia and Egypt.¹

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¹ Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 2.

However, whereas in those countries the autocrats in charge had reacted with a measure of restraint, Gaddafi declared war on the Libyan uprising² and soon after, the number of protesters killed rose from hundreds to more than a thousand. As Gaddafi forces gained strength in the territory, the opposition weakened to the level that it became clear that the city of Benghazi would fall.³ The protesters were met with violent crackdown by the Libyan authorities and the Libyan situation increasingly developed into a mass revolt because thousands were losing their lives daily.⁴ It was at that point that Gaddafi threatened the disaffected population with extinction.⁵ Gaddafi told his supporters to attack the oppositions in their dens and called the protesters cockroaches and rats, who did not deserve to live.⁶

Following his words, the international community became deeply alarmed, and the prospect of massacre and atrocity in Libya at the hands of the regime's military forces was clear.⁷ The UN Security Council met to consider the crisis and the prevailing situation in Libya on 26 February 2011 and the outcome of the meeting was the adoption of Resolution 1970 (2011). The Resolution expressed grave concern about the conflict in Libya. It also welcomed the condemnation by the various regional organisations. It condemned the killing of civilians and reminded the government of Libya of its responsibility to protect its population from the heinous crimes.⁸ The UN Resolution 1970 demanded an immediate end to the violence and urged the Libyan authorities to act with utmost restraint, and respect for human rights.⁹ Despite the non-forcible measures in resolution 1970, Gaddafi continued to unleash terror on the Libyan population, and as a result, consideration of adopting forcible measures to protect civilian population by the Security Council started.

2. Adoption of Resolution 1973

In response to General Gaddafi's threat to take action against civilians, the Security Council passed Resolution 1973,¹⁰ which authorized the member

² Ibid 2.

³ Charles Sampford and Ramesh Thakur, *Responsibility to Protect and Sovereignty: Law, Ethics and Governance Series 13*.

⁴ Geir Ulfstein and Hege Fosund Christiansen, 'The Legality of NATO Bombing in Libya' (2013) 62 *International and Comparative Law Quarterly* 160.

⁵ Spencer Zifcak (n 1) 2.

⁶ VP Nanda, 'From Paralysis in Rwanda to Bold Move in Libya: Emergence of the Responsibility to Protect, Norm under International Law – Is the International Community Ready for it?' (2011) 34(1) *Houston Journal of International Law* 39.

⁷ Zifcak (n 1) 2.

⁸ Sampford and Thakur (n 3) 13.

⁹ United Nations Security Council Resolution 1970

¹⁰ Chelsea O'Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) 24:557 *Duke Journal of Comparative and International Law* 566

nations acting through regional arrangements to use all necessary measures to protect civilians under threat of attack.¹¹ NATO airstrikes led by the United States, France, and the United Kingdom, commenced hours after the resolution was passed.¹² Resolution 1973 in Libya therefore represents the first mandate by the Security Council for a military intervention based on the responsibility to protect.¹³ The adoption of Resolution 1973 was a surprise as most legal actors had expected Russia and China to veto any proposal for military intervention.¹⁴

Shortly, after the resolution was adopted, political and international scholars reacted to different actions that led to its adoption. While some have welcomed the resolution and expressed their support, others have criticised it as an illegal interference in civil war,¹⁵ which does not require UN Security Council response.¹⁶ Some assert that the intervention has been hijacked by regime change. Others have argued that the Libyan intervention presented considerable danger for the future of responsibility to protect.¹⁷ Modeme argues that violent suppression of demonstration, protests, armed rebellion or insurgency are domestic matters that have little implication and therefore do not fall within the competence of Security Council and do not warrant international military intervention.¹⁸ The UN Security Council has a wide range of discretion to make a determination whether an internal situation poses threat to international peace and security.¹⁹ The systematic violation of human rights could not be regarded purely as an internal matter anymore and the concept of sovereignty contained in the UN Charter Article 2(1) would not pose a limitation to Security Council action in the international legal order.²⁰

¹¹ United Nations Security Council Resolution 1973 <https://www.nato.int/nato_static/assets/pdf_2011_03/20110927_110311-UNSCR-1973.pdf> accessed on 2 October 2021.

¹² O'Donnell (n 10) 566.

¹³ Ulfstein and Christiansen (n 4) 161.

¹⁴ Andrew Garwood-Gowers, 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36(2) *University of South Wales Law Journal* 603.

¹⁵ Mehrdad Payendeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 355, 380.

¹⁶ Lawrence Modeme, 'The Libya Humanitarian Intervention. Is it lawful in International Law?' (2012) 7 <www.academic.edu/576116/the_libya_humanitarian_intervention_is_it_lawful_in_international_law> accessed 2 October 2021.

¹⁷ Zifcak (n 1) 9.

¹⁸ Modeme (n 18) 7.

¹⁹ Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Cote d'Ivoire' (2012) 37 *South African Yearbook of International Law* 8, 10.

²⁰ Erika De Wet, *Chapter VII Powers of the Security Council* (Hart Publishers North America 2003) 194.

The Organisation of Islamic Cooperation (OIC) has largely supported the adoption of Resolution 1973.²¹ The Ministerial Executive of OIC issued a Communiqué in which it welcomed the Security Council Resolution 1973.²² The Arab League reiterated their support for the 1973 resolution and no-fly zone in Libya.²³ Also, the three AU non-permanent members of the Security Council- Nigeria, Gabon, and South Africa- voted in favour of a no-fly zone. Justifying Nigeria's endorsement of the Resolution 1973, the then country permanent representative to UN, Angela Ogwu, said that the magnitude of humanitarian disaster in Libya compelled Nigeria to take such a stance.²⁴ On the South African perspective, the Deputy Minister for International Cooperation Ebrahim Ebrahim, argued that South Africa not only campaigned for the suspension of Libya from Human Rights Council in Geneva when the conflict broke out, but that President Zuma had informed Gaddafi that South Africa abhorred his government's violation of human rights and he referred to South Africa's active role in the adoption of the UN Security Council Resolution 1973.²⁵ The President of Rwanda expressing his support towards resolution 1973 stated that:

...no country knows better than my own country the cost of the international community failing to intervene to prevent a state killing its own people. Through UN Resolution 1973, we are seeking a committed intervention to halt the crisis that was unfolding in Libya. From what the world saw on the sidelines of this conflict, had this action not been taken, the bombardment of that country's town and cities would have continued. Benghazi most likely would have borne the brunt of a furious administration, and hundreds and thousands of lives could well have been lost-our responsibility to protect is unquestionable-this is the right thing to do; and this view is backed with the authority of having witnessed and suffered the terrible consequences of international inaction'.²⁶

²¹Payendeh (n 15).

²² Press Release of Organization of Islamic Conference Final Communiqué Issued by the emergency open ended Ministerial Meeting of the OIC Executive Committee on the Alarming Development in Libya Arab Jamarhiya (9 March 2011) <<http://www.oic-oci.org/topic-details.asp-id=5057>> accessed 30 November 2021. See also Payendeh (n 15) 380.

²³ Martin Chulov, 'Arab League to Reiterate Backing for the Libya No-fly Zone, Guardian' (22 March 2011). <<http://www.tinyurl.com/4dxglac>> accessed 30 October 2021.

²⁴ 'Libya, Nigeria votes in Favour of No-fly Zone' (19 March 2011) <<http://www.vanguardngr.com/2011/03/Libya-Nigeria-Votes-in-favour-of-no-fly-zone-resolution>> accessed 2 November 2021. See also Payendeh (n 15) 380.

²⁵ Sandy Africa and Rentia Pretorius, 'South Africa, the African Union and Responsibility to Protect, the case of Libya' (2012) 12 *African Human Rights Journal* 409.

²⁶Paul Kagame, 'Intervention in Libya was the Right Thing to do, New African' (May 2011) <<http://www.connection.ebscohost.com/c/opinions/60584069/kagame-intervening-libya-was-right-thing-do>> accessed 24 October 2021.

South American States were strongly divided on the Resolution 1973. While a lot of them such as Bolivia, Brazil, Venezuela and Cuba strongly condemned the adoption of Resolution 1973 in Libya,²⁷ the Brazilian statement was that the use of force authorised by the Resolution 1973 could change the narrative and ways that may have serious repercussions and also expressed doubt as to whether the use of force will lead to the actualization of the common goal.²⁸ India on their own rejected the use of force and stated that it was not acceptable.²⁹ Other countries such as Mexico and Columbia having voted in favour of the resolution expressed their support. Statements by Russia and China, the two permanent members of the Security Council who abstained in the vote on Resolution 1973 were critical. China strongly opposed and condemned the Libya intervention, Russia harshly criticised it.³⁰ Indian ambassador to the UN objected to the alteration of NATO military stance from the relative neutrality of civilian protection to evident partiality. He further asserted that the Resolution 1973 was concerned with the protection of civilians, it did not mean that NATO could decimate one side, arm rebels, worsen tribal animosities, declare victory and take the other way.³¹

3. Prohibitions to the Use of Force and its Exceptions

The prohibition of the threat or use of force in Article 2(4) of the UN Charter has rightly been described as the corner-stone of the Charter system.³² Notwithstanding its inherent weaknesses, which stem primarily from the malfunctioning of the collective security system in the way originally envisioned by the framers of the UN Charter, international law has until now withstood all attempts by states or scholars to restrict the scope and content of the provision.³³ Article 2(4) provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.³⁴ In other words, no intervention can be made in a state without the consent of the state in question.³⁵

²⁷ 'Latin America Condemned US/UN Invasion of Libya. COTO Report' (22 March 2011) <<http://www.tinyurl.com/3s6ecxx>> accessed 24 October 2021.

²⁸ Payendeh (n 15) 380.

²⁹ Dire Tladi, (n 19) 13.

³⁰ Payended (n 17) 380.

³¹ Zifcak, (n 3)12.

³² Payendeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Law making' (2010) 35 *The Yale Journal of International Law* 469, 492.

³³ Payendeh (n 15) 492.

³⁴ Article 2 (4) of the United Nations Charter <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 18 October 2021.

³⁵ Dire Tladi, 'The Non-consenting Innocent State: The Problem With Bethlehem's Principle 12' (2013) 107 *The American Journal of International Law* 563, 575 .

Clearly, this is directed at inter-state use of force, although as it has turned out, civil conflicts have been more common in the contemporary international law than traditional inter-state conflict.³⁶ The prohibition of the use of force is complemented by the non-intervention principle, which prohibits coercive intervention into the exclusive domestic affairs of a state.³⁷ Under the UN Charter Article 2(6), there is a duty on the UN to ensure that even States which are not UN members act in accordance with these principles for the maintenance of international peace and security.³⁸ The essence of complying with the principle of non-intervention in any domestic jurisdiction is to ensure that the international community do not take laws into their hand, and that the principles relating to use of force is to be complied with.

As we posited above, the UN Charter Article 2(4) prohibits the use of force in international law. The UN Charter permits states to use force in only two circumstances: first, under the authority of the Security Council pursuant to its powers under Chapter VII of the Charter, and secondly, in the exercise of the right of individual or collective self-defence under Article 51 of the Charter.³⁹ In other words, use of force that does not comply with the above principle in international legal order would be regarded *ultra vires* and illegal.

The Chapter VII powers of the UN Charter particularly Article 39 provides that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁴⁰ The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the UN to apply such measures.⁴¹ Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.⁴² Security Council is central in the authorization of use of force in international legal order, once it determines that such action threatens international peace and security. No enforcement action shall be made either by the regional agencies without Security Council authorization.⁴³

³⁶ Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006) 591.

³⁷ Payendeh (n 15) 492.

³⁸ Evans (n 63) 591.

³⁹ John Duggard, *International Law A South African Perspective* (4th edn Juta Co 2011) 499.

⁴⁰ Art 39 of the United Nations Charter.

⁴¹ Art 41 of the United Nations Charter.

⁴² Art 42 of the United Nations Charter.

⁴³ Art 53 of the United Nations Charter.

4. The Security Council Authorization of Use of Force under Responsibility to Protect

The Security Council authorization of the use of force for the purposes of maintaining or restoring international peace and security is beyond question.⁴⁴ In order to exercise its powers, the Council has been granted a wide margin to determine the existence of a threat to the peace, breach of the peace or act of aggression.⁴⁵ Under the UN Charter Article 24(1), the Security Council has the primary responsibility for the maintenance of international peace and security. The Chapter VII of the UN Charter gives the Security Council wide range of powers for the authorization of use of force.⁴⁶

Article 39 vested on the Security Council the power to determine threat to international peace and make recommendation thereto.⁴⁷ Once the Security Council determines that a threat to international peace exists, it will consider appropriate measure for dealing with such situation. The Security Council acting pursuant to Chapter VII will, by majority of at least nine votes (so long as none of the permanent members exercises a veto), will in the first instance authorize the use of measures falling short of military force under Article 41 of the UN Charter.⁴⁸ If the Security Council considers that Article 41 measures would be inadequate or have proved to be inadequate, it may authorise such forcible measures under Article 42 as may be necessary to maintain or restore international peace and security.⁴⁹

State sovereignty has long been regarded as the pivotal structural paradigm of international law.⁵⁰ Its recognition in Article 2(1) of the UN Charter as a fundamental, albeit qualified, principle of the UN is only one of many indicators that it has not forfeited its significance,⁵¹ although Article 2(7) has put a caveat, that the above principle shall not prejudice the application of enforcement measures under Chapter VII of the UN Charter. At the same time, the rising importance of the protection of human rights raises the question of how to reconcile the inherent tension between these two principles.⁵² In the contemporary international legal order, it has become clear that the treatment of human beings within the territorial boundaries of a state does not belong to the

⁴⁴ Tladi (n 19) 24.

⁴⁵ Tladi (n 19) 24.

⁴⁶ Evans (n 36) 607.

⁴⁷ The United Nations Charter, art 39.

⁴⁸ Khawar Quareshi, 'Legal Grounds for the Intervention in Libya' <<http://www.lawgazette.co.uk/analysis/legal-grounds-for-intervention-in-libya/60292.fullarticle>> accessed 15 October 2021.

⁴⁹ Quareshi (n 48).

⁵⁰ Payendeh (n 15) 470.

⁵¹ Ibid 470.

⁵² Ibid 470.

domain of a state exclusively to exclude interferences from the outside.⁵³ Responsibility to protect is a concept which emphasizes the protection of civilian populations from war crimes, ethnic cleansing, genocide and crimes against humanity, by the international community through the UN Security Council in a situation, where the host state failed in its responsibility to protect its citizens.⁵⁴

Intervention in intrastate human rights violations and humanitarian crisis does not fit neatly into the international law governing the use of force,⁵⁵ except where it falls within the exceptions to the use of force posited above, that is, pursuant to Security Council powers under Chapter VII, and self-defence under Article 51. In other words, intervention under the doctrine of responsibility to protect would only be legal if it complies with the use of force enshrined in the UN Charter. There is a dispute as to whether the Security Council may adopt a resolution under Article 39, determining that a situation constitutes a threat to the international peace justifying action under Chapter VII, when it involves a serious violation of human rights within a particular territory.⁵⁶

Some argue that there must be some external element, which affects a neighbouring state or has the potential of provoking armed conflict between states; others posited that a serious violation of human rights within the domestic jurisdiction of a state poses a threat to the international peace under Article 39.⁵⁷ Based on the above assertion, Tladi contended that the test of whether the Security Council should act is no longer whether there is a threat to peace or breach of international peace, rather whether the issue is important internationally and has a high profile.⁵⁸ It should be noted that massive human rights violations, a deteriorating humanitarian situation, and the negative effects of internal conflict on a region, for example, increasing refugee migration, possible military engagement in neighbouring states, and spill over effects, have become grounds for the Security Council to activate the Charter's peace enforcement mechanisms.⁵⁹ Dugard maintains that a purely internal situation can constitute a threat to international peace under Chapter VII, which could warrant Security Council to invoke use of force or measures under Article 41 and 42.⁶⁰ De Wet states that systematic violations of human rights cannot be regarded as

⁵³Ibid 470.

⁵⁴United Nations General Assembly Resolution 60/1 n 109 para 138-139.

⁵⁵Garwood-Gowers (n 14) 595.

⁵⁶Dugard (n 39) 483.

⁵⁷Ibid 483.

⁵⁸Dire Tladi, 'Strict Positivism, Moral Argument, Human Rights and the Security Council: South Africa and the Myanmar Vote' (2008) 8 *African Human Rights Law Journal* 32.

⁵⁹Peyendeh (n 15) 366.

⁶⁰John Dugard, 'The Influence of the Universal Declaration as Law' (2009) 24 *Maryland Journal of International Law* 88.

purely internal matters anymore and that the concept of state sovereignty contained in Article 2(1) of the UN Charter, would not pose a limitation to Security Council action under Chapter VII.⁶¹ The argument for the legality or otherwise of use of force in the light of responsibility to protect is more likely to be based in the growth on importance of human rights and the restrictions on state sovereignty.⁶² Gray posited that since the protection of human rights is no longer a purely domestic matter, a use of force for human protection purposes overrides the prohibition of the use of force.⁶³ In other words, humanitarian crises in a domestic arena can now be a justification for Security Council authorization of use force for human rights protection in an internal jurisdiction of a state.

It should be noted that the UN Security Council had on several occasions in the past authorised use of force for human rights protection purposes in a situation of internal conflict.⁶⁴ Examples of earlier use of force authorised by the Security Council for human protection include Resolution 794 on Somalia and Resolution 940 on Haiti.⁶⁵

5. Analysis of UN Security Council Resolution 1973 and Criteria for Responsibility to Protect

The main elements of the Resolution 1973 are the operative paragraphs 4 and 8.⁶⁶ The paragraph 4 of the resolution authorizes the member states that have notified the UN Secretary-General, acting nationally or through regional organization, to take all necessary measures, notwithstanding paragraph 9 of the Resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in Libya, including Benghazi, while excluding a foreign occupation force on any part of Libyan territory.⁶⁷ The operative paragraph 8 authorizes member states that have notified the UN Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6, as necessary, and request states concerned in cooperation with the Arab League to coordinate closely with the Secretary-General on measures they are taking to implement this ban.⁶⁸ The overarching purpose of Resolution 1973 was the protection of civilians, and there were five major ways that the resolution

⁶¹ Erika De Wet (n 20) 194.

⁶² Christine Gray, *Use of Force for Humanitarian Purpose; Research Handbook on International Conflict and Security Law*, Nigel D White (ed) (Edward Elgar Publishers 2013) 230.

⁶³ Ibid 230.

⁶⁴ Garwood-Gowers (n 14) 603-604.

⁶⁵ Ibid 604.

⁶⁶ Tladi (n 19) 36.

⁶⁷ Security Council Resolution 1973 paragraph 4

⁶⁸ Security Council Resolution 1973 paragraph 8.

authorized this protection like mandate to use all necessary measures, protection of civilian populated areas including Benghazi, Protection of areas under threat of attack, an exception to the arms embargo notwithstanding paragraph 9 of Resolution 1970, exclusion of a ground forces and no fly zone.⁶⁹

5.1 All Necessary Measures

The Security Council immediately responded to the violence in Libya with a comprehensive resolution that authorized all necessary measures to stop attacks on civilians.⁷⁰ All necessary measures used in the operative paragraphs are a well-accepted practice of the Security Council for the permission to use force to achieve a specific purpose.⁷¹ This is the language employed by the Security Council to authorize the use of force under Chapter VII, particularly under Article 42 of the UN Charter.⁷² Given the prevailing situation in Libya, Henderson contended that the wording was adopted to create some form of intentional ambiguity thereby allowing all States to win the arguments over its permissible limits.⁷³ In as much as the UN Security Council Resolution 1973 does not provide the time limits and modalities to be taken, the intervening states would have to show that every action they took was essential with regard to the objective they pursued, namely the protection of civilians and civilian populated areas including Benghazi, and to enforce compliance with the no-fly zone.⁷⁴

Some legal commentators have argued that the manner, in which the coalition of states carried out the ‘all necessary measures’ in Resolution 1973, assisted the opposition forces in winning the war, thereby ousting Gaddafi from power.⁷⁵ In rejecting this view, Akande posited that the use of all necessary measures employed by the UN Security Council was the only way of stopping Gaddafi forces from winning the war and could not be interpreted as assisting the opposition forces.⁷⁶

The reason being that the threat to civilians that justifies the military intervention emanated from the Gaddafi regime, and military action against the origin of the human rights violations encompasses the measures necessary for

⁶⁹ PR Williams and Colleen (Betsy) Popken, ‘Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity’ (2011) 44 *Case Western Reserve Journal of International Law* 225, 233.

⁷⁰ *Ibid.*

⁷¹ C Henderson, ‘International Measures for the Protection of Civilians in Libya and Cote d’Ivoire’ (2011) 60 *International and Comparative Law Quarterly* 770.

⁷² Williams and Popken (n 69) 234.

⁷³ Henderson (n 70) 771.

⁷⁴ Payendeh (n 15) 385.

⁷⁵ Simon Adams 15.

⁷⁶ Dapo Akande, ‘What does the United Nations Security Council Resolution 1973 permit?’ (2012) <<http://www.ejiktalk.org/what-does-un-security-council-resolution-1973-permit>> accessed 4 May 2021.

the civilian protection.⁷⁷ The intervening states could hardly have protected civilians in Benghazi and other places in Libya against the Libyan forces without at the same time strengthening the opposition. If coalition forces had wanted to protect only civilians and not insurgents, such approach would have been impossible to implement in practice.⁷⁸ In other words, ‘all necessary measures’ encompasses those measures the intervening states employed for civilian protection which includes training and assisting the rebels.

5.2 Civilian Populated Areas in Libya including Benghazi

The operative paragraph 4 of Resolution 1973 also incorporated protection of civilians in Libyan territory and also made special reference to include those living in Benghazi.⁷⁹ Article 51 of the Protocol Additional to the Geneva Convention provides that the civilian population shall enjoy general protection against dangers arising from military operation.⁸⁰ The civilian population as such shall not be the object of attack or threats of violence the primary purpose of which is to spread terror among the civilian population.⁸¹ Even if military personnel are present in an area, their presence does not deprive the area of its civilian nature.⁸² Thus, going by the Geneva Convention ‘civilian populated areas used in Resolution 1973’ authorized the intervening states to use force to protect entire towns and villages in Libya, even if legitimate military targets existed within them, so long as civilians were present.⁸³

The express inclusion of Benghazi in Resolution 1973 as a protected area was significant because it was the command and control centre for the Libyan opposition since the inception of the uprising.⁸⁴ Apart from the fact that the Libyan uprising started in Benghazi, Gaddafi’s threat to civilians living in Benghazi that he would not have pity on them also triggered the Security Council to make specific reference to the protection of civilians living in Benghazi in Resolution 1973.⁸⁵ In extending protection to civilian populated areas including Benghazi, the Security Council recognized that those needing protection may also be engaged in self-defence, but also assisted them in doing so.⁸⁶ Also, the rapid advance of the regime forces to within striking distance of

⁷⁷Payendeh (n 15) 387.

⁷⁸Ibid.

⁷⁹ Security Council Resolution 1973 para 4.

⁸⁰ ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts’ (Protocol 1) (8 June 1977) <<http://cpwg.net/wp-content/uploads/sites/2/2013/08/AP-1-and-11-to-the-Geneva-Conventions.pdf>> accessed 7 October 2021.

⁸¹ Art 51(2) of the Additional Protocol to the Geneva Convention.

⁸² Williams and Popken (n 69) 237-238.

⁸³ Ibid 238.

⁸⁴ Ibid 238.

⁸⁵ Ulfstein and Christiansen (n 4) 160-161.

⁸⁶ Williams and Popken (n 69) 238.

the rebel held city of one million people had created an urgent need for the protection of civilians in Benghazi, and there was no room for ambiguities as to the legality of protecting the entire population living in Benghazi including the opposition forces.⁸⁷ This was a clear acknowledgement by the Security Council that Gaddafi forces and the Libyan opposition were not entitled to the same protection.⁸⁸

The operative paragraph 4 of Resolution 1973 also extended protection to civilians and civilian-populated areas under threat of attack and in doing so, provided the interveners with the flexibility to successfully fulfil its mandate of civilian protection.⁸⁹ Authorising the protection of civilians under threat of attack may seem like common sense for a resolution with the goal of protecting civilians, to ensure that the intervening forces were able to stop attacks on civilians before they occurred.⁹⁰ While Welsh posited that NATO construed this approach to overstep their mandate in Resolution 1973,⁹¹ Williams and Popkin on the other hand contended that this clause provided NATO with the flexibility to adapt the campaign to changing circumstances on the ground and to strike all targets that posed a risk and threat to civilian population.⁹² Also, the interveners did not shy away from eliminating threats of attack to civilians, because destroying targets that posed an imminent threat to civilians was a key objective in the early campaign when the regime forces were staging an offensive against the opposition in Benghazi⁹³

5.3 Notwithstanding Paragraph 9 of Resolution 1973 and Excluding Foreign Occupation

The broad interpretation of ‘notwithstanding paragraph 9 of the Resolution 1973’ in operative paragraph 4 of Resolution 1973 authorises states to arm and train the opposition as long as it was necessary for civilian protection.⁹⁴ The paragraph 9 of Resolution 1973 provides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel

⁸⁷ Ulfstein and Christiansen (n 4) 163.

⁸⁸ Williams and Popken (n 69) 338.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Jennifer Welsh, ‘Civilian Protection in Libya’ 1.

⁹² Williams and Popken (n 69) 240.

⁹³ Ibid 240.

⁹⁴ Ibid 243.

whether or not originating in their territories.⁹⁵ In common language, when the word ‘notwithstanding’ is used as a preposition, as it is in operative paragraph 4 of Resolution 1973, it means despite, and states could use all necessary measures to protect civilians despite paragraph 9 of the Resolution 1970.⁹⁶ Although, the meaning of this phrase has been debated, the logical interpretation is that this phrase created an exception to the paragraph 9 arms embargo for measures that were necessary to protect civilians, and includes measures that may include arming and training civilians so that they may protect themselves.⁹⁷

It should be noted that the UN Security Council Resolution 1973 only authorises protection of civilians in Libya.⁹⁸ The inclusion of notwithstanding paragraph 9 in Resolution 1973 shows that drafters of the resolution purposely and thoughtfully created exceptions to the arms embargo.⁹⁹ The addition of this phrase reflects an understanding by the Security Council that those who need protection may also be engaged in self-defence.¹⁰⁰ In rejecting this above proposition, Milanovic argues that distribution of arms to the rebels was absolutely prohibited by the operative paragraph 4 of resolution 1973.¹⁰¹ Akande contended that those States using force in and against Libyan forces must be entitled to transfer their own arms, for their own use to the territory of Libya. If this were not so, the authorization to use force would be meaningless.¹⁰² Furthermore, the reference to acting nationally or through regional arrangements is not intended to limit the authorization but rather to make clear that force can be used in different ways.¹⁰³ More importantly, the authorization is to use all necessary means to achieve a goal and there is no reason why this must be done directly and not indirectly. The authorization is effectively an authorization to use force.¹⁰⁴ Under international law, states may use force either directly, through their own armed forces or indirectly by providing support to non-State groups.¹⁰⁵ If a State is authorised to use force it may choose to do so directly or

⁹⁵Security Council Resolution 1970 (2011).

⁹⁶ Williams and Popken (n 69) 244.

⁹⁷ Ibid 244.

⁹⁸ Security Council Resolution 1973.

⁹⁹Williams and Popken (n 69) 244.

¹⁰⁰Ibid.

¹⁰¹ Marko Milanovic, ‘Can the Allies Lawfully Arm the Libyan Rebels?’ (2011) <www.ejiltalk.org/can-the-allies-lawfully-arm-the-libyan-rebels/>. accessed 8 October 2021.

¹⁰²Dapo Akande, ‘Does Security Council Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?’ (2011) <www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>. accessed on 8 October 2021.

¹⁰³Ibid.

¹⁰⁴Ibid.

¹⁰⁵Ibid.

indirectly and this may include providing support or arms or other assistance to non-State groups in order to fulfil the mandate.¹⁰⁶

5.4 Excluding Foreign Occupational Forces

The Security Council Resolution 1973 in its operative paragraph 4, also authorized the use of force but explicitly excluded a foreign occupation force of any kind on any part of Libyan territory.¹⁰⁷ On the basis of this formulation, it has been argued that Resolution 1973 categorically excluded the deployment of foreign forces, because of the fact that the operative paragraph 4 did not stipulate the term ground forces, but instead resorted to the technical phrase occupation force.¹⁰⁸ Under international law, the concept of occupation can be defined as the exercise of effective control over the territory of a state by another state.¹⁰⁹ Also, according to Article 42 of the Hague Convention IV, a territory is considered occupied when it is actually placed under the authority of the hostile army.¹¹⁰ Williams and Popkin posited that any foreign intelligence or military presence on the ground in Libya falling short of this threshold definition did not constitute foreign occupation of territory.¹¹¹ It should be noted that this phrase certainly set the tone that there would not be heavily-armed peacekeeping forces in Libya, but it allowed some military presence on the ground.¹¹²

Also, a very broad interpretation of the operative paragraph 4 of Resolution 1973 clearly gives the interveners the flexibility of putting limited foreign intelligence and personnel on the ground of Libya, so long as they did not constitute a foreign occupation of any form.¹¹³ In other words, foreign intelligence and military personnel could be used as long as they do not exercise effective control over the Libyan territory.¹¹⁴ On the basis of this formulation, military operation could include ground forces without occupation of the territory. Accordingly, the deployment of ground troops in order to gather information or mark possible targets for air strikes is encompassed by the

¹⁰⁶Ibid.

¹⁰⁷Payendeh (n 15) 385.

¹⁰⁸Ibid. 385.

¹⁰⁹Ibid.

¹¹⁰'Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague' (18 October 1907) <www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf> accessed 7 October 2021.

¹¹¹Williams and Popken (n 69) 247.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ben Smith and Arabella Thorp, 'Interpretation of Security Council Resolution 1973 on Libya (6 April 2011) House of Commons Library' 5 <http://www.icil.cam.ac.uk/sites/default/files/icil/documents/arabspring/libya_38_House_of_Commons_Interpretation_SCRResolution_1973.pdf> accessed 4 November 2021.

Security Council authorization in as much it aims at civilian protection.¹¹⁵ Many scholars assert that coalition forces on ground abused this provision because of the fact that they provided the rebel forces with arms, ammunitions and military training, which contradicted the wordings of operative paragraph 4.¹¹⁶ Akande posited that any measure that was adopted by the coalition for the protection of civilian population in Libya would be accepted provided it was for the purposes of civilian protection.¹¹⁷ Furthermore, ground troops were allowed to be deployed to ensure civilian protection, but they were prohibited to besiege Libyan territory, and this suggests that the Security Council wanted to rule out the possibility that a military intervention would result in the occupation of Libya.¹¹⁸ With regards to the admissible measures, only occupation forces are explicitly excluded, which means that deployment of ground troops was generally allowed so long as they did not seize effective control over parts of Libyan territory.¹¹⁹

6. Conclusion

There are legal merits in the application of responsibility to protect in Libya. The mandate no doubt was for the protection of civilians, and the interveners worked tremendously in ensuring that the Libyan protection was given adequate protection. The intervention in Libya actualized the mandate in both Resolutions 1970 and 1973 by meeting the legitimate demands of the Libyan population, including ousting Gaddafi's regime which posed serious threat to the peace and security in Libya. The intervention in Libya also advanced the concept of responsibility to protect populations from massive human rights atrocities, which was adopted by the world leaders in 2005 in order to ensure that the international community through the UN Security Council aided in preventing mass atrocities anywhere they are likely to occur in the world. That is to say, leaders of individual states cannot rely on inviolability of sovereignty as an alibi to unleash atrocities on their civilian population, while the international community stands by. Contemporary international law has adopted the principle of responsibility to protect to lift the veil of sovereignty.

In conformity with the above reasoning, the UN Security Council swiftly adopted Resolution 1973 which authorized military force in Libya, and this seemed to point to a new era of international cooperation and prompt response on civilian protection. As expected, the supporters of responsibility to protect were quick to hail Resolution 1973 as a triumph for a new concept.¹²⁰ Conversely, the opponents of military intervention in Libya such as China,

¹¹⁵Payendeh (n 15) 385-386.

¹¹⁶Henderson (n 70) 771.

¹¹⁷Akande (n 76) 179.

¹¹⁸Payendeh (n 15) 386.

¹¹⁹Payendeh (n 17) 391.

¹²⁰Garwood-Gowers (n 16) 616.

Russia, India, Brazil and South Africa (though South Africa voted in favour of Resolution 1973) put up a fierce opposition to the manner in which the interveners carried out the military operations in Libya, arguing that Resolution 1973 that was adopted under the pretext of responsibility to protect was employed to advance regime change in Libya.

The study wonders at what security implications the international community would have grappled with, in the event that Resolution 1973 was not adopted, as it later became evident that despite the criticisms the intervention in Libya prevented massive atrocities. The work contended that military intervention in Libya will no doubt serve as a precedent to would-be perpetrators of human rights violations and opponents of the responsibility to protect who will ultimately come to terms with this emerging concept that requires international cooperation for perfection.

The study found that the responsibility to protect has not attained the status of customary international law and could not be binding on States to implement the concept when the need arises. The implementation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity by the international community would only be legal if, the use of force to protect human population is authorized by the UN Security Council. This study found that the interveners in Libya averted mass atrocities, humanitarian crises and other grave forms of human rights violations.

ECONOMIC IMPLICATIONS OF TRADE IN WILDLIFE: FROM LEGALITY TO ILLEGALITY

Helen Agu,^{*} Emmanuel Onyeabor,^{**} & Edwin Arum^{***}

Abstract

Illegal trade in wildlife has caused the decline of many species in Nigeria, Africa and the world. Illegal killing, smuggling and other forms of illicit trade in wildlife do not only hurt the economy and the ecosystem, but they also fuel organised crime as well as feed corruption and insecurity, undermining the sustainable development of the country. Wildlife in Nigeria is under pressure as most endangered species, are traded both domestically and internationally. Nigeria is not only a source of wildlife products but has also emerged as a major transit country for wildlife trafficking according to the current World wildlife Crime Report. Using a literature-based review, this paper critically examines the legality and illegality of wildlife trade in Nigeria in line with the provisions of extant laws and how this scenario has grossly hampered global efforts toward combating wildlife trafficking. It proffers amendment of the text of extant laws to reflect the intents and global aspirations to curb this scourge and preserve biodiversity for posterity. It further advocates global partnerships efforts to strengthen enforcement capacity to investigate and prosecute offenders.

Keywords: Endangered species, illicit financial flows, poaching, organized crime, conservation.

1. Introduction

Illegal wildlife trade (IWT), (and other wildlife crimes), has become a major threat to the iconic wildlife species of Africa, driven by high market values on the black market. IWT is now considered to be the world's fourth largest internationally organized crime, generating between USD \$7 and \$23 billion every year.¹ Wildlife crime undermines the economic prosperity of countries and communities in Africa, deteriorating their natural capital, social stability, and cohesion, and threatening sustainable economic development, including the erosion of benefits derived from legal nature-based enterprises like tourism.²

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¹ The Economic Impact of Illegal Wildlife Trade in Southern Africa; <<https://www.conservation-strategy.org/project/economic-impact-illegal-wildlife-trade-southern-africa>>accessed 19 July 2021.

² Ibid.

Generally, illegal trade and trafficking in wildlife include the illegal stealing, sale, smuggling, transportation and distribution of wild animals and plants, their products, and derivatives for commercial purposes or human use.³ This has attracted attention of major NGOs, United Nations and the Interpol and has been ranked as 4th largest world's largest illicit activity.⁴ Well-organized criminal groups have turned this environmental exploitation into a professional business, with high revenues encouraging the continued poaching and harvesting of endangered and protected species in national parks and forests. Notwithstanding, several laws abound providing for permissible trade in wildlife while prohibiting trade in some critical species. Therefore, it is not all wildlife trades that are illegal. However, some prevailing factors like poverty, corruption, legal and institutional irregularities have made it difficult to differentiate between the legal and illegal trades, thus occasioning a smooth movement between the divergent trades.⁵

In a bid to tackle this challenge, the law often becomes stringent on both trades. However, this stringency of the law has often led to the destruction of both legal and illegal wildlife trades, thereby crippling local economies, and advancing secret wildlife trading. It is therefore the thesis of this paper that stifling every sale and exploitation of wildlife species and derivatives just because of illegal trade would result to wildlife laundry. It also makes the law a conduit through which illegal wildlife sales will move from illegality to legality. Rather ways should be adopted to sustainably manage the whole chain which encompasses the supply-side, transactional, and demand-side of the trade to ensure that people benefit maximally from their environments without threatening the survival of the wildlife species.⁶

This paper is divided into four parts following this introduction. Part two appraises the regulatory framework for wildlife trade globally and in Nigeria; part three discusses the crises of wildlife trade, from legal to illegal and its

³ Roz Price, 'Economic drivers and effects of the illegal wildlife trade in Sub Saharan Africa' [2017] *Institute of Development Studies* 3 <<https://www.gsdc.org/wp-content/uploads/2017/09/144-economic-drivers-of-IWT-in-Sub-Saharan-Africa-new-K4D-template.pdf>> accessed 27 July 2021.

⁴ UNODC, 'World Wildlife Crime Report 2020' [2020] <<https://www.unodc.org/unodc/en/data-and-analysis/wildlife.html>> accessed 27 July 2021

⁵ Traffic, 'What's driving the Wildlife Trade?' *A Review of Expert Opinion on Economic and Social Drivers of the Wildlife Trade and Trade Control Efforts in Cambodia, Indonesia, Lao PDR, and Vietnam 2008* <https://www.traffic.org/site/assets/files/5435/whats-driving-wildlife-trade-executive_summary.pdf> accessed 27 July 2021

⁶ WWF, 'Second-Biggest Direct Threat to Species after Habitat Destruction' (2018) *WWF* <https://wwf.panda.org/discover/our_focus/wildlife_practice/problems/illegal_trade/> accessed 13 April 2022.

implications for global and national economy; part four concludes the paper with workable recommendations.

2. Appraisal of the Regulatory Framework for Wildlife Trade Globally and In Nigeria

2.1 Regulatory Framework at International Level

Various legal instruments had been developed for the regulation of wildlife species. Notable among these are:

2.1.1 The Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention on Wetlands) 1971

This is a framework intergovernmental treaty signed in 1971 in Ramsar, Iran, with the primary purpose of engendering cooperation among states for the conservation and “wise use” of the World’s several Wetlands.⁷ The Convention advocates that while people enjoy the resources in the wetlands, they should maintain the ecological wellbeing of those wetlands.⁸ Each party under this Convention is enjoined to nominate at least one wetland in its territory based on already established criteria to the International List of Important Wetlands.⁹ Many parties have already complied with this arrangement.

Further, parties are mandated to make national laws for the protection of their wetlands, keep adequate records and conduct research when necessary. They are also obligated to create awareness among the local people on the need to conserve the wetlands and develop relevant management and developmental plans. Notwithstanding, the Convention faces some challenges primarily the fact that the obligations under the Convention are general in nature and as such do not address specific issues such as trade within national boundaries nor has it any control over the domestic markets, as many illegal trades in wild fauna and flora go on within territorial boundaries before going into the international terrain.¹⁰ The CITES did not also make for specific enforcement procedures beyond the port of entry, indirectly making the combat of illegal trade the sole responsibility of National governments. In most African states, national governments are weaker than state governments, leaving the combat of poaching in the hands of the National Government makes the job of poachers easier and once they slip through the national law enforcement agents, they are now free. This ought not to be so. The CITES did not list many endangered

⁷ Ramsar Convention 1971, art 1

⁸ Daniel O Suman, ‘Mangroove, Ramsar Convention: An Overview’ [2019] <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/ramsar-convention>> accessed 19 July 2021.

⁹ These criteria include hydrology, ecology and support for wildlife and human populations.

¹⁰ UNODC, ‘CITES and the international trade in endangered species’ (2019) <<https://www.unodc.org/e4j/en/wildlife-crime/module-2/key-issues/cites-and-the-international-trade-in-endangered-species.html>> accessed 26 April 2022.

species of wild fauna and flora, the Convention captured just eight per cent of the world's known reptile species like all ten crocodile skink species.¹¹

More so, many provisions of the Convention are vaguely drafted in so much that interpretation becomes a big challenge.¹²

2.1.2 UNESCO World Cultural and Natural Heritage Convention 1972

This Convention is one of the greatest international instruments on the conservation of natural heritage of outstanding collective value for the present and future generations. The Convention is governed by the World Heritage Committee with the assistance of the World Heritage Centre, the Convention's Secretariat, and three technical advisory bodies to the Committee: IUCN, ICOMOS, ICCROM.¹³ The implementation of this Convention is expedited through operational guidelines which set out processes for new inscriptions, danger listings, and the provision of global support through the World Heritage Fund.¹⁴

Parties to the Convention are also enjoined to make national and regional laws for the protection of world heritage within their domain, integrate those heritages in the lives of the community, and integrate the protection into their comprehensive planning programs.¹⁵ They are also to undertake appropriate legal, scientific, technical, administrative, and financial measures necessary for the identification, protection conservation, presentation, and rehabilitation of those heritages and to refrain from any measures that might be detrimental to the preservation of those heritages.¹⁶

2.1.3 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973

Trade in wildlife species is regulated under the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES). The purpose of the Convention could be seen from the Convention's statement of purpose

¹¹ Rachel Nuwer, 'The vast majority of animals in the wildlife trade are not protected' (2018) *National Geographic* <<https://www.nationalgeographic.com/animals/article/animals-dying-without-protection>> accessed 26 April 2022.

¹² Ornella Ferrajolo, 'State Obligation and Non-Compliance in the Ramsar System' [2011] *Journal of International Wildlife Law and Policy* 243.

¹³ IUCN, World Heritage Convention <World Heritage Convention | IUCN> accessed 27 July 2021.

¹⁴ Daniel O Suman, 'Mangroove, Ramsar Convention: An Overview' [2019] <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/ramsar-convention>> accessed 22 July 2021.

¹⁵ UNESCO, 'State Parties Responsibilities Under the World Heritage Convention World Heritage Convention <State Parties Responsibilities under the World Heritage ...> accessed 27 July 2021

¹⁶ *Ibid.*

contained in its preamble, which is the ‘protection of certain species of wild fauna and flora against over-exploitation through international trade.’ Under CITES trade in species listed in three appendices is subjected to mandatory licensing, through permits and certificates, to ensure that such trade does not threaten their survival. Around 35,000 species are listed in these appendices, of which about 30,000 are plants. The Convention regulates trade in species based on their conservation status and the risk posed by trade.

Appendix I contain species threatened with extinction that are or may be affected by trade. Commercial trade is therefore prohibited. Species such as great apes, leopards, tigers, most rhinoceros populations, several parrots and many orchids are in Appendix I. In exceptional cases (such as for scientific research), trade may take place if authorized by an import permit and an export permit.

Appendix II contains species that are not now threatened with extinction, but that could become so unless trade is strictly regulated. Trade is permitted only with an export permit issued under specific conditions including a ‘non-detriment’ finding (NDF) by the scientific authority. The NDF must demonstrate that trade is not detrimental to the species’ survival. Appendix II contains most of CITES-listed species.

Appendix III contains species that are protected in at least one country. CITES parties have enlisted the cooperation of other parties in controlling trade in a species under their jurisdiction. Trade requires an export permit or a certificate of origin if it has been sourced from a country that has not listed the species.

The Convention has also created a platform for synergy among nations to collaborate in controlling cross border trade in wildlife.¹⁷ More so, the Convention has by implication given States a leeway to set up structures to punish poachers. Further, the implementation of CITES has brought about the artificial propagation of many plants thus reducing the pressure on plants in the wild.¹⁸

Notwithstanding, the CITES gave room for divergent national policies to influence its implementation and this has resulted in lack of harmonization of wildlife protection, thus creating a gap through which criminal exploitation of

¹⁷ CITES, ‘Conf.18.6’ <<https://cites.org/sites/default/files/document/E-Res-18-06.pdf>> accessed 27 July 2021.

¹⁸ Catharine L Kriebs, ‘Sustainable Use of Endangered Species under CITES: Is It A Sustainable Alternative?’ (2014) *Penn Law: Legal Scholarship* 461 <<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1467&context=jil>> accessed 19 July 2021.

wildlife could thrive.¹⁹ Another fundamental hindrance to the enforcement of the Convention is the fact that the Convention is not self-executing but relies on supplementary legislations to bring about its implementation.²⁰ Other major hindrances to the implementation of the Convention are the several exceptions allowed by the Convention which include giving parties the right to enter reservations in respect of species already protected by the Convention thus creating loopholes through which illegal wildlife trade thrives.²¹ Article XXIII gave countries the right to “opt out” of the Convention with respect to any specific listing. The Convention is also bereft of a precise standard of listing species in its Appendixes. Another challenge is the irregularity in the taxonomy of plant species, some names might be so confusing that the officials of state parties might find it so challenging to harmonize and recognize them. Another challenge is the leniency with which offenders are handled²² and the inconsistent record keeping of state parties.²³

To improve the implementation of the Convention, the Convention must be amended to bear stronger enforcement mechanisms. Enforcement might be through economic sanctions or any other mechanism that could compel parties to accede and comply with the provisions of the Convention.²⁴

2.14 The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention (CMS) 1979

The need to give adequate protection to species which move across national boundaries gave birth to this Convention. This is a framework Convention which came into force in 1983 under the auspices of the United Nations Environment Program (UNEP). Its primary purpose is the conservation and sustainable use of migratory species of wild animals together with their habitats and migratory routes. It is the only international Convention with this primary

¹⁹ Anita Lavorgna and Catherine Rutherford and Valentina Vaglica and Matthew Smith and Maurizio Sajeve, CITES: Wild Plants and Opportunities for Crime (2017) *European Journal on Criminal Policy and Research* 24 <<https://link.springer.com/article/10.1007/s10610-017-9354-1>> accessed 19 July 2021.

²⁰ Kriepe (n18).

²¹ David S Favre, *International Trade in Endangered Species: A Guide to CITES* (London: Martinus Nijhoff Publishers 1989) 323.

²² *ibid.*

²³ Meena Alagappan, ‘The United States’ Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora’ (1990) 10 *J Int’l L & Bus* 541.

²⁴ CITES, ‘List of Parties to the Convention’ <<https://cites.org/eng/disc/parties/index.php>> accessed 19 July 2021. See also Convention On International Trade In Endangered Species Of Wild Fauna And Flora (Sixth Meeting of the Conference of the Parties Ottawa, Canada 12 July 1987). <<https://www.cites.org/sites/default/files/eng/cop/06/doc/E06-44.pdf>> accessed 19 July 2021

purpose.²⁵ The Convention is also divided into Appendixes and species are grouped depending on the level of protection afforded them by the Convention. It places responsibilities on States especially range States and States through which these species migrate. The Convention advocates the collaboration of all states in the achievement of its purpose and encourages parties to create more agreements geared towards the actualization of its purpose.²⁶ The Convention stipulates that when such agreements are made the public should be notified of such.²⁷

2.1.5 The Convention on Biological Diversity (CBD) 1992

This is another veritable instrument in wildlife protection. The purpose of this Convention could be seen from its Article 1 which include, conservation of biological diversity, sustainable use of its components, fair and equitable sharing of benefits arising out of the utilization of genetic resources, appropriate transfer of relevant technologies, taking into account all rights over those resources etc. The Convention intends to achieve this through promoting biodiversity conservation and sustainable use through national laws, policies, international institutional structure to support implementation and principles for the international exchange of genetic resources and biotechnologies derived from them. One practical aspect of the Convention could be seen in its Article 6 which enjoins countries to create a national strategy for conserving biodiversity and to integrate the Convention into economic planning. The Convention also provided for in-situ and ex-situ conservation in its Articles 8 and 9 it also advocates sustainable use in its article 10, while providing for impact assessment and minimizing adverse impacts.

A major challenge to the implementation of this Convention is the challenge of bio-piracy. Bio-piracy simply means the unlawful arrogation and transfer of biological diversity and genetic resources and basic information from local communities in developing countries by industrialized nations without obtaining the approval of those local communities or putting arrangements in place for sharing accruing profits.²⁸ Other challenges include, lack of human and financial capacity, inadequate environmental data needed for tracking the impact of development activities on biodiversity, ineffective institutional

²⁵ UNESCO, 'UN Convention on the Conservation of Migratory Species of Wild Animals' <<https://www.waddensea-worldheritage.org/un-convention-conservation-migratory-species-wild-animals>> accessed 22 July 2021.

²⁶ Ibid.

²⁷ Bonn Convention 1979, arts v (5) and IX(4).

²⁸ Wakogi, Wanjiku, 'Challenges of Implementing the Convention on Biological Diversity in Developing Countries to Prevent Biopiracy: A Case' <<http://erepository.uonbi.ac.ke/handle/11295/5293>> accessed 15 September 2020.

structures and nonchalance of government at different levels to take proactive measures in conserving biodiversity, etc.²⁹

2.2. National Laws and Regulations on Wildlife crime in Nigeria

A number of regulatory frameworks had been put in place by the Government of Nigeria to regulate wildlife species. They are:

2.2.1 Endangered Species (International Trade and Traffic) Act No 11 1985³⁰

The primary purpose of the Convention is to ensure the conservation and management of Nigeria's wildlife and the protection of some species in danger of extinction as a result of overexploitation. According to section 1 of the Act, the hunting or capture of or trade in, the animal species listed in the First Schedule to the Act (being animal species threatened with extinction) is categorically banned. In section 1(2), the Act prohibits the hunting, capture or trade on the species listed under the second schedule except with a duly issued licence. The Species listed under the second schedule are species though not necessarily now threatened with extinction, may become so threatened unless trade in respect of such species is controlled.³¹

The Act also prohibits trade in any animal listed in the second schedule of the Act except an export permit has been duly issued.³² The Minister in granting the permit must have convinced himself that such export will not be detrimental to the survival of that specimen and that the health and wellbeing of the specie will be assured during the export. He must also be convinced that an import permit has been or will be issued by the import country. Before the issue of an import permit, the minister shall also be convinced that the specimen will not be used for commercial purposes, the import is not for a purpose that will be inimical to the survival of the specimen and the proposed recipient must have the requisite facility to care for it.³³

2.2.2 National Park Service (Amendment) Act, 2006.

The purpose of this Act is to establish the National Park Service to be responsible for the preservation, enhancement and protection of wild animals and plants and other vegetation in National Parks; and for matters connected therewith. The Act establishes the National Park service with distinctive objectives set out in section 6 of the Act which include; the conservation of selected and representative examples of wildlife communities in Nigeria; the establishment of an ecologically and geographically balanced network of protected areas under the jurisdiction and control of the Federal Government;

²⁹ Convention on Biological Diversity, What's the Problem? [2007] <<https://www.cbd.int/impact/problem.shtml>> accessed 22 July 2021.

³⁰ Cap E9 Laws of the Federal Republic of Nigeria (LFN) 2004.

³¹ Endangered Species (International Trade and Traffic) Act 1985, s 2.

³² Ibid, s. 1(2).

³³ Ibid, s 2(1)(b).

the protection of endangered species of wild plants and animals and their habitats; the conservation of wildlife throughout Nigeria so that the abundance and diversity of their species are maintained at the optimum levels commensurate with other forms of land use, in order to ensure the continued existence of wildlife for the purpose of their sustainable utilisation for the benefit of the people of Nigeria; the preservation of outstanding scenic, natural, scientific, recreational and other values in the National Parks; the protection and maintenance of crucial wetlands and water catchment areas; the control of dangerous vertebrate species; the implementation of relevant international treaties, agreements or other arrangements regarding, relating to or connected with protected areas and wildlife management to which Nigeria is a party, in so far as the power to implement those international treaties, agreements or arrangements is conferred on the Service by the Federal Government; the promotion and provision of education about wildlife and nature conservation; and the conservation of biological diversity in Nigeria.

According to section 20 of the Act:

the ownership of every wild animal and wild plant existing in its natural habitat in, National park and anything whatsoever, whether of biological geomorphologic or historical origin or otherwise, existing or found in a National park is hereby vested in the Federal Government and subject to the control and management by the Federal Government for the benefit of Nigeria and mankind generally.

2.2.3 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, (NESREA) 2007³⁴

This Act establishes the National Environmental Standards and Regulations Enforcement Agency as an enforcement Agency for environmental standards, regulations, rules, laws, policies, and guidelines.

The Agency is charged with the responsibility for the protection and development of the environment, biodiversity conservation, and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies, and guidelines. The Act also mandated the Agency in its section 7(c) to enforce compliance with the provisions of international agreements, protocols, conventions, and treaties on the environment and such other agreements as may from time to time come into force. This, the Agency is charged with the implementation of CITES in Nigeria but just like other state institutions, like the Economic and Financial Crimes Commission and the National Agency for Food and Drug Administration and Control, the effectiveness of NESREA is yet to be felt.

³⁴Act No 25 2007.

2.2.4 National Environmental (Protection of Endangered Species in International Trade) Regulations 2011

These Regulations are applicable to specimens of wildlife species listed in articles I, II, III of CITES which have been domesticated by the Endangered Species (Control of International Trade and Traffic) Act 1985. The Regulations shall also be applicable to wildlife species which shall subsequently be listed by the Convention after the commencement of the Regulation. The Regulations ban the import of specimens listed in the Appendixes of CITES into Nigeria. The Regulations also ban introduction into Nigeria, listed specimens taken in the marine environment, not under the jurisdiction of any country. It further bans the exportation and re-exportation of listed specimens from Nigeria.³⁵ The Act also provided the requirements for importation which include permits and other certifying certificates.

3. Legal Trade in Wildlife: Economic Benefits

There are several economic benefits of the wildlife trade, especially when done in accordance with the law, which if properly managed will form a formidable economic base for any nation. Wild flora is so essential in the manufacture of drugs. Two alkaloids, vincristine" and vinblastine, extracted from the leaves of the Madagascar periwinkle plant, have proven effective in treating childhood leukaemia and Hodgkin's disease.³⁶

Moreover, not less than 3,000 plant species have been discovered to possess vital ingredients needed for the treatment of cancer³⁷ Further, Antibiotics³⁸ and antiminthics have also been manufactured from numerous species of plants and fungi.³⁹ It is projected that in the twenty-four major industrialized nations, plant-based drugs accounted for \$43 billion in revenue annually.⁴⁰ According to Worldwide Fund for Nature, not less than 40% of all

³⁵ National Environmental (Protection of Endangered Species in International Trade) Regulations 2011, regulation 3 (2) (a)-(e).

³⁶William C Burns, 'CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal' (1990) 8 (2) *Dickinson Journal of International Law* 1.

³⁷Vergsteeg, 'The Protection of Endangered Species: A Canadian Perspective' (1984) 267 (273) *II Ecology LQ* 1. See also Paul Ehrlich and Briau Walker, 'Rivets and Redundancy' (1998) 48 (5) *BioScience* 387.

³⁸ Antibiotics are best described as metabolic constrainers which destroy bacteria without meddling with the host metabolism.

³⁹Walter G Rosen, *Diversity in Danger: The Current Status of the Earth's Biological Wealth* (1st edn 1 WorldCat Member Library Worldwide 1987) 1. <<https://www.worldcat.org/title/diversity-in-danger-the-current-status-of-the-earths-biological-wealth/oclc/969634526>> accessed 19 July 2021.

⁴⁰ P Ehrlich and A Ehrlich *Extinction: The Causes and Consequences of the Disappearance of Species* (New York: Random House 1981) 1.

prescription drugs used in industrialized nations are derived naturally from plant species or have been developed with the aid of "chemical blueprints."⁴¹

Wild flora is also beneficial to the industrial sector, for instance, the United States Department of Agriculture is currently working on about 460 plant varieties with a view to discovering a substitute to imported gasoline lubricants.⁴² Moreover, the jojoba plant has also been instrumental in the manufacture of linoleum, ink, chewing gum, adhesives, disinfectants, detergents, corrosion inhibitors, shampoos, lipstick, sunscreen compounds, and polishes. Many wild plants are used for the generation of hydrocarbons which may be improved to be a more functional substitute for fossil fuel.⁴³ The aesthetic benefits of flora varieties are enormous as lovers of nature pay heavily just to import some special and beautiful flora from anywhere, they could be found across the globe. Some of these floras possess some protective features as they drive away dangerous reptiles and rodents from the environment where they are planted.⁴⁴

A sustainably managed wildlife trade and resources lessen the pressure on existing biodiversity. It will also protect their habitat through land conversion. Regulated trade would also improve the lives of local people through incentives and other economic support. Moreover, it is also a renewable economic resource, and regulated trade could be fundamental to the attainment of internationally endorsed United Nations (UN) Sustainable Development Goals.⁴⁵

4. Illegal Wildlife Trade and its Resultant Economic Implications

Wildlife is a national resource with divergent sectors ranging from tourism and health to industries. IWT claps the wildlife sector the same way bunkering drives the oil sector. When the illegal wildlife trade happens, the effect is both on the government and the community. While the government is deprived of revenue, the local community is also deprived of its communal purse. Poachers who are ignorant of the value of the wildlife undersell at a cheaper rate to foreigners; while foreigners who understand the value buy at a cheaper rate and probably resell at a higher rate and make more money that could have been

⁴¹ Worldwide Fund for Nature, 'Squandering the Unknown' (1989) 7 *BBC Wildlife* 189.

⁴² Ibid.

⁴³ Douglas F Williamson, 'Tackling the Ivories: The Status of the US Trade in Elephant and Hippo Ivory' [2004] <https://www.traffic.org/site/assets/files/4054/tackling_the_ivories.pdf> accessed 19 July 2021.

⁴⁴ The Treaty defined 'species' to mean 'any species, subspecies, or geographically separate population thereof.' See also cites 1973, art 1 (a).

⁴⁵ Ivonne Higuero, 'How Wildlife Conservation can Benefit Sustainable Human Development' [2020] <How Wildlife Conservation Can Benefit Sustainable Human Development | United Nations> accessed 27 July 2021

earned by the government or the local community. Impliedly the wealth of the nation is ignorantly transferred at no cost.

A poacher who has never seen one million Naira in his life will deem it a great benefit selling a tiger illegally for five million Naira, not knowing that he has wasted a resource of over twenty million Naira. The resultant effect of this is that wildlife that should have a positive implication has now constituted a leakage through which poverty can set into the region.⁴⁶

Moreover, the monies realized from these illegal activities are not even utilized for the benefit of the community; rather, they seep into the private pockets of poachers. For instance, in rural Zambia, hunters are the richest in the community making 96 per cent of the local per capita annual income from a single expedition.⁴⁷ This is also obtainable in local Namibia, where a single rhino horn can fetch the hunter three times his annual income. Illegal wildlife trade is a highway to poverty in that it momentarily cushions the economic troubles of the poacher, only to leave the entire community, and indeed the nation in a worse economic and environmental state in the long term.⁴⁸

Illegal wildlife trade is dynamic in nature with severe economic implications, when it is stifled in one country; it fluidly slides into another country where regulations and enforcement are not stringent. Poachers tend to be more conversant with the law than the law enforcement agents as they can sniff through legislative and enforcement lacunas to advance their enterprise. For instance, due to the conducive environment in Democratic Republic of the Congo occasioned by weak legal institutions, pangolin scale traders have adopted the country as a depot for their wares.⁴⁹ At other times, when it appears that enforcement of the law is intense on particular specie, wildlife sale can suave to other species with equivalent economic value. This is prevalent in timber. It is also obtainable in animal derivatives, for instance since the laws are tight on tiger bones, many wildlife merchants have resorted to Leopard, jaguar and lion bones.⁵⁰

⁴⁶Rosaleen Duffy and others, 'Toward a new understanding of the links between poverty and illegal wildlife hunting' (2016) (30)(1) *Conserv Biol*14.

⁴⁷P Lindsey and others, 'Illegal Hunting and The Bush-Meat Trade in Savanna Africa: Drivers, Impacts and Solutions to Address the Problem' [2015] *Panthera/Zoological Society of London/Wildlife Conservation Society Report: New York* 79 <<http://www.fao.org/3/a-bc609e.pdf>>accessed 20 July 2021.

⁴⁸Africanews, 'Namibia struggling to protect rhinos amid pandemic' [2021] <<https://www.africanews.com/2021/04/03/namibia-struggling-to-protect-rhinos-amid-pandemic/>> accessed 27 July 2021.

⁴⁹UNODC, World wildlife crime Report: Trafficking in Protected Species (2020 United Nations Publication) 12

⁵⁰Ibid.

This situation raises a need for cross-border enforcement of wildlife regulations.⁵¹ The Southeast Asian countries Cambodia and Lao PDR have always provided a transit route for the export of wildlife to China⁵² China with its wealth and thirst for elephant ivory, pangolin scales have fuelled this trade economically and poachers from these countries cash in on the loopholes in laws and enforcement to service China with wildlife products from endangered species.⁵³ This is not different from what we see in several African countries like Nigeria.⁵⁴ China's technological advancement and digital economy have increased the ease of connectivity between poachers in Korea and Japan, the improved road initiatives, infrastructure, and several developmental activities have enhanced in the influx of illegally traded wildlife products into China.⁵⁵ Many transit routes have benefitted economically from this trade making it an impossibility to secure their compliance in the combat of this menace.

It is a fact that by the virtue of the territorial integrity of states, laws can only be enforced within a given state; states should therefore agree to allow wildlife laws to be enforced across national boundaries to ensure that poachers do not get away with their enterprise. This should also be employed in Africa, in the conservation of wildlife. Africa being the home of many wildlife resources should be a single territorial jurisdiction for the enforcement of wildlife laws.

With the advent of the technological revolution across the globe, the sale of wildlife species using the internet is fast growing into a formidable industry. Facebook, Instagram, eBay, Twitter Alibaba, etc. have afforded a smart platform for sales which also makes monitoring and detection difficult as traders can trade across national boundaries virtually and can switch accounts at any suspicion of detection. This also has economic implications as money moves

⁵¹ Yunbo Jiao and Pichamon Yeophantong and Tien Ming Lee, 'Strengthening International Legal Cooperation to Combat the Illegal Wildlife Trade Between Southeast Asia and China' (2021) *Frontiers in Ecology and Evolution* <<https://www.frontiersin.org/articles/10.3389/fevo.2021.645427/ful>> 1 accessed 26 April 2022.

⁵² Y M Li and D M Li, 'The dynamics of trade in live wildlife across the Guangxi border between China and Vietnam during 1993–1996 and its control strategies.' (1998) *Biodivers Conserv* 7, 895–914. doi: 10.1023/A:100887311965; See also, Y M Li and others, 'Illegal wildlife trade in the Himalayan region of China' (2000) *Biodiver Conserv* 7, 901. doi: 10.1023/A:1008905430813

⁵³ K Krishnasamy and M Zavagli, 'Southeast Asia: At the Heart of Wildlife Trade' (2020) *Malaysia: Southeast Asia Regional Office*

⁵⁴ Daniel Etim Jacob, 'Wildlife Poaching in Nigeria National Parks: A Case Study of Cross River National Park' (2015) DOI:10.5376/ijmec.2015.05.0004

⁵⁵ Jiao (n51).

across national boundaries without the countries and communities accounting for them.⁵⁶

The laundry propensities in illegal wildlife commerce could be seen from the sale of timber, where timber especially the rosewood is harvested illegally in one country and sold in the legal market of another country, thus sanctifying the illegal origin of the product. This is possible since countries are under no legal obligation to enforce the forestry laws of other countries⁵⁷

Tourism is one of the biggest industries associated with wildlife; the reduction of these species negatively affects tourism especially in countries whose national economies are hinged on tourism.⁵⁸ Illegal wildlife trade is pivotal to the crashing of many other sectors of the economy dependent on wildlife. These sectors include textile, medicine aesthetics etc. The challenge of illegal wildlife trade is quite extensive; it has the propensity of breeding security tensions especially at transnational levels.⁵⁹ This is because poachers bear arms and will not hesitate to bring down any obstacle on their way. From using the arms to protect their activities they venture into other crimes aided by arms. No economy thrives in conflict,⁶⁰ once this happens, there will be massive loss of national revenues and unquantifiable environmental destruction⁶¹ not just that the country loses its internally generated revenues which are done through tax and it also loses a natural resource base.

Demand is one factor that must be dealt with if illegal wildlife trade and its resultant economic implications must be handled. Just like other commodities, scarcity especially when orchestrated by legal restrictions has a subtle way of fuelling demand, using the law to totally ban sale of wildlife species cannot in

⁵⁶ Imelda Abano and Leilani Chavez, 'Wildlife trafficking, like everything else, has gone online during COVID-19' [2021] *MONGABAY* <<https://news.mongabay.com/2021/06/wildlife-trafficking-like-everything-else-has-gone-online-during-covid-19/>> accessed 20 July 2021

⁵⁷ UNODC, World wildlife crime Report: Trafficking in Protected Species (2020 United Nations Publication) 13.

⁵⁸ OECD, 'Illegal Trade in Environmentally Sensitive Goods, OECD Trade Policy Studies' [2012] *OECD: Paris*. <http://www.keepeek.com/Digital-Asset-Management/oecd/trade/illegal-trade-inenvironmentally-sensitive-goods_9789264174238> accessed 20 July 2021.

⁵⁹ David H Barron, 'How the Illegal Wildlife Trade is Fuelling Armed Conflict' (2015)16 (2) *Georgetown Journal of International Affairs* 217.

⁶⁰ R Cooney and others, 'From Poachers to Protectors: Engaging Local Communities in Solutions to Illegal Wildlife Trade' [2016] *Society for Conservation Biology* <<https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.12294>> accessed 27 July 2021.

⁶¹ All Answers Ltd, 'Effects of Animal Trafficking on the Economy' [2021] <<https://www.ukessays.com/essays/economics/effects-animal-trafficking-economy-9124.php?vref=1>> accessed 20 July 2021.

any way stop the demand for it, rather it will hike the demand and at the same time the prices and once prices are high more people will get interested so as to make more profit.⁶² Others also believe that the scarcer a commodity is, the more valuable, in effect; legal restriction creates higher financial value for IWT.⁶³ Most times regulatory laws in the areas of wildlife do not affect demand and supply, thereby creating loopholes for criminal actors to change lanes and schemes of operation.⁶⁴

Economic implication is directly or indirectly tied to health implication, for instance in 2020, the world economy almost crashed due to the scourging effect of Covid-19, it is trite that many diseases spread through animal movement from one locale to the other. The movement of animals has procedures which include quarantine, when necessary. When there is an illegal movement occasioned by trade, these procedures are flouted and when a disease spreads it still bites sore on the economy.

5. Challenges of Wildlife Trade: Legality vs Illegality

Notwithstanding the stifling of wildlife trade through the laws, the populations of wildlife have continued to deplete. This is because restrictive laws drive people to continue their activities in the secret and making their private money at the expense of collective economic advancement.

A total ban on wildlife exploitation is not the solution to illegal trade; rather it is an injustice to legal wildlife trade. For instance, some wildlife species are privately cultivated by landowners, when there is a complete ban, it entails that their investments are lost as they cannot sell to make their profits. Others spend so heavily to conserve and restock those animals and there is no way they can recover their money except through the sale of derivatives from those animals.⁶⁵ For example, landowners in South Africa who invest in the conservation and restocking of rhinos cannot even sell those horns due to the international ban on the sale of rhino horns.⁶⁶

Exploitation and trade in wildlife have come to stay. This leaves Africa with the only right option of sustainable exploitation, which entails finding

⁶²R J Hall and others, 'Endangering the endangered: the effects of perceived rarity on species exploitation' [2008] *Conserv Lett* 1.

⁶³F Chen, 'Poachers and Snobs: Demand for Rarity and the Effects of Antipoaching Policies' (2016) 9 *Conserv Lett* 65.

⁶⁴UNODC, World wildlife crime Report: Trafficking in Protected Species (2020 United Nations Publication) 12

⁶⁵ M Sas-Rolfes, and others, 'Illegal Wildlife Trade: Scale, Processes, and Governance' [2019] *Annual Review of Environment and Resources* 203.

⁶⁶ EC Ubino and EF Pienaar and JR Soto, 'Structuring Legal Trade in Rhino Horn to Incentivize the Participation of South African Private Landowners' [2018] *Ecol Econ* 154: 306.

means through the exploitation to advance Africa economically while conserving the natural resources.⁶⁷

As stated earlier, interpose between legal and illegal wildlife trade is the major clog in the wheel of proper wildlife administration. Illegal wildlife trade encompasses all strata of activities surrounding the exploitation and sale of wild fauna and flora through a means contrary to the laid down national and international laws.⁶⁸ Many illegal trades pass off as legal trades due to some wildlife trade drivers or conflicting factors. The economic implications of these factors on wildlife are felt across the whole chain of wildlife exploitation.⁶⁹

The determination of legality and illegality is relative, and subject to local circumstances; this is because what is legal in a country can become illegal in the shores of another country. Sometimes, it might be illegal to hunt some animals in their countries of domicile, but such laws would not be binding on countries where those animals are sold or consumed.⁷⁰

One of the major factors driving wildlife trade is poverty. According to the Economics of Ecosystems and Biodiversity (TEEB) Report, nature is the GDP of the poor; it forms the bedrock of the socioeconomic survival of rural dwellers. Their food, money, shelter, and happiness are dependent on their natural environment. Therefore, the denial of their right to exploit their environment is the denial of their right to survive. In most instances, due to poverty in Sub Saharan Africa and other countries, the residents are left with no option than to resort to illegal wildlife exploitation as a cheap way of survival.⁷¹

Although poverty offers a conducive atmosphere for poaching, the main motivating factor is the demand by people who are willing to pay the price for what they want notwithstanding the cost. Therefore, in obedience to the law of demand and supply, the local communities are always willing to make the supplies, once the cash keeps pouring in. People sell because people buy; if there were no demands from the rich countries, there will be no market for

⁶⁷International Institute for Environment and Development, 'Communities, livelihoods and sustainable wildlife management' [2017] <Communities, livelihoods and sustainable wildlife management | International Institute for Environment and Development (iied.org)> accessed 27 July 2021.

⁶⁸ Sas-Rolfes (n 65).

⁶⁹Jessica A Lyons and Daniel J D Natusch 'Wildlife Laundering through Breeding Farms: Illegal Harvest, Population Declines and a Means of Regulating the Trade of Green Pythons (*Morelia viridis*) from Indonesia' (2011) 144 (12) *Science Direct*.

⁷⁰Ibid.

⁷¹P Lindsey and others, 'Illegal Hunting and the Bush-meat Trade in Savanna Africa: Drivers, Impacts and Solutions to Address the Problem' [2015] *Panthera/Zoological Society of London/Wildlife Conservation Society Report: New York* 79 <<http://www.fao.org/3/a-bc609e.pdf>> accessed 20 July 2021.

poachers domiciled in poor countries.⁷² A cursory look at the demand in wildlife products reveals that the demands are luxurious in nature, for instance the most sought-after product of poaching is ivory, which an average poor man has no business with.

Therefore, the impact of wealth and ostentation supersedes the impact of poverty in illegal wildlife trade.⁷³ Illegal Wildlife Trade in sub-Saharan Africa is fuelled by the ever-growing demand for wildlife and its derivatives in global North⁷⁴

The next intervening factor is food insecurity. Both wild plants and animals provide a veritable food base for the local communities. Many communities get their protein annually from wildlife resources. Some communities do not hunt wildlife for luxury but for the irresistible taste of bush meat. This is the case with most communities in Nigeria, where people and fun-seekers who believe that alcoholic beverages are best enjoyed with bush meat continue to mount pressure on wildlife. Population explosion is another adverse factor because as the human population increases, the pressure on wildlife also increases through the destruction of their habitat.

Many governments do not see wildlife crimes as serious crimes worth the government's attention and as such there is little or no investment to curtail it. Rangers are not well equipped, and even when poachers are apprehended, they are either allowed to go free or handed weak sentences by the court which is incapable of deterring future offenders.⁷⁵

Weak legal and enforcement mechanism is a major driver of the illegal wildlife trade. Africa and indeed many developing countries have a track record of weak laws, governance, and corruption.⁷⁶

Institutional lapses coupled with other economic drivers mentioned above have made it a herculean task to regulate the wildlife trade in Africa. The wildlife trade should have been a great resource in Africa, but because most African communities are bereft of the value of these resources, they keep wasting these resources under the guise of benefitting from them.

⁷²R Duffy and others, 'Toward a New Understanding of the Links between Poverty and Illegal Wildlife Hunting' [2016] *Conservation Biology* 30 doi:10.1111/cobi.12622

⁷³C Nellemann and others, 'The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources' [2014] *United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal* <<https://www.cbd.int/financial/monterreytradetech/unep-illegaltrade.pdf>> accessed 20 July 2021.

⁷⁴Sas-Rolfes (n 65) 16.

⁷⁵Williamson (n 43) 11.

⁷⁶Harrison and others 'Wildlife crime: a review of the evidence on drivers and impacts in Uganda' [2015] *IIED Research Report* <<http://pubs.iied.org/pdfs/17576IIED.pdf>> accessed 20 July 2021.

Corruption remains the bedrock of the negative effects of wildlife trade in sub-Saharan Africa, the inability of laws to work effectively lies in the corrupt practices in the system occasioned by officials who sneak through the laws to condone illegality. When corruption is mentioned, bribery comes to mind.⁷⁷ According to the Environmental Investigation Agency in the case of Shuidong connection, 4 – 10per cent of the ultimate cost of ivory in Asia is expended on bribing law enforcement officials.⁷⁸ The case in issue recorded US\$90,000-210,000 expended on bribes alone. It was recorded in 2012 that the amount of money given to border officials in a single day along Viet Nam-China border was between US\$18,000 to US\$30,000.⁷⁹

Here in Africa, the Financial Intelligence Unit (FIU) of Namibia⁸⁰ also recorded a case where a traveller from Namibia en route China was accosted in South Africa with baggage containing 18 rhino horns weighing a total of 43 kilograms. Obviously, he was cleared by some officials who closed their eyes to the baggage. In several other places, fake permits are obtained with the aid of corrupt officials.⁸¹ Corruption cuts across all chains of wildlife trade. In effect, corruption especially among judicial officers perverts criminal justice, through loss or concealment of evidence, threat to or compromise of witnesses, and delays. All these advance illegalities.⁸²

The cultures, colonial and historical inclinations of the local people also have a great role to play in driving the illegal wildlife trade. Many local communities are hunters from the cradle and have built their subsistence economy on the harvest and sale of wildlife products; it would be problematic to

⁷⁷ Organisation for Economic Co-operation and Development (OECD), ‘Strengthening Governance and Reducing Corruption Risks to Tackle Illegal Wildlife Trade: Lessons from East and Southern Africa’ [2018] <https://www.oecd-ilibrary.org/trade/strengthening-governance-and-reducing-corruption-risks-to-tackle-illegal-wildlife-trade_9789264306509-en> accessed 27 July 2021

⁷⁸ Environmental Investigation Agency, ‘The Shuidong Connection: Exposing the Global Hub of the Illegal Ivory Trade’ [2017] <<https://eia-international.org/wp-content/uploads/EIA-The-Shuidong-Connection-FINAL.pdf>> accessed 27 July 2021

⁷⁹ E Bennett, ‘Legal ivory trade in a corrupt world and its impact in African elephant populations’. *Conservation Biology*, 29(1), 54–60, 2014

⁸⁰ Republic of Namibia Financial Intelligence Centre, Trends and typology report No 1 of 2017: Rhino and elephant poaching, illegal trade in related wildlife products and associated money laundering in Namibia, 2017.

⁸¹ UNODC, Sharing Electronic Resources and Laws on Crime (SHERLOC), Case Law Database, available at: sherloc.unodc.org. Case number ZAFx008.

⁸² UNODC, ‘Tackling Corruption in Illegal Wildlife Trade in Nigeria’ [2021], <<https://www.unodc.org/nigeria/en/press/tackling-corruption-in-illegal-wildlife-trade-in-nigeria.html>> accessed 27 July 2021

expect them to embrace any legislation or regulation that might adversely affect their socio-cultural architecture.⁸³

Due to the secrecy of IWT, it has become so challenging to come up with a study that accurately unravels its accurate implication on wildlife. When the laws are stringent, people swing into secrecy, thus making monitoring and control problematic. But when modulated access is granted, regulation comes naturally. Another challenge is that in many circumstances, the law still paves way through lacunas and exceptions for illegality. More so, due to the complexity in wildlife trade, there is also a challenge of data generation and analysis coupled with the fact that when laws are not properly implemented, it provides interpose between legal and illegal wildlife trade.⁸⁴

6. Conclusion

For there to be an effective wildlife administration and trade control, the jumble between legal and illegal trade must be critically addressed. Just like tackling guerrilla warfare where absolute carefulness is employed to sieve out the rebels from the citizens; absolute carefulness is also required to unmask wildlife laundry. Wildlife crimes thrive in secrecy, all efforts should be geared towards the exposure of the trade. All legal and institutional smokescreens must be cleared. Secrecy in wildlife trading inhibits monitoring and control, therefore wildlife laws must not be so stringent to drive people into secret wildlife trading.

Moreover, for laws to be effective, it must address the entire chain of the trade from the harvester/supplier to the consumer. At the Supply stage, efforts should be made to reduce the activities of poachers and other persons that have direct access to the wild and ensure that exploitation is done within the ambits of the law. More so, other legal substitutes can also be adopted in place of illegal exploitation. These substitutes include ranching, farming, artificial propagation, aquaculture, captive-breeding, biosynthetic substitutes, etc.

At the transactional stage, efforts should also be made to ensure that all activities and processes that take place between the time the wildlife is harvested and when they get to the final consumers comply with the law. Efforts should also be made at all levels to change the options and the desires of the consumers to shift their attention on some of these scarce species to other alternatives that still satisfies their desires without endangering endangered species.

The primary place of local communities in the control of trade in wildlife species cannot be overemphasised. For them to passionately get involved in

⁸³Higuero (n 45)12.

⁸⁴Bret A Collier and Thomas W Schwertner, 'Management and Analysis of Wildlife Biology Data' <<http://www.nmr.lsu.edu/bret/BretWebSiteDocs/TechChapter2011.pdf>> accessed 27 July 2021

ending illegal trade, they should be saddled with the control and management of the proceeds of wildlife resources from their communities. Moreover, the poachers and other harvesters of wildlife live among them, this gives them an advantage of quick detection of poaching and poachers, much more than government officials or law enforcement agents could do. When the communities are excluded from benefitting from their environment, they will frustrate the efforts of government, and the local people who are familiar with the nukes and crannies of the wild would continue to secretly exploit and put in their pockets.

In addition to this, since the local communities are economically dependent on wildlife, alternative sources of economic sustenance must be provided, if not, the government will be gathering with one hand and scattering with the other hand. Offenders of wildlife trade are crafty and can evade justice based on technicalities. In response to this, countries should not just charge them with wildlife trafficking, but when necessary, they should go in for other offences such as money-laundering, corruption, fraud and other crimes incidental to wildlife crimes.⁸⁵ The same way advertisements play a vital role in all economic activities, the use of key influencers is also vital. Celebrities, entertainers, sports, and religious leaders should be used to influence the choice of people to turn their attention from the endangered species of wildlife.⁸⁶

The place of cross border protection of wildlife species cannot be over-emphasised. Nations must reach a compromise on their territorial integrity to allow wildlife laws made in other countries to be implemented within their boundaries. States should also demonstrate willingness to deploy all state resources to enforce such laws, when this is done; it becomes easier to foil illegal wildlife contracts even if they were contracted online.

⁸⁵UNODC, World wildlife crime Report: Trafficking in Protected Species (2020 United Nations Publication) 20

⁸⁶ Elizabeth Duthie, 'The Effectiveness of Celebrities in Conservation Marketing' [2017] <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0180027>> accessed 27 July 2021

COMPULSORY ACQUISITION OF LAND (PRIVATE PROPERTY) IN NIGERIA: PRIORITIZING PUBLIC INTEREST OVER PRIVATE INTEREST

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Abstract

Compulsory acquisition of land (private property) is permitted under the Nigerian law, but such acquisition must be conducted in accordance with the prescriptions of law. A fundamental criterion in compulsory acquisition is the compliance with the public purpose requirement. Increasingly, state governments in Nigeria have been engaging in massive land grabbing for many reasons that tend to challenge the public purpose requirement. In certain cases, including governments' acquisition for mass housing projects, the resultant beneficiaries are far from qualifying for the ascription of the term 'public' for the purpose of compliance with the public purpose requirement. This casts doubt on the acquiring authority's compliance with the extant law. Using a doctrinal methodology, this paper argues for the prioritization of public interest over private interest. The paper aims to provide a roadmap for ensuring that public interest requirement reigns supreme in any compulsory acquisition in Nigeria.

Keywords: Land, compulsory acquisition, government, public purpose, options

1. Introduction

Compulsory acquisition of land is a crucial development tool employed by governments to ensure that land is available for vital uses that are beneficial to the public.¹ Increasingly, governments are under intense pressure to deliver public services necessitating compulsory acquisition.² Compulsory acquisition of land distinguishes from market-based approach to acquisition of land which is largely determined by arm's length dealings and competitive pricing. Market-based approach to acquisition of land is ill-suited for governmental uses of land for public purpose since it stultifies development programmes. For instance, the landowner might refuse to sell thus rendering nugatory the government development drive for public benefit, or the market price may be too high

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¹ Collins C. Ajibo and others, 'Standard of Review in Indirect Expropriation: Reconciling the Effect Rule with the Doctrine of Intent' (2022) 11 *GJCL* 36; Jonathan Mills Lindsay, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' (2012) 1(3) *PPP Insights* 1-2.

² Simon Keith and others, 'Compulsory acquisition of land and compensation' (2008) *Food and Agriculture Organisation Land Tenure Studies* 1.

thereby rendering the public purpose economically otiose. Consequently, compulsory acquisition of land by governments is an important feature of national constitutions and international law.³ Despite the prevalence of this governmental power in many jurisdictions, compulsory acquisition continues to attract controversy both in theory and practice.⁴ There is a convergence of opinions that compulsory acquisition is an area filled with tension.⁵ From the economic actors' perspective, the 'often conflictual and inefficient aspects of the process are seen as a constraint to economic growth' and national development.⁶ Compulsory acquisition of land becomes even more controversial in the face of rapid growth in population, expansion of public services and economic activities. Most compellingly, compulsory acquisition causes tension among landowners who are threatened with dispossession.⁷ While compulsory acquisition of land for development purposes could ultimately bring benefits to the society it can be disruptive to people whose land is acquired.⁸ Specifically, it creates displacement of families from their homes, farmers from their fields, and businesses from their neighbourhoods.⁹ It may interfere with livelihoods, separate families, deprive communities of important religious or cultural sites, and destroy networks of social relations.¹⁰ If compulsory acquisition is poorly undertaken, it may leave people landless and homeless, with no viable way of earning a livelihood, and with the feeling that they have suffered a grave injustice.¹¹ The power of compulsory acquisition can be abused and it is usually the case in the atmosphere of weak institutions.¹² Unfair procedures for the compulsory acquisition of land and inequitable compensation for its loss can reduce land tenure security, increase tension between the government and citizens, and reduce public confidence in the rule of law.¹³ In similar vein, unpredictable and unenforceable procedures create opportunities for rent-seeking and corruption.¹⁴ While good governance is vital to provide a balance between the governments' need to acquire land and the need to protect the rights of people whose land is to be acquired,¹⁵ such good

³ Liz Alden Wily, 'Compulsory Acquisition as a Constitutional Matter: The Case in Africa' (2018) 62 (1) *Journal of African Law* 77.

⁴ Jonathan Mills Lindsay, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' (2012) 1(3) *PPP Insights* 1-2.

⁵ Keith and others (n 2) 1.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

governance is generally lacking in Nigeria. This is owing to the existence of weak institutions, the corruptive flatulence of the political class and a parasitic patronage system.

Consequently, this paper seeks to explore the avenues for enthronement of good governance in compulsory land acquisition in Nigeria. It argues that the court should prioritize public interest requirement in compulsory acquisition of land in Nigeria by government. This will afford the court an opportunity to determine the appropriateness of state actions and de jure compliance with the spirit of rule of law. In effect, this paper is not really concerned about the applicable reparation or compensation regime, the standard or adequacy of compensation and valuation method (even though excerpts of these areas are used to illustrate the points made). Rather, the main thrust of the paper hinges on the enthronement of good governance in the procedures for and aftermath of compulsory acquisition of land. The payment of compensation by government tends to obscure or legitimize the lack of transparency and fraudulent leanings that underpin the compulsory acquisition. Hence, this paper seeks to chart a sustainable way of compulsory acquisition that satisfies not only the letters but also the spirit of the law.

The article is divided into seven sections. Apart from the introduction above, section two generally examines compulsory acquisition. Section three evaluates the context and limits of compulsory acquisition. Section four assesses reparation and compensation. Section five considers the criteria for compulsory acquisition. Section six argues for the prioritization of public interest over private interest, while section seven concludes.

2. Compulsory Acquisition

2.1 Classification of Acquisition

Compulsory acquisition is not a new phenomenon in Nigeria, but it is gaining currency because of the frequency and potential for abuses. The term ‘compulsory acquisition’ of land is sometimes referred to as expropriation, compulsory purchase, eminent domain, police power, land acquisition and resumption.¹⁶ Expropriation could be direct, indirect or regulatory.¹⁷ Indirect expropriation also can be classified as creeping and consequential,¹⁸ constructive, de facto, disguised, or acts tantamount to expropriation.¹⁹ Indirect

¹⁶ Ibid.

¹⁷ UNCTAD, ‘Expropriation’ [2012] <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> accessed 10 January 2022.

¹⁸ A creeping expropriation could be a cumulative series of regulatory acts or omissions over a prolonged period of time, often interspersed with lawful state regulatory actions, none of which can necessarily be identified as the decisive event that deprived the investors of the value of its investment.

¹⁹ Acts tantamount to expropriation or consequential expropriations involve, inter alia, deprivations of the economic value of a foreign investment, based on failures of the host

or regulatory expropriation generally involves actions and omissions of the government that undermine or tend to undermine the value of investment. This could be in the form of actions and omissions or series of actions or omissions, which individually may not completely constitute an expropriatory act, but when viewed as a whole, it would make any reasonable observer to conclude that expropriation has occurred. Equally, indirect expropriation extends to the multiplicity of improper regulatory acts, omissions, and other unjustifiable conducts that undermine or tend to undermine the essential normative framework created and maintained by law, even if the government, in effect, does not evince the intention to expropriate. Indirect expropriation can occur even without the intention of the state to do so.²⁰ Indirect expropriation is a dominant feature of contemporary investment agreements.²¹ Early in time, it was noted that (1) ‘a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention’, and (2) ‘even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated’.²²

A comprehensive scope of the mode of indirect expropriation is hardly predictable. Each case has to be judged based on the circumstances. Nevertheless, evidence indicate that indirect expropriations are characterized by the following cumulative elements: (1) act or omission attributable to the state; (2) interference with property rights or other protected legal interests of foreign investors; and (3) interference that undermines the economic value of investment, even though the owner still retains the legal title or remains in physical possession.²³ Although outright expropriation is more relevant in national context, the significance of indirect expropriation lies in the divergences that underpin lawful and unlawful acquisition and the quantum of compensation applicable.

2.2 Lawfulness and Unlawfulness of Acquisition

The issue of lawfulness or unlawfulness of acts constituting regulatory expropriation is more pronounced in international law than national law.²⁴ Under international law, the rule is that every act of a state’s breach of

state to fulfil its basic obligations to establish and maintain an appropriate legal, regulatory, and administrative framework for foreign investment.

²⁰ JR Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’ (1983) III *Recueil Des Cours* 259, 322.

²¹ See US Model BIT 2012, art 6.

²² GC Christie, ‘What Constitutes a Taking Under International Law’ (1962) 38 *BYBIL* 307, 310 11.

²³ UNCTAD (n 17) 12.

²⁴ See also cases of *S D Myers, Inc v Government of Canada* [2000] UNCITRAL 96 (particularly the separate opinion by Dr Bryan Schwartz on partial award) [69 – 75]; *Azurix Corp v Argentine Republic* [2006] ICSID ARB/01/12 para 311 111.

international obligation engages state responsibility.²⁵ Thus, one school of thought contends that whether regulatory expropriation is lawful or unlawful compensation applies. The implications of this position are threefold: (1) regulatory action of the government that is lawful is compensable; (2) regulatory action of government that is unlawful is compensable; and (3) regulatory action of the government that falls within the borderline of lawfulness and unlawfulness is compensable.²⁶ The only difference herein pertains to the degree of compensation applicable.²⁷ Thus, in a lawful expropriation the degree of compensation is lesser. That is, the quantum of compensation would be lesser, since the government might be somewhat justified to initiate the controverted action. On the other hand, where regulatory expropriation is unlawful the threshold of compensation is higher. The implication would be that the disputed governmental action would be unjustifiable or hardly justifiable. Therefore, the degree of compensation would be higher.

The preceding view is juxtaposed with the argument that only cases of unlawful expropriation attract compensation. Thus, where the regulatory expropriation satisfies the standard of legality (such as public purpose, non-discrimination, and due process), compensation may not be claimable.²⁸ The preceding reflects the position of international law concerning international investment. While indirect expropriation is vital in the sphere of international investment law, outright expropriation or compulsory acquisition is more relevant in the national context involving citizens' real property.

3 Context and Limits of Compulsory Acquisition

3.1 Compulsory acquisition and fair hearing

Compulsory acquisition in Nigeria is primarily regulated by the constitution of the Federal Republic of Nigeria 1999 (as amended). Since the constitution is the grundnorm it supersedes all other laws and regulations. Accordingly, section 44(1) of Nigerian 1999 constitution provides that '[n]o moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law'. In other words, the constitution allows compulsory acquisition, but it must

²⁵ WM Reisman and RD Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 74 *The British Yearbook of International Law* 121.

²⁶ There is no unanimity of position by the tribunals as indicated hereunder. See Collins C Ajibo, *International Investment Law: National, Regional and Global Perspectives* (Nijmegen Netherlands: Wolf Legal Publishers, 2020) chap 11.

²⁷ See *ADC v Hungary* [2006] ICSID ARB/03/16 para 496 93; *Ioannis Kardassopoulos & Ron Fuchs v Republic of Georgia* [2010] ICSID ARB/05/18 & ARB 07/15 para 502 161.

²⁸ JM Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 *Golden Gate University Law Review* 465.

be conducted in accordance with the prescription of the law. Such prescriptions of the law that must be adhered to by the acquiring authority include the prompt payment of compensation; and affording any person claiming such compensation a right of access for the determination of his/her interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in Nigeria.²⁹

The payment of compensation and the right of fair hearing are, therefore, two constitutional prescriptions that must be complied with. The constitution, however, does not define the meaning of 'prompt payment of compensation'. While prompt compensation has an established meaning under international law, it is arguable if it should be construed as such under the national law. In the final analysis, the textual and contextual meaning of the term should be adopted. In that case, 'prompt' is interpreted in accordance with its denotative meaning bearing in mind the context it is used. Accordingly, it means that the acquiring authority must undertake payment (of compensation) timeously and not belatedly. Similarly, the section does not clarify on the quantum and/or adequacy of compensation. This gives the impression that, in principle, the acquiring authority may compensate the landowner with any amount even if a pittance. In reality, the Land Use Act (incorporated into the constitution) stipulates extensive procedures for the payment of compensation that largely address the ambiguity inherent in section 44 of the constitution.³⁰

Apart from the manner of payment of compensation, the landowner is entitled to fair hearing in a court of law or tribunal or body having jurisdiction in that respect to determine his/her interest in the property and the amount of compensation payable.³¹

3.2 Exceptions

The requirement of section 44(1) of 1999 Constitution above does not apply to compulsory acquisition of property to satisfy general law. Compulsory acquisition to satisfy general law includes:

- (i) for the imposition or enforcement of any tax, rate or duty;
- (ii) for the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence;
- (iii) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
- (iv) relating to the vesting and administration of property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of

²⁹ CFRN 1999, §44.

³⁰ The provisions of the Land Use Act concerning compensation are addressed hereunder.

³¹ Section 47(2) of the Land Use Act states that '[n]o court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act'.

- unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up;
- (v) relating to the execution of judgements or orders of court;
 - (vi) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
 - (vii) relating to enemy property; 8. relating to trusts and trustees;
 - (viii) relating to limitation of actions;
 - (ix) relating to property vested in bodies corporate directly established by any law in force in Nigeria;
 - (x) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;
 - (xi) providing for the carrying out of work on land for the purpose of soil-conservation; or
 - (xii) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.³²

In these foregoing cases, subsection 1 is inapplicable. Similarly, under the provisions of the Land Use Act, no compensation is payable where a right of occupancy is revoked or compulsorily acquired as a result of the alienation of a right of occupancy, statutory or customary, without the requisite consent of the Governor or the appropriate Local Government Authority; a breach of any of the provisions which a certificate of occupancy deemed to contain by virtue of section 10 of the Act; a breach of any term contained in the certificate of occupancy or in special contract made under section 8 of the Act, or; a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor.³³ Also, it is noteworthy that the entire property in and control of 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.³⁴

³² CFRN 1999, s44(2).

³³ Land Use Act, ss28(2)(a) and (5)(a-c). For discussion see, Akintunde Otubu, 'The Land Use Act and Compulsory Acquisition without Compensation (2016) (4) *Gravitas Review of Business and Property Law* 13.

³⁴ CFRN 1999, s44(3).

4. Reparation and Compensation

4.1 Standard of Compensation

The requirement of payment of compensation mentioned above requires deeper analysis from national and international law. Under international law, the Hull standard appears to hold sway. The Hull standard stipulates that expropriation of property must be accompanied by the payment of prompt, adequate and effective compensation. However, the requirement of Hull standard is controverted by many countries particularly the developing countries. Thus, it is widely accepted under international law that a sovereign state in its exercise of right of eminent domain can expropriate foreign investments but is obliged to pay compensation.³⁵ But the contentious issues had been the standard of compensation for the acquired property, and the space of time within which the sovereign expropriator should pay.³⁶ This controversy remains unresolved to date despite surreptitious incorporation of the Hull standard in many treaties. According to one commentator, '[i]t is nothing short of absurd to pretend that the protestation of the rule of full, prompt and adequate compensation ... in all circumstances is representative of customary international law'.³⁷ The UN Declaration on Permanent Sovereignty of the Peoples over their Natural Resources (PSPNR), Resolution 1803 (XXII) of 1962 Resolution (a consequence of decolonisation) made no mention of payment of 'prompt, adequate and effective' compensation but instead used the expression 'appropriate compensation'. However, it has been argued that 'appropriate compensation' is synonymous with the Hull standard of 'adequate' compensation.³⁸ But if this was the case, the Resolution would have said so in clear terms.³⁹ Nevertheless, the forces of globalisation and significant liberalisation of economies to attract foreign investment and trade have taken the centre stage lately, forcing many countries to accept the Hull standard. Hence, the element of Hull standard is seen in the compensation regime embodied in the Nigerian Investment and Promotion Commission (NIPC) Act.⁴⁰ The 1999 constitution equally uses the term 'prompt' compensation in section 44. The Land Use Act half-heartedly reflects the spirit of Hull standard. There

³⁵ Adeoye Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 *International and Comparative Law Quarterly* 60.

³⁶ Lee A O'connor, 'International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State, the Notes and Comments' (1983) 6 *Loy LA Int'l & Comp LJ* 399.

³⁷ Wolfgang Friedmann, 'National Courts and International Legal Order: Projections on the Implication of Sabbatino Case' (1965-1966) 34 *GWLR* 454.

³⁸ Stephen M Schwebel, 'The Story of the Un's Declaration on Permanent Sovereignty over Natural Resources', (1963) 49 *ABAJ* 465 66.

³⁹ Patrick M Norton, 'A Law of the Future or a Law of the Past? Modern Tribunal and International Law of Expropriation' (1991) 85 *AJIL* 478.

⁴⁰ NIPC Act, art 25.

is a requirement of payment of compensation within a reasonable time reflecting prompt compensation.⁴¹

4.2 Restitution, Compensation and Valuation

The International Law Commission Articles on State Responsibility (ILC) follows the standard of compensation epitomised by the Hull standard if restitution is impossible. The ILC position is in line with the ruling earlier in time that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁴² The ruling is no less than *restitutio in integrum*. Hence, Article 35 of ILC provides, *inter alia*, that ‘a state responsible for an internationally wrongful act is under an obligation to make restitution’ provided reversion to such a *status quo ante* is possible, and that it is not disproportionate ‘to the benefit deriving from restitution instead of compensation’.⁴³ Similarly, Article 36 of the ILC Articles provides that in event that *restitutio in integrum* is impossible, compensation should be paid.⁴⁴ The quantum of compensation ought to cover ‘any financially assessable damage including loss of profits’ as long as the claimants could establish it.⁴⁵

The combined effect of the Article 35 and Article 36 of the ILC shows that restitution remains the general standard of reparation in cases of internationally wrongful acts of the state including cases of expropriation. However, where reversion to such a *status quo ante* is impossible, compensation is paid by the delinquent state. The analysis of the Commentaries to article 36 indicates that the prevailing customary international compensation standard depends, by and large, on the circumstances of each case.⁴⁶ Loss of future profits may or may not be awarded depending on the circumstances.

The implication of the foregoing is that Article 35 and Article 36 of the ILC applies to compulsory acquisition of land belonging to foreign enterprises or investors. Hence government would be required to apply restitution. It is only if restitution is impossible that compensation applies. In the context of compulsory acquisition of citizens’ land by government, restitution would arise only if the public purpose requirement fails, otherwise compensation prevails.

Under international law, consequential compensation revolves around three methods of valuation, namely: fair market value, including interest though

⁴¹ Land Use Act, s6(7).

⁴² Chorzow Factory case (*Germany v Poland*) (1928) PCIJ Rep Series A No 13 47.

⁴³ James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 213.

⁴⁴ See ILC articles on State Responsibility, art 36(1).

⁴⁵ See Ibid art 36(2).

⁴⁶ Crawford (n 43) 218 30.

future profit remains doubtful, book value, or discounted cash flow.⁴⁷ Fair market value reflects the prevailing market rate conducted at arm's length competitive pricing when symmetrical information prevails. Arguably, fair market should reflect the compensation payment in every compulsory acquisition in Nigeria.

5. Criteria for Compulsory Acquisition

The main criteria under international law are that compulsory acquisition must be conducted in accordance with public purpose, non-discrimination, and due process.⁴⁸ Section 44 of the constitution does not explicitly embody these criteria. However, public purpose requirement is part of the Land Use Act,⁴⁹ which in turn is incorporated into the constitution. Similarly, public purpose is required under the Nigerian Investment legislation.⁵⁰ The three main provisions that seem to be abused by (state) government in compulsory acquisition of land are illustrated by section 51(1)(a, b and g) of the Land Use Act, namely: (1) compulsory acquisition for exclusive Government use or for general public use; (2) compulsory acquisition for use by a body corporate directly established by law or by a body corporate registered under the Companies and Allied Matters Act respecting government ownership of shares, stocks or debentures; and (3) compulsory acquisition to obtain control over land required for or in connection with planned urban or rural development or settlement.

5.1 Acquisition for Exclusive Government Use or for General Public Use

Section 51(1) of the Land Use Act stipulates that public purpose includes compulsory acquisition for exclusive Government use or for general public use. The expression 'exclusive Government use' creates opportunity for exploitation. The acquisition for 'general public use' is clear and requires no over-flogging. The expression 'exclusive Government use' should be strictly construed as such. This means that 'exclusive Government use' is not to be linked to private interest. Hence, compulsory acquisition to build or expand government offices and institutions satisfy this requirement. Similarly, compulsory acquisition to provide government facilities used by the general public is apprehended under this requirement. However, compulsory acquisition ostensibly for 'exclusive Government use' but which is really owned by individuals violates this subsection. Thus, the court, when called upon to do so, constantly should inquire into whether the public purpose requirement is satisfied in the compulsory acquisition undertaken by any government. As stated in the case of

⁴⁷ See *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* (1977) 20 ILM 1 [1981] 75 148, 87 172, where award of future profits was refused.

⁴⁸ See World Bank Guidelines on the Treatment of Foreign Direct Investment, section IV (1); Energy Charter, art 13; NAFTA, art 1110.

⁴⁹ See Land Use Act, ss 6(3), 28(2)(b), 28(4), 51.

⁵⁰ NIPC Act, s 25.

Goldmark Nigeria Limited and Others v Ibafor,⁵¹ where the government failed to comply with the laid down procedure for acquisition of property it is the duty of the courts to intervene between the government and the private citizen.

5.2 Acquisition for Body Corporate

There is another underbelly to the situation which tends to embolden incidences of land grabbing by government. Section 51(1) of the Land Use Act notes that public purpose includes compulsory acquisition for use by anybody corporate directly established by law or by anybody corporate registered under the Companies and Allied Matters Act as respects which the government owns shares, stocks or debentures. This provision literally means that once the government ‘owns shares, stocks or debentures’ in a body corporate involved in compulsory land acquisition the public purpose criterion is satisfied. The implication of the preceding is that the courts would be disinclined to nullify such a compulsory acquisition. Apparently, this could be abused in the absence of good governance and in a jurisdiction with prevalent violations of rule of law like Nigeria. Good governance and adherence to the rule of law are crucial to effective and fair compulsory acquisition.⁵² Consequently, the courts should play a more active role in mounting judicial scrutiny to determine the probative value of competing public and private interests.

Specifically, the court should scrutinize the government ownership of ‘shares, stocks or debentures’ in a body corporate involved in compulsory land acquisition. In this context, the categorization of government should be classified into two forms for the purpose of liability: government as a fictional entity and government as composition of individuals. The ownership of securities by the former means that government’s ownership is in continuity. That is, even if the incumbent leaves office the ownership of the securities continues to exist under the management of the successive government. This means that ownership does not reside with individuals constituted in the government, but the fictional entity known as the government. This form of ownership satisfies the tenet of public purpose. Arguably, this should be the interpretation that should hold sway. By contrast, if the ownership of securities resides with individuals and/or corporate bodies owned by individuals constituted in the government then this violates the public purpose requirement. That is, if the individuals constituted in the government can transmit the ownership based on their discretion and equally vacate office with their ownership it would be antithetical to public purpose criterion envisaged by the law. This is without prejudice to individuals in the government holding the securities on trust for the benefit of the generality of the people.

A more intractable scenario, however, is where the quantum of shares owned by government can be said to constitute a charade to disguise the true intention behind the compulsory acquisition. For instance, where government

⁵¹ (2012) LPELR 9349(SC) 23.

⁵² Keith and others (n 2) 1.

owns a paltry two per centum of shares in a company the ownership structure of which suggests a desperate attempt by political actors merely to meet the statutory requirement of public purpose, such acquisition should attract the searchlight of the courts and be struck down as being in violation of the land rights of the affected citizens. The possibility of this scenario is made real because the definition of public purpose in section 51 of the Land Use Act does not stipulate the quantum of shares or debentures which the government should own in the company. In the absence of some form of interstitial legislation or activism by the courts, this loophole would constitute a veritable joker in the hands of an aberrant Governor.

5.3 Acquisition for Urban or Rural Development or Settlement

Section 51(1)(g) of the Land Use Act, as pointed out, allows compulsory acquisition to obtain control over land required for or in connection with planned urban or rural development or settlement. As a matter of fact, there are numerous development and settlement projects that come under this subsection. However, the most compelling one is the state governors' acquisition of land for housing project. There would be no problem if the housing projects are meant for all, both the rich and the poor. However, extensive land grabbing for housing projects by various state governors in Nigeria are not always meant to build houses for all. Rather, the housing projects are meant to benefit their friends and cronies, as well as to satisfy private interests. Certainly, extensive land grabbing to provide housing for the rich few does not satisfy the public purpose criterion. In the case of *Goldmark Nigeria Limited and Others v Ibafor*,⁵³ the court held that compulsory acquisition must be for bona fide public purpose. The court acknowledged the convergent of opinions that for a particular purpose to qualify as public purpose or public interest it must not be vague and the way it benefits the public at large must be capable of proof. The court noted that the test is whether or not the purpose is meant to benefit the public and not just to aid the commercial transaction of a company or a group of people for their own selfish or financial purposes.⁵⁴ Indeed, compulsory acquisitions to satisfy the interest of few beneficiaries that are supporting the incumbent government contradict the legal conception of the public for the purpose of public purpose requirement.

5.4 Prioritisation of Public Interest over Private Interest

It is important to emphasise that the Nigerian courts would be unlikely to intervene where an acquiring authority complies strictly with the law on the revocation of the right of occupancy and the compulsory acquisition of land.⁵⁵

⁵³ (2012) LPELR 9349(SC).

⁵⁴ (2012) LPELR 9349(SC); *Alhaji Bello v The Diocesan Synod of Lagos & Ors* [1960] WNWL 166.

⁵⁵ Oladipo O Sholanke, 'Three Supreme Court Cases on Compulsory Acquisition of Land in Nigeria' (2014) 58 (2) *Journal of African Law* 266, 270.

However, the court will be favourably disposed to intervene where the reason for the revocation of right occupancy was not covered by the enabling law,⁵⁶ or where the purpose of acquisition was not stated in the notice of revocation.⁵⁷ Similarly, the court would likely inquire if the acquisition is simply a case of the acquiring authority dispossessing one party of his/her property only to give it to another party.⁵⁸ The court might inquire if it is a case of acquiring the property for no reason or for a reason that has failed.⁵⁹ Similar disposition of the court might obtain in a case of revoking the right of occupancy in order to aid the commercial transaction of a company or a group of people for their financial purposes.⁶⁰

The court should not hesitate to enquire into the public interest nature of compulsory acquisition of land by government. Specifically, the categories of occurrences apprehended by the definition of public purpose under section 51 of Land Use Act require robust judicial safeguarding and shepherding. The mere exercise of the power of revocation for public purposes as embedded in section 51 of Land Use Act by a government should not automatically emasculate judicial scrutiny and rulings. Nevertheless, the aggrieved party must frame his reliefs properly otherwise it would fail. In the case of *Alhaji Tsoho Dan Amale v Sokoto Local Government and Others (Amale)*,⁶¹ the appellant's claim (concerning compulsorily acquisition of movable and immovable property by the government) centred on enforcement of fundamental human rights under Chapter IV. The Supreme Court ruled that the claim of the appellant as disclosed in his suit and the affidavit in support did not relate to one breaching his fundamental right. Rather, it was a claim for declaration of title to his statutory right of occupancy or for compensation for unexhausted development on the land which should not be brought under the Fundamental Rights (Enforcement Procedure) Rules.⁶² Consequently, the appellant's suit was declared incompetent as the main claims have nothing to do with breach or threatened breach of the right to fair hearing.⁶³

The aggrieved party ought to frame the matter within appropriate headings. This is particularly the case where compulsory acquisition violates good governance. Accordingly, a number of suggestions are presented to guide the landowners and the courts in such circumstances.

⁵⁶ *Dantsoho v Mohammed* [2003] 6 NWLR (Pt 817) 457 (SC).

⁵⁷ *Obikoya v Governor of Lagos State* [1987] 1 NWLR pt 50 385 (CA).

⁵⁸ *Ibrahim v Mohammed* [2003] 6 NWLR (Pt 817) 615 (SC).

⁵⁹ *Obikoya v Governor of Lagos State* [1987] 1 NWLR (Pt 50) 385 (CA).

⁶⁰ *Ereku v Military Governor Mid-Western State of Nigeria and Others* [1974] 10 42 (SC).

⁶¹ *Alhaji Tsoho Dan Amale v Sokoto Local Government and Others (Amale)* (2012) SC290/2001 (Unreported).

⁶² *Ibid.*

⁶³ *Ibid.*

First, where a land compulsorily acquired is used for a purpose that creates doubt about its compliance with public purpose (e.g., compulsory acquisition for political elite housing) the landowners should proceed to court to challenge the action of the government. In this context, the court has a duty to inquire into whether the compulsory acquisition by government is a mere smokescreen to provide housing or land space for family members, cronies and affiliated group. Where the governmental action lacks public interest character and constitutes a mere covert ploy to confiscate land, the court should justifiably intervene at the suit of the landowner. The concern has been raised as to what happens if, for instance, a right of occupancy over a plot of land only in a high-density area is revoked for mining purposes (eg oil, zinc, limestone, etc), and it is proved by an expert that there is no such mineral in the land, or a right of occupancy over a plot of land is revoked to build a university, hospital or stadium which never materialized?⁶⁴ Arguably, the acts that constitute public purpose should be able to satisfy public interest. Hence, compulsory acquisition of land by government on the ground of public purpose should be able to satisfy public interest. If the acquisition is undertaken on the ground of public purpose but applied to satisfy private interest the public purpose criterion is defeated which nullifies the acquisition, remedied only if applied for public purpose.

Secondly, the court should examine the nature of government's interest *ex ante* in the compulsory acquisition and the beneficiaries of the acquisition *ex post*. The overriding consideration of the court should be, is the acquisition meant to benefit the universality of the population irrespective of class, status, and affiliation? Or does the acquisition benefit a private few? If the former is the case in the sense that even the poor, the opposition and the plurality of the population can benefit then the public purpose requirement is met. By contrast, if the latter holds sway, then the court should be able to hold that a private few are not equal in effect to the public. In that respect, such compulsory acquisition by government is a nullity.

Thirdly, the landowners should not be afraid to approach the court for interpretation and potentially protection in the event of arms-twisting by the government through coercion and/or compensation.⁶⁵ It is understood that covert carrot and stick approach is applied by the government to arm-twist the landowners to accept the government proposal to cede with their lands even if the public purpose requirement is not met by the government. Nevertheless, it is the obligation of landowners to preserve and protect their heritage so long as the public purpose requirement espoused by the government is a sham. Compulsory acquisition of private property for a purpose other than that prescribed by law, that is not duly notified to the landowner and that does not offer the landowner

⁶⁴ Samuel I Nwatu, 'The Right to a Fair Hearing under the Land Use Act' (2000-2001) 8 *Nigerian Juridical Review* 196, 215.

⁶⁵ *Ohochukwu v Attorney General of Rivers State & Others* (2012) SC207/2004 (Unreported).

appropriate compensation, ought to fail.⁶⁶ Arguably, the provisions of compulsory acquisition ought to be construed by the court strictly against the acquiring authority and sympathetically in favour of the complainant concerning any irregularity covered by the statute.⁶⁷

6. Conclusion

Compulsory acquisition of land is an emerging concern in Nigeria. The situation is aggravated by lack of good governance and prevalent weak institutions. Compulsory acquisition of land distinguishes from market-based approach to acquisition of land which is largely determined by arm's length dealings and competitive pricing. While good governance is vital to provide a balance between the governments' need to acquire land and the need to protect the rights of people whose land is to be acquired, such good governance is generally lacking in Nigeria. Consequently, recommendations are provided to enhance transparency and adherence to rules of law in compulsory acquisition of land in Nigeria. First, where a land compulsorily acquired is used for a purpose that creates doubt about its compliance with public purpose the landowners should proceed to court to challenge the action of the government. Secondly, the court should examine the nature of government's interest *ex ante* in the compulsory acquisition and the beneficiaries of the acquisition *ex post* in order to apportion liability. Thirdly, the landowners should approach the court for interpretation in the event of arms-twisting by the government through coercion. Arguably, in the event of ambiguity the provisions of compulsory acquisition should be construed by the court strictly against the acquiring authority and in favour of the complainant.

⁶⁶ Sholanke (n 55) 272.

⁶⁷ *CSS Bookshops Ltd v RTMCRS* [2006] 11 NWLR (Pt 992) 530 (SC); *Peenock Investments Ltd v Hotel Presidential Ltd* [1983] 4 NCLR 122; *Alhaji Bello v Diocesan Synod of Lagos* [1973] 1 All NLR (Pt 1) 247; *Nigerian Telecommunications Ltd v Chief Ogunbiyi* [1992] 7 NWLR (Pt 255) 543; *Osho v Foreign Finance Corporation* [1991] 4 NWLR (Pt 184) 157.

LEGAL RESPONSIBILITY OF A FATHER TOWARDS A CHILD UNDER THE NIGERIAN CHILD'S RIGHT ACT OF 2003

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Abstract

A father, as the parent of a child may be a biological, foster, adoptive, stepfather or even a grandfather. He may also be the one who has legal custody of the child and may or may not be resident in the same state as the child. In essence, anyone can father a child, but it does not end there because, every father has an important role to play in a child's life. Fathers are specifically assigned with legal responsibilities towards for their children. This ranges from the provision of physical and mental support to psychological and financial support, among others. Unfortunately, in recent times, the role of fathers is fast becoming an abandoned trend with several fathers not living up to their legal responsibilities. The aim of this research is to examine whether there are legal obligations of a father towards a child under the Child's Right Act. This research discovered that that there are legal obligations for fathers as imposed by the law. However, some fathers fail to fulfil their responsibilities towards their children despite the provisions of the law. This research adopts the doctrinal research methodology.

Keywords: Father, child, legal responsibility, punishment, Child's Right Act, Nigeria.

1. Introduction

Fatherhood is the state or time of being a father.¹ It is a lifelong responsibility which can be a real pain, yet some fathers get the job done. Routinely, fathers oversee the evolution of little boys and girls into productive men and women and even into responsible, caring fathers and mothers.² They accomplish this miracle by sponsoring a crucial transition in their child's development. The father enforces a major rule of masculine development.³ This is recognised, in ritual and in common practice by all successful human societies because at some culturally designated point, boys have to separate, in the psychological sense, from their mothers.⁴ Unlike girls, who share a common biological destiny with

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¹ AS Hornby (ed), *Oxford Advanced Learner's Dictionary of Current English* (8th edn. Oxford University Press 2010) 576.

² Jeffrey Rosenberg and W Bradford Wilcox, 'The Importance of Fathers in the Healthy Development of Children, Child Abuse and Neglect User Manual Series' [2006] <<http://nccanch.acf.hhs.gov/profess/tools/usermanual.cfm>> 7.

³ David Gutmann, 'Psychology: The Paternal Imperative' (1988) 67 (1) *The American Scholar* <<http://www.jstor.org/stable/41212725>> 119.

⁴ Ibid.

their mothers, most boys will become fathers; and like their fathers, their work will engage them - whether as hunters, soldiers or traveling salesmen - on the communal periphery with other men, rather than close to home, with their mothers or wives.⁵ Men exemplify the principle of closeness through distance: they sustain the home by their readiness, when called upon, to leave the home.⁶

Fathers generally have duties towards their children, same as rights, and also under the law. Unfortunately, some do not know the extent of that responsibility and tend to ignore or not take it up fully. This paper discusses the legal responsibilities of a father in a child's life under the Child's Rights Act⁷ (CRA) as a legal obligation and not just a right. This is to show that a 'new fatherhood' is an emerging concept.

2. Who is a Father?

Generally, a father is the male parent of a child.⁸ A father may be a biological, foster, or adoptive father, a stepfather or even a grandfather.⁹ A biological father is one whose semen fertilized the ovum from which a child was born.¹⁰ A foster father is a man who looks after or brings up a child or children as a father, in place of the natural or adoptive father.¹¹ An adoptive father is one who adopts a child. He is not biologically or genetically related to the child but steps into the role of a biological father and plays the same role upon adoption.¹² Similarly, a guardian is one who has legal rights and responsibilities of taking

⁵ 'The Significance of a Father's Influence' <<https://www.focusonthefamily.com/family-qa/the-significance-of-a-fathers-influence/>> accessed 24 November 2021.

⁶ Rosenberg and Wilcox, 'The Importance of Fathers in the Healthy Development of Children' [2006] *US Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children's Bureau Office on Child Abuse and Neglect* (2006) 7.

⁷ Child's Rights Act Laws of the Federation of Nigeria (LFN) 2004.

⁸ Hornby (n 1).

⁹ M Yogman, 'Fathers' roles in the care and development of their children: The Role of Paediatricians' [2016] *CF Garfield and Committee on Psychosocial Aspects of Child and Family Health* <<https://www.pediatrics.aappublications.org>> assessed 9 November 2021.

¹⁰ *Collins English Dictionary* (HarperCollins Publishers 2022) <<https://www.collinsdictionary.com/dictionary/english/biological-father>> accessed 13 April 2022.

¹¹ Ibid.

¹² Merriam Webster *Merriam-Webster.com Dictionary* < <https://www.merriam-webster.com/dictionary/adoptive%20parent>. > accessed 15 April 2022.

care of someone who cannot take care of himself or herself, such as a child whose parents have died.¹³

In all these, a biological or adoptive father as well as a guardian or foster parent plays the same roles. They naturally step into the shoes of a father and must carry out the legal responsibilities imposed by the law. A father may or may not be in legal custody of a child and may be resident or non-resident. Therefore, it follows that any man can father a child. However, it does not end in just fathering a child as every father has an important role to play in a child's life.¹⁴ Under the law, a legal father is someone that has not just parental responsibilities towards a child but carries them out. This could be by way of adoption or if his name is on the birth certificate of the child or he is the biological father of the child.¹⁵

A man's name may appear on the birth certificate of a child even though he is not married to the mother or is not the biological father of the child. Thus, the paternity of a child in Nigeria may be determined as follows:

- a. Acknowledgement – where the man admits being the father of the child. Ordinarily, no issue arises.¹⁶
- b. Presumption – where a man is presumed to be the father of the child because the child is born within wedlock or during the subsistence of the marriage to the mother. Again, here, there will be no problem even if the child was conceived by another man without the knowledge of the woman's husband.¹⁷ This provision is supported by section 165 of the Evidence Act.¹⁸ However, parties may rely on the provisions of Section 84 of the Matrimonial Causes Act to show that parties did not have sexual intercourse during the subsistence of the marriage, but cannot be compelled to give evidence that a child born during the marriage is illegitimate. These provisions protect the child and the presumption that when a child is born within marriage, he is presumed to be legitimate. This was the position of the court in *Oduche v*

¹³Cambridge Dictionary Editors, *Cambridge Dictionary* (Cambridge University Press 2022) < <https://dictionary.cambridge.org/dictionary/english/guardian> > accessed 14 April 2022.

¹⁴Ibid.

¹⁵ Infolaw, 'Legal Father v. Biological Father: What are your Rights?' [2018] <www.infolaw.co.uk> accessed 9 November 2021; see also, *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384.

¹⁶ Jessica A Ajonumah and Ogechi Dublin-Green, 'Paternity, Illegitimacy and Customary Acknowledgment in Nigeria: A Re-Evaluation' (2019) 7 (2) *International Journal of Business & Law Research* 113.

¹⁷ Ibid; *Anozia v Nnani & Anor* (2015) 8 NWLR pt. 1461 256; *Duru v Duru* (2016) LPLER 40444 (CA); Afromums, 'Motherhood: What the Law says about Paternity of a Child or an Adult in Nigeria' [2018] www.afromums.ng

¹⁸ Evidence Act, 2011.

*Oduche*¹⁹ where it was held that where the husband and wife have cohabited together and no impotence is proved to the satisfaction of the court, the child or children are conclusively presumed to be legitimate even though the wife is shown to have been guilty of infidelity.

- c. Proof – where a woman is able to prove that the man is the father of her child. This may not be easy especially where a man denies paternity of the child. However, the Deoxyribonucleic Acid (DNA) test would most likely bring about solution.²⁰ By section 63 of the CRA, the court may, on application, give direction for the use of scientific tests, including blood tests and DNA tests to show that the person is or is not the father of that child.²¹

2.1 Effect of a Father's Involvement in the Development of a Child

Fathers are pillars in the development of a child's well-being. Children look up to their fathers to lay the house rules for them and enforce same. They look up to fathers for protection, words of affirmation, love, and care. Studies have shown that when a father is affectionate, loving and understanding, it positively impacts on the child's intellectual and social development.²²

It is important to note that a guardian appointed at the death of a father can acquire the legal responsibilities of a father. Section 68 of the CRA provides that: where the father and mother of a child were not married to each other at the time of the birth of the child, the Family Court may on the application of the father or mother (jointly and severally) order that he shall have parental responsibilities for the child.²³

A father's involvement in a child's life makes a positive difference in the areas of intellectual, physical, sociological, and psychological development, among others. This creates a positive atmosphere for the child and ensures that he lacks nothing. Families that have supportive fathers are strengthened because it ensures there is effective communication and emotional support.²⁴ Also, when children have close relationships with father figures, they are more likely to

¹⁹ (2006) 5 NWLR pt 972 101.

²⁰ *Olayinka v Adeparusi & Anor* (2011) LPELR 8691 (CA).

²¹ CRA, s 63; (n 5).

²² Pediatric Associates of Franklin, 'The Importance of a Father in a Child's Life,' [2022] <<https://www.pediatricsoffranklin.com/resources-and-education/pediatricsoffranklin.com/resources-and-education/pedatric-care/the-importance-of-a-father-in-a-childs-life/#:-:text=Children%20want%20to%20make%20their,well%2Dbeing%20and%20self%20confidence.>> accessed 14 April 2022.

²³ CRA, ss 68 and 153.

²⁴ Child and Family Research Partnership, '5 Things You Should Know about the Importance of Fathers, The University of Texas Austin' <<https://childandfamilyresearch.utexas.edu/5-things-you-should-know-about-importance-fathers>> accessed 14 April 2022.

avoid high risk behaviours, less likely to have sex at a young age, have healthy and stable relationships and high-paying jobs.²⁵ In all these, it can be safely said that fathers are irreplaceable in the growth of young children. This is because a father's involvement has a positive impact in the development of that child.²⁶

Whilst acknowledging this, the law goes a step further to acknowledge this stance by imposing legal obligations on fathers. This is because there has been a surge lately on irresponsible fathers who refuse to take up responsibility for their own children as expected and required by the law. They desert the mothers with the children refusing to pay parental support, or are drunkards, lazy and therefore as good as dead.²⁷ In examining the responsibility of fathers towards children, it is important to understand the meaning of a child under extant Nigerian law.

2.2 Who is a Child?

There are many definitions of the word 'child.' The Black's Law Dictionary defines a child as 'a person under the age of majority.'²⁸ The Oxford Dictionary defines a child as 'a young human who is not yet an adult.'²⁹ These definitions are vague as they do not determine the age of majority or when one is considered an adult. The Merriam Webster dictionary defines a child as 'a person not yet of age; a young person; an unborn or recently born person.'³⁰

The common denominator amongst all these definitions is that they dwell heavily on psychology and mental development. However, for the purposes of this paper, we shall dwell on the formal legal aspect which deals with age. By Article 2 of the Children and Young Persons Act (CYPA), a child is a person under the age of 14 years, while a young person is a person who has attained the age of 14 years but is under the age of 17 years.³¹ The United Nations Convention on the Rights of a Child (CRC) defines a child as a person below the age of eighteen years except in the law applicable to the child, the age of

²⁵ Joshua Kirsch, 'The Science of Dad and the "Father Effect"' *Fatherly* [2018] <<https://www.fatherly.com/health-science/science-benefits-of-fatherhood-dads-father-effect/amp/>> accessed 15 April 2022.

²⁶ Xiaohong Liu, 'A Review of the Study on Father Involvement in Child Rearing' *Asian Social Science* 15(9) 82.

²⁷ Pediatrics Associates of Franklin, 'The Importance of a Father in a child's life' <<https://www.pediatricsoffranklin.com/resources-and-education/pediatric-care/the-importance-of-a-father-in-a-childs-life/>> accessed 20 October 2021.

²⁸ BA Gardner (ed), *Black's Law Dictionary* (8th edn, West Publishing Co 2004).

²⁹ AS Hornby (ed), *Oxford Advanced Learner's Dictionary of Current English*. (8th edn Oxford University Press 2010).

³⁰ Merriam Webster's Collegiate Dictionary (11th edn., Merriam Webster Inc 2007).

³¹ CYP Act Cap 32 LFN 1958 <<http://www.cleen.org/Juvenile%20Justice%20Repert>> accessed 20 October 2021.

majority is attained earlier.³² The African Charter on the Rights and Welfare of the Child (ACRWC) also defines a child as every human being below the age of eighteen years.³³ For the CRA, Section 277 provides that a child is anyone below the age of 18 years. This paper adopts the definition provided by the CRA and notes that every child due to their development must be protected at all costs.

2. The Protection of the Child under the Child Rights Act

Children are the future leaders and hope of any civilized society. However, due to the fact that they lack the physical, emotional and mental maturity required to face life, they require special care and protection.³⁴ Unfortunately, many Nigerian children face a lot of problems ranging from domestic violence to discrimination, trafficking, abuse and exploitation among others.³⁵ All these challenges faced by these children call for serious protective measures, legally and otherwise, hence, laws have been enacted to help address these issues effectively in Nigeria. The CYPWA provides for the welfare and the treatment of young offenders and the establishment of juvenile courts.³⁶ Section 21 of the Criminal Code (CC) protects the child and the dignity of his or her person, and section 306 of CC prohibits unlawful killing of a child as guaranteed by the Nigerian Constitution.³⁷ Thus, a child becomes a person capable of being killed as soon as it is born. Section 328 of the CC also protects a child from being unlawfully killed during delivery.³⁸ The 1999 Constitution contains the Bill of Rights, guaranteeing the rights to life, personal liberty, fair hearing, and freedom of movement.³⁹ Section 42 prohibits discrimination.⁴⁰ Other sections of the Constitution are also protective of the child.

³²Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49

³³African Charter on the Rights and Welfare of the Child, art 14, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* 29 November 1999.

³⁴OI Tajudeen, 'Legal Framework for the Protection of Child Rights in Nigeria' [2015] *AGORA International Journal of Juridical Sciences* <<http://univagora.ro/jour/index.php/aij>> assessed 22 October 2021.

³⁵Ifeoma Enemo, 'Effectiveness of Nigeria's International Obligations in Curbing Domestic Violence' (2018) 9 (1) *Nnamdi Azikiwe Univ Jour of Intl Law* 4.

³⁶'The Child Rights Manual: Trainers' Manual, Nigeria' [2013] <www.barhumanrights.org.uk> accessed 20 October 2021.

³⁷CCA Cap 77 LFN 2004, ss 21 and 306.

³⁸Criminal Code s 328.

³⁹CFRN (as amended) 1999, ss 307-309.

⁴⁰That is, discrimination on the basis of ethnic group, place of origin, sex, religion, or political opinion.

Nigeria ratified many international conventions that protect the child especially the CRC.⁴¹ There is also the ACRWC,⁴² among others. The Labour Act is also available to protect children from exploitation.⁴³ Again, institutional measures are also taken to ensure the protection of the child.⁴⁴ The rights contained in the CRC and ACRWC were actually incorporated and consolidated in the CRA.⁴⁵ The rights as provided by the CRA are therefore as follows:

- a. Section 1 - the child's best interests shall be paramount. The principle of the best interest of the child is provided in the CRC. It is a complicated concept and defined as a dynamic concept that requires an assessment appropriate to the specific context.⁴⁶ The principle of 'best interest of the child' applies in all issues related to children such as health decisions, custody, and guardianship, among others.⁴⁷ In determining what the best interest of the child is in any situation, different values, perspectives and views to come to place from different States Parties, resulting in various laws relating to children. This is because consideration is given to culture, religion, and practice in each area.⁴⁸
- b. Section 4 – Every child has the right to survival and development.
- c. Section 7 – Every child has the right to freedom of thought, conscience, and religion.
- d. Section 8 – Every child is entitled to privacy.
- e. Section 10 - Every child has the right to freedom from discrimination.
- f. Section 11 - The dignity of the child shall be respected at all times.
- g. Section 15 – Every child has the right to basic education.

⁴¹ The provisions of the CRA are same as the CRC, borrowing a leaf too from the African U Charter.

⁴² African Charter on the Rights and Welfare of the Child, art 14 OAU Doc CAB/LEG/24.9/49.

⁴³ Labour Act Cap L1 LFN 2004.

⁴⁴ For example, Nigerian Agency for the Prohibition of Trafficking in Persons, Nigerian Children's Parliament, National Council of Child Rights Advocates of Nigeria (NACCARAN), the umbrella NGO involved in Child's Rights Advocacy, Child Development Departments in the Federal and State Ministries of Women Affairs, and others.

⁴⁵ SO Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Rights Act 2003' (2009) 37 (3) *International Journal of Legal Information*.

⁴⁶ United Nations Committee on the Rights of the Child, 2003 para 12 2009.

⁴⁷ Aron Degol and Shimelis Dinku, 'Notes on the Principle Best Interest of the Child: Meaning, History and its Place under Ethiopian Law' (2011) 5 (2) *Mizan Law Review* 320.

⁴⁸ Mary George and Noor Aziah Mohd Awal, 'The Best Interest Principle Within Article 3(1) of the United Nations Convention on the Rights of the Child' (2019) 19 (4) *International Journal of Business, Economics and Law* 33.

- h. Section 11; 32 - Every child has the right to freedom from physical, mental, or emotional injury, abuse or neglect, sexual abuse, maltreatment, torture, inhuman or degrading punishment.
- i. Section 12 – every child has the right to rest and leisure.
- j. Section 13 – Every child has the right to enjoy the best possible state of physical, mental, and spiritual health.
- k. Section 16 - provides for the right of mentally and physically disabled children and street children to be protected so that they can socially integrate and develop.
- l. Section 21 and 22 - prohibits the betrothal and marriage of children.
- m. Section 24 – Prohibits causing of tattoos, marks, and female genital mutilation.
- n. Section 26 – Prohibits using children in criminal activities.
- o. Section 27 – Prohibits trafficking, abducting or unlawfully removing children from lawful custody.
- p. Section 28 – Prohibits forced or exploitative labour and the employment of children as domestic help outside their own home or family.
- q. Section 30 – Prohibits buying, selling, hiring, or otherwise dealing in children for the purpose of begging, hawking, prostitution or for other unlawful immoral purposes; also prohibits recruiting children into the armed forces.
- o. Section 35 – Prohibits exposing children to pornographic or other harmful materials.⁴⁹

In the light of the provisions above, the question is: are fathers responsible for the protection of their children? This will be answered below.

4. Father's Responsibilities under the Law

The CRA provides for the rights and responsibilities of parents, governments, institutions for the protection of children. It also provides that the best interest of the child is of primary or paramount consideration in all actions to be taken concerning a child.⁵⁰ For the CRA to be enforceable in any state, it must be passed into law by the House of Assembly of the State.⁵¹ For example, the Enugu House of Assembly on August 16, 2016, passed the Child's Right and Responsibility Law on the same premise with the CRA.⁵² Generally, it is the

⁴⁹ See the provisions of the CRA generally and the Child Rights Manual (n 23).

⁵⁰ CRA (Part I), ss. 1-2.

⁵¹ Presently, the CRA has been promulgated into law in some states such as Abia, Anambra, Bayelsa, Ebonyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers and Taraba States.

⁵² Childs Rights and Responsibility Laws of Enugu State, 2016. Enugu State in line with many other states in Nigeria passed its own Child's Rights and Responsibility Law (CRRL) in 2016, in bid to achieve a successful implementation of Child's Rights in the state.

responsibility of a father to live an exemplary life: in character, action, speech, among others. He is a priest, provider, protector, playmate, companion, teacher, trainer, servant of the child. He is a primary care giver ordained by God and therefore, his responsibilities towards a child are inevitable.

Under the law, a father has legal responsibilities which are termed 'parental responsibilities.'⁵³ In the United Kingdom, 'parental responsibility' is defined as 'all rights, duties, powers, responsibilities and authority which by law, a parent of a child has in relation to the child and his property.'⁵⁴ Section 277 of the CRA also defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.' The South African Children's Act, in section 18 (2) clearly provides that, 'the parental responsibilities and rights that a person may have in respect of a child include, the responsibility and right to (a) care for the child; (b) maintain contact with the child; (c) act as guardian of the child; and (d) contribute to the maintenance of the child.'⁵⁵

Parental responsibility thus consists of such duties as to:

- i. Safeguard and promote the child's health, education, development and welfare;
- ii. Provide care, direction, guidance and control in a manner appropriate to the child's age and understanding;
- iii. Determine all aspects of upbringing;
- iv. Provide a home, either directly or indirectly;
- v. Maintain relations or regular contact if not living with the child;
- vi. Act as the child's legal representative; and
- vii. Safeguard and deal with any property.⁵⁶

A reading of section 20 of the CRA confirms that a father has the responsibilities stated above. These include the responsibilities to provide the necessary guidance, discipline, education, and training for the child. Additionally, a father has the responsibility to generally safeguard and protect the child from any activity that is harmful to him or not in his best interest. Such

⁵³ Responsibilities for care and protection are also placed on the other parent, guardian, institutions, persons and authority responsible for the care, maintenance, upbringing, education, training, socialization, employment and rehabilitation of the child.

⁵⁴ United Kingdom Children Act 1989, s 3(1) <<https://www.legislation.gov.uk/ukpga/1989/41/section/3>> accessed 25 October 2021.

⁵⁵ Children's Act 38 2005 (2006) 492 (28944) <https://www.gov.za/sites/default/files/gcis_document/201409/a38-053.pdf> accessed 12 November 2021.

⁵⁶ Guernsey and Alderney Annual Report, 'Islands Safeguarding Children Partnership: Parental Responsibility- Child Protection Guidelines' [2017] <<http://iscp.gg/CHttpHandler.ashx?id=113398&p=0>> accessed 22 October 2021.

activities can be gleaned from Part III sections 21-40, (Part IV) and 41-49 of the CRA.

The legal responsibility of a father cannot be surrendered but can be delegated, transferred, or shared with another person. Delegation derives from the word 'delegate' and refers to giving a particular job, duty, right, among others to someone else so that they do it for you.⁵⁷ Delegation is the act of delegating a particular job, duty or right to someone.⁵⁸ On the other hand, transfer refers to moving something from one person to another.⁵⁹ In relation to the legal responsibilities of a father, it can be delegated as well as transferred depending on the situation. Delegation of fatherly responsibility arises where the roles are delegated to a guardian by a biological father. In this case, the legal responsibilities are transferred to such guardian for the period of guardianship. Thus, fatherly responsibilities are shared between the biological father and guardian. This also shows that the legal responsibilities of a biological father last till eternity. They do not abate when the responsibilities are transferred but are in abeyance or runs concurrently with that of the guardian. This also applies where the father has failed to exercise responsibility over the child. However, it is only upon the death of a biological father that parental responsibilities can elapse as such death brings the responsibilities to an end. It is important to note that in all cases, one must do what is necessary to promote the welfare of any child in his custody and take care of him or her. Examples include seeking medical attention in an emergency, refusing to release a child to a mentally ill or intoxicated father to resume care of the child until the police or larger family intervenes, etc.

The legal responsibilities towards a child as already noted, could be exercised by the child's biological father who is married to his/her mother, the child's unmarried biological father, his adopted father, or the legal guardian. Thus, the CRA provides in sections 68-81 that where the father and the mother of a child were not married to each other at the time of the birth of the child, the Family Court (established under section 135 of the Act) may on the application of the father or mother, order that he or she shall have parental responsibility for the child, or the father and mother may by agreement have joint parental responsibility for the child.⁶⁰ It is possible and easier when an unmarried father and mother agree to have joint parental responsibilities as the father automatically gets involved and takes up his responsibilities.

In the Nigerian society today, it is very difficult and rare for a young man who is not married to the mother of his child to apply for parental responsibility.

⁵⁷ Cambridge Dictionary (Cambridge University Press 2022) <<https://dictionary.cambridge.org/dictionary/english/delegate>> accessed 15 April 2022.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Sections 68-81 deal with possession and custody of children.

This does not mean that there are no cases where young fathers take up responsibilities of childcare irrespective of the legitimacy of the children, but they are not common.⁶¹ Such young men go as far as relying on arguments such as denial of paternity of the children in question or the issue of their illegitimacy, especially if they are born outside wedlock. This is despite the fact that Section 42 of the 1999 Constitution provides that no child shall be discriminated on by reason of circumstances of his birth. Even with the provision of the Constitution, children are still regarded as illegitimate and denied their rights to fatherhood based on this in some communities.⁶²

In fact, in some cases, the issue of illegitimacy is used as an excuse by some men to escape their parental responsibilities. This results in the mothers raising the children single-handedly, abandoning or selling them off to the highest bidder. Some boys/men even deny paternity of their children in order to avoid parental responsibility. The result is that the society is flooded with many children who end up being discriminated against especially in matters of inheritance. Such children can only inherit from their biological father if he accepts paternity, or he adopts them.⁶³

Under customary law in some parts of Igbo land, a father's legal responsibility arises only when he is married to the child's mother. Thus, where a father is unmarried, even his biological child does not belong to him unless he pays the bride price on the mother of the child. Therefore, he is not expected to perform his responsibilities as a parent. Any attempt to do so would be regarded as futile as the child is deemed to belong to his or her maternal grandfather who should be the one to carry out parental responsibilities towards the child. This custom is repugnant to natural justice, equity, and good conscience because the responsibilities of a father should be vested in him naturally and not as a result of marriage. It also leads to irresponsibility on the part of a father who may be trying to escape the responsibilities of being a father. In such a case, he may deliberately refuse to marry the mother of his child to escape his legal responsibilities. However, a father's attempt to shirk his responsibility of maintaining his child was halted by the court in the case of *Anene Chikezie v Ifeoma Anene*.⁶⁴ Here, a husband argued that he had no obligation to maintain the children of the marriage, and that at that time, he was living separately from them. He therefore stated that the court could not make an order for such

⁶¹ We see such possibility though in cases of such rich celebrities like David Adeleke (Davido), Innocent Idibia (TuBaba), Ayodeji Balogun (Wizkid), Oladapo Oyebanjo (D'Banj), Chinedu Okoli (Flavour), among others who even show off their children and their mothers called 'baby mamas.'

⁶² VE Onuoha and Michael Attah, 'The Right to Inherit: Illegitimacy and Constitutional Liberation in Nigeria- Just a Legal Shield' (2014) 36 (3) *Journal of Social Welfare and Family Law* 226.

⁶³ Ajonumah and Dublin-Green (n 16)114.

⁶⁴ ESLR 190 207-208.

maintenance by him, as there was at the time, no petition for dissolution of the marriage. Justice Nnamani of the Customary Court of Appeal, Enugu, in the lead judgment asked a salient question thus: ‘... does a man have an obligation to provide for his child or children whether or not there is a petition for the dissolution of his marriage to the mother of the child or children?’ According to him, ‘the answer is a quick aye.’ A man has both moral and legal obligations to provide for his child or children. The moral obligation stems from a code of paternity which is written by the creator with the ink of love in the hearts of men, which incidentally, most animals, though bereft of the quality of humanity, observe. Legislation is not needed for the observance of this code. He further stated that: the legal obligation is embodied in our laws. By the Customary Court Rules, 2004:

Whenever it appears to a court that an order for the maintenance of a child should be made, the court may make an order directing the putative father or the natural father of such a child, as the case may be, to pay (a) the mother of the child, or (b) where the mother of the child is dead or is for any reason unable to take care of the child, then the father, mother, brother or sister of the mother of the child or any other person who acts in the place of the parent of that child, a regular monthly allowance which the court considers reasonable for the maintenance of that child until he attains the age of sixteen years.⁶⁵

Therefore, in cases of divorce, where a mother is granted custody of the child in the child’s best interest,⁶⁶ the father provides for maintenance of the child. A father who takes custody of a child goes further to provide attention, care and nurture in addition to material needs and the day to day living arrangements.

5. Towards Living up to the Responsibilities of Fatherhood

The question is; have fathers lived up to the obligations of the law? The answer is no. Married fathers have generally relied on their wives to give all manner of support to their children under the pretext of being the bread winners in the families. This is not to say that revision of financial support is not necessary in the development of a child. But there are other responsibilities a father has towards his children such as emotional, psychological, mental support, among others. Similarly, some fathers deny paternity of children born outside wedlock, abandoning the mother to perform their legal obligations in their stead. This has created a vacuum in the developmental growth of children born in similar situations occasioning the rising cases of morally decadent children in the society.

In addition, some fathers have taken a negative step further by betraying the trust imposed on them as parents. A good example is by defiling their daughters at tender ages, using them for rituals or contracting them for criminal

⁶⁵ Customary Courts Rules 2004, Order 10 Rule 4.

⁶⁶ Matrimonial Causes Act Cap M8, LFN 2004, s 71.

activities (such as drug peddling). Despite the provisions of the law detailing a father's legal responsibility to a child, some fathers continue to do abominable and unthinkable acts to their children. A few examples below buttress this stance:

- (a) Chidi Onyishi father accused of killing his 7-year-old son, Chukwudalu Richards for money rituals in Enugu;⁶⁷
- (b) Christopher Sule, an evangelist was arrested and arraigned for allegedly persistently torturing his six- and eight-year-old children in an unimaginable manner over a period of time, with electric cables, resulting to severe injuries and scars which were very unsightly.⁶⁸
- (c) In Ogun State, a father was caught and arrested for chaining his 12-year-old son in the house for three years with bare necessities and a sparse meal a day.⁶⁹
- (d) A father was arrested and arraigned in Lagos for inserting pepper into the private part of his 12-year-old daughter.⁷⁰
- (e) A father allegedly beat his 13-year-old son and in the process ruptured his intestine.⁷¹
- (f) 15-year-old Bidemi Olarenle's father had carnal knowledge of her at the tender age of 10 and continued till she was 15 when she became pregnant.⁷²
- (g) A 12-year-old girl testified that her father, Emmanuel Idoko, a commercial motorcyclist defiled her by using his manhood and finger to test if she was a virgin.⁷³

⁶⁷ Geoffrey Anyanwu, 'Evil Father: How my Husband killed our son to make money-Wife' <<https://www.sunnewsonline.com/evil-father-how-my-husband-killed-our-son-to-make-money-wife/>> accessed 24 November 2021.

⁶⁸ Isaac Shobayo, 'Pastor Beats Wife, Daughters to Stupor in Plateau' *Nigerian Tribune* (2017) <<https://tribuneonline.com/pastor-beat-wife-daughters-stupor-plateau/>> accessed 14 April 2022.

⁶⁹ Evelyn Usman, 'Father Chains 13-year-old son over N2000' *Vanguard* (2017) <<https://www.vanguardngr.com/2017/06/father-chains-13-yr-old-son-n2000/amp/>> accessed 14 April 2022.

⁷⁰ Vanguard, 'Father puts Pepper in Daughter's Private Part' *Vanguard* (2016) <<https://www.vanguardngr.com/2016/08/father-puts-pepper-daughters-private-part/amp/amh>> accessed 14 April 2022.

⁷¹ George, 'Boy Suffers Ruptured Intestines After Father's Brutality' <<https://www.tori.ng/amp/13362/boy-suffers-ruptured-intestines-after-fathers-brut.html>> accessed 14 April 2022.

⁷² Vanguard, 'Abomination! Father impregnates daughter' *Vanguard* (18 October 2010) <<https://www.vanguardngr.com/2010/10/a-b-o-m-i-n-a-t-i-o-n-father-impregnates-daughter/>> accessed 20 October 2021.

⁷³ R Okoye, 'Violated by Their Fathers' *Sun Newspaper* (28 March 2019) <<https://www.sunnewsonline.com/violated-by-their-fathers/>> accessed 24 October 2021.

- (h) A 46-year-old fashion designer, Wale Akanusi, who impregnated his daughter twice and aborted the pregnancies. After the atrocities were discovered: it is not a new thing that a man had sex with his daughter.⁷⁴

Stories such as these abound of atrocities committed by fathers on their children. These include all forms of sexual abuse and exploitation, domestic violence, rape, slavery, human trafficking, child labour, rituals, organ trafficking such as the examples above. It is disturbing that these fathers who have the responsibility to protect their children are the ones abusing them. Some do not even care and cannot provide food, clothes, access to medical treatment, accommodation, and other necessities of life for these children. All these may have worked in the mind of the court in *Anene Chikezie v Ifeoma Anene*,⁷⁵ Justice Nnamani stated that:

To argue, as the appellant's counsel did, that a court cannot order an abdicative father to pay for arrears of due and unpaid maintenance allowance for the simple reason that, at the time they accrued, there was no pending divorce petition, would amount to saying that a man has no obligation to fend for his child. It is an incorrect legal proposition which, if bought, can reduce a man to the paternal rascality of the billy goat, which gleefully mounts the nanny goat for copulation but runs away as soon as the deed is done, and is never held accountable for the responsibility of rearing the resultant kid.

There is therefore an urgent need for a solution. The law it seems would always come handy in this respect and ensure that such men are punished for their irresponsible acts. However, this is dependent on if we adopt an activist approach and make cases for enforcement in courts.

6. Legal Liabilities Imposed on a Father for Failure in Carrying Out His Fatherly Responsibilities

The law makes provisions for punishment of fathers who are in breach of their obligations towards their children. This is justified under the principle of the best interest of the child as the primary consideration in issues related to children.⁷⁶ In line with this, responsibilities are imposed on parents and guardians as fathers.⁷⁷ For example, parents are to provide the best attainable health care for the child.⁷⁸ Therefore if any of them has custody of a child who is less than two years, he or she must ensure that the child is fully immunized. Failure to do so makes it a punishable offence and liable for a fine in the first instance and a term of imprisonment not exceeding one month in the second and

⁷⁴ Ibid.

⁷⁵ *Anene Chikezie v Ifeoma Anene* ESLR 190 207-208, per Justice Nnamani.

⁷⁶ CRA, s 1.

⁷⁷ Sections 7, 13, 15, 17, 20, 22 of the CRA provides for different responsibilities of parents.

⁷⁸ CRA, s13.

subsequent instances.⁷⁹ Again, failure to protect a child's rights listed in sections 3 - 40 of the CRA, such as child marriage,⁸⁰ tattoos and skin marks,⁸¹ forced labour,⁸² unlawful sexual intercourse,⁸³ sexual exploitation,⁸⁴ among others, will lead to various prison terms ranging from one month to life imprisonment, and such fine as ranging from five thousand naira to five hundred thousand naira only.

It is important to mention that a child whose father or other parent has breached the obligations bestowed on him by the law can enforce his or her rights in the Family Court. Unfortunately, Nigerian culture does not support the idea of a child taking his/her father/mother to court. It is unheard of and considered a taboo. That child will be regarded as evil, an ingrate, wicked and may even be cursed not just by parents and relations, but neighbours and family friends. This is so even though the act of child abuse and neglect, ordinarily, should be more repulsive, repugnant, and offensive. All hands must therefore be on deck, to speak out to condemn the irresponsibility of some fathers. In the words of Nnamani, he advised fathers thus: '... go ye and read, nay, study the Child's Right Act and Child's Right Laws of different states, as fatherhood is no longer business as usual.'⁸⁵ This means that the face of fatherhood has changed, and acts required of a father have legal implications attached. There is no exception for fathers that are illiterate and cannot read. This is because of the saying that 'ignorance of the law is no excuse under the law.' However, one way of carrying them along is through programmes that will create massive awareness creation and sensitization by non-governmental organizations (NGOs) and community-based organizations (CBOs) with the support of government at the local government, state, and federal levels.

7. Conclusion

It is very clear that the Nigerian child is not safe because he/she is exposed to lots of dangers even in the hands of an irresponsible father who is in a trusted position and constitutes the first line of protection. A father who fails to perform his legal responsibilities of protecting and promoting the rights of his child should be dealt with, in accordance with the dictates of the law. Unfortunately, till date, there are still some states especially in Northern Nigeria, which are yet

⁷⁹ CRA, ss13(4) & (5).

⁸⁰ CRA, ss 21-23.

⁸¹ CRA, s 24.

⁸² CRA, s28.

⁸³ CRA, s31.

⁸⁴ CRA, s32.

⁸⁵ G Nnamani, 'The Imperatives of Fatherhood Under the Child's Right Law' being a paper presented by His Lordship, Hon. Justice George Chibueze Nnamani, FCI Arb, President of the Customary Court of Appeal Enugu State Nigeria during the 2017 International Federation of Women Lawyers (FIDA) Week Celebration on November 7 2017 at Hon Justice IA Umezulike Auditorium High Court Enugu.

to domesticate the CRA and pass their own Child Rights Law. Also, for states that have passed their own Child's Law, there have been no test cases. Be that as it may, as we rely on the law to protect a child from an uncaring father, there should be programmes embarked upon by NGOs like International Federation of Women Lawyers (FIDA) and CBOs, to sensitise and enlighten all fathers on the consequences of their likely positive or negative actions on children and the need for change. The cost implications of investigating, arresting, and imprisoning an erring father outweigh the awareness creation and sensitization. In line with the maxim, 'prevention is better than cure', it is better to sensitise and enlighten than to enforce the law against such fathers. Sensitisation and enlightenment will definitely prevent these fathers from inflicting further harm to the children in whatever way. They will become better equipped with adequate knowledge, to effectively preserve, protect and defend the rights of the child. They would also have a change of attitude to enable them carry out their legal responsibilities as fathers because, once a father, you are a father for life and cannot run away from your responsibilities.

**INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS
INITIATIVE & ORS V NATIONAL IDENTITY MANAGEMENT
COMMISSION: A MILESTONE TOWARDS A HUMAN RIGHT-BASED
APPROACH TO DATA PROTECTION IN NIGERIA**

Felix Emmanuel*

Abstract

On 24 September 2021 the Court of Appeal (CA) delivered judgment in Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v National Identity Management Commission (ITDRLI& ORS v NIMC or the Case), in which the CA resolved the conflict on the status of data protection rights in Nigeria. Prior to the decision in the Case, there were conflicting decisions of high courts on whether data protection rights qualified as fundamental right to privacy in section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN). The decision of the CA in the Case is that the fundamental right to privacy under section 37 of the CFRN includes data protection rights. This decision of the CA is a milestone in data protection in Nigeria, even though it is relatively late as conversations at the global stage have progressed beyond recognition of data protection rights as part of right to privacy, to advocating for the creation of data protection right, independent of the right to privacy. In this review, we present the facts, arguments, and decision in the Case, summarise previous conflicting decisions on the point, and make our comments on the decision of the CA in the Case, and the global trends of human right-based approach to data protection. We end the review with a conclusion.

Keywords: Data privacy, data protection, data protection right, and privacy right.

1. ITDRLI& ORS v NIMC: ¹ The Facts, Arguments, and Decision

1.1 The Facts

The 2nd Appellant registered with the Respondent for the issuance of national identity card and was given a National Identification Number Slip with error in his date of birth. The 2nd Appellant subsequently applied to the Respondent to correct his date of birth and the Respondent demanded for ₦15,000 for the correction and the Appellant objected on the ground that the demand was in violation of his fundamental right to private and family life in section 37 of the CFRN. The Respondent insisted on the ₦15,000 for the correction.

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¹ [2021] LPELR-55623(CA).

The Appellants commenced an action against the Respondent by way of originating summons for the determination of (i) whether by the construction of section 37 of the CFRN the Respondent's act of demanding for payment for correction of personal data is likely to interfere with the 2nd Applicant's right to private and family life, and (ii) whether by the provisions of article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR), the 2nd Appellant could request the correction of his personal data from the Respondent free of charge. The Appellants sought for (x) a declaration that the demand for the 2nd Appellant to pay for correction of his personal data was likely to violate his fundamental rights to private and family life in section 37 of the CFRN and article 3.1(1)(7)(h) of the NDPR, (y) a declaration that the correction of 2nd Appellant's personal data by the Respondent ought to be without payment by virtue of section 37 of the CFRN and article 3.1(1)(7)(h) of NDPR, (z) an order mandating the Respondent to correct the personal data of the 2nd Appellant pursuant to section 37 of the CFRN and article 3.1(1)(7)(h) of the of NDPR, and (xx) an order of perpetual injunction restraining the Respondents from demanding payment for correction of the personal data of the 2nd Appellant and those of other data subjects pursuant to section 37 of CFRN and article 3.1(1)(7)(h) of NDPR.

In response to the suit, the Respondent filed a counter-affidavit and a notice of preliminary objection, challenging the jurisdiction of the High Court of Ogun State (the lower court). The lower court heard the parties², upheld the preliminary objection, and struck out the originating summons. Dissatisfied with the judgment, the Appellants appealed to the CA. The decision of the CA is the subject of this review.

The Appellants and Respondent submitted three issues for determination and the Court adopted the issues submitted by the Appellants for the determination of the appeal.³ For our purpose, we limit this review to the first and second issues adopted by the Court⁴.

Issue: Whether or not the trial Court was right when it held that rectification of date of birth has nothing to do with right to private and family life guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Issue 2 Whether or not the trial Court was right when it held that the Appellants' suit which bordered on data protection did not disclose a cause of action

² The trial Court heard both the preliminary objection and the originating summons.

³ An appellate court is permitted to prefer issue(s) formulated by any of the parties to those formulated by the other party. The court can even formulate issues which it considers germane on its own. See *Dasuki v FRN & Ors* [2018] LPELR-43897(SC), 29-30, paras C-C.

⁴ The third issue relates to the propriety of filing a joint application for an enforcement of fundamental rights under the Fundamental Rights Enforcement Procedure Rules, 2009.

under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and thereby occasioned a miscarriage of justice to the Appellants.

1.2 Arguments of Parties

Appellants' counsel referred the CA to the finding of the lower Court that the right of privacy in section 37 of the CFRN extends to the protection of personal information and argued that the finding was an endorsement by the lower Court that protection of personal data is contemplated in section 37 of the CFRN, but that the lower Court surprisingly concluded that the demand for the payment of ₦15,000 for the correction of 2nd Appellant's date of birth had nothing to do with his right to privacy. Counsel relied on *Nwali v EBSIEC & Ors*⁵ and submitted that 'privacy of citizens' used in section 37 of the CFRN is broad and should be interpreted liberally to cover data protection.

Appellants' counsel argued further that the lower Court ought to have considered the provisions of the NDPR in determining whether the right to rectification of data falls within section 37 of the CFRN instead of simply holding that the NDPR cannot confer jurisdiction on a court where the CFRN has not conferred such jurisdiction. He submitted also that the lower Court was wrong in holding that the NDPR which was made in furtherance of the right to privacy in section 37 of the CFRN cannot confer jurisdiction on a court which has concurrent jurisdiction to hear fundamental rights matters. Counsel argued that rectification of personal data is a right and the Respondent cannot validly ask the 2nd Appellant to pay before exercising that right. He cited *Abba Aji v Bukar Abba*⁶ for the proposition that a right is something due to a person by just claim, legal guarantee or moral principle.

The Respondent's counsel submitted that the case of the Appellants before the lower Court was not a fundamental right action because there were no facts in the supporting affidavit that suggest a breach or likely breach of the Appellants' rights in section 37 of the CFRN. He argued that the action of the Appellants at the trial Court which was about statutory fee to be paid to the Federal Government, ought to have been commenced before the Federal High Court ("FHC") in line with section 251(1)(a) of the CFRN⁷, or since it was about the administrative decision of the Respondent, the Appellants should have

⁵[2014] LPELR-23682(CA), 27-29, paras E-E. The Court of Appeal held that 'Privacy of Citizens is general and is not limited to any aspect of the person or life of citizens. It is not expressly defined by the Constitution and there is nothing in the Constitution or any other statute for which it's exact meaning or scope can be gleaned.'

⁶[2014] LPELR-24362(CA).

⁷The section confers exclusive jurisdiction on the FHC to determine matters of revenue of the Federal government when the Federal government or any of its agencies sues or is sued.

challenged same at the FHC in line with section 251(1)(r)⁸, or because it touched on interpretation of the CFRN as it relates to an agency of the Federal Government, the Appellants ought to have challenged it before the FHC in line with section 251(1)(q).⁹

Respondent's counsel argued further that the Appellants' case before the lower Court did not disclose any reasonable cause of action against the Respondent because the case of the Appellants was not that the Respondent refused the 2nd Appellant's request for correction of his date of birth, but rather that the Appellants wanted the request to be granted free of charge, and that article 3.1 (1)(7) of the NDPR does not state that modification should be done without payment of prescribed fees. He added that the NDPR is a regulation while the National Identity Management Commission Act, 2007 (NICM Act) is an act of the National Assembly which supersedes the NDPR, and the NICM Act empowers the Respondent in section 31(d)(i) and (ii) thereof to impose fee for correction of personal data.

1.3 Decision of the CA

The CA upheld the finding of the lower Court that the right to privacy of citizens in section 37 of the CFRN includes the right to protection of personal information and personal data and added that the scope and limitations of the fundamental rights guaranteed in Chapter IV of the CFRN are better understood from statutes, laws, and regulations.

The CA referred to the preamble to the NDPR which states that the NDPR was made due to concerns and contributions of stakeholders on privacy and protection of personal data, article 1.1(a) of the NDPR which provides for one of the objectives of the NDPR as safeguard of rights of natural persons to data privacy, and art 2.9 of the NDPR which provides that privacy right of data subjects shall be interpreted for the purpose of advancing and not restricting the safeguards of data subjects under any data protection instrument made in furtherance of fundamental rights and Nigerian laws.

The CA held that the NDPR must be construed as one of the instruments that protects or safeguards the right to privacy of citizens in relation to their personal information and data, and that apart from article 2.9 of the NDPR which links the NDPR to the fundamental rights provided in Chapter IV of the CFRN, article 1.2(c) of the NDPR provides that the NDPR shall not operate to deny any Nigerian or any natural person privacy rights he is entitled to under

⁸The section confers exclusive jurisdiction on the FHC to determine any action or proceeding for a declaration or injunction which affect the validity of any executive or administrative action or decision of the Federal government or any of its agencies.

⁹The section confers exclusive jurisdiction on the FHC to determine matters relating to the operation and interpretation of the CFRN in so far as it affect the Federal government or any of its agencies.

law, regulation, policy, and contract in force in Nigeria or any other foreign jurisdiction. The Court then held that personal data protection in the NDPR generally falls under the fundamental right to privacy guaranteed in section 37 of the CFRN.

On whether the Appellants' case had anything to do with right to private and family life guaranteed in section 37 of the CFRN, the CA observed that article 3.1(8) of the NDPR relied upon by the Appellants was not applicable as it relates to transfer of personal data to a foreign country or to an international institution. The Court instead referred to article 2.8(b) of the NDPR which provides thus:

The right of a data subject to object to the processing of his data shall always be safeguarded. Accordingly, a Data Subject shall have the option to:

...

(c) be expressly and manifestly offered the mechanism for objection to any form of data processing free of charge.

The Court also referred to article 3.1(3) and (4) of the NDPR which provides thus:

(3) Except as otherwise provided by any public policy or Regulation, information provided to the Data Subject and any communication and any actions taken shall be provided free of charge. Where requests from a Data Subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

a) charge a reasonable fee considering the administrative costs of providing the information or communication or taking the action requested; or

b) write a letter to the Data Subject stating refusal to act on the request and copy the agency on every such occasion through a dedicated channel which shall be provided for such purpose.

(4) The Controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

The Court held that although the above provisions make data processing and rectification generally free of charge except where the request for it is unfounded, excessive, and repetitive, but the provisions are subjected to public policy or regulation which may impose fees for the provision of those services. The Court then referred to section 31(d)(i) and (ii) of the NIMC Act which empower the Respondent to impose fees for modification of entries in the National Identities Database.

The CA upheld the finding of the lower Court that the case of the Appellants is not about refusal to register the 2nd Appellant or grant of unauthorised access to any of the Appellants' personal data to a third party. The CA also upheld the finding of the lower Court that the case of the Appellants was a challenge of an executive/administrative decision of the Respondent which the Appellants sought to masquerade as a fundamental right action.

In all, the CA held that the action of the Appellants was not principally a fundamental right enforcement action but a challenge of Respondent's decision to charge fees for rectification of personal data, and the action ought to have been instituted at the FHC in line with section 251(1)(r) of the CFRN.

2. Comments

2.1 Previous Conflicting Decisions

Prior to the decision in the Case, there were conflicting decisions of the lower Court and the FHC on whether data privacy right qualified as right to privacy in section 37 of the CFRN and could be enforced under the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules).

In *Incorporated Trustees of Digital Rights Lawyers Initiative v LT Solutions & Multimedia Limited*¹⁰ (*ITDRLI v LTSM*), the lower Court *coram* Ogunfowora, J held that the right to private and family life under section 37 of the CFRN includes data privacy right, and the rights of data subjects under the NDPR could be enforced under the FREP Rules. In the case LTSM tweeted, offering over 200 million Nigerian and international mailing lists for sale. ITDRLI commenced an action against LTSM under the FREP Rules, claiming that there was no legal basis for LTSM to process personal data in the manner it did. The main issue for determination before the Court was whether LTSM breached or was likely to breach the right of ITDRLI to private and family life. The Court held that the right to private and family life under section 37 of the CFRN ought to be interpreted broadly to include protection of personal data.

A later decision of the FHC took a different view from *ITDRLI v LTSM*. In *Incorporated Trustees of Laws and Rights Awareness Initiative v The National Identity Management Commission*¹¹ (*ITLRAI v NIMC*) the FHC *coram* Watila, J held that a breach of the rights of a data subject under the NDPR is not necessarily a breach of right to private and family life under section 37 of the CFRN, and an action for the interpretation of the provisions of the NDPR cannot be brought under the FREP Rules. In the case, the Federal Government of Nigeria made to establish a national identity database and ITLRAI sued (under the FREP) for and on behalf of one Daniel John, claiming that the processing of personal data by NIMC necessary to carry out the project was likely to breach Daniel's right to privacy in section 37 of the CFRN and article 1.1(a) of the NDPR. ITLRAI sought for an injunction against further release of digital identity cards pending the independent report of external cyber security experts on how safe the application was.

In concluding that the claim for breach or likely breach of the provisions of the NDPR was not properly brought under the FREP Rules and lumped with the claim for breach or likely breach of the right in section 37 of the CFRN, the FHC

¹⁰ High Court of Ogun State, 9 November 2020.

¹¹ Federal High Court, 9 December 2020.

held that (x) an action brought under the FREP Rules must have one of the fundamental rights in Chapter IV of the CFRN as the principal claim, (y) the view in *ITDRLI v LTSM* ignored the implication of article 3.2.2 of the NDPR which provides that a breach of the provisions of the NDPR is to be considered as a breach of the NITDA Act, (z) a breach of the NITDA Act can only be remedied in accordance with section 18 of the NITDA Act which provides for fine and/or imprisonment for breach of the provisions of the NITDA Act, (xx) article 2.10 of the NDPR already provides for penalties for the breach of the rights of data subject under the NDPR, and (yy) it is unlikely that the sanctions provided under section 18 of the NITDA Act and article 2.10 of the NDPR can be enforced against a respondent in an action commenced under the FREP Rules.

2.2 Our Support for the Decision in the Case

We support the decision of the CA on the status of data protection *vis-a-vis* fundamental right to privacy in section 37 of the CFRN for at least two reasons. First, the reasons for the decision of the CA are legally sound. Second, the decision improves data protection right in Nigeria and provides the foundation for data protection rights enthusiasts to subsequently advocate for recognition of data protection right independent of right to privacy.

A holistic read of the NDPR, especially article 2.9 of the NDPR on advancement of right to privacy provides a basis for the view that the NDPR was issued in furtherance of the right to privacy in section 37 of the CFRN. Fundamental rights in Chapter IV of the CFRN are general and it takes other legislation and judicial authorities to define their extent and limitations.

A community reading of the provisions of the NDPR presents the reasoning of the court in *ITDRLI v LTSM* that a breach of the rights under the NDPR is a breach of the provisions of the NITDA Act for which sanctions have been provided by the NITDA Act, as restrictive. We hold the view that there is no legal basis to limit a right because an incidence of its breach is sanctioned under a different statute. An assault could amount to a breach of the right to dignity of human person, for an instance.

It has been argued in support of the decision in *ITLRAI v NIMC* that the FHC was right in holding that a breach of a data subject's rights under the NDPR cannot be remedied through an action under the FREP Rules because that position agrees with the basis for the FREP Rules which provides for specialised procedures for enforcement of fundamental rights under Chapter IV of the CFRN or the African Charter¹². This argument is no longer tenable as the

¹²Sadiku Ilegieuno and others, 'Enforcing Data Subject Rights Under Nigeria's Data Protection Regulation: The Wrong Way (and the Right Way)' (2021) <<https://www.templars-law.com/enforcing-the-data-subjects-rights-under-nigerias-data-protection-regulation-how-not-to-go-about-it/>> accessed 20 November 2021.

decision in the Case has conferred on the rights under the NDPR the status of fundamental rights under the CFRN.

The Data Protection Bill, 2020¹³ released by the Nigerian National Identification Management Commission (the Bill) contained provisions more likely to be linked to the fundamental rights under Chapter IV of the CFRN. The general objective of the Bill included to "... regulate the processing of information relating to data subjects, and to safeguard their fundamental rights and freedom as guaranteed under the Constitution of the Federal Republic of Nigeria, 1999." However, the Federal Government of Nigeria has abandoned the Bill and sought for experts to draft a new Data Protection Bill, making further discussion of the provisions of the Bill unhelpful to our purpose in this piece.¹⁴

In the preamble to the NDPR, cognizance is taken of "emerging data protection regulations within the international community geared towards security of lives and property and fostering the integrity of commerce and industry in the volatile data economy."¹⁵ At the global stage, countries are going past recognising data protection right as a privacy right to creating a data protection right that is independent of the right to privacy. Article 8 of the Charter of Fundamental Rights of the European Union provides for data protection as a right, and article VI of the Hungary's Constitution of 2011 guarantees the rights of individuals to the protection of their data.

In support of trends in pushing for distinct data protection right, Maria argues that although privacy may be the main value behind data protection, data protection legislation advance further interests other than privacy such as data security which seeks to keep data secured against risk and accessed by unauthorized persons and data quality which speaks to the accuracy, relevance, and up-to-datedness of personal information.¹⁶

3. Conclusion

The decision of the CA in the case has promoted the rights of data subjects under the NDPR to the level of fundamental rights protected in the CFRN.¹⁷ There are

¹³ Data Protection Bill, 2020, National Identification Management Commission, (2020-2021).

¹⁴ Tosin Omoniyi, 'Data Protection: Indignation as FG abandons draft bill, seeks 'consultants' for fresh process.' *Premium Times* (Abuja, 17 November 2021) <<https://www.premiumtimesng.com/news/top-news/495768-data-protection-indignation-as-fg-abandons-draft-bill-seeks-consultants-for-fresh-process.html>> accessed 23 November 2021

¹⁵ Paragraph 3 of the preamble to the NDPR.

¹⁶ Dr Maria Tzanou, 'Data Protection as a Fundamental Right Next to Privacy? Reconstructing a Not So New Right' (2013) 3(2) *International Data Privacy Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076415> accessed 18 November 2021.

¹⁷ See *El-Rufai v Senate of the National Assembly* [2016] 1 NWLR (Pt 1494) 504 at 533.

data protection rights which cannot be protected within the spectrum of privacy right. Teresa¹⁸ argues that the right to be forgotten¹⁹ is not exactly a right to privacy but rather a right tied to the right to self-actualise and to redefine oneself to the world; the right to data portability²⁰ is not simply a right to privacy, it is a right of individuals to control their personal data; and the right to transparency and explanation of the process of automated decision making²¹ is not exactly a privacy right, but the right of individuals to protect themselves against potential bias and injustice.

By clothing data protection rights under the NDPR with constitutionality, the decision of the CA in the Case provides the basis to further push for a higher standard of data protection by recognition of data protection right as a right distinct from the right to privacy.

It remains only for this milestone in data protection in Nigeria to be consolidated by legislation as the decision in the Case is a judicial authority that could be overturned on appeal or departed from in subsequent cases.

¹⁸Teresa Scassa, 'A Human Rights-Based Approach to Data Protection in Canada: A Research and Policy Agency' (2020) *University of Ottawa Press, Ottawa Faculty of Law Working Paper* 2020 (26) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3620450> accessed 21 November 2021.

¹⁹Art 3.1(9) of the NDPR.

²⁰Art 3.1(7)(h) of the NDPR.

²¹Art 3.1(7)(l) of the NDPR.